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# Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)



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**2015  
Torkel Opsahl Academic EPublisher  
Brussels**

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**ISBN 978-82-8348-017-7 (print) and 978-82-8348-016-0 (e-book)**

*Dedicated to CHEAH Choo Kheng and GOH Yuen Yong*



## EDITORS' PREFACE

With the release of this Volume 4 of *Historical Origins of International Criminal Law*, the research project with the same name has fulfilled its publication goals. As editors we hope the four volumes – containing in their first editions more than 3,000 pages of materials – have increased our knowledge on historical antecedents and factors contributing to the development of international criminal law, and helped crystallise the community of those interested in the sub-discipline of the history of international criminal law.

The scope of the project has been unusually comprehensive. The response from scholars around the world was very encouraging, suggesting that the project theme has united relevant actors by speaking to a shared curiosity and wish to construct a more mature hinterland for international criminal law, similar to what criminal law enjoys within some countries. This should consolidate further the consensus around the basics of international criminal law – in particular the principles born out of the Nuremberg and Tokyo trials – regardless of differences of opinion about issues such as the International Criminal Court, universal jurisdiction or immunity of state officials. International criminal law is much older than these controversies. International criminal law is much more than the International Criminal Court. Current controversies should not be allowed to cloud this historical reality.

We would like to recognise the visionary role played by the Centre for International Law Research and Policy which has conceptualised and carried this research project from the beginning to the end. As with Volume 3, we would also like to place on record our sincere gratitude to each member of the diverse and skilled editorial team and experts of the Torkel Opsahl Academic EPublisher, in particular Mr. Gareth Richards (who has again made an extraordinary contribution), Assistant Professor ZHANG Binxin, Mr. Moritz Thörner, Mr. Alf Butenschøn Skre, Ms. Shama Abbasi, Mr. Ryan Nicholas Hong, Mr. Devasheesh Bais and Dr. WEI Xiaohong. As editors, we are responsible for the final result. But all the members of the team stand together in having completed this aspiring project.

Finally, we thank the German Ministry of Foreign Affairs for support to finalise the editing of Volume 4, and the Royal Norwegian Ministry of Foreign Affairs for support in other aspects of this research project.

Morten Bergsmo  
CHEAH Wui Ling  
SONG Tianying  
YI Ping



## FOREWORD BY WEGGER CHRISTIAN STRØMMEN

Volumes 1–4 of *Historical Origins of International Criminal Law* contain more than 80 chapters by over 100 contributors from every continent. They cover a broad spectrum of aspects of the historical evolution of international criminal law, falling into 13 main clusters: 1) Early antecedents of international criminal law; 2) the aftermath of the First World War; 3) the period between the two World Wars; 4) the Nuremberg legacy; prosecutions in 5) Japan, 6) China and Southeast Asia, and 7) Europe after the Second World War; origins of 8) core international crimes and 9) principles of individual criminal responsibility; contributions by 10) internationalised jurisdictions, 11) national courts, and 12) other actors and methods; and 13) additional disciplinary perspectives.

The scope of the four volumes is broad and inclusive. They contribute important knowledge on the making of international criminal law over decades. They show how the sufferings of victims in armed conflicts around the world gradually made states hold those responsible accountable through criminal trials. They discuss in depth how atrocities of the Second World War were subjected to several thousand trials in Japan, China, Southeast Asia and Europe. War victimisation cut across nations, religions, ethnic and other groups, and so did the trials. They were not reserved for one nation, region or skin colour.

But states did not only hold trials at the national level. In resolution 95(1) of 1946 the United Nations General Assembly affirmed the Nuremberg and Tokyo principles, and later new international law instruments such as the 1948 Genocide Convention and the 1949 Geneva Conventions were developed. States also started a long-drawn process to develop common international jurisdiction to enforce individual criminal responsibility when national criminal justice systems cannot provide accountability for core international crimes. This ultimately led to the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda and several other *ad hoc* internationalised criminal jurisdictions, prior to the entry into force of the Statute of the International Criminal Court ('ICC') in 2002.

My country Norway has been fully supportive of these later developments of international criminal justice. This active support has, indeed,

become an important part of Norway's foreign policy in the past two decades, and continues to be so.

But some other countries have adopted a wait and see attitude to parts of the newer developments, like the establishment of the ICC. Bringing the historical perspective of these four volumes into today's debates on international criminal law may enhance our comprehension of the past, and thus help us overcome diverging views when they come to the forefront today, and look forward. The wide geographical scope of the contributions makes them particularly relevant. The four volumes remind us that such contemporary controversies should not make us lose sight of the strong consensus around the central principles of international criminal law. The fires and torment of the Second World War made minds sober and clear. At the heart of the common purpose of states and peoples were the United Nations Charter and the Nuremberg and Tokyo principles. They remain pillars of the international legal order. Their contribution in the past, present and future continue to serve international peace, security and justice.

Through this large research project, the Centre for International Law Research and Policy draws our attention to the common legacy and interests at the core of international criminal law. By creating a discourse community with more than 100 scholars from around the world, the Centre has set in motion a wider process that will serve as a reminder of the importance of the basics of international criminal law. Others may wish to follow this example and construct common ground in sister disciplines of international law, by that helping states to not get bogged down in current disagreements when they seek to develop the international legal order further. History can be our instrument to find this common ground in the field of international criminal law and related disciplines.

Wegger Christian Strømme

*Secretary General, Royal Norwegian Ministry of Foreign Affairs*

## FOREWORD BY LING YAN

The Historical Origins of International Criminal Law Project has aimed to provide a deeper and critical understanding of the history and foundations of international criminal law. It has held two international seminars: in Hong Kong on 1–2 March 2014 and Delhi on 28–30 November 2014. The papers presented at the seminars were initially designed to be published in three volumes, but finally developed into four separate volumes due to the unpredictably enthusiastic response to the call for papers from international and national judges, prosecutors, national judicial officers, international organisation officials and professors at universities from around the world. They have prepared contributions to the volumes, expressing their experiences, views and research results from not only legal but also social and political perspectives.

Volumes 1 and 2 of *Historical Origins of International Criminal Law* are based on papers submitted to the Hong Kong seminar. They traced international humanitarian law roots back to the early work of philosophers and military leaders in ancient time, and showed how the theory of international criminal law developed through international treaties and the prosecution of war criminals from the seventeenth century to the Second World War. Other chapters focus on the legacy of international military trials in Nuremberg and Tokyo, and less known stories of national trials of Nazi and Japanese war criminals in Asia and Europe after the Second World War.

Volumes 3 and 4 contain papers from the Delhi seminar. The chapters of Volume 3 further expand the historical and geographical landscape of international criminal law, and investigate the origins of core international crimes (war crimes, genocide, crimes against humanity and aggression) and principles of international criminal responsibility and the modes of liability (such as complicity, conspiracy, and command responsibility).

Volume 4 shows how the procedural law created in Nuremberg and Tokyo continues to influence contemporary international criminal procedure. The practice of the ICTY and ICTR has made contributions to substantive international criminal law by defining core international crimes and modes of liability, and by narrowing the gap in the application of in-

ternational humanitarian law between international armed conflict and non-international armed conflict. However, the success of international criminal justice depends on full co-operation of countries and the political will of the United Nations Security Council. Previous experience suggests that there are chances of success for international criminal justice when the political agenda is aligned with the work of international criminal courts or tribunals. Without political support, the risk of failure in international judicial work will be higher, which is now one of the biggest challenges for the ICC.

The exercise of the ICC's jurisdiction is based on the principle of complementarity. More attention should be put on building national judicial capability as international criminal jurisdictions are only able to prosecute a small number of persons responsible for core international crimes. Criminal justice for core international crimes should be at the national level in the future. In this regard, some countries have set good examples for national prosecutions. The Supreme Court of Israel found, in the Eichmann case, that universal jurisdiction can be exercised not only in the context of piracy, but also in the context of gross human rights offences violating interests of the international community. The human rights movement in Argentina has also been influential in pushing for the prosecution of crimes committed by dictatorship. The Argentine domestic courts have been applying international criminal law even though some international provisions have not been implemented in national legislation.

To pursue international criminal justice, a diversity of actors is involved. For instance, the work of fact-finding commissions has made significant contributions towards the establishment of the ICTY and ICTR. It was also an additional factor for the creation of the ICC. INTERPOL's important co-operation with international criminal jurisdictions since 1994 has contributed to the success of ICTY, ICTR, ICC, STSL and STL. With the encouragement of INTERPOL, national jurisdictions started using its services against serious criminals. Furthermore, a new phenomenon introduced by the ICC Statute is victim participation in proceedings, which assists the Court to find the truth and to realise justice for victims. A variety of fact-work methods have been deployed over the years in international criminal justice. Among them, the introduction of demographic analysis stands out.

The ICC is a last resort in the enforcement of justice for core international crimes. The universality of the ICC Statute is regarded as impera-

tive to end impunity for the perpetrators of the most serious crimes of international concern and to prevent such crimes. However, at the time of writing, one-third of the world's countries remain outside of the ICC system. Identifying their concerns is important to improve the performance of the ICC and to promote a better understanding of its work.

LING Yan

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## FOREWORD BY ANURADHA BAKSHI\*

In 1474 an *ad hoc* tribunal located in Breisach, Austria, comprising 28 judges from the cities of Austria and the Hanseatic League, tried Peter von Hagenbach, a Germanic knight and military commander from Alsace for murder, rape and other crimes. This trial has since been recognised as the first international war crimes prosecution.<sup>1</sup> The defence he put up was one that is still relevant: he was merely following orders. Much like today, his defence was dismissed and he was convicted and sentenced to death. Over five centuries, a myriad of wars and geopolitical developments later, the international community is in a position to punish modern-day Hagenbachs like never before, thanks to the emergence of the concepts of universal jurisdiction and individual criminal responsibility for certain international crimes, coupled with the establishment of the International Criminal Court ('ICC') and various criminal tribunals.

The success of these initiatives will, however, largely depend on how effectively they grasp the international political and legal climate surrounding these prosecutions. While the era after the Second World War has seen the granting of a broad cluster of rights to individuals, the casting of obligations, and therefore the prosecution of individuals rather than states, occupies a "distinct but narrow pedigree".<sup>2</sup> Understanding and appreciating the nature of the challenges that emerged during the evolution of universal criminal law, and the discourse that surrounded it, are integral to engaging with challenges that we face in the modern day. The project to explore the historical foundations of international criminal law undertaken by the Centre for International Law Research and Policy provides us with a unique opportunity to delve into both the theoretical and political origins of what is recognised as one of the most significant areas of international law and global politics.

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\* **Anuradha Bakshi** is Principal Legal Adviser of the Asian-African Legal Consultative Organization ('AALCO'). The views expressed in this Foreword do not necessarily reflect those of AALCO or any of its member states.

<sup>1</sup> See Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. II, Steven and Sons, London, 1968, pp. 15–16.

<sup>2</sup> Malcolm Shaw, *International Law*, 7th ed., Cambridge University Press, Cambridge, 2010, p. 397.

This book is the fourth in the series of volumes entitled *Historical Origins of International Criminal Law*. The volumes contain papers presented at two international conferences. The first was held in Hong Kong on 1 and 2 March 2014, and the second in New Delhi on 29 and 30 November 2014. Both conferences brought together leading experts including academics, lawyers, historians and sociologists to explore and theorise upon various aspects of the emerging sub-discipline of history of international criminal law. The first conference sought to trace how specific trials, treaties, declarations, acts of states and publications have contributed to the development of international criminal law, as it exists today, in a historical context. The Hong Kong conference findings have already been published by the Torkel Opsahl Academic EPublisher in two informative and coherent volumes.

The second conference in New Delhi sought to build on the findings and discourse of the Hong Kong conference by analysing the evolution of key doctrines and institutional contributions in international criminal law. On behalf of the Asian-African Legal Consultative Organization ('AALCO'), I was actively involved in the organisation of the New Delhi conference and was fortunate to participate in the programme. *Historical Origins of International Criminal Law*, Volumes 3 and 4 contain papers from the New Delhi event.

One of the key contributions of Volume 3 is the investigation into hitherto unexplored historical and geographical aspects of international criminal law. Ancient religious texts such as the Laws of Manu (*Manusmṛti*) and forgotten or uncited cases of prosecutions in Ancient Greece, China and the Ottoman Empire offer a refreshingly new angle to this study. It is important that we move beyond the traditional narrative offered in most textbooks that limit the history of international criminal law to the trials at Tokyo and Nuremberg and the former Yugoslavia and Rwanda criminal tribunals. With the ICC attempting forays into an increasing number of geopolitical contexts, an appreciation of the evolution of international criminal law in such new contexts is imperative. The broad range of backgrounds of contributors to these volumes brings together various perspectives on this sub-discipline.

A second key feature of Volume 3 is the way it probes the origins of doctrines of core international crimes for the purpose of better understanding their parameters and elements. Chapters on instruments such as the Lieber Code and the Geneva Conventions serve as useful indicators of the evolution. A third, closely related, contribution of this volume is its



focus on the concept of individual criminal responsibility itself. Chapters address various aspects of the development of the principle and specific modes of liability, and by that also derive the essence of the acceptance of individual rather than state responsibility.

Volume 4 traces the institutional contributions made by national and international courts and other organisations, and highlights challenges and successes they have encountered in their work on core international crimes. It analyses the nature and extent of state participation in the evolution of this discipline of international law. Indeed, we must bear in mind that the implementation of international criminal law, like any field of international law, will always hinge on the extent to which states are willing to co-operate with each other to attain the said goal. Exploring political narratives that have shaped state response to the implementation of international criminal law is critical to project and resolve similar deadlocks that may occur in the present day.

The ICC, which at the time of its establishment was a hallmark of such political compromise, is now well into its second decade. At the time of writing, more than 35 individuals have been charged by the Court, including the Kenyan President Uhuru Kenyatta, former Libyan leader Muammar Gaddafi, Ugandan rebel Joseph Kony and Sudanese President Omar al-Bashir. Despite being criticised as a mere tool of Western imperialism, the Court has the potential to develop into a powerful tool for the prosecution of international crimes.

Yet, 41 United Nations Member States have refrained from signing or acceding to the ICC Statute for reasons ranging from definitional objections, the terms in the Statute to political strong-arming. This situation is very unfortunate. The International Criminal Tribunals for the former Yugoslavia and Rwanda brought a fair number of perpetrators to justice, thereby paving the way for reconciliation in these war-torn countries. It is imperative that the ICC too obtains the backing of all United Nations Member States, a move that will require sustained negotiation and interpretation of existing concepts within the international criminal law discourse, along with political compromise.

Studying international criminal law's theoretical and institutional evolution as explored in Volumes 3 and 4 of *Historical Origins of International Criminal Law* will help us develop a direction that could take this discipline forward. In an era torn by civil war, violent extremism and sustained human rights abuse on an international scale, there is an urgent

need for the further development of this discipline to account for the challenges that lie ahead.

I urge readers to approach Volumes 3 and 4 with an open mind so as to appreciate the fresh perspectives they offer. Much like the preceding Volumes 1 and 2, the present volumes serve as authoritative texts in a rapidly evolving discipline of international law.

## PROLOGUE BY ZHU WENQI \*

### 1. What Was at Stake at the Tokyo Trial?

The year 2015 marks the 70th anniversary of the end of the Second World War which, for the first time in history, triggered the trials of war criminals held under the auspices of the International Military Tribunal at Nuremberg ('IMT'), the International Military Tribunal for the Far East at Tokyo ('IMTFE') and elsewhere. These trials made armed aggression a crime instead of a national right. Despite their outcomes, the law of the trials has come under attack, and that is still the case. Some scholars regard the Tokyo trial as a form of "victors' justice" or as a "failure".<sup>1</sup> The Japanese Prime Minister Shinzō Abe has also challenged the legitimacy of the Tokyo trial by questioning the definition of "aggression".<sup>2</sup> All that makes it necessary, almost 70 years since the beginning of the IMTFE, to recall and to re-examine the value and significance of the trials: Why was the Tokyo trial held? What was at stake at the trial? And what should its impact be on modern society?

### 2. Aggression: No Longer a National Right

By the end of the Second World War those responsible for the conflict were brought to justice for the first time in history in order to answer personally for offences they had committed while acting in their official capacities. The establishment of the Nuremberg and Tokyo Tribunals and

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\* **ZHU Wenqi** is Professor at Renmin University. This foreword is a modified version of a presentation made at the Seminar on the Historical Origins of International Criminal Law, co-organised by the Centre for International Law Research and Policy, Peking University International Law Institute, City University of Hong Kong and the European University Institute (Department of Law), Hong Kong, 1–2 March 2014.

<sup>1</sup> For example, see Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971, p. xiv, where he states that "[t]he Tokyo trial is a failure that can instruct us".

<sup>2</sup> Abe said in a meeting of the Budget Committee of the Congress on 8 May 2013 that "there is no generally accepted definition of 'aggression' and international lawyers have different view upon that". Kazuo Yamagishi, "Abe Stands Firm on Definition of 'Aggression' amid International Outcry", in *Asahi Shimbun*, 10 May 2013.

their trials was innovative. But these two *ad hoc* tribunals did not invent the legal doctrine which provides that aggression is a crime.

After the First World War, in which millions of soldiers were killed and the suffering of civilians was enormous, there was a public outcry to punish those responsible for the aggression and atrocities that occurred during the conflict. As a result, the five victorious powers (France, the United Kingdom, Italy, the United States and Japan) appointed a 15-member Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. In its report of 29 March 1919, the Commission concluded that responsibility rested primarily on Germany which “declared war in pursuance of a policy of aggression”.<sup>3</sup> Article 227 of the Treaty of Versailles arraigned ex-Kaiser Wilhelm II for “a supreme offence against international morality and the sanctity of treaties”.<sup>4</sup>

In February 1920 a Covenant was adopted for the League of Nations, with its first objective “to achieve international peace and security”, with its members accepting an “obligation not to resort to war”. It was for this purpose that Article 10 of the Covenant provides: “In case of any such aggression or in any case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled”.<sup>5</sup>

The movement to develop the laws of war then attained a new plateau when the Kellogg-Briand Pact was signed in Paris in 1928 in order to commemorate the tenth anniversary of the ending of the First World War. This treaty was

[d]eeply sensible of their solemn duty to promote the welfare of mankind; Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made [...] uniting civilized nations of the world in a common renunciation of war.<sup>6</sup>

The high contracting parties condemned recourse to war and agreed that the settlement of all disputes “shall never be sought except by pacific

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<sup>3</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, “Report Presented to the Preliminary Peace Conference, 29 March 1919”, reprinted in *American Journal of International Law*, 1920, vol. 14, nos. 1/2, pp. 95–154.

<sup>4</sup> Treaty of Versailles, 28 June 1919, Art. 227 (<https://www.legal-tools.org/doc/a64206/>).

<sup>5</sup> The Covenant of the League of Nations, Art. 10 (<https://www.legal-tools.org/doc/106a5f/>).

<sup>6</sup> General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 27 August 1928, 46 Stat. 2343, Preamble (<https://www.legal-tools.org/doc/97bac6/>).

means”.<sup>7</sup> What is important is that the Kellogg-Briand Pact was eventually signed by almost all states, including Germany and Japan.

However, while the Kellogg-Briand Pact had outlawed aggression, its definition was not clear as there was no agreement on how illegal war was to be determined nor who was to make the determination. Then came a crucial question: Did Japan commit aggression before or during the Second World War?

The Tokyo trial, like the IMT for Germany, was a response to the unspeakable atrocities committed by Japanese militarists. They had conducted a reign of barbarism during the war as a matter of state policy, and the international community demanded stern justice should be done. The Tokyo trial lasted two and a half years. From the evidence revealed during the trial, it was recorded that Japanese troops killed millions of innocent civilians – men, women and children – simply because of their race, religion or political persuasion. Japanese troops committed terrible atrocities, including notorious examples such as the Rape of Nanking,<sup>8</sup> the Bataan death march, the treatment of prisoners of war and other slave labourers building the Burma-Siam death railway, and so on. Japan, like its Nazi ally, was engaged in many actions during the Second World War that were far more inhumane, contrary to natural and man-made law, than what had occurred in past wars.

Crimes against peace were defined in the Charters of both the IMT-FE and IMT as the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.<sup>9</sup> But IMT-FE Charter differed slightly from the IMT Charter, since the former added the words “declared or undeclared” so as to emphasise that aggressive war, by whatever name, was an international crime.<sup>10</sup> The indictment at the Tokyo trial consisted of 55

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<sup>7</sup> *Ibid.*, Art. 2.

<sup>8</sup> For more details of the Rape of Nanking, see Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II*, Basic Books, New York, 1997.

<sup>9</sup> Charter of the International Military Tribunal for the Far East (‘IMT-FE’), 19 January 1946, amended on 25 April 1946, Art. 5(a) (<https://www.legal-tools.org/doc/a3c41c/>). This wording duplicated that of the Charter of the International Military Tribunal at Nuremberg, 8 August 1945, Art. 6(a) (‘IMT’) (<https://www.legal-tools.org/doc/64ffdd/>).

<sup>10</sup> Japan did not even think there was a war between Japan and China as neither state had ever declared war. The Japanese troops merely “entered” China.

counts, with specific dates, venues and full particulars appended. The first 36 counts accused the defendants (high-ranking Japanese ministers and generals) that they did “plan, prepare, initiate, or wage aggressive war [...] in violation of international law, as well as in violation of sacred treaty commitments, obligations and assurances”.<sup>11</sup>

The wrongs that the military tribunals sought to punish were so horrible that the world could not tolerate them being ignored. Modern war was so cruel that it had brought mankind to the brink of destruction. So there was a view that war itself must be eliminated. However, because of the *nullum crimen sine lege* principle in the penal code and the fact that there was no criterion to determine aggression not all jurists agreed with the concept of criminal responsibility for war. Some jurists agreed to try the accused for war crimes or for crimes against humanity, but not for crimes against peace. This is because they believed there was no basis for that in international law.<sup>12</sup>

What role should international law play? Since all war begins with aggression, there is always a right and a wrong side. Civilisation must mobilise its resources on the side of right. International law is one of these resources. If conventional war crimes were recognised in international law why not make a case to determine an aggressive war as illegal?

At the IMTFE, while eight of the 11 judges concurred with all the findings of law, the convictions and the sentences, three judges dissented on some points. Judge Henri Bernard of France felt that the majority went too far when it imposed personal criminal responsibility on Japanese commanders for not having prevented certain war crimes. Judge Bert V.A. Röling of the Netherlands believed that aggression could not be considered a crime under existing international law.<sup>13</sup> Judge Radhabinod Pal of India, in his 500-page dissenting opinion, agreed with Röling that, as a

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<sup>11</sup> IMTFE, Indictment, 3 May 1946 (<https://www.legal-tools.org/doc/59771d/>).

<sup>12</sup> For example, the former the US Supreme Court justice Arthur Goldberg, in an interview in 1980, said: “I find no ground for trying the accused for crimes of aggression or waging war. To wage war is not a crime, and there is no basis for it in international law”. Tokyo and Nuremberg, he noted, represented a step in that direction. Cited in Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, Morrow, New York, 1987, pp. 24–25.

<sup>13</sup> Bert V.A. Röling, “International Law and the Maintenance of Peace”, in *Netherlands Yearbook of International Law*, 1973, vol. 4, pp. 1–103.

matter of pre-existing law, aggression had neither been defined nor made a crime for which individuals could be held to account.<sup>14</sup>

Though the law for the cases was doubtful on crimes against peace, the facts were relatively clearer. Without justification, German troops invaded Austria, Poland and France, and Nazi troops murdered millions of innocent civilians simply because of their race, religion or political persuasion. Japan did the same, as it invaded Korea, China, the United States, the Philippines, Vietnam, Burma, Palau and other countries of Southeast Asia.

Jurists may have different views on the finer points of the law, but no one would deny the fact that Germany and Japan waged aggressive war during the Second World War. Lord Wright, an Australian and the first chairman of the United Nations War Crimes Commission ('UN-WCC'), which was formed in London in 1943 by 17 nations, including Asia-Pacific states such as China, Australia, the United States, New Zealand and India, said: "The Second World War was deliberately created by a number of very evil men [...] including Hitler and his clique and corresponding figures in the Far East. [...] The war was purely acquisitive and aggressive. Their motives are naked, blatant and unashamed". Early in 1945 the UNWCC produced a paper that spelled out the nature of war criminality. In their analysis of the war in the Pacific, the Allies held that Japan's outrageous actions did not consist alone of individual and isolated incidents but were "deliberately planned and systematically perpetrated throughout the Far East and Pacific".<sup>15</sup>

The Tokyo trial eventually proved by evidence that Japan had directed criminal plans that resulted in waging aggressive war and oppressive occupation of various territories, and that a group of military leaders in Japan had decided to expand their country's power by the use of force. As the IMTFE judgment noted: "That common object, that they should secure Japan's domination by preparing and waging wars of aggression, was a criminal object. Indeed *no more grave crimes* can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it".<sup>16</sup>

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<sup>14</sup> IMTFE, *United States of America et al. v. Araki Sadao et al.*, Judgment of the Hon'ble Mr. Justice Pal, Member from India, 1 November 1948 (<https://www.legal-tools.org/doc/712ef9/>).

<sup>15</sup> Cited in Brackman, 1987, p. 26, see *supra* note 12.

<sup>16</sup> IMTFE, *United States of America et al. v. Araki Sadao et al.*, Judgment, 1 November 1948, p. 1142 (emphasis in original); also reprinted in Benjamin B. Ferencz, *An Interna-*

All the judges agreed upon these facts. Judge Bernard, who noted the loopholes that existed in the Covenant of the League of Nations, the Kellogg-Briand Pact and many other declarations, expressed his agreement that war itself was a crime and that all who “at any time with guilty knowledge played a part in its execution are guilty”.<sup>17</sup> Judge Röling also approved of the death sentences for six of the defendants for reasons of political security rather than existing international law.<sup>18</sup>

At the Nuremberg and Tokyo trials individuals were tried for the first time to answer personally for offences they had committed while acting in official capacities as chiefs of state and military leaders. This is quite significant. The rules of international law may appear abstract and remote. But any war must be planned, ordered and executed. Only through the punishment of those who were specifically engaged in it could the rules and principles of international law become respected and implemented. Moreover, the ability to wage war was no longer considered a national right but a crime under international law.

### 3. Survival of Humanity

The Nuremberg and Tokyo trials were novel – the first time that persons were held accountable on the principle of individual criminal responsibility. In the eyes of some lawyers, this fact itself could be questioned and challenged. But this is actually the very beauty of the trials which were concerned with the survival of humanity.

Not long after the IMTFE started, Kenzo Takayanagi, the leading defence counsel at the Tokyo trial, opposed the concept of individual responsibility for crimes against peace. According to him: “It is the general principle of the law of nations that duties and responsibilities are placed on states and nations and not on individuals”. This immunity is both “a legal principle and a practical necessity of statecraft”.<sup>19</sup> However, one

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*tional Criminal Court, a Step towards World Peace: The Beginning of Wisdom*, Oceana Publications, New York, pp. 505–6.

<sup>17</sup> See Benjamin B. Ferencz, “The Crime of Aggression”, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. 1: *Commentary*, Kluwer Law International, The Hague, 2000, p. 49.

<sup>18</sup> Röling, 1973, see *supra* note 13.

<sup>19</sup> Takayanagi Kenzo, *Kyokuto saiban to kokusaiho*, Yuhikaku, Tokyo, 1948, pp. 59–60, 63, cited in Minear, 1971, p. 40, see *supra* note 1. Takayanagi was Japan’s leading specialist in Anglo-American law. He had been trained in the 1910s at Tokyo Imperial University,



may ask to this: If holding of the trials was not desirable what should have taken place?

The Nuremberg and Tokyo trials were the response to the atrocities committed by the German Nazis and Japanese militarists, of whom the international community demanded justice to be done after the end of the Second World War. But at that time no treaty, precedent or custom could be used to provide guidance under international law as to the way justice should be done. Given this situation, the Allies could choose between executive action and judicial proceedings. Since they had all the defendants at hand, they could simply take the suspected top German and Japanese criminals, shoot them and then announce to the world that they were dead. This kind of executive action, compared with a complicated criminal procedure, has the advantage of a sure and swift disposition.

Some Allied states, notably the United Kingdom, initially preferred executive action. As one early *aide-mémoire* sent by the British to President Franklin D. Roosevelt stated, not only would a trial be “exceedingly long and elaborate” and open to being misunderstood by the general public but also “nor is it clear that [Nazi deeds] can be properly described as crimes under international law”.<sup>20</sup> However, while executive action has the advantage of a sure and swift disposition, it would at the same time be a violation of the fundamental principles of justice. It might also encourage the Germans and Japanese to turn these criminals into martyrs. Consequently, while acknowledging serious legal difficulties surrounding a judicial proceeding, the Allies decided to take the course of the judicial method by establishing international military tribunals for the trial of German and Japanese war criminals.

The persons to be charged were determined by legal rules, and the defence counsel, selected by the defendants, were granted all the rights and privileges needed in order to ensure fair trials. Robert H. Jackson, the US Chief Prosecutor at Nuremberg, while making comments on the nature and purpose of the prosecution, said:

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit

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Harvard Law School, Chicago University, Northwestern University and London’s Middle Temple. Since 1921 he had been professor at Tokyo Imperial University.

<sup>20</sup> Aide-Memoire from the United Kingdom, 23 April 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, 1945*, Government Printing Office, Washington, DC, 1949, p. 18. See also Samuel I. Rosenman, *Working with Roosevelt*, Harper, New York, 1952, pp. 542–45.

their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>21</sup>

History appears sometimes as a circle. What happened in the past may happen again. The Tokyo trial was part of the great effort to make peace more secure through the condemnation of aggression as a crime. The use of the judicial method would also have the advantage of making available an authentic record of the crimes committed for all mankind to study in future years, so as to prevent such atrocities from taking place again. The trials were therefore a good opportunity to let the world, including the Japanese, know about the atrocities committed by Japanese troops. During two and a half years of the Tokyo trial,

[m]ore than 200,000 spectators attended the trial, 150,000 of them Japanese. No less than 419 witnesses – from buck privates to the last emperor of China – gave testimony. In addition, 779 affidavits and depositions were introduced in evidence. On any given day there were about 1,000 people in court – judges, accused, lawyers, legal staffs, MPs, stenographers, translators, cameramen, spectators, Japanese and foreign press.<sup>22</sup>

Vengeance was not the goal of the trials. While promising “stern justice”, the Potsdam Declaration, which defined the terms of the Japanese surrender, stated clearly: “We do not intend that the Japanese shall be enslaved as a race or destroyed”.<sup>23</sup> At the same time Jackson made clear the severity of the crimes that had been committed: “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization can not tolerate their being ignored because it cannot survive their being repeated”.<sup>24</sup> What was at stake at the Tokyo trial, then, was the survival of humanity.

The atrocities committed during the Second World War were the result of individuals suffering from man’s inhumanity to man. During the Tokyo trial the prosecution tendered evidence of countless accounts of gang rape, beheading and even vivisection. In one Japanese account placed in evidence, the deponent testified that live, healthy Allied prison-

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<sup>21</sup> Robert Jackson, *The Case against the Nazi War Criminals: Opening Statement for the United States of America and Other Documents*, Alfred A. Knopf, New York, 1946, p. 3.

<sup>22</sup> Brackman, 1987, p. 18, see *supra* note 12.

<sup>23</sup> Proclamation Defining Terms for Japanese Surrender (‘Potsdam Declaration’), 26 July 1945, Art. 10.

<sup>24</sup> Jackson, 1946, p. 3, see *supra* note 21.

ers had been used for medical demonstrations. “The man was tied to a tree outside the Hikari Kikan office”, the affiant said of one occasion. “A Japanese doctor and four Japanese medical students stood around him. They first removed his fingernails, then cut open his chest, and removed his heart, on which the doctor gave a practical demonstration”.<sup>25</sup> This was the Holocaust in the Far East.

Even the defendants did not feel comfortable with their acts. Arnold C. Brackman was a journalist with the news agency United Press who sat through most of the prosecution’s case and half of the defence’s. He observed that when such testimony was taken, “some of those in the dock removed their headphones. With heads bowed, others with eyes closed, they were unwilling or unable to hear the worst”. One of the defendants, the Foreign Minister Mamoru Shigemitsu, later wrote:

It is terrible to think that after the Second World War many wrongful acts involving inhumanity were brought to light, so that our good name was lost and the impression was created abroad that the Japanese people are cruel monsters.<sup>26</sup>

This is easy to understand. Any nation wishes to have respect from the other nations. Japan is no different. But the appropriate way to gain respect is certainly not to forget the past. The constant exposure of the crimes by the Nazi regime is now recognised as a major obstacle to the revival of Nazism in Germany. The Germans are aware of the unspeakable behaviour of their former leaders.

This is not the case in Japan, where, for example, the younger generation has little knowledge of the recent past. According to a survey conducted by Japan’s leading newspaper *Yomiuri Shimbun*, only 5 per cent of surveyed Japanese citizens said that they are “fully aware of” the Japanese-provoked aggression and the Pacific War. About 44 per cent of the respondents said that they “know a little” about the war; and another 49 per cent answered that they are uninformed about history. Education and school textbooks are the main ways for students to learn about the past. But in the guidelines provided by Japan’s Ministry of Education, in a basic history of Japan which consists of several hundred pages, the account of the Second World War is reduced to a mere six pages, mostly taken up by a photograph of Hiroshima’s ruins, a tally of Japan’s war dead and pictures of the US fire-bombing of Tokyo. The Japanese invasion of China is described as an “advance”, and the Rape of Nanking is

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<sup>25</sup> Brackman, 1987, p. 21, see *supra* note 12.

<sup>26</sup> *Ibid.*

attributed to the resistance of the Chinese Army. This is simply “distorting history”.<sup>27</sup> In the eyes of ordinary Chinese people, Japan sent a large army to China, killed 10 million people, and caused great damage during the war. If this was not aggression, what is it?

Nearly seven decades after the Tokyo trials, the rehabilitation of the class A war criminals has received an unexpected boost in Japan. Fourteen militarists, including Tojo Hideki, were enshrined as “martyrs” at the Yasukuni Shrine, which is dedicated to Japan’s war dead and is one of Japan’s most revered Shinto temples. Now, almost every year around 15 August, Japanese cabinet ministers pay their respects at the Yasukuni Shrine. Prime Minister Abe himself visited the shrine on 26 December 2013.<sup>28</sup> As to the question “why do this”, one of the explanations is that these militarists also sacrificed for their country.

But with the Tokyo trial, what happened in those countries that Japan invaded during the course of the Second World War has been put on the record as historical facts, and its outcomes should never be abolished by a play on words. Why do we still need to dig into the past and reflect on the Tokyo trial? Obviously, it is not to make the Japanese angry. After all, it was not the Japanese people who were on trial. In Japan, just as in any other country, there are good people and bad ones. Joseph Grew, the pre-war US Ambassador to Japan, once wrote in his diary: “For me, there are no finer people in the world than the best type of Japanese”.<sup>29</sup> Simply, the best type did not rule Japan between 1928 and 1945, the time period within the jurisdiction of the IMTFE.

If we examine the past closely at this historic moment, it is not for reasons of hate or revenge, but for our best wishes that the world remains peaceful forever. What was actually at stake at the Tokyo trial was the very survival of humanity.

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<sup>27</sup> YAN Yuewen, “Distorting History Is Unacceptable”, in *Beijing Review*, 30 March 2015.

<sup>28</sup> YIN Pumin, “Between War and Peace”, in *Beijing Review*, 16 November 2014.

<sup>29</sup> Cited in Brackman, 1987, p. 30, see *supra* note 12.

## PROLOGUE BY VOLKER NERLICH\*

The post-Second World War trial at Nuremberg before the International Military Tribunal ('IMT') heralded a new era in international law. It left the traditional state-centred perspective of the discipline and took the role of the individual into focus. The justification for the Nuremberg paradigm of individual criminal responsibility for serious breaches of international law and its enforcement through an international jurisdiction is succinctly put in a key sentence of the IMT's judgment: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".<sup>1</sup>

The principle of individual criminal responsibility immediately gained a foothold in international relations more generally. The General Assembly of the newly founded United Nations affirmed the Nuremberg Principles in 1946;<sup>2</sup> the Genocide Convention was adopted in 1948, providing not only for individual criminal responsibility but also referring to the establishment of an international penal tribunal to try crimes of genocide;<sup>3</sup> the Geneva Conventions of 1949 established the 'grave breaches' regime to ensure the prosecution of the most serious violations of humanitarian law;<sup>4</sup> in the 1950s the establishment of a permanent in-

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<sup>1</sup> International Military Tribunal, *Nuremberg Tribunal v. Goering et al.*, Judgment, 1 October 1946, in International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal*, vol. I: *Official Documents*, International Criminal Tribunal, Nuremberg, 1947, p. 223 (<https://www.legal-tools.org/doc/45f18e/>).

<sup>2</sup> United Nations General Assembly resolution 95(I), 11 December 1946 (<https://www.legal-tools.org/doc/bb7761/>).

<sup>3</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Article VI, adopted by United Nations General Assembly resolution 260(III) of 9 December 1948, entered into force 12 January 1951 (<https://www.legal-tools.org/doc/498c38/>).

<sup>4</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, para. 1054.

ternational criminal court and the adoption of a code of crimes against mankind was contemplated.<sup>5</sup> International criminal law was born.

Of course, these developments did not come out of nothing.<sup>6</sup> As various chapters of the four volumes of *Historical Origins of International Criminal Law* discuss in some detail, the second half of the nineteenth century saw the establishment of the Red Cross movement to contain human suffering caused by war; the Hague Peace Conferences of 1899 and 1907 led to the adoption of a series of international instruments that transformed the traditional laws of war into ‘humanitarian law’, with the Martens Clause at its centre;<sup>7</sup> in 1915 France, Great Britain and Russia denounced the Turkish massacres of the Armenian population as “crimes against civilization and humanity”;<sup>8</sup> after the First World War the Versailles Peace Treaty provided for the prosecution of the former German Emperor for “a supreme offence against international morality and the sanctity of treaties” and of German war criminals;<sup>9</sup> the League of Nations was founded to avoid future war and enhance international co-operation;<sup>10</sup> during the *inter bellum* period, several additional international instruments were adopted, including the Kellogg-Briand Pact, in which the states parties to it renounced resort to war in their international relations.<sup>11</sup>

Nevertheless, while the establishment of the IMT (and its sister tribunal, the International Military Tribunal for the Far East) may seem to be a logical and inevitable reaction to the atrocities of the Axis powers in the Second World War when looked at from today’s perspective, this is probably an anachronism. It was by no means clear that the crimes of Nazi Germany and its allies should be addressed by resorting to a judicial mechanism, and not through the use of brute force against a defeated enemy. The Moscow Declaration of 30 October 1943 provided for the prosecution and punishment of German war criminals. With regard to those

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<sup>5</sup> *Ibid.*, paras. 40 ff.

<sup>6</sup> See, for example, United Nations Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General (1949), UN doc. A/CN.4/7/Rev.1, pp. 7 ff. (‘Historical Survey’) (<https://www.legal-tools.org/doc/816c13/>).

<sup>7</sup> Werle and Jessberger, 2014, paras. 1038 ff., see *supra* note 4.

<sup>8</sup> M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2001, p. 88.

<sup>9</sup> Versailles Peace Treaty, Arts. 227–30 (<https://www.legal-tools.org/doc/a64206/>). Werle and Jessberger, 2014, paras. 6 ff., see *supra* note 4.

<sup>10</sup> Werle and Jessberger, 2014, para. 1435, see *supra* note 4.

<sup>11</sup> *Ibid.*, paras. 1438 ff.

“German criminals whose offenses have no particular geographical localization” (that is, the German leadership), the declaration stated merely that they “will be punished by joint decision of the government of the Allies” – thus leaving room for a potential non-judicial reaction.<sup>12</sup> Stalin is said to have advocated the summary execution of the German leadership and officer corps; Winston Churchill apparently had similar ideas.<sup>13</sup>

Why, then, was Nuremberg trial possible and could lead to a “Grotian moment”<sup>14</sup> or paradigm shift for international law? There is probably no simple answer to this question. The absence of a meaningful judicial reaction to German war crimes during the First World War, despite provisions to that effect in the Versailles Peace Treaty, certainly provided an impetus for better preparation of the Allied powers when the world was dragged into a World War once again 20 years later.<sup>15</sup> Furthermore, the total defeat of Germany in the Second World War and its complete occupation gave the victorious Allied powers an opportunity to actually establish a tribunal that did not exist in the same way after the First World War. The former German Emperor could escape prosecution by seeking refuge in the Netherlands;<sup>16</sup> Göring and other Nazi leaders fell into the hands of the Allies.

Nevertheless, arguably the most important reason for the establishment of the IMT was the sheer monstrosity of the crimes committed by Nazi Germany, in particular the genocide of the European Jews. The cold-blooded, industrialised and highly bureaucratised extermination of European Jewry marked an unprecedented low point in German history, and arguably in the history of humanity. These were not merely transgressions of the laws of war by a defeated enemy that the victors wished to punish, this was radical evil.

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<sup>12</sup> Historical Survey, pp. 21–22, see *supra* note 6. The Moscow Declaration is available at <https://www.legal-tools.org/doc/910354/>.

<sup>13</sup> Ian Cobain, “Britain Favoured Execution over Nuremberg Trials for Nazi Leaders”, in *The Guardian*, 26 October 2012.

<sup>14</sup> Michael P. Scharf, “Seizing the ‘Grotian Moment’: Accelerated Formation of Customary International Law in Times of Fundamental Change”, in *Cornell International Law Journal*, 2010, vol. 43, no. 3, p. 453.

<sup>15</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty’s Stationery Office, London, 1948, pp. 109 ff.

<sup>16</sup> Christian Tomuschat, “The Legacy of Nuremberg”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, p. 831.

In the face of these monstrous crimes, it was the American government that pushed for a judicial reaction. The US President Franklin D. Roosevelt and his advisers had the vision to replace the cynical logic of power and violence that made the Holocaust possible, with resort to law and – more importantly – justice.<sup>17</sup> Probably because the crimes of the Nazis were so extraordinary, the US government’s plea for the establishment of an international criminal jurisdiction could not be ignored.

The development of international criminal law since Nuremberg was not linear. Efforts to establish a permanent international criminal court were stalled by the Cold War and the second half of the twentieth century saw numerous mass atrocities that were largely or completely left unpunished. Many of them even went unnoticed by the international community. It took a shift in the overall political climate in international relations, marked by the fall of the Berlin Wall and the end of the Cold War, and another set of horrendous conflicts for international criminal law to become firmly entrenched through the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as the adoption of the Rome Statute of the International Criminal Court in the last decade of the century.<sup>18</sup>

Nevertheless, the establishment of the IMT as a reaction to the Holocaust and to the other gruesome crimes committed by Nazi Germany stands as an important example of how radical evil can be overcome and replaced by an idea that paves a way for a better future.

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<sup>17</sup> Cobain, 2012, see *supra* note 13.

<sup>18</sup> Werle and Jessberger, 2014, paras. 45 ff., see *supra* note 4.



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## The Role of Internationalised Jurisdictions, National Jurisdictions and Other Actors in the Making of the History of International Criminal Law

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Following the chronological account of the post-Second World War trials in Volumes 1 and 2 of *Historical Origins of International Criminal Law* and the analyses of doctrinal developments in Volume 3, this book dwells on more recent developments and considers in particular the contributions made by a number of key institutions and methods in criminal justice for core international crimes. Rules are created and applied by institutions, whose performance depends on work processes aided by methods, expertise and professionalism. Over time, networks of domestic and international institutions evolve alongside international criminal law itself. The rules and rulings of a particular institution not only embody legal doctrines, but reflect aspirations and limitations of the institution. The vision, policies and interests of relevant actors all affect the quality of international criminal justice. Studying the historical development of these various factors facilitates our better understanding of these key institutions and methods in international criminal law.

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### 1.1. Network of Institutions

Legislative, judicial and executive jurisdiction is exercised by institutions at national and international levels. These central architects of international criminal law represent sovereigns directly or indirectly. Part 1 of this volume focuses on internationalised judicial bodies which are products of the unprecedented institutionalisation process of international criminal law since 1993. United Nations Security Council resolutions or treaties have created international criminal courts such as the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR'), and the International Criminal Court ('ICC'). As much as these courts remain responsible to their creators, they inevitably take on a life of their own.

The emergence of an international institution could be a harbinger of new trends. Almost half a century after the Nuremberg and Tokyo military tribunals, the ICTY revived the idea of trying the most serious crimes at the international level. The birth of such an international tribunal in the first place shows the international community's willingness to temper sovereignty by the imperative to punish serious crimes. That being said, tensions arising from such compromise and other entangled interests<sup>1</sup> do not cease to exist the moment the institution takes its first breath; on the contrary, they tend to persist and take on further dimensions, sometimes even threatening the tribunal's survival or meaningful existence. Here, institutional creativity and resilience show great value when walking less trodden paths. For example, despite the initial suspicion of its functionality, the ICTY survived and has been driving international criminal law forward ever since. In a broader sense, these institutions provide ongoing mechanisms to test and optimise international criminal justice.

The international community has agreed to set up a series of internationalised institutions since the ICTY and other initial attempts. At one stage they gave the impression of being the main dispenser of criminal justice for core international crimes, to the extent that they overshadowed the role of domestic courts. National institutions, however, retain essential

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<sup>1</sup> Morten Bergsmo, CHEAH Wui Ling, SONG Tianying, YI Ping and ZHANG Binxin, "Doctrine and the Scope of the Historical Landscape of International Criminal Law", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law*, vol. 3, Torkel Opsahl Academic EPublisher, Brussels, 2015.

resources and access in implementing international criminal law. Relevant treaties in the field have envisioned the primary role of national institutions through the principles of universal jurisdiction and *aut dedere aut judicare*. For example, the Convention on the Prevention and Punishment of the Crime of Genocide requires criminalisation of acts of genocide under domestic law and their punishment by a court of the territorial state where the act was committed.<sup>2</sup> The 1949 Geneva Conventions and their 1977 Additional Protocol I oblige states to criminalise the “grave breaches” and exercise universal jurisdiction over these war crimes.<sup>3</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also prescribes penal punishment for acts of torture under domestic law and the obligation *aut dedere aut judicare* regarding such acts.<sup>4</sup> With regard to immunity, where sovereignty and the need to punish international crimes have to be balanced, domestic courts also offer dynamic practice. Part 2 of this volume provides examples of domestic institutions’ contributions to international criminal law. Although faced with much suspicion with regard to their impartiality and independence, domestic courts remain the most realistic hope of achieving universal and comprehensive accountability for core international crimes.

Part 3 turns to other actors in international criminal justice, including intergovernmental organisations such as the INTERPOL and the Asian-African Legal Consultative Organization (‘AALCO’), or civil society representatives such as the International Association of Penal Law and peoples’ tribunals. Some of them have directly facilitated the criminal justice process. For example, the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission played a leading role in in-

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<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Arts. V and VI (<http://www.legal-tools.org/doc/498c38/>).

<sup>3</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949, Arts. 49–50; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12 August 1949, Arts. 50–51; Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Arts. 129–30; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Arts. 146–47; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art. 85.

<sup>4</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Arts. 4–7 (<https://www.legal-tools.org/doc/326294/>).

vestigation and trials in the Far East.<sup>5</sup> Many of these organisations make unique and significant contributions to the field in the endeavour to find their role in the network of international criminal justice.

These first three parts of this volume do not intend to make an exhaustive list of actors in international criminal justice. Many important players in the field are not specifically studied, but nevertheless mentioned where pertinent. For example, LIU Daqun observes that the UN Security Council took the unprecedented step to create the two *ad hoc* tribunals in an efficient and pragmatic manner, which contributes to the development of international criminal law.<sup>6</sup> Natalia M. Luterstein refers to the Inter-American Court of Human Rights when discussing trials of massive atrocities in Argentina.<sup>7</sup> Mareike Schomerus puts forward the perspectives of the Lord's Resistance Army ('LRA') – a non-state armed group in northern Uganda – when assessing the impact of the ICC's prosecution of the LRA leaders in an ongoing armed conflict.<sup>8</sup> By sampling from the central architects and those at the periphery, these three parts show the diversity of actors, through whose mutual interactions the systematic evolution of the field has been prompted.

## 1.2. Evolution within Institutions

Institutions may be proactive or reactive in coping with changing circumstances, but change is the eternal theme. The mandate or priorities of institutions may not always have been what we see today. For example, the ICTY moved from its jurisdictional primacy to complementarity, with the aim to implement its Completion Strategy and achieve more comprehen-

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<sup>5</sup> Marquise Lee Houle, "China and the War Crimes Far Eastern and Pacific Sub-Commission", Chapter 16 below; see also Anja Bihler, "Late Republican China and the Development of International Criminal Law: China's Role in the United Nations War Crimes Commission in London and Chungking", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law*, vol. 1, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 507–38.

<sup>6</sup> LIU Daqun, "Contribution of the United Nations *Ad Hoc* Tribunals to the Development of International Criminal Law", Chapter 3 below.

<sup>7</sup> Natalia M. Luterstein, "A Historical Approach to International Criminal Law through the Lenses of Domestic Prosecutions: Judging Massive Human Rights Violations in Argentina", Chapter 8 below.

<sup>8</sup> Mareike Schomerus, "International Criminal Law in Peace Processes: The Case of the International Criminal Court and the Lord's Resistance Army", Chapter 6 below.

sive accountability.<sup>9</sup> Argentine courts started to try mass human rights violations two decades after the late 1970s dictatorship, as the domestic institutions eventually recognised the incompatibility of the amnesty laws with Argentina's international obligations.<sup>10</sup> Four decades after the Second World War, INTERPOL still refused to engage in the fight against serious international crimes. This very conservative legal and policy position was only transformed in the 1990s to ensure the relevancy of the organisation on the international level.<sup>11</sup> Over time, new methodologies have been developed to cope with the scale and complexity of international crimes. Helge Brunborg describes with great precision the demographic analysis developed and used at the ICTY, which was not fully appreciated by the prosecution until a breakthrough at trial. Such a methodology has been an important tool in proving core international crimes.<sup>12</sup>

The evolution of methodologies and institutional values may be driven by the prevailing tide of the time. Through self-reflection and adaptation, institutions optimise their operations and better position themselves in the network. Their individual evolution, if accumulated and reinforced, also has an impact on the orientation of the system as a whole.

### 1.3. Interaction among Institutions

No institution, domestic or international, operates in isolation. Interactions may take place within and outside the network of international criminal law, and between international and domestic institutions. The result of such exchange could be conflict or co-operation, division or convergence, compromise or expansion, continuity or departure, but all are essential for the emerging system of criminal justice for core international crimes to live and flourish.

Referencing jurisprudence is the most common way of interaction among courts. It forges a sense of community through recognition and reinforcement. For example, Itai Apter concludes that domestic civil litiga-

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<sup>9</sup> Serge Brammertz and Kevin C. Hughes, "From Primacy to Complementarity: The International Criminal Tribunal for the Former Yugoslavia, 1993–2015", Chapter 4 below.

<sup>10</sup> Luterstein, *supra* note 7.

<sup>11</sup> Yaron Gottlieb, "Addressing Genocide, Crimes against Humanity and War Crimes in INTERPOL's Practice: Historical Milestones and Recent Developments", Chapter 14 below.

<sup>12</sup> Helge Brunborg, "The Introduction of Demographic Analysis to Prove Core International Crimes", Chapter 12 below.

tion concerning human rights violations by governments and corporations could not have developed without international criminal law serving as the core element of the alleged torts.<sup>13</sup> Regional human rights courts have also influenced domestic and international courts to different degrees, in areas including crimes against humanity and the victim's role.<sup>14</sup> Not to mention that states also resort to the International Court of Justice to resolve disputes between domestic courts in implementing international criminal law.<sup>15</sup> Within the network of international criminal law institutions, the principle of complementarity between international and domestic courts, as it evolves and matures, introduces a dynamic jurisdictional relationship.<sup>16</sup>

The life span of many institutions can be predicted from their legal basis and mandate. When the time comes, temporary international criminal courts will all be part of history. Fortunately, their intellectual legacy will inform the permanent International Criminal Court, future temporary institutions, as well as national criminal justice. As David Re observes, the Nuremberg and Tokyo procedures continue to influence international criminal law today.<sup>17</sup> LIU Daqun also maps the legacy of the ICTY and ICTR in various areas.<sup>18</sup> Institutional cross-fertilisation throughout history means a new institution does not necessarily have to reinvent the wheel or proceed based on pure assumptions in its operation. The cumulative memory of past institutions is a resource to the discipline.

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<sup>13</sup> Itai Apter, "Civil Litigation and International Criminal Law: the Historical Discourse – Do the Two Go Together Even if Not Intended?", Chapter 10 below.

<sup>14</sup> See, for example, Luterstein on prosecution of mass human rights violations before Argentine courts, *supra* note 7; Furuya Shuichi, "Victim Participation, Reparations and Reintegration as Historical Building Blocks of International Criminal Law", Chapter 20 below.

<sup>15</sup> See, for example, International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002; International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012.

<sup>16</sup> See, for example, Brammertz and Hughes, *supra* note 9; Patricia Pinto Soares, "Article 17 of the Rome Statute of the International Criminal Court: Complementarity – Between Novelty, Refinement and Consolidation", Chapter 5 below.

<sup>17</sup> David Re, "Evolutionary, Revolutionary, or Something more Sinister? How the Nuremberg and Tokyo Procedures and Rules Continue to Influence International Criminal Law", Chapter 2 below.

<sup>18</sup> LIU, *supra* note 6.

#### 1.4. Identity of International Criminal Law

As Parts 1–3 of this volume focus on the operational side of the institutions analysed, Part 4 captures some transformations in the actors’ relevant perspectives and attitudes. This may help us understand the psyche of the discipline more deeply. Barrie Sander conceptualises the views of scholars and practitioners and identifies the shift from belief in international criminal courts as progress, to critiques of their limitations.<sup>19</sup> The compass of Sander’s analysis is the presumed collective mentality in the field, rather than concrete actions.

The operation of institutions relevant to criminal justice for core international crimes generates thoughts as much as practices. When studying the history of international criminal law, we should take into account institutional inclinations and motivations. Courts do not operate like machines by taking in legal doctrines and producing standard decisions. The mentality and actions of individuals making up the institutions form the identity of the international criminal law, whose past will normally be part of its presence and future.

#### 1.5. Chapter Contributions

Part 1 of this volume examines the contributions of international criminal jurisdictions, including those of the Nuremberg and Tokyo tribunals, the United Nations *ad hoc* tribunals, as well as aspects of ICC principles and early practice.

In Chapter 2 David Re traces the evolution of structures and procedures of international criminal courts and tribunals from Nuremberg and Tokyo, and explains why the basic structural, procedural and evidentiary regimes have survived the passage of several decades. Re puts forward three reasons: the value of reusing a proven precedent, the need for transparency in international criminal law proceedings and the historical background of the creation of contemporary international criminal courts.

In Chapter 3 LIU Daqun discusses some key contributions of the ICTY and the ICTR to the development of international criminal law. LIU examines the *ad hoc* tribunals’ contributions with regard to the substantive crimes under international criminal law, modes of liability, procedur-

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<sup>19</sup> Barrie Sander, “International Criminal Justice as Progress: From Faith to Critique”, Chapter 19 below.

al law, as well as other issues like outreach efforts. He argues that apart from these, the *ad hoc* tribunals have also contributed to reconciliation and peace consolidation in the relevant regions, to the deterrence of future crimes, and to the establishment of the ICC.

In Chapter 4 Serge Brammertz and Kevin C. Hughes explore the historical development in the relationship between international criminal tribunals and national courts with regard to the prosecution of core international crimes through the example of the ICTY. Brammertz and Hughes analyse how the ICTY shifted from the approach of international primacy of jurisdiction to positive complementarity, and finally to a framework of collaboration between international and national prosecutors. They argue that with the changing landscape of international justice, more attention should be paid to judicial co-operation between international and national courts, and that the essential role of national justice must always be recognised.

In Chapter 5 Patricia Pinto Soares provides a comprehensive analysis of the principle and concept of complementarity, within and beyond the ICC Statute, from the Treaty of Versailles to contemporary practices. Soares argues that complementarity is not a creation of the ICC Statute. She introduces the concept of “substantive complementarity” as an established principle of the law on core international crimes, which sets out a peremptory obligation on the part of the state of custody to prosecute perpetrators if extradition or international prosecution is not possible. She concludes by calling for more future application of this principle.

In Chapter 6 Mareike Schomerus analyses the tension between peace and justice by examining the ICC’s involvement in the Uganda conflict – the first situation before the ICC – and how it is viewed by actors in the armed conflict. Schomerus indicates that a dichotomous framing of “peace versus justice” is over-simplistic. She argues that the tension lies more in the negative way in which the administering of justice procedures is perceived and thus procedures need to be seen as just and fair by all the actors involved and affected.

Part 2 of the book focuses on the interrelationship between international criminal law and domestic institutions, and the contribution of national jurisdictions to the development of international criminal law.

In Chapter 7 Seta Makoto analyses how domestic law has served as the origin of universal jurisdiction and contributes to the enlargement of



the scope of universal jurisdiction under international law. Seta draws his conclusion from an examination of domestic legislation and its enforcement, regarding both substantive and procedural aspects of the universal jurisdiction. He argues that domestic practices can indeed become an origin for further development of universal jurisdiction under international law.

In Chapter 8 Natalia M. Luterstein uses the domestic trials of human rights violations in Argentina as a case study to analyse how international criminal law has been applied by national courts. Luterstein submits that there exists a “dialectic relationship” between international criminal law and domestic law. She suggests that domestic practices could strengthen and promote the development of international criminal law, and international criminal law could influence domestic law into promoting human rights and combating impunity. She proposes that domestic courts should play an even more important role in the application of international criminal law.

In Chapter 9 Hilde Farthofer considers how domestic legislation incorporates the crime of aggression and the difficulties involved in this process. After looking back at early international efforts to achieve peace and security and the Nuremberg trial, Farthofer examines the case of West Germany with respect to domestic legislation on the crime of aggression. In conclusion, she warns that although states need to take domestic measures to counter acts of aggression, the means taken to achieve such a goal are not unrestricted.

In Chapter 10 Itai Apter explores the interrelationship between international criminal law and domestic civil litigation by looking at two case studies concerning the immunity of state officials and corporate liability for war crimes. After examining the historical discourse and cross-effects between the two disciplines, Apter concludes that in an increasingly globalised world, international criminal law and its development should be viewed and understood together with other legal fields.

In Chapter 11 Md. Mostafa Hosain introduces the 1973 International Crimes (Tribunals) Act (‘ICT Act’) of Bangladesh as an early example of domestic legislation on the prosecution of core international crimes. Hosain discusses the historical background of the ICT Act, its inclusion of rape in the definition of crimes against humanity, and its scope of applica-

tion. He suggests that the ICT Act could serve as a precedent for domestic prosecutions with limited capacity and resources.

The chapters in Part 3 of the book take us away from the usual angle of international criminal law study, and view its development from the perspectives of actors who are traditionally not mainstream in criminal courts and tribunals or methods that have contributed significantly to international criminal law or justice.

In Chapter 12 Helge Brunborg describes how demographic analysis was introduced to the work of the ICTY and how this represented a significant shift in the fact-work of international criminal justice. Special focus is placed on the case of Srebrenica and the use of demographic evidence in trials concerning this. Brunborg demonstrates that demographic analysis can play an important role in international criminal trials, and that such use also contributes to the development of data collection concerning armed conflict generally, which is important for trials, reconciliation and history.

In Chapter 13 Mutoy Mubiala examines the role of international fact-finding mandates. Mubiala concludes that fact-finding mandates have been an “important building block” in the evolution of international criminal law and justice, as they have contributed to the institutional growth of international criminal law and now increasingly complement international courts and tribunals in the implementation of the law. For the future of fact-finding mandates, Mubiala calls for the codification of the law relating to international fact-work, the establishment of a permanent international fact-finding body, and the creation of a training centre in international fact-finding.

In Chapter 14 Yaron Gottlieb traces INTERPOL’s changing position with regard to requests concerning core international crimes and thus its support for criminal justice for such crimes. Gottlieb describes the transformations of INTERPOL’s position as a “pendulum movement”, one extreme being its original non-engagement in the fight against core international crimes, the other being full co-operation with potential risk of compromising INTERPOL’s neutrality. He argues that INTERPOL’s new policy adopted in 2010 has struck the right balance between these two extremes.

In Chapter 15 Mark A. Lewis examines the ideological transformation of the International Association of Penal Law between its found-

ing in 1924 and the early Cold War. Lewis explains how the Association's ideology turned from a liberal internationalism in the 1920s, toward state security before the Second World War, inaction during the war, and finally to anti-communism and pro-human rights doctrines in the Cold War after failed attempts to resuscitate its criminological internationalism after the Second World War. He argues that these ideological changes represent a larger transformation in the ideas of the European intellectual bourgeoisie from the 1920s to the 1950s.

In Chapter 16 Marquise Lee Houle describes the creation, composition, and work of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, and China's engagement with these bodies. Houle shows how China had actively participated in both commissions, and how it played a leading role in the investigation and trial in the Far East. She highlights the importance of the work of the commissions as a stepping stone to contemporary international criminal law, disregarding the political motivations involved which will always have a role to play in international criminal justice.

In Chapter 17 Ustina Dolgopol introduces the efforts of peoples' tribunals to address lacunae in the enforcement of international criminal law. Dolgopol examines the work of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery as a case study. She demonstrates how the work of peoples' tribunals provides recognition to those who might otherwise be forgotten or ignored, and thus challenges the manner international criminal institutions operate.

In Chapter 18 Rahmat Mohamad looks at the positions of Asian and African states on the establishment and functioning of the ICC. He outlines the Afro-Asian positions on various important issues before and after the establishment of the ICC against the background of debates regarding the ICC's focus on Africa thus far. Rahmat suggests that the ICC should ensure its credibility to achieve universality, and calls for cooperation between the ICC and the Asian African Legal Consultative Organization of which he is Secretary-General.

Part 4, the last of Volume 4, includes chapters on more theoretical aspects of the development of international criminal law and justice. It sets out to understand the mindset of the field and historical transformations of thought.

In Chapter 19 Barrie Sander demonstrates how international criminal law scholarship has shifted from claiming international criminal justice as progress to a more critical approach. Sander argues that this latter approach contributes to a more textured and realistic understanding of what international criminal courts can do. He concludes that all responses to mass violence, international criminal law included, are limited. He suggests that the relevant actors should always bear such limitations in mind, and make this clear to the public, while at the same time be sensitive to the relevant contextual factors.

In Chapter 20 Furuya Shuichi examines how the victim-oriented perspective in the ICC system was gradually brought into the field of international criminal law. He points out that the adoption of such a perspective by the ICC system is not fortuitous, but reflects long time developments in domestic law, human rights law, as well as practices of ICC's predecessors. Furuya concludes by noting that the ICC system also promotes the development in other fields, and that the dynamism of "cross-references" among different legal instruments and systems will contribute to a more elaborated victim-oriented perspective in criminal justice for core international crimes.

In Chapter 21, Chris Mahony analyses the selection of cases as a decisive factor in determining the direction and independence of international criminal justice, and thus its historical evolution. Based on the practice of several international criminal jurisdictions, he suggests that state interests regarding specific situations and international criminal law enforcement be explored further so as to contextualise states' critical positions concerning case selection. He provides a framework to find whether individuals and groups seeking to extend the reach of international criminal justice have been impinging upon states' self-interest in controlling international criminal justice case selection. The chapter also touches upon the weak versus powerful state competition over the prosecution of the waging of war and case selection control.

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## Evolutionary, Revolutionary, or Something More Sinister? How the Nuremberg and Tokyo Procedures and Rules Continue to Influence International Criminal Law

David Re\*

### 2.1. Introduction

In 1945 and 1946 the United States of America, the United Kingdom, France and the Soviet Union conducted the first international criminal law trial at the Nuremberg International Military Tribunal ('IMT').<sup>1</sup> At the time everything was new and the Tribunal's structures, procedures and even its substantive law (that is, the crimes tried) required invention. Remarkably, the core of the structures, the procedures and the crimes continues in a modified form in modern international courts and tribunals. The aim of this chapter is to identify the structures and procedures that have survived the passage of time and international diplomacy, and to explain why they have lasted.

Going back to the 1940s, Thomas J. Dodd, one of the American prosecutors at the IMT, writing shortly after the end of the Nuremberg trial, stated:

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<sup>1</sup> Some commentators have suggested that the trial of Peter von Hagenbach in Breisach in 1474 was the first ever international criminal law trial, but Gregory S. Gordon has persuasively demonstrated that this was not so. See Gregory S. Gordon, "The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law", in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, pp. 13–49.

The operation of the International Military Tribunal at Nuremberg indicates that an International Criminal Court can function successfully. The procedures worked out at the trial I feel sure will make it easier for similar courts to operate in the future.<sup>2</sup>

During the trial, Sheldon Glueck, a leading advocate for an international criminal court, had optimistically observed that the IMT “will become a precedent in international law”. It was, he believed, a precedent for trying leaders for deliberately leading their countries into “an unjustified, inexcusable, aggressive and therefore criminal war [who] may be held personally liable”. But, he stressed, the trial “is being conducted under a system of law that is still in an early stage of evolution”.<sup>3</sup>

Over 40 years later, Telford Taylor, another American prosecutor, concluded that “Nuremberg was in part ‘revolutionary’ in the sense that its makers adopted several novel criminal principles”.<sup>4</sup> And, in a bold statement at around the same time, Christian Tomuschat described the IMT at Nuremberg, together with the Charter of the United Nations (‘UN Charter’), as marking the “inception of the international community as a legal concept that is more than an academic construction”, culminating in “a network of institutions, which belong to an overarching structure that has primacy over state sovereignty, is slowly emerging and expanding”.<sup>5</sup> Which, if any, are correct? Was it evolutionary or revolutionary? Or, something more sinister? Or were Dodd’s words more prescient? And was Nuremberg really procedurally the inception of a network of institutions?

The answer, it appears, is a mixture. As it was the first international criminal trial, the IMT was undoubtedly revolutionary. And, as its structure and procedures have morphed into those used by the modern international criminal courts and tribunals, evolutionary. A network of institutions has emerged and expanded. And, due to the motivations in con-

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<sup>2</sup> Thomas J. Dodd, “The Nurnberg Trials”, in *Journal of Criminal Law and Criminology*, 1947, vol. 37, no. 5, p. 367.

<sup>3</sup> Sheldon Glueck “The Nuremberg Trial and Aggressive War”, in *Harvard Law Review*, 1946, vol. 59, no. 3, p. 452.

<sup>4</sup> But without specifying what they were, see Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Knopf, New York, 1993, p. 626.

<sup>5</sup> Christian Tomuschat, “The Legacy of Nuremberg”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 839–40.

structing the original court processes – a rapid, documentary trial of the defeated enemy, but with the appearance of fairness – it was understandably somewhat sinister. But more practically, the Nuremberg procedures have mostly succeeded for international trials – they represent a “working precedent”. And whatever the motivations of the Allies in promoting particular procedural mechanisms to achieve swift justice after the war, the basic structural, procedural and evidentiary regimes survive.

How did this occur? In 1945 the victorious Allies held numerous defeated accused enemy war criminals in their custody. The IMT at Nuremberg and the International Military Tribunal for the Far East (‘IMT-FE’)<sup>6</sup> at Tokyo were structurally and procedurally designed for a quick trial of these enemies, with a definite outcome. As were the US Nuremberg Military Tribunals, established pursuant to Control Council Law No. 10,<sup>7</sup> to try Axis war criminals in the American zone in Germany.

The IMT and IMT-FE had similar structures, procedures and substantive laws. Structurally, the Allies established tribunals with separated judicial chambers and investigating prosecutors’ offices, with each of the four states at Nuremberg appointing judges and prosecutors. Procedurally, the Allies were united in their desire to conduct a rapid trial with procedures favouring an inclusionary approach to admitting evidence. They wanted documents, not witnesses, to decide the result. Consequently, they adopted a hybrid combining features of both the common law and civil law systems. The procedures for admitting evidence leaned more towards the practices of the civil law, while the conduct of the trial – the order of proceedings, the questioning of witnesses, and so on – was adversarial and much closer to the common law. Other notable features, such as pleas of guilty and dissenting judgments came from the common law, while the pre-trial disclosure of evidence to the defence, judicial benches of fact-

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<sup>6</sup> Special Proclamation to Establish an International Military Tribunal for the Far East (<https://www.legal-tools.org/doc/242328/>); Charter of the International Military Tribunal for the Far East 19 January 1946, and amended on 25 April 1946 (‘IMT-FE Charter’) (<https://www.legal-tools.org/doc/a3c41c/>).

<sup>7</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol XV: *Procedure, Practice and Administration, October 1946–April 1949*, US Government Printing Office, Washington, DC, 1949, pp. 23–28 (‘Control Council Law No. 10’) (<https://www.legal-tools.org/doc/ffda62/>).

finding judges and judicial questioning derived from civil law systems. Most of these features persist in the modern courts and tribunals.

In 1993 and 1994, almost 50 years after the Nuremberg and Tokyo trials, the United Nations Security Council faced similar challenges in establishing the modern international criminal tribunals. It modelled the statutes of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') on those of the IMT and IMTFE Charters. The judges of both new Tribunals then adopted international hybrid procedural rules that contained many similarities to those used at Nuremberg and Tokyo.

The basic structure of the 1940s post-war international criminal courts and tribunals remains more or less unchanged in the modern international criminal courts, namely a singular international institution of a court or tribunal comprising judicial chambers, a prosecutor's office that investigates and prosecutes, and a court registry.<sup>8</sup> Many of the procedural rules and practices of these first two internationalised criminal tribunals continue today in some form.

Some significant rules and practices developed at Nuremberg and Tokyo have inspired key international criminal procedural law rules. These include the most basic aspects of an adversarial trial, mixed panels of international judges, an independent investigating prosecutor, and inclusionary rather than exclusionary rules for admitting evidence. Other less fundamental practices and principles persist, such as a heavy reliance on documents (in some cases) including affidavit type witness testimony, indictments that do not contain evidence, pleas of guilty, judicial notice of adjudicated facts – a wider form of *res judicata* spilling over into other cases – pre-trial motions, the order of calling evidence at proceedings, full pre-trial disclosure of prosecution evidence, and allowing defendants both to testify in their own case and give unsworn statements. Others, such as challenges to jurisdiction, emerged from the 1940s practices rather than the rules. Another category of practices adopted by some modern international courts and tribunals but not others is, for example, judicial rule-making by all bar the International Criminal Court ('ICC'), where it exists

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<sup>8</sup> The Special Tribunal for Lebanon, additionally, has a Defence Office, as a separate organ. Statute of the Special Tribunal for Lebanon, Arts. 7, 13, attached to UN Security Council resolution 1757, 30 May 2007, UN doc. S/RES/1757 ('STL Statute') (<https://www.legal-tools.org/doc/da0bbb/>).



in a modified form in the Regulations of the Court. And even with the intervention of international human rights law, similar procedural regimes continue in modern international criminal trials.

Examining what has lasted is more instructive than what has not; for example, Nuremberg's absence of the right to appeal a judgment of conviction, or of a judicial appeal of a sentence. Almost all of the key provisions persist. The main difference is the addition of specific international human rights law instruments mandating the right of an accused person to a fair trial. Notwithstanding this, most of the exclusionary rules typical to common law systems do not feature in these courts and tribunals.

Some modern commentators have bluntly dismissed the precedents of Nuremberg and Tokyo, damning them as lacking coherent procedures, using an extremely limited set of rules, and having an inadequate due process regime – especially in view of modern standards. And, even more disparagingly – “when they fitted a certain approach or interpretation, the Nuremberg procedural law and practice were cited as an important precedent”.<sup>9</sup> Strong contemporary criticisms were also made of the Tokyo procedural practices.<sup>10</sup>

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<sup>9</sup> Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction*, Oxford University Press, Oxford, 2008, pp. 38–39. Salvatore Zappalà also questions the relevance of the rules and principles of those in the IMT and IMTFE Charters to today, “particularly in the light of the panoply of provisions on fair trial guarantees at the international level, which did not exist at the time”; Salvatore Zappalà, “Comparative Models and the Enduring Relevance of the Accusatorial–Inquisitorial Dichotomy”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, p. 45. See also Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, pp. 6–7.

<sup>10</sup> See, for example, Justice Pal's dissenting opinion in the IMTFE Judgment:

In prescribing the rules of evidence for this trial *the Charter practically discarded all the procedural rules* devised by the various national systems of law, based on litigious experiences and tradition, to guard a tribunal against erroneous persuasion, and thus left us, in the matter of proof, to guide ourselves independently of any artificial rules of procedure.

International Military Tribunal for the Far East ('IMTE'), *United States of America et al. v. Araki Sadao et al.*, Judgment, Dissenting Opinion of the Member from India (Justice Pal), 1 November 1948, p. 280 (emphasis in original) (<https://www.legal-tools.org/doc/712ef9/>), reprinted in Neil Boister and Robert Cryer (eds.), *Documents on*

These Nuremberg and Tokyo precedents, however, prosper rather than merely linger. The simplest explanation for why is that lawyers (and diplomats) naturally lean towards the known rather than the unfamiliar. International criminal proceedings – involving multiple international actors – require hybrid structures and procedures. The Nuremberg precedent was a known quantity that had worked at the time, and, importantly, was the only known precedent. As such, it was reused.

Although this is partially accurate, the international political context also helps to explain this recycling. International trials face unique obstacles. These include the magnitude of the crimes and the difficulty in obtaining admissible evidence and witnesses in situations of conflict and post-conflict, linguistic challenges including of translation and interpretation, deciphering vast collections of documents, numerous transitional justice issues including the concept of “no peace without justice” and of prosecuting high-level political and military figures and the role of amnesties, external political pressures and cost, including that of employing international personnel working together. Finding a workable solution that combines national and international interests is a very complex undertaking.

Many states have an interest in the procedures and the outcomes of any internationalised criminal justice procedure or institution. They may support, or alternatively oppose, the investigation and trial of the political and military leadership of a strategic or cultural enemy, or ally. And irrespective of the scale of atrocity crimes, or their persistence, some states remain intransigently opposed to establishing institutions to deal with them. On the other hand, the motivation of some proponents of international criminal justice – namely, in bringing to justice the perpetrators of atrocity crimes – may be simply altruistic.

Negotiating resolutions of the United Nations General Assembly and Security Council is usually fraught with competing political considerations. International criminal justice may involve complicated issues of devolved sovereignty, including investigating and trying national citizens for serious offences carrying sentences of life imprisonment, but in a strange hybrid system employing legal procedures sometimes alien to the affected state and accused persons. This can engender a high degree of

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*the Tokyo Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, p. 932.

suspicion and mistrust. Establishing international confidence in the structure, jurisdiction, procedures and methodology of any international criminal justice institution is essential. In circumstances such as these, procedural transparency is paramount, especially in the public part of the process – the trial. The procedures must be certain as well as transparent.

It appears that the reason why the Nuremberg and Tokyo structures and procedures persist in the modern international criminal courts and tribunals combines three factors. One is the value of reusing a proven procedural and structural precedent – however flawed some may consider it. The second is the maximum transparency needed in international criminalised proceedings – based on the international geopolitical conflicts of interest. A third factor results from circumstances, namely the accident of history that was the confluence of events when the modern international criminal courts and tribunals emerged in the 1990s.

## **2.2. The Background: Similarities and Differences in Establishing International Courts and Tribunals in the 1940s and 1990s**

“It is safe to say that no litigation approaching this in magnitude has ever been attempted”<sup>11</sup> was one assessment after the Nuremberg IMT trial. Examining, therefore, some of the similarities, and differences, between the circumstances in the 1940s and 1990s helps explain why the Nuremberg and Tokyo precedents were reused. The parallels include the involvement of the same “Great Powers” in establishing the international criminal tribunals, their different geopolitical goals, their different legal systems, their divergent approaches and their shared goals in bringing war criminals to justice.

One similarity is the speed of negotiations to establish a new tribunal – less than two months for the IMT Charter, 60 days for the ICTY Statute, and two months for the ICTY Rules of Procedure and Evidence. The Rome Conference of the International Criminal Court, which took a deceptively quick five weeks in June and July 1998, had been preceded by years of diplomatic negotiations.<sup>12</sup> The ICC’s Rules of Procedure and Ev-

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<sup>11</sup> Robert H. Jackson, “LXIII. Report to the President by Mr. Justice Jackson, October 7, 1946”, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*, Department of State, Washington, DC, 1949, p. 434 (‘Jackson Report’).

<sup>12</sup> In 1989 the UN General Assembly resolved (GA resolution 44/39, 4 December 1989) to ask the International Law Commission (‘ILC’), when considering its draft code of crimes

idence, however, required five diplomatic preparatory commission meetings over a further two years to materialise.<sup>13</sup>

Some common legal and investigatory challenges faced those creating both the Nuremberg and Tokyo Tribunals and, almost 50 years later, the ICTY and ICTR. Political considerations apart, both had a vast number of crimes, ‘crime bases’ and potential accused persons. In the 1940s, while a true transitional justice situation existed,<sup>14</sup> some of the potential defendants were in Allied custody, some were on the run and others were dead. In the 1990s, while none was in the custody of the United Nations, the conflicts in the former Yugoslavia were ongoing.

Both faced time pressures – the Allies wanted to proceed rapidly with German denazification, and the post-war reconstruction of Germany and Japan, and they desired a quick joint trial of the military and political leadership of their defeated enemies. In 1993 the international community wanted the conflicts in the former Yugoslavia to end. At the same time, however, there was a real political issue in whether an international criminal tribunal would help or hinder the peace process – namely the issue of “no peace without justice”. Included in this was whether indictments would interfere with amnesties and political deals to end the conflicts. And, although in 1993 the same four post-Second World War state actors at Nuremberg were permanent members of the United Nations Security Council, another 11 Security Council members and multiple other inter-

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against the peace and security of mankind, to continue working on a draft statute for an international criminal court (but also to address persons engaged in illicit trafficking in narcotic drugs across national frontiers). Five years later, in 1994, the General Assembly referred the ILC’s 1994 Draft Statute for an International Criminal Court to an *ad hoc* committee on the establishment of an ICC (GA resolution 49/53, 9 December 1994), and it prepared a report in 1995. The General Assembly then established a Preparatory Commission (GA resolution 50/46, 11 December 1995), and it held six sessions between March 1996 and April 1998. In December 1997 the General Assembly decided to hold a State Conference in Rome (GA resolution 52/160, 15 December 1997). See, generally, M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, vol. 1: *Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, NY, 2005, pp. 61–101. See also, generally, Fanny Benedetti, Karine Bonneau and John Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994–1998*, Brill, Leiden, 2013.

<sup>13</sup> Bassiouni, 2005, pp. 101–7, see *supra* note 12.

<sup>14</sup> Even if the term awaited invention.

ested parties – non-governmental organisations (‘NGO’), intergovernmental organisations and states – were also in this fray.<sup>15</sup>

But, perhaps most importantly, for Nuremberg everything had to be invented, and for the ICTY studied and then reinvented. At both, the most basic features of a criminal justice institution, such as its structure, had to be settled. Within this were the composition, including the nationality, of a bench or chamber of judges; the role of the prosecutor; the identity of the appointing authority for the judges, prosecutor and defence counsel; the location of the seat of the Tribunal; and how to investigate crimes. Procedurally, many questions were posed including how to receive evidence and to question witnesses. A challenge for both was in expediting the proceedings and minimising their cost – meanwhile considering translation issues – but while guaranteeing a fair trial to the accused.

Once the courts were established, the prosecutors had to quickly prioritise their selection of accused persons or defendants. The benches were composed of judges from different legal, cultural and linguistic backgrounds – as were the prosecution and defence personnel and other court staff. The defence was under-resourced and translations were problematic. These similarities, and indeed differences, help to explain the resort in the 1990s to the existing precedent – while updating it to incorporate the principles of modern international human rights law.

### **2.3. The 1940s: Establishing the Nuremberg IMT and the Tokyo IMTFE**

Given the post-war political, legal and military challenges, negotiating the IMT’s existence, jurisdiction and procedures was remarkably rapid.<sup>16</sup> The backdrop to this joint trial of 22 defendants – 21 present and one *in absentia* – provides some context as to how its structures and procedures devel-

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<sup>15</sup> To name some, the International Committee of the Red Cross (‘ICRC’), the Commission on Security and Cooperation in Europe (‘CSCE’), the European Community, United Nations agencies such as the United Nations Commission on Human Rights (‘UNCHR’), and NGOs such as Helsinki Watch, Amnesty International and so on.

<sup>16</sup> For an American insider’s perspective, see Taylor, 1993, pp. 64 ff., *supra* note 4. See also Taylor’s more contemporary account in Telford Taylor, “Nuremberg Trials: War Crimes and International Law”, in *International Conciliation*, 1949, no. 450, pp. 243–371, which is Appendix B to Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10*, US Government Printing Office, Washington, DC, 1949, pp. 121–241.

oped. The IMT's establishment in 1945 was an American initiative. In November 1942 the Soviet government had proposed to the United Kingdom establishing an international tribunal to try "major war criminals" – a policy pursued by the British after the First World War in urging the creation of a similar tribunal to try the German Kaiser. But this time, the British, and in particular Prime Minister Winston Churchill, were far from convinced.

The Americans and British thereafter, in 1943, established a 14-member United Nations War Crimes Commission<sup>17</sup> to identify war crimes suspects and to gather evidence that could be used in potential war crimes trials. In November that year, in Moscow, the United Kingdom, the United States and the Soviet Union jointly declared that "major criminals whose offenses have no particular location [...] will be punished by a joint decision of the Governments of the Allies".<sup>18</sup> But this did not necessarily mean after a trial and a conviction – this was left deliberately ambiguous.

At that point, the British still opposed trials, favouring a rough-and-ready form of summary justice in first capturing accused Nazis, then identifying them and thereafter executing them by firing squad.<sup>19</sup> The Ameri-

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<sup>17</sup> Comprising nine governments-in-exile, plus the United Kingdom, the United States, Australia and China. It originated from the St. James's Declaration, which stated that a principal aim of the nine was "the punishment, through the channel of organized justice, of those guilty of or responsible for these [war] crimes". Inter-Allied Information Committee, *Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James's Palace, London, on 13th January, 1942, and Relative Documents*, His Majesty's Stationery Office, London, 1942, pp. 3–4. The Declaration did define "organized justice" as not specifying that a trial and conviction were required before the carrying out of any punishment. Writing in 1949, Taylor, however, interpreted this as clearly referring to "a condemnation to be pronounced in *judicial proceedings*"; Taylor, 1949, p. 127, see *supra* note 16.

<sup>18</sup> Declaration of German Atrocities, Secret Protocol, Annex 10, Moscow Conference of Foreign Secretaries, Signed by the United Kingdom, the United States and the Soviet Union, 30 October 1943 ('Moscow Declaration') (<https://www.legal-tools.org/doc/3c6e23/>). Generally, see Taylor, 1993, pp. 26–27, *supra* note 4.

<sup>19</sup> For example, British Aide-Memoire; the British Ambassador (Halifax) to the Secretary of State (Hull), 19 August 1944, opposing any extension of the terms of reference of the United Nations War Crimes Commission, and proposing national trials, in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944–1945*, Hoover Institute Press, Stanford, CA, 1982, p. 16; Discussions Regarding Procedures and Scope of the United Nations Commission for the Investigation of War Crimes, in *Foreign Relations of the United States Diplomatic Papers, 1944*, US State Department, Washington, DC, 1944, pp. 1351–53; Memorandum, Major War Criminals, by the British Lord Chancellor Sir John Simon, 4 September 1944, in which he wrote: "I am strongly of the opinion that

cans, on the other hand – having opposed trials after the First World War – now promoted them. Internally, however, in the United States a debate raged – for example, the Secretary of the Treasury, Henry Morgenthau, in tandem with his Morgenthau Plan to demilitarise and deindustrialise a defeated Germany, promoted his own version of summarily executing “arch war criminals”, but with military commissions trying “certain other war criminals”.<sup>20</sup>

The United Kingdom maintained its opposition to trials of these major criminals until 3 May 1945,<sup>21</sup> when the Big Three – the United Kingdom, the United States and the Soviet Union<sup>22</sup> – after reviewing an American proposal “for the prosecution and punishment of certain war criminals”,<sup>23</sup> negotiated the San Francisco Declaration.<sup>24</sup> The American chief of counsel for any IMT, Justice Robert H. Jackson, then travelled to occupied Germany, France and the United Kingdom, and on 6 June 1945, upon his return, presented an interim report to President Harry S. Truman proposing the basic legal concepts and general pattern of what was to be-

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the method of trial, conviction, and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goering, Goebbels and Ribbentrop [...] their fate is a *political, not a judicial question*”, in Smith, *id.*, p. 32.

<sup>20</sup> See Memorandum from Henry Morgenthau Jr. to President Roosevelt, 5 September 1944 (The Morgenthau Plan), in Smith, 1982, pp. 27–29, see *supra* note 19. After apprehension and identification, “the person identified shall be put to death forthwith by firing squads made up of soldiers of the United Nations”. The same day the Secretary of State, Cordell Hull, approved a State Department Memorandum for the Cabinet Committee on Germany, stating: “Large groups of particularly objectionable elements, especially the SS and the Gestapo, should be arrested and interned and war criminals should be tried and executed”, *id.*, p. 27.

<sup>21</sup> On 16 April 1945 the British Lord Chancellor, Lord Simon, had written a memorandum that was given to President Roosevelt’s White House Counsel, Judge Samuel Rosenman, reiterating that for the British “execution without trial is the preferable course”. The Arguments for Summary Process Against Hitler and Co, prepared by the Lord Chancellor (Simon), in *ibid.*, p. 27. Rosenman was in Europe at the time of Roosevelt’s death, attempting to persuade the British to agree to a tribunal and, at Truman’s direction, successfully continued these efforts. See Jackson Report, p. 22, *supra* note 11.

<sup>22</sup> The San Francisco Declaration was made during the San Francisco Conference negotiations founding the United Nations Organisation.

<sup>23</sup> Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, 30 April 1945, in Jackson Report, p. 28, see *supra* note 11. On 6 June 1945 the British formally “accepted in principle the United States draft as the basis for discussion”; Aide-Memoire from the United Kingdom, 3 June 1945, *id.*, p. 41.

<sup>24</sup> Taylor, 1949, pp. 130–31, see *supra* note 16.

come the Nuremberg IMT.<sup>25</sup> Joined by France, the four Allies negotiated the London Agreement and its Charter from 26 June to 2 August 1945. During these negotiations in London, the Soviets concurred generally with the American desire to establish such a tribunal and, as the basis for engineering a consensus, were largely prepared to follow the American proposals.<sup>26</sup> The London Agreement, to which was annexed the Charter of the International Military Tribunal, also known as the Nuremberg Charter or the London Charter, establishing the Tribunal, was signed on 8 August 1945, after just under six weeks of inter-Allied negotiations.<sup>27</sup>

In December 1947 Justice Jackson submitted a report to the US Secretary of State on this record of negotiations. This record reveals both the complexity and simplicity of the process once the four had agreed to establish an international military tribunal. The complexity, however, lay more in the procedural, structural and substantive legal novelty of the new tribunal than in the negotiating process itself. Starting with an American proposed draft charter, the four parties produced drafts, counter-drafts and comments, debated them, and then either compromised or conceded. Whatever the ideological and jurisprudential differences, there were only four participants and they shared substantially similar goals.

Notwithstanding the Allies' shared goal of swiftly proceeding to a public trial, the growing post-war suspicion and distrust required some compromises, but probably not as many as the Western negotiators reported afterwards.<sup>28</sup> The Soviets genuinely feared being outnumbered by

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<sup>25</sup> Jackson Report, pp. 42–54, see *supra* note 11. See also Taylor, 1949, pp. 130–31, *supra* note 16. On 3 June 1945 the British government had accepted in principle the US draft for establishing an IMT as the basis for discussion; Aide-Memoire from the United Kingdom, June 3, 1945, in Jackson Report, p. 41, see *supra* note 11.

<sup>26</sup> George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial*, Kluwer Law International, The Hague, 1996, p. 97.

<sup>27</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, adopted and entered into force 8 August 1945, 82 UNTS 279 ('London Agreement'), reprinted in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 1: *Official Documents*, IMT, Nuremberg, 1947, pp. 8–9 ('Trial of Major War Criminals, vol. 1') (<https://www.legal-tools.org/doc/844f64/>). Charter of the International Military Tribunal, Part of the London Agreement of 8 August 1945 ('IMT Charter') (<https://www.legal-tools.org/doc/64ffdd/>).

<sup>28</sup> For example, Taylor, 1949, p. 135, see *supra* note 16, wrote: "Divergences of viewpoint were numerous, and several serious disagreements prolonged the discussion, but in general the Agreement [...] embodied the recommendations of the Jackson report", referring to



their Western allies and had good reason to negotiate, one specific reason being that the other three held most of the suspects in their own custody. The challenge was to find a compromise on both the substantive crimes and all procedural aspects of trying those suspected of mass criminality.

To succeed, such a novel international military tribunal – containing such a mixed composition of personnel, laws and procedures – required a high degree of public transparency. The proceedings needed to be public – the Allies had an enormous collection of potential evidence – and it needed to be presented publicly. There had to be a ‘show’ but without the appearance of a show trial. And not only were the substantive crimes and their elements unsettled – such as the concept of waging an aggressive war, and the elements of crimes against humanity – but the criminal procedural regimes differed between the inquisitorial civil law processes of France and the Soviet Union, on one hand, and the adversarial common law of the United States and the United Kingdom, on the other. The court structures and the roles of prosecutors and judges also diverged in the two systems.

Substantively, for example, the common law recognised the inchoate crime of conspiracy whereas the civil law generally did not. The Americans and the British were dedicated to a single trial against major accused and organisations using conspiracy charges. A compromise between the common law and the civil law confined this to one count of conspiracy to wage an aggressive war as the first count on the four-count indictment.<sup>29</sup>

The record of negotiations shows that the four Allies were united in their desire to limit any defence challenge to the evidence they had already collected and proposed to present before the Tribunal they were establishing. The crimes charged in the four counts on the indictment were

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“Report to the President”, in Jackson Report, pp. 42–54, and relating to the American Memorandum Presented at San Francisco, 30 April 1945, in Jackson Report, pp. 28–38, see *supra* note 11, proposing establishing an international military tribunal.

<sup>29</sup> Trial of Major War Criminals, vol. 1, pp. 29–68, see *supra* note 27: Count One – conspiracy to commit crimes against the peace, war crimes and crimes against humanity; Count Two – crimes against peace; Count Three – war crimes; and Count Four – crimes against humanity. Appendix A was a statement of individual responsibility against each accused; Appendix B, a statement of criminality of groups and organisations; and Appendix C contained Charges and Particulars of Violations of International Treaties, Agreements, and Assurances Caused by the Defendants in the Course of Planning, Preparing, and Initiating the Wars, *id.*, pp. 68–92.

too numerous to prove on witness testimony alone. The Allies were also anxious to ensure as swift a trial as possible and to minimise any potential disruption caused by the defendants to the proceedings, and to eliminate any possibility of a challenge to the process – to the Tribunal’s composition, or legality, or jurisdiction, or law.

Their intention was to devise a court structure that could achieve these aims while avoiding the appearance of imposing a form of ‘victors’ justice’ on their defeated enemies. The negotiations reveal the development of procedural rules specifically designed to facilitate the introduction of prosecution evidence already in Allied hands (documents and statements or affidavits) while minimising the need to call witnesses to testify. It is self-evident to experienced court lawyers that documents are an easier form of proof than witnesses.

From at least November 1944 onwards the Americans deliberately pursued this strategy. Using their own military commissions as a precedent, they recommended procedural rules designed to lessen the prosecution’s burden of proof and to facilitate using documents in place of the oral testimony of witnesses. In 1942, in the case of *Ex parte Quirin* – upon a presidential order – a “military commission” had been established to try eight so-called Nazi saboteurs, captured after they landed by submarine in the United States. The saboteurs had been deemed unworthy of either a court martial or a trial before a civilian court, both of which applied the normal common law rules of evidence, and particularly those used to exclude prejudicial evidence. The US Supreme Court (of which Jackson was a member) upheld the constitutionality of the presidential order.<sup>30</sup> The saboteurs were quickly tried, convicted and sentenced to death.<sup>31</sup>

President Franklin D. Roosevelt’s order, Proclamation 2561 of 2 July 1942, was candidly entitled “Denying Certain Enemies Access to the

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<sup>30</sup> *Ex parte Quirin*, 317 US 1, 46 (1942). Military commissions were used to try non-members of the US armed forces, and did not have the same evidentiary and procedural rights given to American military personnel tried before courts martial. In that case, the US Supreme Court ruled constitutional the presidential decree establishing a military commission to try the eight Nazi saboteurs. The American IMT member, Francis Biddle, as Attorney General, had prosecuted the trial.

<sup>31</sup> Roosevelt commuted the death sentence of one to 30 years’ imprisonment and another to life imprisonment. The remaining six were executed a week after the verdict.

Courts”.<sup>32</sup> Although designed to try enemy non-combatant saboteurs operating on the territory of the United States, it was nevertheless a useful precedent for trying non-American military and political personnel in judicial forums outside of the normal military and civilian criminal justice system – which included those overseas. The Americans were conscious of its potential use for post-war trial. To illustrate, in late 1944 – during the internal planning process for any such trials – the US Judge Advocate-General pointed out to the Assistant Secretary of War its advantages in that the “procedure of the military commission is expeditious, and its rules of evidence are now relaxed”.<sup>33</sup> The Americans, no matter what was publicly stated about the need for a “fair trial”, did not want their domestic criminal procedures, military or civilian, applied wholesale to the trial of Nazi or Japanese war criminals. Neatly encapsulating the American position – as of September 1944 – the US Secretary of War had recognised that

we must not put ourselves in the position where it can be said that we convicted these people without a trial. But it must be free from all the delays that would go with the technicalities of courts-martial or the United States jurisprudence should go in, absolutely.<sup>34</sup>

The UK government expressed the same reservations. The Lord Chancellor,<sup>35</sup> Viscount Simon, although as of April 1945 still expressing the British preference for summary executions over trials, nevertheless conceded that an accused person must have “all the rights properly conceded to an accused person”. These included being defended and to call any relevant evidence. “His defence could not be forcibly shut down or

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<sup>32</sup> The proclamation was case-specific, relating to enemy subjects who entered the territory of the United States, and were charged with acts relating to sabotage, espionage, and so on, but specifying that “such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions”.

<sup>33</sup> Despite this, “the basic principle that the accused must be proved guilty on the evidence presented to the tribunal in the particular case still applies”. Judge Advocate-General’s Memorandum for the Assistant Secretary of War, Subject: Trial of European War Criminals (Comments on the Bernays Plan), 22 November 1944, in Smith, 1982, p. 58, see *supra* note 19.

<sup>34</sup> Telephone conversations between the Secretary of War (Henry Stimson) and the Judge Advocate-General (Major General Myron C. Cramer), 5 September 1944, in *ibid.*, p. 25.

<sup>35</sup> The office combined the position of Minister for Justice and the head of the judiciary.

limited. British public opinion would have been very sensitive to the suspicion that an accused person had been denied his full defence”.<sup>36</sup>

An American judge, Evan J. Wallach, has persuasively demonstrated that although the Nuremberg rules of procedure and evidence “were essentially devised by Americans and based on American law”, they were intentionally amorphous and could thus be “applied to produce fair or unfair trials, just or unjust results”.<sup>37</sup> According to Wallach, the procedures – deriving from the military commissions – were strategically designed to “deny defendants charged in war crimes trials the advantages of Anglo-American evidentiary and procedural rules”.<sup>38</sup> Writing after the trial and placing the Nuremberg IMT within the context of his experience prosecuting the *Ex parte Quirin* trial, the American member, Francis Biddle stated that “all standards of justice required some measure of trial even where ‘political’ methods are used”.<sup>39</sup>

The contemporary view after the event, however, was naturally more anodyne. Jackson, in his 1947 report, observed: “The four nations whose delegates sat down at London to reconcile their conflicting views represented the maximum divergence in legal concepts and traditions likely to be found among occidental nations”. According to him, the resulting compromise was that features of both systems “were amalgamated to safeguard both the rights of the defendants and the interests of society”.<sup>40</sup> Jackson, however, did not refer to the American desire to use the laxer evidentiary standards of military commissions. But he did write of his difficulty in even describing the “chief ideological conflicts that perplexed the London Conference”. The two conflicting fundamental concepts were

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<sup>36</sup> The Arguments for Summary Process Against Hitler and Co, prepared by the Lord Chancellor (Simon), 16 April 1945, in Smith, 1982, p. 27, see *supra* note 19.

<sup>37</sup> Evan J. Wallach, “The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?”, in *Columbia Journal of Transnational Law*, 1999, vol. 37, p. 853.

<sup>38</sup> *Ibid.*, p. 857, referring to Roosevelt’s executive order, Proclamation 2561, establishing the military commission (p. 854, fn. 11). The evidence the commission should admit ought to “have probative value to a reasonable man. The concurrence of at least two-thirds of the members present shall be necessary for a conviction or sentence”.

<sup>39</sup> Francis Biddle, “The Nürnberg Trial”, in *Proceedings of the American Philosophical Society*, 1947, vol. 91, no. 3, pp. 294–302, reprinted in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, p. 201.

<sup>40</sup> In the Preface to Jackson Report, pp. v, viii, see *supra* note 11.

“one as to the relation between a court and the government which establishes it; the other as to the nature of the criminal process”.

In Jackson’s view, the differences with the Soviets were explicable by an essential authoritarianism lying at the heart of its legal system. The Soviet delegation considered that the Tribunal should be bound by the view of the Moscow Declaration, declaring that the Nazi captives were criminals and thus guilty and the only consideration should be punishment.<sup>41</sup> But he did not add that until well into 1945 this was also official British policy. Nor did he concede that the Soviets and Americans were actually not that far apart. During the negotiations, the chief Soviet negotiator, and thereafter IMT member, Major General Iona Nikitchenko, candidly stated: “There is no suggestion on the part of the Soviet Delegation to apply the whole Soviet system to the trial of war criminals. We should aim to simplify procedure and to facilitate the work of the courts”.<sup>42</sup> The Americans were themselves attempting to do just this by proposing using the procedures of their own military commissions.

Jackson’s report also has to be viewed in the context of the onset of the Cold War and the increasing ideological differences between the West and the Soviet Union. His alarm, however, was justified insofar as it concerned the Soviet views on judicial impartiality. As Nikitchenko frankly explained: “the Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case”.<sup>43</sup> He also famously and bluntly said, regarding the “character of the trial”:

We are not dealing here with the usual type of case where it is a question of robbery, or murder, or petty offenses. We are

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<sup>41</sup> Robert H. Jackson, “Nuremberg in Retrospect: Legal Answer to International Lawlessness”, *American Bar Association Journal*, 1949, vol. 35, pp. 813–16 and 881–87. See also Telford Taylor, “The Nuremberg Trials”, in Mettraux, 2008, p. 382, *supra* note 39.

<sup>42</sup> Jackson Report, p. 79, see *supra* note 11.

<sup>43</sup> *Ibid.*, p. 105. Minutes of conference session, 29 June 1945, *id.*, p. 106:

The prosecution would assist the judge, and there would be no question that the judge has the character of an impartial person. Only rules of fair trial must, of course, apply because years and centuries will pass and it will be to posterity to examine these trials and to decide whether the persons who drew up the rules of the court and carried out the trials did execute their task with fairness and with justice but subject to giving the accused an opportunity for defense to that extent. The whole idea is to secure quick and just punishment for the crime.

dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed.<sup>44</sup>

The evolution of the IMT's procedures – from the American and British perspective as shown in their internal documents – is more revealing than the accounts written afterwards by some of the participants. As described, neither wanted the Tribunal to use the exclusionary rules, typical to their own criminal justice systems, which could interfere with their objective of a swift trial followed by rapid punishment. But to satisfy the most fundamental precepts of due process – and the public and historical perspective of the semblance of a fair trial such as those alluded to by Simon – the various drafts of the London Charter included sections devoted to the rights of the defendants.<sup>45</sup>

International human rights law standards, however, were then sparse. The minimum standards applied at the Nuremberg and Tokyo Trials apparently derived from those “applicable to the treatment of aliens, which had at their root a basic standard of justice” – namely a fair trial before an impartial tribunal and without unreasonable delay. Otherwise, under American law, this would amount to cruel or unusual punishment or unfair discrimination.<sup>46</sup>

The compromise between the common law and civil law – and internally, between the common law criminal justice system and that of military commissions – was the IMT Charter, which like the later ICTY, ICTR, Special Court for Sierra Leone (‘SCSL’) and ICC Statutes, established a hybrid system combining procedural and substantive laws but using adversarial proceedings with nominally independent prosecutors.<sup>47</sup>

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<sup>44</sup> During the negotiations on 29 June 1945, *ibid.*, pp. 104–5.

<sup>45</sup> See the various drafts within the American government and military, in Smith, 1982, *supra* note 19; and the drafts proposed by the Americans at San Francisco: American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, in Jackson Report, p. 22, see *supra* note 11.

<sup>46</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008, pp. 74–75.

<sup>47</sup> At least, theoretically, once appointed.

A key consequence of this was achieving maximum public transparency during a public trial.

But while giving the all-important appearance of an impartial judicial process, it also permitted the trial to utilise procedures far less favourable to the defence than Anglo-American domestic or military procedural law would have permitted. A contemporary commentator – sceptical of the precedent of the Nuremberg judgment and whether international criminal law actually existed – nonetheless observed that the “successful combination of the accusatory and inquisitorial systems, and of Anglo-Saxon with Continental rules of criminal procedure in the Charter and during the trial are pointers to the more constructive aspects of the matter”.<sup>48</sup> Another observer, but viewing it from the Soviet perspective 50 years later, concluded that given the

assorted complexities, the outcome was an impressive tribute to how much such collaboration among the great powers can achieve when their interests happen to coincide and the dramatic effects that a collective bid by them will inevitably have on pivotal institutions of international law and policy.<sup>49</sup>

Substantively, between the conclusion of the IMTFE trial in 1947 and the establishment of the ICTY in 1993, the two most relevant developments were the General Assembly’s 1953 Revised Draft Statute for an International Criminal Court and 1954 Draft Code of Offences against the Peace and Security of Mankind,<sup>50</sup> and the work of the International Law Commission (‘ILC’) – commencing in 1982 – on completing these draft statutes.<sup>51</sup> These were, however, incomplete in 1993 when the crisis in the conflicts in the former Yugoslavia led to the establishment of the ICTY.<sup>52</sup>

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<sup>48</sup> Georg Schwarzenberger, “The Judgment of Nuremberg”, in *Tulane Law Review*, 1947, vol. 21, pp. 329–61, reprinted in Mettraux, 2008, p. 188, see *supra* note 39.

<sup>49</sup> Ginsburgs, 1996, p. 124, see *supra* note 26.

<sup>50</sup> Revised Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953), UN General Assembly Official Records, 9th sess., supp. no. 12, at 21, UN doc. A/2645 (1954) (‘1953 Revised Draft Statute for an ICC’); ILC, Draft Code of Offences against the Peace and Security of Mankind with commentaries, adopted at sixth session, 1954, *Yearbook of the International Law Commission, 1954*, vol. II, pp. 149–52 (<https://www.legal-tools.org/doc/80a02d/>).

<sup>51</sup> For a general historical chronology, see Bassiouni, 2005, pp. 26–36, *supra* note 12.

<sup>52</sup> The ILC draft was produced in 1996, Draft Code of Offences against the Peace and Security of Mankind, 6 May–26 July 1996, Report of the International Law Commission on the Work of its Forty-eighth Session, UN GAOR, supp. no. 10, UN doc. A/51/10, 1996. Its

## 2.4. Establishment of the ICTY: The First Internationalised Criminal Tribunal since Tokyo

One basic distinction between the Nuremberg negotiations and those establishing the modern courts and tribunals is that unlike those engaged in the multilateral consultations for, say, the ICTY and then the ICC, the pre-Nuremberg negotiators and decision-makers were the sole (but collective) initiator and decision-maker. And, added to that, they shared common aims including even debating who would be the potential defendants.<sup>53</sup>

In the 1990s the Statutes of the ICTY and ICTR resulted from negotiations in New York at the level of the 15 members of the UN Security Council. The UN, in 1992, and with great difficulty, had established two fact-finding missions to the former Yugoslavia, one of the UN High Commission on Human Rights' Special Rapporteur, Tadeusz Mazowiecki, and the other of a Commission of Experts established by the Security Council.<sup>54</sup> Geopolitically, in 1993 four of the permanent mem-

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Draft Statute for an International Criminal Court was presented to the General Assembly in 1994, Report of the International Law Commission on the Work of its Forty-sixth session, 2 May–22 July 1994, UN GAOR, 49th sess., supp. no. 10, UN doc. A/49/10 (1994), *Yearbook of the International Law Commission, 1994*, vol. II (part 2) ('1994 Draft Statute for ICC') (<https://www.legal-tools.org/doc/17ad09/>).

<sup>53</sup> International Conference on Military Trials, London, 1945, Illustrative Draft of Indictment, Submitted by British Delegation, July 17, 1945, Draft list of defendants and indictment. Göring, Hess, Ribbentrop, Ley, Keitel, Kaltenbrunner, Rosenberg, Hans Frank, Frick and Streicher, in Jackson Report, p. 259, see *supra* note 11. See also, Summary Record of Two Informal Gatherings of British and American Delegations June 21 and 24, 1945, where the British Attorney General proposed the names of potential defendants to the Americans, *id.*, p. 69.

<sup>54</sup> United Nations Security Council, resolution 780 (1992), adopted 6 October 1992, UN doc. S/Res/780 (1992). UN High Commission on Human Rights, resolution of 14 August 1992, 1992/S-1/1. Security Council Provisional Verbatim Record, 6 October 1992, UN doc. S/PV/3119. UN High Commission on Human Rights, Situation of Human Rights in the Territory of the former Yugoslavia, Fifth Periodic Report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur, 17 November 1993, E/CN.4/1994/47. Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 27 May 1994, UN doc. S/1994/674 (<https://www.legal-tools.org/doc/4eb957/>). Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, vol. 1, Transnational Publishers, Ardsley, NY, 1995, p. 25 describe the negotiations as "particularly acrimonious". For an account of the political obstacles facing the Human Right Commission's work, see Michael P. Scharf, "Bassiouni and the 780 Commission", in Leila Nadya Sadat and Michael P. Scharf (ed.), *The Theory and Practice of*



bers of the Security Council had some form of involvement in the conflicts occurring on the territory of the former Yugoslavia, including providing support to differing combatants.<sup>55</sup> While sharing the aim of ending the conflicts, their strategic aims in the Balkans, during and after the conflicts, differed.

The road to resolution 808 (1993) establishing the ICTY in February 1993 was impossibly politicised.<sup>56</sup> France sponsored the actual resolution establishing the Tribunal,<sup>57</sup> and it was unanimously adopted.<sup>58</sup> Two options were advocated: a draft convention, proposed by Sweden and based on a Commission on Security and Cooperation in Europe ('CSCE') report,<sup>59</sup> and a tribunal established by the Security Council under Chapter VII of the UN Charter. That same month Italy, France and Sweden submitted to the Secretary-General draft statutes for a tribunal.

The French draft statute proposed a Commission for Investigation and Prosecution of five members, charged with continuing the investigations of the two UN fact-finding bodies, and, after terminating the investi-

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*International Criminal Law: Essays in Honor of M. Cherif Bassiouni*, Martinus Nijhoff, Leiden, 2008, pp. 269–84.

<sup>55</sup> This included material and financial support. For an account of some of this and the role of the various Security Council members in the conflict in Bosnia and Herzegovina, see, for example, Brendan Simms, *Unfinest Hour: Britain and the Destruction of Bosnia*, Penguin, London, 2002.

<sup>56</sup> See generally, Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg*, Carolina Academic Press, Durham, NC, 1997, pp. 51–74. See also Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, Texas A&M University Press, Austin, 2004, pp. 26–42, originally published as *La Justice face à la guerre: de Nuremberg à La Haye*, Stock, Paris, 2000.

<sup>57</sup> Having surprised the Americans by producing a draft statute based upon the report of a committee of French jurists; see Scharf, 1997, pp. 52–53, *supra* note 56. S/25266, Letter dated 10 February 1992 from the Permanent Representative of France to the United Nations addressed to the Secretary-General. The Foreign Ministers of both Germany and France had proposed at the London Conference of 26 August 1992 the establishment of an international criminal court to try the crimes being committed in the conflict, see United Nations, *The Path to The Hague: Selected Documents on the Origins of the ICTY. Le chemin vers La Haye: Sélection de documents sur les origines du TPIY*, United Nations International Criminal Tribunal for the former Yugoslavia, New York, 1995, pp. 39–49, including the conference's "Specific decisions at the London Conference", 27 August 1992.

<sup>58</sup> Security Council Provisional Verbatim Record, 3175th meeting, held at Headquarters, New York, on Monday, UN doc. S/PV.3175, 22 February 1993, pp. 8–11.

<sup>59</sup> Letter dated 18 February 1993 from the Permanent Representative of Sweden to the United Nations addressed to the Secretary-General, UN doc. S/25307.

gation, would either decide there were no grounds for prosecution or commit the suspect to the tribunal or a national court.<sup>60</sup> It did not suggest how the proceedings would be regulated, other than by reference to the fair rights of the defence set out in the International Covenant on Civil and Political Rights, and that it should be before five judges and two surrogate judges.

Italy had proposed a prosecutor's office of precisely 36 persons, of whom four were to be appointed by the judges. It would itself investigate, but NGOs could submit "documented denunciations" to it.<sup>61</sup> Under Principles of Proceedings the draft referred to the right of an accused person to question "witnesses for the prosecution"<sup>62</sup> (from which an adversarial process could be inferred). The court would also adopt its own rules of procedure. The Swedish proposal supported a procuracy, which would be independent of the court and would investigate and prosecute suspects.<sup>63</sup> This too presupposed an adversarial model of proceedings.

Following the passage of resolution 808, the UN's Office of Legal Affairs had a mere 60 days to draft a statute,<sup>64</sup> a limitation described by one of its principal drafters as not leaving much time for reflection, and "certainly not on certain 'long-term' aspects of the Tribunal's work".<sup>65</sup> Over these 60 days the drafting team reviewed submissions from 30 governments, 10 NGOs, committees of legal experts, the International Committee of the Red Cross and the CSCE.<sup>66</sup>

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<sup>60</sup> Report of the Committee of French Jurists, Submitted by France, 10 February 1993, UN doc. S/25266, p. 57.

<sup>61</sup> Letter dated 17 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, Art. 9, Draft Statute, 17 February 1993, UN doc. S/25300, p. 5.

<sup>62</sup> *Ibid.*, Art. 11(1)(f), Draft Statute, p. 6.

<sup>63</sup> Letter dated 17 February 1993 from the Permanent Representative of Sweden to the United Nations addressed to the Secretary-General, 18 February 1993, UN doc. S/25307, p. 11.

<sup>64</sup> The Secretary-General was requested to provide a report including specific proposals and options for the effective and expeditious implementation of the decision to establish the Tribunal. The report was submitted on 3 May 1993. United Nations Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), and Add. 1, UN doc. S/25704, 3 May 1993, ('Secretary-General's Report on Resolution 808') (<https://www.legal-tools.org/doc/c12981/>).

<sup>65</sup> Larry D. Johnson, "Ten Years Later: Reflections on the Drafting", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 371.

<sup>66</sup> *Ibid.* The article incorrectly refers to the CSCE (Commission on Security and Cooperation in Europe) as the OSCE (Organization for Security and Co-operation in Europe). Draft

Compared to drafting the London Agreement and IMT Charter in 1945, this consultation was wide and open. But it was during this 60-day period that the Americans submitted their own draft statute to the Secretary-General.<sup>67</sup> It differed from the other proposals and drew heavily, both structurally and procedurally, upon the Nuremberg and Tokyo precedent. The Office of Legal Affairs accepted most of the American proposals and then based its draft statute substantially upon the US model, with its Nuremberg and Tokyo antecedents.<sup>68</sup> Specifically, the American proposals on the general organisation of the Tribunal, the rights of the accused, double jeopardy, the standard for appeal and listing rape as a war crime were accepted by the drafters.<sup>69</sup> Under the draft statute, the prosecutor was an independent organ of the Tribunal charged with both investigating and prosecuting cases, but was to be appointed by the Security Council. The Secretary-General then submitted this draft statute to the Security Council.<sup>70</sup>

The draft statute, however, was not necessarily supported by all Security Council members. But rather than opening the draft to modification, the United States apparently persuaded its three former Second World War allies to make statements, interpreting various provisions, when voting on the implementing resolution 827 (1993).<sup>71</sup> Whether the states that proposed or supported the Tribunal's establishment actually wanted it to function is a different issue. According to an American in-

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statutes were received from Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey (jointly), the Russian Federation, the United States and the Netherlands. See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, vol. 2, Transnational Publishers, Ardsley, NY, 1995.

<sup>67</sup> Letter dated 12 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN doc. S/25575, 12 April.

<sup>68</sup> According to Scharf, 1997, p. 62, see *supra* note 56, the US later tried to codify their interpretive attempts into the ICTY's Rules of Procedure and Evidence, but this was rejected by the judges.

<sup>69</sup> *Ibid.*, pp. 55–56. Secretary-General's Report on Resolution 808, see *supra* note 64.

<sup>70</sup> Secretary-General's Report on Resolution 808, see *supra* note 64.

<sup>71</sup> Morris and Scharf, vol. 1, 1995, pp. 33–34, see *supra* note 54. See Security Council Provisional Verbatim Record of the 3217th meeting, New York, 25 May 1993, UN doc. S/PV.3217.

volved in negotiating the statute, some permanent Security Council members never considered that it was supposed to work.<sup>72</sup>

Straight after its establishment, the ICTY faced massive problems in funding and gaining international support and confidence.<sup>73</sup> While the newly elected US President Bill Clinton took the view that the Tribunal's effective operation should be "a United Nations priority", both the UK and France were concerned about trials interfering with the peace settlement. The Chinese had reservations about the precedent, while Russia was uncomfortable with trying its historical allies, the Serbs.<sup>74</sup>

Between 1993 and 2009, the ICTY Statute was amended nine times by Security Council resolutions. The ICTY and ICTR's Rules of Procedure and Evidence, by contrast, are judicial creatures, and were modified many times.<sup>75</sup>

The Rome Statute of the International Criminal Court and its Rules of Procedure and Evidence, as noted above, resulted from years of open diplomatic negotiations, most particularly from 1995 to 1998 for the Statute, and in 1999 and 2000 for the Rules. The drafting commencement point was with the ILC 1994 report on a Draft Code for an International Criminal Court and 1996 report on a Draft Code of Crimes against the Peace and Security of Mankind.<sup>76</sup> The negotiations involved NGOs, inter-governmental organisations and international institutions.<sup>77</sup> Despite this,

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<sup>72</sup> According to an opinion editorial, Michael Scharf, "Indicted for war crimes, then what?" in *Washington Post*, 3 October 1999, p. B01, wrote that within the US government it was perceived as a public relations device and a potentially useful policy tool, while the Russians wanted no more than a Potemkin court.

<sup>73</sup> Generally, see, Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, Yale University Press, New Haven, NJ, 2000.

<sup>74</sup> Scharf, 1997, p. xv, see *supra* note 56.

<sup>75</sup> Revision 50 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia was adopted on 8 July 2015, IT/32/Rev.50.

<sup>76</sup> 1994 Draft Statute for ICC, see *supra* note 52. Draft Code of Crimes against the Peace and Security of Mankind, with Commentaries, 1996, *Yearbook of the International Law Commission, 1996*, vol. II, part two, pp. 17–56 ('1996 Draft Code of Crimes against the Peace and Security').

<sup>77</sup> During the negotiations, many NGOs, and in particular the Coalition for an International Criminal Court, played an important part in the process, especially in submitting expert NGO papers, lobbying and meeting State delegates; see M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Ardsley, NY, 2003, pp. 458–59. Some 238 NGOs participated and played a significant role; see M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court", in

the negotiations at the Rome Conference in June and July 1998 proceeded with speed, and resulted in the adoption of a statute for an international criminal court.

The Extraordinary Chambers in the Courts of Cambodia ('ECCC'), the SCSL and the Special Tribunal for Lebanon ('STL') – the products of international agreements between concerned states and the United Nations, after the passage of relevant Security Council resolutions – effectively rode on the backs of these “predecessors” by borrowing heavily from their statutory instruments.

## **2.5. Structural Similarities between the IMT and IMTFE and Modern International Criminal Courts and Tribunals**

The modern international criminal courts and tribunals have maintained the basic structural model used in the post-Second World War tribunals of a judicial chamber, a registry and prosecutor's office contained within the same institution. Jurisdiction and primacy, international co-operation and the seat of the institution can also fall into this category.

### **2.5.1. The Judicial Chamber**

The concept of panels of international judges hearing international matters was not novel in 1945. But it was without precedent in international criminal trials. The idea of panels of judges of different nationalities – with no more than one of a particular nationality – trying international criminal cases originated at Nuremberg and Tokyo. And, with variations in the modern hybrid courts and tribunals, it continues.

Germany was divided into four zones in 1945 and the four occupying Allies had established the IMT. Each therefore got to appoint a member (a judge) and an alternate to the Tribunal.<sup>78</sup> The Charter specified that the Tribunal members were to choose their own presiding judge.<sup>79</sup> The

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*Cornell International Law Journal*, 1999, vol. 32, no. 3, p. 455. See also, generally, Benedetti *et al.*, 2013, pp. 114–16, *supra* note 12.

<sup>78</sup> IMT Charter, Art. 3, see *supra* note 27: “Each Signatory may replace its members of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate”.

<sup>79</sup> *Ibid.*, Art. 4(b):

The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President,

British and Americans opposed a Soviet judge presiding over the Trial,<sup>80</sup> and the judges chose the British judge, Lord Justice Geoffrey Lawrence, to preside.<sup>81</sup> The Soviet member, Nikitchenko, however, presided at the first session of the Tribunal in Berlin. The judges also required interpretation to communicate.<sup>82</sup>

At Tokyo, by contrast, the Supreme Commander for the Allied Powers, General Douglas MacArthur, appointed the prosecutor, and – from a list proposed by the signatories to the instrument of surrender – 11 judges. He was even allowed to choose the presiding judge of the trial chamber,<sup>83</sup> and duly appointed an Australian High Court Judge, William Webb, as the President.<sup>84</sup>

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and the President shall hold office during the trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

<sup>80</sup> Anne Tusa and John Tusa, *The Nuremberg Trial*, Skyhorse, London 2010, p. 111.

<sup>81</sup> Biddle wanted to preside but Jackson and the American Office of Strategic Services' ('OSS') chief General William J. Donovan opposed this on the basis that the Americans had already picked a trial site in their zone, Nuremberg, and had provided most of the defendants. Jackson then convinced Biddle to support Lawrence for the presidency with French support. Joseph E. Persico, *Nuremberg: Infamy on Trial*, Penguin, London, 1994, pp. 76–78. The OSS, 1942–1945, was the predecessor of the Central Intelligence Agency.

<sup>82</sup> Geoffrey Lawrence (Lord Oaksey), "The Nuremberg Trial", in *International Affairs*, 1947, vol. 23, no. 2, pp. 151–59, reprinted in Mettraux, 2008, p. 298, see *supra* note 39. Lawrence explained that neither the Russian nor French judges spoke English and interpretation was required. Presumably implicit is that Lawrence, for his part, spoke neither French nor Russian.

<sup>83</sup> IMTFE Charter, Art. 2, see *supra* note 6:

*Members.* The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

*Id.*, Art. 3: "*Officers and Secretariat.* (a) *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal".

<sup>84</sup> Webb, the Chief Justice of Queensland, had headed the Australian War Crimes Board of Inquiry, which inquired into Japanese crimes committed in Papua New Guinea during the war. See Boister and Cryer, 2008, p. 82, *supra* note 46, for a critique of his appointment, qualifications, experience, competence and performance.

The difference between Nuremberg and Tokyo can be explained by the circumstances of the drafting of their respective Charters. Whereas the IMT Charter was an agreement between the four Allies, the IMTFE Charter was issued by MacArthur under the authority of the Allied powers the Japanese had surrendered to on 2 September 1945.<sup>85</sup> Three Allies at Nuremberg would not have consented to allowing one Ally to select the President of the Tribunal.

At Nuremberg, the Soviets had proposed that the Control Council appoint the judges.<sup>86</sup> Today, that would be considered an unthinkable intrusion into judicial independence. International criminal judges are now either appointed after an interview process, or elected by the United Nations General Assembly (after the Security Council has presented a shortlist of candidates) or the ICC's Assembly of States Parties. As at Nuremberg (but not Tokyo), the judges of all modern courts also elect their own presiding judges, presidents and vice-presidents, with the exception of the ECCC where Cambodia's Supreme Council of the Magistracy appoints the presiding judges of each chamber. And panels of judges of mixed nationality endure. And, likewise as at Nuremberg and Tokyo, judicial appointments to hybrid bodies are made by a centralised authority, for example, at the ECCC and the STL by the United Nations' Secretary-General and at the SCSL by the Secretary-General and the government of Sierra Leone.

Alternate judges in international criminal proceedings also originated at Nuremberg. Recognising the possible length of trials, the IMT Charter (but not the IMTFE Charter)<sup>87</sup> also allowed for alternative judges, as do the modern courts and tribunals, for example, in the ICC Statute.<sup>88</sup> These were not in the ICTY Statute, but the ICTY Rules, which from the

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<sup>85</sup> Australia, Canada, China, France, the Netherlands, New Zealand, the Soviet Union, the United States and the United Kingdom. To these were joined India (then a British colony), and the Commonwealth of the Philippines (at the time under the sovereignty of the United States).

<sup>86</sup> Ginsburgs, 1996, p. 100, see *supra* note 26.

<sup>87</sup> According to Boister and Cryer, 2008, p. 81, see *supra* note 46, for reasons of insufficient accommodation and transport.

<sup>88</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Art. 74(1) ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

outset allowed the appointment of a replacement or substitute judge, were eventually amended to allow reserve judges to sit in trials.<sup>89</sup>

The ICTY Statute departs from the Statute of the International Court of Justice ('ICJ') in having four-year terms for judges, instead of nine. The UN Secretary-General appoints its Registrar. The election of judges is by the General Assembly after the Security Council has sent it a shortlist of candidates. The ICC judges are elected by its Assembly of States Parties for nine-year terms, according to a formula involving geography, gender and experience.

### 2.5.2. The Prosecutor

Jackson's appointment as the chief American prosecutor actually predated the IMT's creation. Soon after assuming office in April 1945, and realising that he had French and Soviet support, Truman agreed to establish a military tribunal to hold a trial. On 2 May 1945 – a few days before the war in Europe ended – he issued an executive order appointing Jackson, an Associate Justice of the US Supreme Court, as chief of counsel before an International Military Tribunal,

designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal.<sup>90</sup>

The idea of having an office of a separate – now “independent” – prosecutor continues. “Independent” is used in the sense that the prosecutor constitutes a separate organ of the court or tribunal and is not subject

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<sup>89</sup> Probably for reasons of cost and efficiency; see Johnson, 2004, p. 374, *supra* note 65. However, the opposite occurred and in March 2006, following the experience of the trial of Slobodan Milošević in which both the presiding judge of the Trial Chamber (shortly after his resignation) and the accused died during the trial, the judges introduced Rule 15*ter* to allow reserve judges to sit. The original Rule 15(E) had allowed a rehearing with a substitute judge, or a continuation of the trial with the consent of the accused. Rule 15*bis*(C), inserted in 2002, allowed the continuation of the trial, with a replacement judge, without the consent of the accused. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted 11 February 1994, IT/32 ('ICTY, Rules of Procedure and Evidence').

<sup>90</sup> Smith, 1982, p. 138, see *supra* note 19.



to direction from states. The Nuremberg model involved dividing shared prosecuting responsibilities between the four chief prosecutors, with the IMT Charter providing that “[o]ne or more of the Chief Prosecutors may take part in the prosecution at each trial”.<sup>91</sup> Realising that the Western Allies had custody of the majority of the potential defendants, and wanting equality in the decision-making, the Soviets had unsuccessfully argued during the negotiations for collegiality among the four chief counsel.<sup>92</sup> The four Nuremberg chief counsel, although separated from the judiciary, were not independent of their governments. The four were appointed by and, naturally, greatly assisted by their own states in their work. National intelligence agencies also “assisted” them with their case selection and their evidence.<sup>93</sup> After the indictment was settled, the four chief prosecutors decided that each would present a separate portion of the case, while dividing among themselves the responsibility for each count.<sup>94</sup>

The IMTFE Charter, by contrast, provided that the Supreme Commander was to appoint the chief counsel “responsible for the investigation and prosecution of charges against war criminals” within the Tribunal’s jurisdiction. However, any “United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel”.<sup>95</sup> MacArthur duly appointed a senior American prosecutor as the chief counsel. The 10 associate prosecutors – each appointed by the other participating countries – have been described as a “mixed bag” in terms of their abilities. The division of responsibilities generally was that the associate prosecutors introduced evidence and put the case together while the chief counsel opened and closed it.<sup>96</sup>

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<sup>91</sup> IMT Charter, Art. 23, see *supra* note 27.

<sup>92</sup> Ginsburgs, 1996, pp. 97, 100, see *supra* note 26; Jackson Report, p. 288, see *supra* note 11.

<sup>93</sup> See, for example, Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services*, Routledge-Cavendish, London 2007 regarding the role of the OSS in helping American prosecutors choose some defendants for trial while offering others immunity from prosecution. The head of the OSS, Donovan, was a special assistant to Jackson in the months before trial and attended the negotiations with the Allies in London. See, for example, Jackson Report, Minutes of Conference Session of 29 June 1945, p. 111, *supra* note 11.

<sup>94</sup> Dodd, 1947, p. 193, see *supra* note 2.

<sup>95</sup> IMTFE Charter, Art. 8(b), see *supra* note 6.

<sup>96</sup> Boister and Cryer, 2008, p. 77, see *supra* note 46.

By contrast, both the ICTY and ICTR Statutes<sup>97</sup> specify a single prosecutor having the discretion to indict “persons responsible for serious violations of international humanitarian law”. Prosecutorial discretion survives, but today political interference is expressly forbidden.<sup>98</sup>

The modern international prosecutors are appointed by the Secretary-General, or at the ICC elected by its Assembly of States Parties. In Cambodia, at the ECCC, there are international and national co-prosecutors. The STL has a prosecutor appointed by the Secretary-General and a Lebanese deputy prosecutor who is based in Beirut. The offices of the prosecutors today, just like at Nuremberg and Tokyo, are the repositories of vast quantities of documents and investigatory material such as witness statements. As noted above, the American proposal for a draft ICTY Statute, containing a separate prosecutor, was adopted. More or less the same model was adopted for the ICC, where he or she may initiate investigations *proprio motu* (on their own volition) on the basis of information on crimes within the jurisdiction of the Court.<sup>99</sup>

The structural position of the prosecutor as an independent organ of a court or tribunal originated at Nuremberg, but the mode of appointment and the notion of independence from states emerged later. Despite this, high-level international appointments, whether by selection or election, have undeniable political elements. The appointment of a particular person may of itself influence prosecutorial decision-making, including the direction of investigations, indictments, charges and other things such as plea agreements. But the international nature of the appointment makes this unavoidable. This notion of independence, however, is preferable to the practice in states where prosecutors are subject to ministerial or political directive or intervention.

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<sup>97</sup> Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by resolution 955, Art. 15 (‘ICTR Statute’) (<http://www.legal-tools.org/doc/8732d6/>); Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Art. 16 (‘ICTY Statute’) (<https://www.legal-tools.org/doc/b4f63b/>).

<sup>98</sup> For example, ICTY Statute, Art. 22, see *supra* note 97; ICC Statute, Art. 42(1), see *supra* note 88: “A member of the Office shall not seek or act on instructions from any external source”.

<sup>99</sup> ICC Statute, Art. 15(1), see *supra* note 88. The NGOs participating at the Rome Conference were particularly persuasive in convincing the Conference to adopt a Statute with an independent prosecutor who is not subject to judicial oversight; see Benedetti *et al.*, 2013, p. 165, *supra* note 12.

### 2.5.3. Jurisdiction: Primacy or Concurrent Jurisdiction

The fundamental structural issue of whether an international tribunal has primacy or concurrent jurisdiction also has its roots in the Nuremberg IMT. Germany, in 1945 and 1946, was under the control of the four occupying powers; Japan was under the control of the Supreme Commander for the Allied Powers. In Germany, war crimes trials could be held in any of the four zones, according to whatever procedure the individual occupying power decided to use. The joint trial, at Nuremberg, was thus in effect an experiment in a form of internationalised justice. The option of holding many, many war crimes trials in the different zones raised the issue of case selection at the Nuremberg IMT – where, due to the nature of the compromise reached, the result could not be guaranteed. Neither could the selection of judges, prosecutors and defence lawyers. This also raised the issue of a zonal retrial for the same crimes.

The IMT Charter effectively provided for the Nuremberg Tribunal to have concurrent jurisdiction with the four occupying powers over any crimes committed, but with implicit primacy, in seemingly requiring the IMT – before a trial could occur in a zone – to first have a group or organisation declared criminal.<sup>100</sup> The same issue persists today, namely of the investigation into and the trial by national authorities of crimes within the jurisdiction of the international body. The international body will inevitably have a smaller case docket, meaning that its jurisdiction – to cover the field of potential criminality – must overlap with that of national bodies. But at the same time, to assert its international and thus symbolic im-

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<sup>100</sup> IMT Charter, Art. 10, see *supra* note 27:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

*Id.*, Art. 11:

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

portance it must have primacy. This model has been followed by the ICTY, ICTR, SCSL and STL Statutes which each permit concurrent jurisdiction but with conditional primacy. The ICC, by contrast, has “complementarity” as its keystone, meaning that the ICC will defer to national proceedings for the same or substantially similar criminal conduct unless it is shown that the state is unwilling or genuinely unable to investigate or prosecute itself.<sup>101</sup>

The principle of *ne bis in idem*, or double jeopardy, did not seem to occupy the minds of those drafting the IMT Charter or its Rules.<sup>102</sup> The sole like provision at Nuremberg related to a trial for membership of a criminal group or organisation. Otherwise, there was no specific bar to retry an accused for a crime on which he had already been tried at Nuremberg. The original Rules of the ICTY, however, explicitly provided for *ne bis in idem* – but as another state could still put an acquitted or convicted accused on trial for the same crime it was only effective before the ICTY.<sup>103</sup>

#### 2.5.4. Languages

Another innovation from Nuremberg was the strict requirement about the use of languages at the trial. Of course, at Nuremberg the proceedings were occurring symbolically in the city of the grand Nazi rallies of the 1930s and were being widely disseminated in the media, and particularly in Germany itself. There was a public relations imperative – or what would now be more neutrally termed “outreach” – in ensuring that the German population understood what was going on.<sup>104</sup> At Nuremberg,

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<sup>101</sup> ICC Statute, Arts. 17(1)(b), 18(3).

<sup>102</sup> Prosecuting a defendant more than once for the same offence, act or facts.

<sup>103</sup> United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, Art. 11(2) (‘Universal Declaration of Human Rights’) (<https://www.legal-tools.org/doc/de5d83/>): “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”. ICTY, Rules of Procedure and Evidence, Rule 13, see *supra* note 89.

<sup>104</sup> Justice Jackson, Minutes of conference session of July 13, 1945, in Jackson Report, p. 213, see *supra* note 11:

There are many people who will want to attend – military men from all parts. We have communications to set up. The press are going to want to know about this. The public is interested. There will be at least 200

therefore, four languages were used – English, Russian, French and German. At Tokyo, there were two – English and Japanese.<sup>105</sup> By the 1990s the official languages of the first two *ad hoc* UN Tribunals were English and French; the ICC, by contrast, has six official languages – those of the United Nations, but two working languages, English and French.<sup>106</sup> The ECCC has English, French and Khmer; the STL has English, French and Arabic; and the SCSL has English. The ICTY and ICTR, as UN *ad hoc* Tribunals, and to the detriment of both and to the legacy of their work, did not follow the Nuremberg and Tokyo route by specifying the language of the participants to the conflict as either an official or a working language. However, at the ICTY, because the defendants have the right to have the proceedings and documents translated into a language they understand, and the proceedings are broadcast live with a short delay, the reality is that the proceedings occurred in the languages of the former Yugoslavia, in addition to English and French.

#### 2.5.5. International Requests for Assistance and Co-operation

International requests for assistance and co-operation by an international criminal tribunal or court were first addressed during the IMT negotiations in London in 1945. The problem arose of defendants being outside the reach of the authority that was supposed to try them. A form of intra-Control Council territorial transfer,<sup>107</sup> provided for requests for the transfer of a person in Germany alleged to have committed a crime<sup>108</sup> either in another country or another zone. The zone commander or the government of the other country could request the arrest and transfer. The zone commander could refuse the request if he believed that the person was wanted either as a defendant or a witness before the IMT. The Nuremberg and

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correspondents for newspapers according to our estimates who will insist on having some place to live and a place to work. That estimate includes a representation of the presses of the different countries. You will have representatives of other nations who will want to observe us.

<sup>105</sup> IMTFE Charter, Art. 9(b), see *supra* note 6: “*Language*. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested”.

<sup>106</sup> ICC Statute, Art. 50(1), see *supra* note 88: “Official and Working Languages. [...] judgments [...] as well as decisions resolving fundamental issues before the Court, shall be published in the official languages”.

<sup>107</sup> Control Council Law No. 10, Art. IV, see *supra* note 7.

<sup>108</sup> *Ibid.*, Art. II.

Tokyo prosecutors were responsible for the investigation of the crimes each was presenting before the Tribunal. But as the four Nuremberg IMT participant countries had full control over Germany – and a similar situation existed in Japan – there was less need for state co-operation than today.

Control Council Law No. 10 provided a formula for disposing of requests by more than one zone or country for the transfer of a person, other than the IMT, in providing that

[t]he execution of death sentences may be deferred but not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his zone.<sup>109</sup>

The ICTR and ICTY Statutes dealt with the same issues.<sup>110</sup> But both Statutes are resolutions passed under Chapter VII of the United Nations Charter, thereby obliging all UN member states to co-operate with the Tribunals. The ICC Statute, by contrast as a treaty, contains a very complicated and detailed state co-operation regime.<sup>111</sup> In essence, state parties are obliged to comply with the Court's requests for co-operation, while non-state parties may be asked to comply, but are not obliged to do so.

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<sup>109</sup> *Ibid.*, Art. III(5).

<sup>110</sup> ICTY Statute, Art. 29, see *supra* note 97; ICTR Statute, Art. 28, see *supra* note 97: Co-operation and judicial assistance.

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - (a) the identification and location of persons;
  - (b) the taking of testimony and the production of evidence;
  - (c) the service of documents;
  - (d) the arrest or detention of persons;
  - (e) the surrender or the transfer of the accused to the International Tribunal.

<sup>111</sup> ICC Statute, Part 9, International Cooperation and Judicial Assistance, Arts. 86–102, see *supra* note 88.

### 2.5.6. Seat of the Tribunal

The structural issue of the seat of the court or tribunal, for practical and symbolic reasons, is also important to an international body. The IMT and IMTFE Charters specified the location of their seats, but not where their functions were to be exercised.<sup>112</sup> The Soviets wanted the seat to be in Berlin, the others in Nuremberg. The compromise specified that Berlin was the Tribunal's seat, where its first session was held, but that the trial would be held in the Palace of Justice in Nuremberg (in the American zone). The Nuremberg and Tokyo model of locating the proceedings in the country where the crimes occurred has been followed wherever permitted by security, such as the SCSL in Freetown, Sierra Leone.<sup>113</sup> The ICC, as a permanent institution with potentially global jurisdiction, falls into a different category.<sup>114</sup>

### 2.5.7. Procedural Similarities

The list of procedural similarities between the 1940s tribunals and those of the modern era is long. It includes:

- the manner of adopting the rules of procedure and evidence,
- an adversarial trial,
- the pre-trial and investigation phase,
- the indictment,
- trial procedures including the order of presenting evidence,
- pre-trial motions,
- judicial powers during the trial,

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<sup>112</sup> IMTFE Charter, Art. 14, see *supra* note 6: “The first trial will be held at Tokyo and any subsequent trials will be held at such places as the Tribunal decided”.

<sup>113</sup> The ICTY was situated in The Hague, the Netherlands, since it was impossible in 1993 to locate the Tribunal in the countries most afflicted by the conflict, that is, the Federal Republic of Yugoslavia, Bosnia and Herzegovina or Croatia, as the conflict was ongoing. The STL was located in Leidschendam, the Netherlands for security reasons, and the trial (and appeal) of one accused at the SCSL, the former Liberian President, Charles Taylor, was also held there, although all other SCSL proceedings were held in Freetown, Sierra Leone. The seat of the ICTR was in Arusha, Tanzania, for similar reasons, but additionally, the Rwandan government had opposed the Tribunal's establishment and the Security Council effectively imposed the tribunal. The ECCC as a Cambodian hybrid court chambers is situated near Phnom Penh, the Cambodian capital.

<sup>114</sup> Its seat is in The Hague, the Netherlands, but it may sit elsewhere “whenever it considers it desirable”; ICC Statute, Art. 2, see *supra* note 88.

- pleas of guilty,
- the need for a fair and expeditious trial,
- the test for admitting evidence,
- judicial notice and adjudicated facts,
- the role of witnesses at trial,
- testimony of defendants, and
- reasoned judgments and allowing dissenting and separate opinions.

Despite these similarities, one ICTY Judge considered that one reason “why Nuremberg could not be cloned” was because the Allies provided the IMT and IMTFE with “shockingly little guidance in the way of procedure”.<sup>115</sup> But while the modern rules are far more detailed, the guidance contained even in the IMT Charter is far more substantial than is often recognised. It actually contained 11 rules (including 35 sub-sections) regulating the procedures. These set out the prosecutors’ powers and duties, the fair trial rights of defendants, the powers of the Tribunal to conduct the trial, sentencing and restitution.<sup>116</sup> The Rules issued by the judges added another nine (plus 20 sub-sections) providing further guidance, mainly on documents and notice to the defence. Most of these continue in a modified form. The spartan procedures for admitting evidence are still utilised and derive directly from the Nuremberg and Tokyo procedures.<sup>117</sup>

### **2.5.8. Adopting the Rules of Procedure and Evidence in International Courts and Tribunals**

The international criminal law statutes and rules feature very few formal rules of evidence. Common law systems have typically developed volu-

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<sup>115</sup> Theodor Meron, “Anatomy of an International Criminal Tribunal”, in *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, Oxford University Press, Oxford, 2011, pp. 100–1. “Few rules were promulgated in advance of the Nuremberg trials, and the tribunals were instructed to apply ‘expeditious and non-technical procedure’” (p.100). This, however, is not that different to the general approach to admitting evidence at the ICTY, despite its much lengthier Rules of Procedure and Evidence.

<sup>116</sup> IMT Charter, Arts. 14–21, 23–25, and 26–29, see *supra* note 27, on sentencing and restitution.

<sup>117</sup> For example, *ibid.*, Art. 19: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value” is directly reflected in ICTY, Rules of Procedure and Evidence, Rule 89(C), see *supra* note 89: “A Chamber may admit any relevant evidence which it deems to have probative value”.



minous rules, mainly exclusionary, contained in a mixture of statute and case law. And, to generalise, civil law systems tend to take a more inclusionary approach to admitting evidence, but with specific statutory provisions for categories of evidence, such as for experts. The traditional explanation is that exclusionary rules developed to shield lay jurors from viewing potentially overly prejudicial evidence, whereas so-called “professional” judges are immune from such distraction. But, given that most criminal hearings in common law jurisdictions do not involve juries, this justification is now wanting.

### 2.5.9. The IMT Rules of Procedure

The IMT Charter is the international precedent for this paucity of regulation of the admission of evidence. As described above, the contemporaneous documentary record – internal governmental, diplomatic and of the IMT Charter negotiations – demonstrate that the four Allies were united in their determination to begin and finish the proceedings, including the execution of any sentences, using the most convenient procedural route possible. So, even had the Americans and British wanted the Tribunal to include the exclusionary rules of their own systems, achieving this would have been politically infeasible.

The British were reluctant to subject potential Nazi war criminals to trials. And, as explained above, US government documents from late 1944 reveal a preference for a military commission that would prescribe procedures “as liberal as the most liberal rules of the civil or military courts of England, France or the United States”, such as those which would permit depositions, widen judicial notice, broaden the scope and effect of circumstantial evidence, admit more hearsay and eliminate statutory limitations.<sup>118</sup> In the opinion of Biddle – the American IMT member who was also the US Attorney General until the negotiations establishing the IMT Charter – the Charter “wisely [...] left the procedure almost entirely in the discretion of the Tribunal”.<sup>119</sup> The IMT Charter provided that the “Tribunal shall draw up rules for its procedure. These rules shall not

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<sup>118</sup> Memorandum for the Assistant Secretary of War (from General Kenneth C. Royall), 14 December 1944, in Smith, 1982, p. 75, see *supra* note 19.

<sup>119</sup> Biddle, 1947, p. 202, see *supra* note 39. Biddle, on 5 January 1944, had dictated A Memorandum re Punishment of War Criminals, saying: “I think the court should have no discretion on punishment and consider only cases punishable by death. Where would you find enough jails to imprison?”, in Smith, 1982, p. 91, see *supra* note 19.

be inconsistent with the provisions of this Charter”. And the Committee for the Investigation and Prosecution of Major War Criminals would draft rules of procedure for submission to the Tribunal, which could accept or amend them.<sup>120</sup> The Tribunal adopted its rules on 29 October 1945.

At the first public session of the IMT in Berlin on 18 October 1945, the presiding judge, Nikitchenko, referred to these rules, which were then in formulation, and noted that a special clerk had been appointed to advise the defendants of their right and to take instructions from them personally as to their choice of counsel and that their rights of defence are made known to them.<sup>121</sup> The rules also provided for:

- the service of additional documents,
- the right to have witnesses and documents summonsed,
- the Tribunal, through its President, providing for the maintenance of order at the trial,
- a witness giving the same oath before testifying as when testifying in his own country,
- filing pre-trial motions, applications and requests in writing with the General Secretary of the Tribunal,
- the Tribunal ruling on all questions during the trial, such as the admissibility of evidence, and if necessary in closed session,
- specifying the composition of the Secretariat, and
- keeping a record of the proceeding – all oral proceedings by stenographic record, and numbering exhibits sequentially.

All official documents were to be in the four languages, English, French, German and Russian; original documents could be withdrawn if needed for historical reasons and substituted with certified copies, if satisfied that no substantial injustice would result. In the interest of fair and expeditious trials, the Tribunal could depart from, amend or add to the rules, either by general amendment or by special orders for particular cases. The defendants also had the right to receive 30 days before the commencement of trial in a language he understood the indictment, the IMT Charter, any documents lodged with the indictment, a statement of his

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<sup>120</sup> IMT Charter, Arts. 13 and 14(e), see *supra* note 27.

<sup>121</sup> Quincy Wright, “The Law of the Nuremberg Tribunal”, in Mettraux, 2008, p. 333, see *supra* note 39. See Minutes of the Opening Session of the Tribunal, at Berlin, 18 October 1945, Trial of Major War Criminals, vol. 1, p. 25, *supra* note 27.

right to the assistance of counsel, and copies of any rules of procedure and evidence.<sup>122</sup> This recognised the differences between some civil law systems where the evidence accompanied the indictment in a dossier for the trial judges, and in those common law systems that did not necessarily provide access to the defendants prior to trial of the evidence to be used against them.

Writing contemporaneously during the trial and therefore without the benefit of history, hindsight, or modern human rights law, Arthur Goodhart described the Nuremberg Rules as following

those recognised in the courts of all civilised countries. Thus the defendants are given the right to have the assistance of counsel, are to be furnished with a copy of all documents, to present evidence in their own defence, and to cross-examine any witnesses called by the prosecution.

He continued, optimistically: “It is clear, therefore that no question can ever be raised concerning the fairness of the rules of evidence and procedure administered by the Nuremberg Tribunal”.<sup>123</sup>

#### **2.5.10. The IMTFE Rules of Procedure**

Six months later, on 25 April 1946, and five months into the Nuremberg trial, the Rules of Procedure of the IMTFE were issued by the President of that Tribunal. They contained similar provisions, but, being substantially based on the Rules of the US Military Tribunals, some modifications. They were drafted by the judges as a committee but with input from the US Judge Advocate General’s Department.<sup>124</sup> They have been described as “apparently a synthesis of those used by military commissions and those in Britain’s Royal Warrant for trial of war criminals”, reflecting the intention of the Supreme Command of Allied Powers that as much evidence as possible be admitted.<sup>125</sup>

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<sup>122</sup> IMT, Rules of Procedure, 29 October 1945, Rule 2(a), Trial of Major War Criminals, vol. 1, pp. 19–23, see *supra* note 27 (‘IMT, Rules of Procedure’) (<https://www.legal-tools.org/doc/73787c/>).

<sup>123</sup> What is meant by “civilised” is left undefined. Arthur L. Goodhart, “The Legality of the Nuremberg Trials”, in *Judicial Review*, 1946, vol. 58, pp. 1–19, reprinted in Mettraux, 2008, p. 629, see *supra* note 39.

<sup>124</sup> See Boister and Cryer, 2008, p. 87, *supra* note 46.

<sup>125</sup> *Ibid.*

Under the Rules of Procedure notice to the accused of the same documents referred to in the IMT Rules was shortened from 30 days to at least 14 days before “the Tribunal begins to take evidence”. Additional prosecution documents were to be translated and provided as soon as practicable. The IMTFE Rules also provided for the maintenance of order in the courtroom, the oaths for interpreters,<sup>126</sup> the oaths for witnesses (the same as at Nuremberg), that a record of the trial was to be kept of oral proceedings, and so much as considered necessary in the interest of justice and for the information of the public would be translated into Japanese. Documents to be adduced into evidence were to be translated and furnished to opposing counsel at least 24 hours before their presentation into evidence. Counsel had to immediately notify opposing counsel if they intended to use additional documents. Only one counsel was to be heard for each accused unless special permission was granted. Rule 9 was critical in specifying that nothing in the Rules

shall be construed to prevent the Tribunal at any time, in the interest of a fair and expeditious trial, from departing from, amending or adding to these rules, either by general rules or special order for any particular case in such form and upon such notice as may appear just to the Tribunal.<sup>127</sup>

Rules were also adopted under Control Council Law No. 10 for the various American military trials and amended several times as the trials progressed.<sup>128</sup>

## 2.6. The ICTY, ICTR and ICC

There is no modern standing international criminal law rule-making commission. Rules of Procedure and Evidence must be modified according to the circumstances of the court or tribunal. Consistent with the prec-

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<sup>126</sup> This was “So help me God!” for English interpreters or by affirmation, and with Japanese interpreters using “I swear according to my conscience”. International Military Tribunal for the Far East, Rules of Procedure, 25 April 1946, Rule 8(b) (‘IMTFE, Rules of Procedure’).

<sup>127</sup> See Boister and Cryer, 2008, p. 103, *supra* note 46.

<sup>128</sup> The Rules of Procedure were adopted and revised from time to time by, for example, Military Government for Germany, USA, *United States of America v. Karl Brandt et al.*, 25 October 1946–20 August 1947 (‘Medical case’). This was the first trial held under Control Council Law No. 10 by a military tribunal established pursuant to Ordinance No. 7. Rules of Procedure for Military Tribunal I in the Trial of the Medical case, adopted 2 November 1946 (<https://www.legal-tools.org/doc/e448dd/>).

edents of the Nuremberg, Tokyo and US Military Tribunals, the 1953 Revised Draft Statute for an International Criminal Court provided for the judges themselves to make the rules.<sup>129</sup> The Committee's report contained no explanation of this proposal.

The judicial rule-making function is a feature of international criminal law that surprises many. With the exception of the treaty-based ICC Statute, with its 123 Assembly rule-makers,<sup>130</sup> the other modern international courts and tribunals all feature judicial rule-making. The ICC judges do have, to a more limited extent, their Regulations of the Court, which allow a reduced form of judicial rule-making.<sup>131</sup>

The spirit of Nuremberg and Tokyo even pervades the content of some of these Regulations, such as electing a presiding judge (or President at Nuremberg), holding hearings publicly, and the order of questioning witnesses. The ICC's procedural regime is contained in this lengthy combination of Statute, Rules of Procedure and Evidence and Regulations. The result of this, however, according to one group of influential

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<sup>129</sup> 1953 Revised Draft Statute for an ICC, Art. 24, see *supra* note 50. The General Assembly never acted upon this draft statute.

<sup>130</sup> As of July 2015.

<sup>131</sup> See ICC Statute, Art. 51(2), Rules of Procedure and Evidence, *supra* note 88, requiring a two-thirds majority of the Assembly of States Parties to amend the Rules, except in urgent cases (Art. 51(3)) in which the judges may adopt a rule by a two-thirds majority until adopted, amended or rejected by the next Assembly meeting, and Rule 3, Amendments. But ICC Statute, Art. 52, Regulations of the Court, allows the judges to "adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning". ICC, Regulations of the Court, 26 May 2004, ICC-BD/01-01-04 (<http://www.legal-tools.org/doc/2988d1/>). These contain provisions that appear in the Rules of Procedure and Evidence of the other international institutions, for example, composition of the court (Reg. 9), precedence of judges (Reg. 10), presiding judges (Reg. 13), alternate judges (Reg. 16), duty judges (Reg. 17), public hearings (Reg. 20), holding status conferences (Regs. 30 and 54), notification of the service of documents (Regs. 31 and 32), court deadlines and time-limits (Regs. 34 and 35), certain roles of the Victims and Witnesses Unit (Reg. 41), the mode and order of questioning witnesses (Reg. 43), the content of the indictment ('the document containing the charges) (Reg. 52), exception - the Trial Chamber modifying the legal characterization of the facts (Reg. 55), notice of appeal and the document accompanying it, responses etc (Regs. 57, 58, 59), variation of grounds of appeal (Reg. 61), additional evidence on appeal (Reg. 62), appeals under Rule 154 and 155 not requiring or requiring leave of the Court (Regs. 64, 65), legal representative of the victims (Regs. 79, 80), victims participation and reparations (Regs. 86-88), co-operation and enforcement (Regs. 107-9), and enforcement (Reg. 116).

commentators is, “[t]ogether with the normative texts, the procedural law of the ICC has become voluminous, multi-layered and complex”.<sup>132</sup>

Procedurally, the ICTY and ICTR Statutes regulate only the investigation and preparation of the indictment, the review of the indictment, co-operation and judicial assistance, and provide some minimal guidance on the commencement and the conduct of the proceedings, and appeals. They set out in general terms the rights of the accused, but are silent on admitting evidence and regular court procedures. This was specifically left to the judiciary. Both statutes specify that the judges were to adopt rules of procedure and evidence for the conduct of the pre-trial phase, trial and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.<sup>133</sup>

According to a senior UN official involved in drafting the ICTY Statute, “it was felt that it would be quite inappropriate for a political body to be involved in the drafting of or even approval of such rules”.<sup>134</sup> Within several years this perspective had changed dramatically insofar as a treaty-based court, the ICC, was concerned. Another explanation for the UN’s internal reluctance to attempt to draft rules is the practical difficulty that this would have presented in the time permitted, and the impossibility of attempting to obtain Security Council consent to a more detailed document. It would have also presented the future challenge of amending the rules (as has been shown at the ICC). The Tribunal was an experiment and precedent existed in Nuremberg and Tokyo for judicial rule-making. Security Council rule-making would have sharply exposed any divisions between the civil law and common law approaches to criminal law procedures. And delegating this function to the judges meant that states could present, as they did, their own drafts to the plenary of judges for consideration. The frequent amendment of the ICTY’s Rules and Procedures by the plenary of judges contrasts with the ICC’s record of no amendments between 2002 and 2013.<sup>135</sup>

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<sup>132</sup> Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014, p. 42.

<sup>133</sup> ICTY Statute, Art. 15, see *supra* note 97; ICTR Statute, Art. 15, see *supra* note 97.

<sup>134</sup> Johnson, 2004, pp. 374–75, see *supra* note 65.

<sup>135</sup> At the 12th session of the Assembly of States Parties in November 2013 the ICC’s Rules of Procedure and Evidence were amended for the first time, amending: Rule 4, plenary sessions; Rule 4*bis*, presidency; Rule 68, prior recorded testimony; Rule 100, place of pro-

In late 1993 the United States submitted a 75-page draft Rules of Procedure and Evidence to the ICTY's judges, who also received submissions from Argentina, Australia, Canada, France, Norway, Sweden, and from Helsinki Watch, the Lawyer's Committee for Human Rights and the International Women's Human Rights Committee.<sup>136</sup> France submitted a two-page document, in which it stated that it "relies entirely on the judges of the Tribunal, in their wisdom, to devise appropriate rules of procedure which usefully expand and clarify the provisions of the Statute".<sup>137</sup> The US proposal, by contrast, was highly detailed, and contained 31 rules, divided into many sub-sections.<sup>138</sup> An American Bar Association taskforce reviewed this draft and presented its revision, with commentary, to the judges. This taskforce had also considered comments on the US draft from the ICTY's first American judge, Gabrielle Kirk McDonald.<sup>139</sup> Both US proposals were based, understandably, on the US Federal Rules of Evidence. McDonald later described unsuccessfully attempting to present the American Bar Association draft to the plenary of 11 judges as a *fait accompli*.<sup>140</sup> Less than two months after their first meeting the judges adopted the Rules of Procedure and Evidence.<sup>141</sup>

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ceedings; Rule 132*bis*, designation of judge for preparation of trial; Rule 134*bis*, presence through video technology; Rule 134*ter*, excusal from presence at trial; 134*quater*, excusal due to extraordinary public duties. See Assembly of State Parties to the Rome Statute of the International Criminal Court, Official Records Twelfth Session, The Hague, 20–28 November 2013, vol. 1.

<sup>136</sup> Morris and Scharf, vol. 1, 1995, pp. 176–77, fn. 482, see *supra* note 54.

<sup>137</sup> Permanent Mission of France to the United Nations, UN doc. IT/4, 28 October 1993, reprinted in Morris and Scharf, vol. 2, p. 505, see *supra* note 66.

<sup>138</sup> Submission of the United States regarding the Rules of Procedure and Evidence of the ICTY, UN doc. IT/14, 17 November 1993, reprinted in *ibid.*, p. 509.

<sup>139</sup> Report of the American Bar Association Task Force on War Crimes in the former Yugoslavia, Commenting on the United States Draft Rules of Procedure and Evidence for the International Tribunal, UN doc. IT/INF.6/Rev.2, 18 January 1994, reprinted in *ibid.*, p. 585.

<sup>140</sup> Describing how she had walked into the first meeting and slapped down the rules, "I was like, 'You want the rules, here they are', adding with a laugh: 'I guess I was playing the typical American role: we know it all, we control it all'", cited in Vladimir Tochilovsky, "International Criminal Justice: 'Strangers in the foreign system'", in *Criminal Law Forum*, 2004, vol. 15, p. 322.

<sup>141</sup> ICTY, Original Rules of Procedure and Evidence, see *supra* note 89, had 125 rules, covering 72 pages. Scharf points out that it took a committee of American judges and law professors four years to draft the US Federal Rules of Criminal Procedure in the 1940s; Scharf, 1997, p. 67, see *supra* note 56. But the ICTY judges, of course, had the advantage

The ICTY's first judges agreed that their new Rules had to reflect "concepts that are generally recognised as being fair and just in the international arena".<sup>142</sup> There were three overriding principles, namely that there should be no needless repetition between the Statute and Rules, substantive law was not to be introduced in the Rules, and they were to be precise but not intrinsically detailed.<sup>143</sup>

As described above, during the ICTY rule-making process the judges received considerable input from states and NGOs. The procedural principles adopted drew heavily on the Nuremberg precedent. The records of the ICTY plenary sessions adopting these first modern rules of procedure and evidence – unlike those of the ICC and indeed the IMT Charter – are not public, but the statement of its first President, Antonio Cassese, in the 1994 Annual Report to the Security Council, attempted to clarify why the rules were adopted as they were, noting:

As a body of a unique character in international law, the Tribunal has had little by way of precedent to guide it. The two other international criminal tribunals that preceded it, at Nuremberg and Tokyo, both had very rudimentary rules of procedure: the rules of procedure of the Nuremberg Tribunal scarcely covered three and a half pages, with a total of 11 rules, and all procedural problems were resolved by individual decisions of the Tribunal; at Tokyo, there were only nine rules of procedure, which formed part of the statute of the Tribunal. Again, all other matters were left to the case-by-case ruling of the Tribunal.<sup>144</sup>

This statement, though, did little justice to the procedures developed at Nuremberg and Tokyo. The explanation that "all procedural problems were resolved by individual decisions of the Tribunal" merely restates the

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of cherry-picking these rules. This short time could also be explained by Cassese's legendary work ethic and energy and that the judges, in the absence of any judicial work, had time on their hands.

<sup>142</sup> ICTY, 1st Annual Report, 29 August 1994, UN docs. A/49/342, S/1994/1007, paras. 52–54 ('ICTY, 1st Annual Report') (<https://www.legal-tools.org/doc/cacdb7/>). See also Gabrielle Kirk McDonald, "Trial Procedures and Practices", in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. 1: *Commentary*, Kluwer Law International, The Hague, 2000, pp. 553–54.

<sup>143</sup> McDonald, 2000, pp. 553–54, see *supra* note 142.

<sup>144</sup> ICTY, 1st Annual Report, para. 54, see *supra* note 142.



Nuremberg rule for dealing with trial motions, namely that “acting through its President, [it] will rule in court upon all questions arising during the trial, such as questions as to admissibility of evidence offered during the trial, recesses, and motions”.<sup>145</sup> But this is very similar to the modern practices. It also glosses over the substance of those procedural rules and ignores that some of these (the 11 provisions containing 35 sub-sections) were in the Charter rather than in those three and a half pages of rules (of nine rules divided into 20 sub-sections).

Cassese likewise declared that the judges had adopted a “largely adversarial approach to our procedures, rather than the inquisitorial approach”, but with two adaptations, namely that as at Nuremberg and Tokyo they had not laid down technical rules for the admissibility of evidence, and second, that the Tribunal may itself (that is, *proprio motu*) order the production of new or additional evidence,<sup>146</sup> explaining in the ICTY’s 1994 Annual Report:

However, there are three important deviations from some adversarial systems. The first is that, as at Nürnberg and Tokyo, there are no technical rules for the admissibility of evidence. This Tribunal does not need to shackle itself to restrictive rules that have developed out of the ancient trial-by-jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. The judges will be solely responsible for weighing the probative value of the evidence before them. Consequently, all relevant evidence may be admitted to the Tribunal unless its probative value is substantially outweighed by the need to ensure a fair

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<sup>145</sup> IMT, Rules of Procedure, Rule 7(c), see *supra* note 122:

Applications and Motions before Trial and Rulings during the Trial.

The Tribunal, acting through its President, will rule in court upon all questions arising during the trial, such as questions as to admissibility of evidence offered during the trial, recesses, and motions; and before so ruling the Tribunal may, when necessary, order the closing or clearing of the Tribunal or take any other steps which to the Tribunal seem just.

<sup>146</sup> Judge Peter Murphy and Lina Baddour, “Evidence and Selection of Judges”, in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Law*, Oxford University Press, Oxford, 2014, p. 375–76.

trial (rule 89) or where the evidence was obtained by a serious violation of human rights (rule 95).<sup>147</sup>

This first “deviation” comes directly from the Nuremberg and Tokyo procedures. The other two described “deviations” were permitting the court to order the production of additional or new evidence *proprio motu* (of its own volition), and not granting immunity or allowing plea bargaining. Plea bargaining – which does not necessarily feature in adversarial systems, there being numerous system-specific differences, such as charge bargaining – was introduced into the ICTY Rules in 2001.<sup>148</sup>

So how was this package viewed at the time? From an “outsider’s” perspective, the preface to the US draft Rules of Procedure and Evidence asserted that the ICTY Statute had established a “modified adversarial system” in which a balance was necessary between the common law and civil law traditions.<sup>149</sup> The “insider’s” view – that of the ICTY Trial Chamber hearing the first trial – also described the procedures as “an innovative amalgam of these two systems”,<sup>150</sup> and, of the rule-making process.<sup>151</sup>

A final indication of the uniqueness of the International Tribunal is that, as an *ad hoc* institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand. The International Tribunal therefore decided, when preparing its Rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. Among these is the fact that the abuses perpetuated in the region have spread terror and anguish among the civilian population. The Judges feared that many victims and wit-

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<sup>147</sup> ICTY, 1st Annual Report, para. 72, see *supra* note 142.

<sup>148</sup> ICTY, Rules of Procedure and Evidence, Rule 62*ter*, Plea Agreement Procedure, adopted 13 December 2001, UN doc. IT/32/Rev.43. The procedure after a plea of guilty was added on 12 November 1997 with the addition of Rule 62*bis*.

<sup>149</sup> Submission of the United States regarding the Rules of Procedure and Evidence of the ICTY, UN doc. IT/14, 17 November 1993, reprinted in Morris and Scharf, vol. 2, p. 509, see *supra* note 66.

<sup>150</sup> ICTY, *Prosecutor v. Duško Tadić et al.*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, 10 August 1995, para. 22 (<https://www.legal-tools.org/doc/ff53bf>).

<sup>151</sup> *Ibid.*, para. 23. This was a controversial majority decision allowing the testimony of witnesses whose identities could be withheld from the defence; it is illustrative of the views of the judges who had participated in drafting the rules. The three judges here had common law backgrounds.

nesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives. This was particularly troubling given that, unlike Nuremberg, prosecutions would, to a considerable degree, be dependent on eyewitness testimony.<sup>152</sup>

Having an off-the-shelf set of rules as a discussion point must have influenced the outcome, but the judges did not accept all of the American proposals. Although it is evident that the United States very successfully influenced the direction of the procedures and rules, other states including France, for example, could conceivably have had the same influence had they submitted their own proposals.

Whatever the rationale behind the American push to relax the common law exclusionary rules at Nuremberg in the 1940s, the international geopolitical interests in the mid-1990s were far too complex to suggest that the American Bar Association and the US State Department could have engaged in some collusion to make it easier to convict selected war criminals. There were far too many actors, interests, and possible accused on the different sides to the conflict in the former Yugoslavia for any state to be able to tailor the rules of an international criminal tribunal to ensure the conviction of certain most-favoured potential accused. Unless, of course, a state could influence the collection of evidence during the investigation phase, *and* the selection of indictees, *and* the presentation of evidence at trial, *and then* its judicial evaluation. But against this is the fact that the judges who drafted the rules of procedure and evidence came from 11 different countries and, as is normal, drew on their own experiences.

Finally, the original Rules, like the equivalent provisions in the ICC Rules,<sup>153</sup> only allowed oral evidence from witnesses,<sup>154</sup> but this was

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<sup>152</sup> Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. 2, pt. 1: *Documents and Cases*, Kluwer Law International, The Hague, 2000, p. 838, referring to “Virginia Morris and Michael P. Scharf, An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia, p. 242”, but neither volume of that book at p. 242 contains such a quote or reference.

<sup>153</sup> ICC, Rules of Procedure and Evidence, adopted 3–10 September 2002, ICC-ASP/1/3. The original Rule 68 permitted the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony of a non-present witness only if the prosecution and defence had had the opportunity to question the

amended a few years later to shift towards accepting written statements. The Nuremberg and Tokyo trials had relied heavily on untested affidavits. If the evidence must be received orally, and, for whatever reason a witness does not make it to court to testify, then there is no evidence. But on the other hand, in some circumstances this can be cured by receiving a witness's testimony in written form.

During the ICC negotiations early suggestions to follow the Nuremberg, Tokyo, ICTY and ICTR precedents of judicial rule-making soon dissipated, and “during the negotiations leading to the ICC Statute, this balance shifted drastically in favour of State involvement” and “positions gradually evolved in the direction of conferring on States the power to both draft and adopt the Rules”.<sup>155</sup> The initial proposal to finalise the ICC's Rules of Procedure and Evidence simultaneously with the ICC Statute proved to be impractical. The drafting was therefore deferred, after the Statute's adoption in July 1998, for separate negotiations. The actual drafting of a document of that complexity by so many participating states working in a gigantic committee was highly problematic. According to the chair of the ICC's Working Group on Rules of Procedure and Evidence: “Beyond the substantive legal difficulties, drafting a highly technical document in a committee open to the international community as a whole was in itself a tremendous challenge”.<sup>156</sup> Another commentator described the ICC's processes as “cumbersome” while observing that

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witness during the recording. Or, if present, the witness consented to its admission and the prosecution, defence and Chamber could question the witness. It was amended in 2013 to

allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

ICC, Amendments to the Rules of Procedure and Evidence, 27 November 2013, ICC-ASP/12/Res.7. This was done in a manner similar to the ICTY, Rules of Procedure and Evidence, Rule 92*bis*, *ter*, *quater* and *quinquies*.

<sup>154</sup> ICTY, Rules of Procedure and Evidence, Rule 90(A), see *supra* note 89, provided: “Witnesses shall, in principle, be heard directly by the Chambers. In cases, however, where it is not possible to secure the presence of the witness, a Chamber may order that the witness be heard by means of a deposition”.

<sup>155</sup> Silvia A. Fernández de Gurmendi, “Elaboration of the Rules of Procedure and Evidence”, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, NY, 2001, p. 237.

<sup>156</sup> *Ibid.*, p. 240.

“whenever legal processes have become overly formalistic, they inevitably lost their vitality and effectiveness”.<sup>157</sup> And, as noted above, the judge-made Regulations have filled in many gaps missing from the Rules of Procedure and Evidence.

## **2.7. The Process: Investigation, Trial and Judgment**

### **2.7.1. The Type of Trial: Adversarial or Inquisitorial?**

The adversarial nature of the modern international criminal trials is directly traceable to Nuremberg. The statutory texts of the modern courts and tribunals provide for the basic feature of adversarial systems with each party to the process having a distinct case. That model features a prosecutor who is responsible for investigating the crimes, submitting an indictment and bringing the evidence at trial.

The procedure for admitting evidence and questioning, or not questioning, witnesses is one of the most fundamental aspects of criminal procedure, and can distinguish different legal systems and traditions. Judicial rules and procedures may vary within national systems, whether classified as civil law or common law or mixed – and within different systems according to the type of case – that is, civil, administrative, criminal and so on. Being educated in their own systems, lawyers naturally favour the familiar.

One of the most fundamental issues is the role of the judiciary in the proceedings – passive, active, controlling or interventionist? In 1949 Jackson wrote that the Americans believed

[t]he tribunal should have no responsibility for the preparation of conduct of the prosecution, but should receive the indictment, hear the evidence offered by the parties and render judgment. The Soviet idea, by contrast, was that the case would actively be conducted by the tribunal, with the prosecutors as subordinates. The Tribunal, they thought, should decide what witnesses to call, what documents to put in evidence, and should examine the witnesses and interrogate the accused.<sup>158</sup>

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<sup>157</sup> Bassiouni, 2005, p. 174, see *supra* note 12.

<sup>158</sup> Jackson, 1949, p. 360, see *supra* note 41.

The American view succeeded. Evidently, having an independent body conducting the prosecution, rather than the court itself, fitted better with the concept of showing that the defendants were receiving a fair trial. At the same time, however, it ensured much greater control over the evidence. The Soviets conceded, but apparently only for pragmatic negotiating reasons.<sup>159</sup> But they would also have recognised the value of controlling the collection and presentation of evidence on the court that they were prosecuting, while also appointing their own judge (who had been their chief negotiator in London).

Who investigates and brings charges is essential to a criminal justice system and is fundamental to its procedural integrity. The modern international criminal institutions have chosen to include a prosecutor's office within the court structure. The prosecutor in each is expressed to be independent. For example, at the ICTY, "the Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source".<sup>160</sup> This contrasts with the roles of Jackson and the British Attorney General, Sir David Maxwell Fyfe, first in representing their countries in the negotiations establishing the tribunal, and then in prosecuting counts on the indictment. Judge Robert Falco and Nikitchenko performed the same role for France and the Soviet Union, but were then appointed by their states as members of the Tribunal. The negotiations included discussing who the defendants could be, the charges and the manner of prosecuting them.

Common law systems may feature investigations by professional investigators such as police who do not work within the structure of the prosecutor's office, although this varies according to systems, and some have prosecutor's offices with investigating functions or even police or investigators subordinated to those offices. None of the modern courts, except the civil law model of the ECCC in Cambodia – which are hybrid chambers within a domestic judicial system – has investigating judges. Every other modern tribunal or court has adopted the Nuremberg and Tokyo model of having an investigating prosecutor who brings an indictment and then a case before the court.<sup>161</sup> Under this system accused per-

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<sup>159</sup> Ginsburgs, 1996, p. 103, see *supra* note 26.

<sup>160</sup> ICTY Statute, Art. 16(2), see *supra* note 97.

<sup>161</sup> For example, ICC Statute, Art. 42(1), see *supra* note 88:

sons respond to a distinct prosecution case and conduct their own pre-trial investigations, and, where necessary, present their own case at trial. No international police force or centralised investigating agency exists to independently investigate cases and then bring them to a prosecutor's office for trial (a feature of some common law jurisdictions).

The ICTY's 1994 Annual Report referred to Nuremberg as inspiring both the ICTY Statute and its initial Rules of Procedure and Evidence:

Based on the limited precedent of the Nürnberg and Tokyo trials, the statute of the Tribunal has adopted a largely adversarial approach to its procedures, rather than the inquisitorial system prevailing in continental Europe and elsewhere. There is no investigating judge collecting the evidence. The initial task of inquiring into allegations of offences and obtaining the necessary evidence falls on the Prosecutor (rules 39–43).<sup>162</sup>

Why was the adversarial route chosen? An obvious answer is that the adversarial method of trying cases is, in some quarters, generally considered to be more transparent.<sup>163</sup> The evidence is presented publicly; it is not hidden in a dossier accessible only to the court and parties.<sup>164</sup> M. Che-

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The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.

<sup>162</sup> ICTY, 1st Annual Report, para. 71, see *supra* note 142.

<sup>163</sup> See, for example, Zappalà, 2013, p. 47, *supra* note 9:

Transparency and the ability to raise public awareness as to the crimes were indeed essential in reaching this objective [the fundamental principles of justice applicable at the time]. The adversarial process appeared to contribute to this goal more effectively than its inquisitorial counterpart which traditionally bears the distinctive feature of secrecy, *ex officio* inquiry, an emphasis on written documents rather than live testimonies, and the questioning of witnesses conducted only or mainly through the judges.

<sup>164</sup> Extraordinary Chambers in the Court of Cambodia ('ECCC'), Internal Rules (Rev. 9), 16 January 2015, Rule 87(3) ('ECCC Internal Rules') (<https://www.legal-tools.org/doc/b8838e/>) provides:

The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court.

rif Bassiouni, for example, argues that the norms of “international due process”, meaning international human rights law instruments, are reflected in the adversarial/accusatorial model of criminal justice – resulting in the inevitable dominance of this in the law and practice of the ICTY and ICTR and the ICC Statute.<sup>165</sup>

One criticism is that this gives the prosecutor too much control over the selection of cases and evidence. But in the absence of an investigating judicial chamber, how could it operate otherwise? And introducing investigating judicial chambers would require enormous expenditure at courts with multiple trials, such as the ICTY, ICTR and ICC. The number of cases would require many investigating judges, especially in the ICC with its multiple “situations” from many different countries.

Besides, in all of the modern courts and tribunals a judge or pre-trial chamber is responsible for confirming the charges or the indictment – and may therefore influence the charges. At Nuremberg, by contrast, the judges had no role in confirming the indictment – the chief prosecutors prepared and submitted the indictment to the court. The “confirmation” process lay in the Committee for the Investigation and Prosecution of Major War Criminals, comprising the four Allied chief prosecutors, tasked to “improve the Indictment and the documents to be submitted therewith”.<sup>166</sup> As the prosecution of the charges was divided between the four chief prosecutors – each representing a different political interest as they were all appointed directly by their governments – and the evidence was divided between the four zones, this gave the prosecutors greater control over the proceedings. Having separate prosecutors also allowed each Allied

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The ECCC uses Cambodia’s civil law procedures.

<sup>165</sup> Bassiouni, 2003, pp. 586–87, see *supra* note 77. He also suggests that the common law system prevailed “because there were more judges and prosecutors in these institutions [the ICTR and ICTY] trained in the common law than in the civil law system” (*id.*, p. 586). He is correct to the extent that six of the original 11 ICTY judges came from countries with a common law tradition. However, the six initial ICTR judges had two common law and three civil law judges and one from South Africa, which has a hybrid legal system. Hence, of the 17 judges who adopted the original Rules of Procedure and Evidence of both institutions, eight were common law trained, eight were civil law and one came from a mixed hybrid system. This hardly represents an invasion of common lawyers imposing their system. And the first prosecutor of both Tribunals, Richard J. Goldstone, also came from South Africa. The US, unlike any other State, provided a comprehensive set of draft rules (see section 2.5.8. above). These were in accepted in part.

<sup>166</sup> IMT Charter, Art. 14, see *supra* note 27.



government to control the evidence on the charges that each was responsible for drafting and prosecuting.

### 2.7.2. Pre-Trial: Investigation and Indictment and Case Selection

The philosophy in establishing an international military tribunal, as specified in the London and Tokyo Charters, was for “the trial and punishment of the major war criminals of the European Axis countries” and “in the Far East”.<sup>167</sup> Having concurrent jurisdiction or primacy, the international body is charged with prosecuting those most responsible for the crimes committed and the crucial issue of case selection, so intimately connected with jurisdiction, has followed a model similar to Nuremberg’s. The model of a prosecutor choosing the defendants, and the charges, and indicting them, has continued. It fits that of an independent investigating prosecuting office.

As described above, in the 1940s the Allied governments were deeply involved in deciding what charges could be brought against the accused Nazi and Japanese leadership, and who should be indicted. To illustrate, in January 1945 Roosevelt instructed his Secretary of War: “The charges should include an indictment for waging aggressive warfare, in violation of the Kellogg Pact. Perhaps these and other charges might be joined in a conspiracy indictment”.<sup>168</sup> At Tokyo, the chief counsel was required to “render such legal assistance to the Supreme Commander as is appropriate”.<sup>169</sup> Under the IMT Charter, the selection of defendants was confined to “major war criminals”, and at Nuremberg the four chief prosecutors (the Committee for the Investigation and Prosecution) chose the defendants and drafted and lodged the indictment for their just and prompt trial and punishment.<sup>170</sup> At Tokyo, an executive committee of the associate prosecutors and US chief counsel’s staff were responsible for approving and completing the indictment.<sup>171</sup>

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<sup>167</sup> *Ibid.*, Arts. 1, 6 (emphasis added); IMTFE Charter, Art. 8, see *supra* note 6.

<sup>168</sup> Presidential Memorandum for the Secretary of War, 3 January 1945, United States Department of State, *Foreign Relations of the United States: Conferences at Malta and Yalta, 1945*, US Government Printing Office, Washington, DC, 1945, p. 401; Smith, 1982, p. 92, see *supra* note 19.

<sup>169</sup> IMTFE Charter, Art. 8(a) Counsel, see *supra* note 6.

<sup>170</sup> IMT Charter, Arts. 6, 14, see *supra* note 27.

<sup>171</sup> Boister and Cryer, 2008, pp. 50–54, see *supra* note 46.

The drafters of the ICTY Statute had nothing to guide them – in how to regulate this – other than the immediate post-Second World War precedents. The ICTY Statute confines its jurisdiction “to prosecute persons responsible for serious violations of international humanitarian law”.<sup>172</sup> However, in 2004, more or less in line with the Nuremberg and Tokyo precedents, the UN Security Council resolved to call on both the ICTY and ICTR “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”.<sup>173</sup> The SCSL Statute, pursuant to an agreement between the UN and Sierra Leone, mandates the court to “prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law”.<sup>174</sup> In determining whether a case is admissible before the Court, the ICC considers whether it is of “sufficient gravity to justify further action”.<sup>175</sup>

### 2.7.3. The Indictment

As described above, the investigation and trial procedures at Nuremberg had to be negotiated during the London negotiations. Divergences between the two legal systems included the content of the indictment. The Continental approach – based on a dossier of evidence compiled in a pre-trial chamber – included the evidence in the indictment. This was apparently alien to Anglo-American procedure, and Jackson described the indictment negotiating experience:

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<sup>172</sup> ICTY Statute, Art. 1, see *supra* note 97.

<sup>173</sup> United Nations Security Council, resolution 1534, adopted 26 March 2004, UN doc. S/RES/1534 (2004). ICTR Statute, Art. 1, see *supra* note 97: “Competence of the ICTR” empowers it “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994”.

<sup>174</sup> Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000 on the Establishment of a Special Court for Sierra Leone, 16 January 2002, UN doc. S/2002.246. Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 1 (‘SCSL Statute’) (<http://www.legal-tools.org/doc/aa0e20/>).

<sup>175</sup> ICC Statute, Art. 17(1)(d), see *supra* note 88. The prosecutor may also conclude, upon investigation, that there is an insufficient basis for a prosecution on the basis of the gravity of the crime, Art. 53(2)(c).

From the beginning it has been apparent that our greatest problem is how to reconcile the two very different systems of procedure. [...] I would not know how to proceed with a trial in which all the evidence has been included in the indictment. I would not see anything left for a trial and, for myself, I would not know what to do in open court.<sup>176</sup>

Writing shortly after the trial, he noted differences of fundamental theory, including the form of the indictment. Domestically, the Americans used a skeletal statement of the charges and withheld the evidence from the defence until the commencement of court proceedings. The Soviets, on the other hand, proposed for the IMT an indictment accompanied by a dossier of evidence, including all witness statements and documents relied upon. The compromise adopted was a shorter indictment than was customary in some continental systems, but one containing more information than is usual in the United States.<sup>177</sup> Objectively, the Soviet proposal was fairer to the defendants than the contemporary American domestic practice, especially in a trial of Nuremberg's size and complexity.

But added to the indictment was a requirement for full pre-trial disclosure of all evidence to be used at trial. The document that emerged, Jackson thought, was "a truly international document", in both style and substance. This full pre-trial disclosure of prosecution evidence is now a fundamental feature of international criminal procedural law, with each court or tribunal regulating with some specificity the disclosure obligations of the parties.

The "compromise" between civil law and common law procedures led to an indictment that specified in detail the charges against the defendants, and required that documents should be submitted with the indictment. This meant that the prosecution did not have to present all of the evidence with the indictment.<sup>178</sup> And there were also differences in style according to who was prosecuting the count. The Americans drafted the counts relating to waging an aggressive war in a narrative style, while those concerning the French and Soviets (war crimes and persecutions) included many detailed recitals of particular atrocities.<sup>179</sup>

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<sup>176</sup> See Taylor, 1993, p. 64, see *supra* note 4.

<sup>177</sup> Jackson, 1949, p. 360, see *supra* note 41.

<sup>178</sup> See Taylor, 1993, p. 64, see *supra* note 4.

<sup>179</sup> Taylor, 2008, p. 385, see *supra* note 39.

Jackson's statements, however, exaggerate the procedural differences or challenges facing the negotiators. In practice, the size of the indictment, and whether evidence was annexed to it, would have had little effect on the trial. Certainly, drafting it and reading it aloud in court would have taken longer, but a lengthier evidence-laden indictment would not have impacted on the presentation of evidence. But more to the point, Jackson's words do not quite accurately reflect the negotiations in establishing the Tribunal. For example, the French had no preference as to the form of the indictment and did not want to put a complete investigation file before the court.<sup>180</sup> (Full pre-trial disclosure is in a different category.)

The British Lord Chancellor, Simon, wrote to Roosevelt's senior legal adviser, White House Counsel, Judge Samuel Rosenman, several days before Roosevelt's death in April 1945. Simon proposed

a "*document of arraignment*" in somewhat general terms and that an inter-allied judicial tribunal (which might, however, include some members who were not professional judges) should be appointed to report upon the truth of this Arraignment after Hitler and Co. had been brought before the tribunal and given the opportunity to challenge the truth of its contents, if they could.

According to Simon, the Tribunal would then – after allowing them to produce any documents or witnesses – report on whether the arraignment or any part of it had been disproved.<sup>181</sup>

Neither the IMTFE Charter nor its Rules actually specified that the prosecutors would bring the indictment before the Tribunal. It was, however, implicit in the process employed, including in the Rules.<sup>182</sup> The In-

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<sup>180</sup> Jackson Report, pp. 80–81, see *supra* note 11.

<sup>181</sup> Memorandum to Judge Rosenman from Lord Simon (Lord Chancellor) Smith, 6 April 1945, in Smith, 1982, p. 150, see *supra* note 19; see also letter from US Ambassador to UK to Secretary of State, 7 April 1945, in *Foreign Relations of the United States Diplomatic Papers, 1945*, vol. III, US State Department, Washington, DC, 1945, p. 1158 enclosing Simon's letter.

<sup>182</sup> IMTFE, Rules of Procedure, Rule 2(a), Service of Additional Documents, see *supra* note 126, stated:

If, before the Tribunal commences to take evidence, the Chief Prosecutor offers amendments or additions to the indictment, such amendments or additions, including any accompanying documents, shall be lodged with the Tribunal and copies of the same translated into a language which they each understand shall be furnished to the accused in custo-

ternational Prosecution Service of the General Headquarters of the Allied Powers investigated, selected defendants and prepared (by majority vote) an indictment that was then submitted to MacArthur for approval.<sup>183</sup> The Tokyo indictment, although apparently drafted by the British prosecutors, likewise contained a compromise between the more spartan common law indictments and the more detailed narratives of the civil law.<sup>184</sup> The Nuremberg indictment contained four counts and indicted 24 individuals and six organisations while the Tokyo indictment contained 55 counts against 28 defendants.

The Nuremberg and Tokyo Rules also permitted the chief prosecutor(s) to amend the indictment before trial by lodging a copy of the amendments and accompanying documents with the general secretaries of the Tribunals.<sup>185</sup>

Following the Nuremberg precedent, the General Assembly's 1953 Revised Draft Statute for an International Criminal Court provided only that the indictment "shall contain a concise statement of the facts which constitute each alleged offence and a specific reference to the law under which the accused is charged" and the Court may authorise an amendment.<sup>186</sup> The 1994 ILC Draft Statute contained a similar provision.<sup>187</sup>

The modern day indictment – or as termed at the ICC the "document containing the charges" – does not annex evidence. The legal principles specify that an indictment must include the charges against an ac-

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dy as soon as practicable and notice given in accordance with Rule 1 (I) to those not in custody.

<sup>183</sup> Awaya Kentarō, "Selecting Defendants at the Tokyo Trial", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, pp. 57–61.

<sup>184</sup> Boister and Cryer, 2008, p. 70, see *supra* note 46.

<sup>185</sup> IMT, Rules of Procedure, Rule 3, see *supra* note 122, and IMTFE, Rules of Procedure, Rule 2(a), see *supra* note 126, both entitled Service of Additional Documents. Medical case, Rule 5, Notice of Amendments or Additions to Original Indictment, was similarly expressed, see *supra* note 128.

<sup>186</sup> 1953 Revised Draft Statute for ICC, Art. 35, see *supra* note 50.

<sup>187</sup> 1994 Draft Statute for ICC, Art. 27(1), see *supra* note 52. It would have been confirmed by the Presidency, which would have set up a trial chamber. The prosecutor would have submitted supporting material with the indictment, just like at the ICTY. ILC, Draft Code of Crimes against the Peace and Security of Mankind, Report of the Commission to the General Assembly on the Work of its Forty-sixth session, 2 May–22 July 1994, UN doc. A/CN.4/SER.A/1994/Add.1 (1994), *Yearbook of the International Law Commission, 1994*, vol. II (part 2) commentary, p. 48 ('1994 Draft Code of Crimes, commentary').

cused person and a statement of the material facts necessary to put the accused on notice of the case against him or her.<sup>188</sup> The evidence supporting the charges in the indictment must be disclosed well before trial according to a timetable set by the court or tribunal. The original ICTY Rules permitted the prosecutor to amend or withdraw an indictment before its confirmation, and, after confirmation, with the leave of the tribunal.<sup>189</sup> At the ICC, the prosecutor may seek to amend the document containing the charge before the trial has commenced.<sup>190</sup>

#### 2.7.4. Trial Procedures

The ICC, ICTY, ICTR, SCSL and STL<sup>191</sup> have conducted their trials according to these adversarial principles. One ICTY judge suggested that

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<sup>188</sup> For a summary of these see Håkan Friman, Helen Brady, Matteo Costi, Fabricio Guariglia and Carl-Friedrich Stuckenberg, “Charges”, in Sluiter *et al.*, 2013, pp. 385–88, see *supra* note 9.

<sup>189</sup> ICTY, Rules of Procedure and Evidence, Rule 50, see *supra* note 89. Before trial, by the confirming judge, and after the commencement of trial, with the Trial Chamber’s leave. The trial could be postponed, where necessary, “to ensure adequate time for the preparation of the defence”.

<sup>190</sup> ICC, Rules of Procedure and Evidence, Rule 128, see *supra* note 153.

<sup>191</sup> ICC Statute, Art. 64(8)(b), see *supra* note 88, provides:

At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

Art. 69(3) provides:

The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

ICTY, Rules of Procedure and Evidence, Rule 85(A):

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) evidence for the prosecution;
- (ii) evidence for the defence;
- (iii) prosecution evidence in rebuttal;
- (iv) defence evidence in rejoinder;

the tilt towards an adversarial model there had several possible sources; the Nuremberg precedent, early proposals made by the US Department of Justice during the establishment procedures, and the perception that having the Judges stand between the parties rather than being allied with the prosecution would enhance the perception of neutrality.<sup>192</sup> The ECCC has also followed this route in trials where the accused contested the charges and their guilt.<sup>193</sup> Likewise, the STL Statute and Rules, which specify that the questioning of witnesses can be led by the judges, starting with the presiding judge, nonetheless feature a statutory regime containing a default position that effectively requires the parties to call their own evidence, including calling witnesses. The STL Rules do not permit the judges to produce documents into evidence although they may order a party to produce additional evidence, or themselves summons witnesses.<sup>194</sup>

#### 2.7.5. Judicial Powers during Trial

At Nuremberg and Tokyo, the parties, rather than the judges, called the witnesses. The international criminal trials in international courts and tribunals have since followed this model. This follows from a procedural model featuring an independent investigating prosecutor and defence counsel who do their own investigations. The Charters of the Tribunals,

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- (v) evidence ordered by the Trial Chamber pursuant to Rule 98;
  - (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

See also ICTR, Rules of Procedure and Evidence, adopted 5 July 1995, Rule 85(A) (<http://www.legal-tools.org/doc/0b0d43/>); SCSL, Rules of Procedure and Evidence, adopted 16 January 2002, Rule 85 (<http://www.legal-tools.org/doc/8036f5/>).

<sup>192</sup> Theodor Meron, “Procedural Evolution in the ICTY”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 522.

<sup>193</sup> With the exception of ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, 001/18-07-2007, Case 001.

<sup>194</sup> STL Statute, see *supra* note 8, and STL, Rules of Procedure and Evidence, adopted 20 March 2009, Rule 165, Power of Chambers to Order Production of Additional Evidence, (<http://www.legal-tools.org/doc/3773bf/>).

however, allowed judges to summons witnesses, require them to attend and to put questions to them at trial.<sup>195</sup>

The judicial questioning of witnesses is also rooted in the Nuremberg procedures. While atypical in nature in common law criminal jury trials (a true minority of cases in most common law jurisdictions), it is normal in civil law criminal proceedings using inquisitorial procedures. The IMT Charter allowed the Tribunal to put “any question to any witness and to any Defendant, at any time”. It could also “summons witnesses to the Trial and to require their attendance and testimony and to put questions to them”.<sup>196</sup> The IMTFE did not exercise its power under the Charter to “interrogate each accused and to permit comment on his refusal to answer any question”.<sup>197</sup> The ICC Rules of Procedure specify that the judges have “the right” to question a witness before and after the parties have done so.<sup>198</sup>

Although the ICC Statute and Rules – like the ICTY Rules – could allow a Trial Chamber to conduct the trial by first questioning the witnesses itself, several factors militate against this, especially in long and complex trials. These include the sheer size of the trials, the lack of any investigating dossier, that the parties have themselves prepared their own cases based upon the prosecutor’s investigation, the length of investigations, the difficulty of dividing the questioning between different members of the same Trial Chamber bench coming from different legal backgrounds, and judicial unfamiliarity with the case file and witnesses who may have been interviewed multiple times preceding the trial by prosecution investigators and lawyers (and often also by state authorities and NGOs). There is also the need for impartiality in judges not acting as second prosecutors, especially where there are participating victims in the trial process.

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<sup>195</sup> IMT Charter, Art. 17, see *supra* note 27; IMTFE Charter, Art. 11, see *supra* note 6.

<sup>196</sup> IMT Charter, Arts. 24(f), 17(a), see *supra* note 27.

<sup>197</sup> See, IMTFE Charter, Art. 11(b), see *supra* note 6. According to Boister and Cryer, 2008, p. 88, see *supra* note 46.

<sup>198</sup> ICC, Rules of Procedure and Evidence, Rule 140(2)(c), see *supra* note 153. The other international courts and tribunals have a similar rule, for example, Rule 85(B) in the ICTY, ICTR and SCSL Rules of Procedure and Evidence. The STL Statute and Rules of Procedure and Evidence also anticipate judicial questioning, Art. 20(2), Rule 145, see *supra* note 194.



Even a strong critic of what he described as the use of “Anglo-Saxon-American common law” procedures in international criminal law proceedings stopped short of advocating judicial primary questioning of witnesses:

This plea for a more active judge does not necessarily mean that examination by the parties, as is their typical privilege in adversarial systems, should instead primarily be put into the hands of the judge as it is practiced in the continental-European tradition.<sup>199</sup>

### 2.7.6. Trial Procedures: Defence Issues

While the Nuremberg and Tokyo trials featured some safeguards for the rights of defendants and accused, modern international human rights law self-evidently guarantees procedural rights that did not exist in 1945 and 1946. Although specified in the two Charters – and even referred to by Nikitchenko in the first session of the Nuremberg Tribunal<sup>200</sup> – in reality, in the 1940s the right of accused Nazi and Japanese war criminals to receive a fair trial was not the highest priority for the Charters’ drafters. The Americans had already pondered

whether a procedure can be devised which will afford the defendants some of the privileges afforded to defendants under our normal criminal procedures and which will not at the

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<sup>199</sup> The former German *ad litem* ICTY Judge, Albin Eser, “The Adversarial’ Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflexions of a Judge”, in Thomas Kruesmann (ed.), *ICTY: Towards a Fair Trial*, Neuer Wissenschaftlicher Verlag, Vienna, 2008, pp. 208, 225, and repeated in “Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY”, in Bert Swart, Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, p. 144: “In this respect I would not go as far as Kirsch [...] who, astonishing for a defence counsel, suggests leaving the examination-in-chief to the judge” (at fn. 57), referring to Stefan Kirsch, “The Trial Proceedings before the ICC”, in *International Criminal Law Review*, 2006, vol. 6, pp. 275–92.

<sup>200</sup> Minutes of the Opening Session, 18 October 1945, Trial of Major War Criminals, vol. 1, p. 25, see *supra* note 27: “The Tribunal has formulated Rules of Procedure, shortly to be published, relating to the production of witnesses and documents in order to see that the defendants have a fair trial with full opportunity to present their defense”.

same time impede the punishment of those already convicted at the bar of world opinion.<sup>201</sup>

The two Charters specified certain minimum procedural rights. For example, both allowed defendants and accused the right to conduct their own defence with the assistance of counsel.<sup>202</sup> Self-representation is more usual in common law systems, unlike in civil law systems where counsel are assigned to represent accused persons.<sup>203</sup> However, the right of a defendant or accused to conduct his own defence, or to have the assistance of counsel, was also specified. These rights were soon affirmed by the United Nations General Assembly in its Nuremberg Principles.<sup>204</sup>

Nuremberg had rules requiring notice to defendants of certain key documents, namely the indictment, the Charter, documents accompanying the indictment and a statement of his right to assistance by counsel. The defence were permitted to conduct their own investigations and could seek the production of witnesses. The defendants could ask the Tribunal to summons witnesses and to obtain documents. Neither the IMT Charter nor Rules, however, contained specific provisions to exclude evidence, although in practice the Tribunal could do this itself in response to a defence objection. No provisions existed for procedural violations. For example, a Nuremberg prosecutor could question a suspect or accused without having to warn them of their right against self-incrimination, or that the evidence could be used against them before the Tribunal.

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<sup>201</sup> Memorandum from the Department of the Treasury. Re: The War Department Memorandum Concerning the Punishment of War Criminals, 19 January 1945, in Smith, 1982, p. 128, see *supra* note 19. This would have entailed eliminating any plea of sovereign immunity, superiority or insanity as automatic defences, specifically defining the crimes to prevent the defence arguing collateral and irrelevant issues, time-limiting that given to “the criminals” to speak on their own behalf, and allowing the Allies’ right to present evidence completely unrestricted by rules of evidence and other technicalities.

<sup>202</sup> IMT Charter, Art. 16(d), see *supra* note 27; IMTFE Charter, Art. 9, see *supra* note 6.

<sup>203</sup> See, for example, Till Gut, Stefan Kirsch, Daryl Mundis and Melinda Taylor, “Defence Issues”, in Sluiter *et al.*, 2013, pp. 1265–66, see *supra* note 9.

<sup>204</sup> United Nations General Assembly, resolution 95(I), Affirmation of Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, 11 December 1946. See also ILC, Principles of International Law Recognized by the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, 1950, Principle V(d) (‘Nuremberg Principles’) (<https://www.legal-tools.org/doc/5164a6/>). See also Gut *et al.*, 2013, p. 1250, *supra* note 203.

The IMTFE Charter also expressly required defendants to have a proper defence and gave them the right to counsel.<sup>205</sup> But unlike at Nuremberg<sup>206</sup> counsel did not need to be professionally qualified to conduct a case before courts of his own country. Each defendant was permitted to select a Japanese “chief counsel” and at least one Japanese “associate counsel” a month before indictment, and shortly before the commencement of trial 28 American attorneys were appointed to assist.<sup>207</sup>

Neither Charter nor its Tribunal Rules specified either a right to silence, or even a presumption of innocence, or even that the Tribunal had to be convinced of guilt beyond reasonable doubt. The IMT judgment, though, explicitly held in relation to two defendants, Hjalmar Schacht and Franz von Papen, that their guilt had “not been established beyond reasonable doubt”.<sup>208</sup> The IMTFE judgment used the formulation “proved” in relation to allegations and “found guilty” in relation to individual criminal responsibility.<sup>209</sup> The Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, specifies the presumption of innocence and the right to a fair and public trial.<sup>210</sup>

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<sup>205</sup> IMTFE Charter, Art. 9, see *supra* note 6.

<sup>206</sup> IMT Charter, Art. 23, see *supra* note 27.

<sup>207</sup> Boister and Cryer, 2008, pp. 78–79, see *supra* note 46.

<sup>208</sup> IMT, *Prosecutor v. Hermann Wilhelm Goring et al.*, Judgment, 1 October 1946, Trial of German Major War Criminals, pp. 556, 573, see *supra* note 27 (‘IMT, Judgment’) (<https://www.legal-tools.org/doc/f41e8b/>). Nikitchenko, in his dissent on the acquittals, stated of Schacht, that “it is indisputably established that” he “participated in the persecution of Jews” (etc.), and of von Papen, that the “evidence establishes beyond reasonable doubt that” that he “actively participated in the Nazi aggression against Austria culminating in its occupation”, (etc.), Dissenting Opinion of the Soviet Member of the International Military Tribunal, Trial of German Major War Criminals, pp. 536, and on the third acquittal, “I consider Fritzsche’s responsibility fully proven”, p. 540.

<sup>209</sup> For example, “The Tribunal finds that the existence of the criminal conspiracy to wage wars of aggression as alleged in Count I, with the limitation as to object already mentioned, has been proved”; and, for example, Araki Sadao, “Accordingly we find him guilty under Count 27”. IMTFE, *United States of America et al. v. Araki Sadao et al.*, Judgment, 1 November 1948, in R. John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial*, vol. 22: *Proceedings in Chambers*, Garland, New York, 1981, pp. 49,770, 49,775 (‘IMTFE Judgment’) (<https://www.legal-tools.org/doc/09f24c/>).

<sup>210</sup> Universal Declaration of Human Rights, Art. 11(1), see *supra* note 103: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.

Pre-trial detention was not mentioned in the Charters or Rules of either Tribunal. But this is unsurprising given that all defendants and accused, save Martin Bormann (who was dead yet tried *in absentia*), were in custody. Both the Tokyo and Nuremberg trial rules were silent on lawyer-client privilege. This is now regulated.<sup>211</sup> Defendants were allowed to object to documents at the time they were offered into evidence, and they could be received without prejudice to a later motion to exclude it.<sup>212</sup>

#### **2.7.6. Notice to Defendants and Accused**

Both the IMT and IMTFE Charters<sup>213</sup> specified that the evidence must be provided to the defence in advance of the opening of the trial. At Tokyo, the indictment was lodged on 29 April 1946, read in court on 3 and 4 May 1946, and 27 of the accused pleaded not guilty to it a week later, on 6 May 1946.<sup>214</sup> The prosecutor's opening statement was on 3 and 4 June and the presentation of evidence began on 16 June 1946. The 55-count indictment against 28 accused encompassed the period between 1928 and 1945.

The IMT Rules provided that the defendants were to receive a translated copy of the indictment at least 30 days before the commencement of the trial.<sup>215</sup> The indictment, signed on 8 October 1945, was lodged before the Tribunal on 18 October 1945, upon which the presiding judge, Nikitchenko, stated:

The individual defendants in custody will be notified that they must be ready for Trial within 30 days after the service of the Indictment upon them. Promptly thereafter the Tribunal shall fix and announce the date of the Trial in Nuremberg to take place not less than 30 days after the service of the In-

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<sup>211</sup> For example, ICTY, Rules of Procedure and Evidence, Rule 97, see *supra* note 89, regulates this, as does ICC, Rules of Procedure and Evidence, Rule 73, see *supra* note 153 on Privileged Communications and Information.

<sup>212</sup> Dodd, 1947, p. 195, see *supra* note 2.

<sup>213</sup> IMTFE Charter, Art. 9(b), see *supra* note 6; the indictment was to be provided to the accused "in adequate time for defense".

<sup>214</sup> Boister and Cryer, 2008, p. 69, see *supra* note 46.

<sup>215</sup> IMT, Rules of Procedure, Rule 2(a), see *supra* note 122.

dictment and the defendants shall be advised of such date as soon as it is fixed.<sup>216</sup>

The defendants were served with the indictment on 19 October 1945.<sup>217</sup> The trial began promptly 30 days later, on 20 November 1945.

The 1953 Revised Draft Statute for an International Criminal Court stated: “The Court shall not proceed with the trial unless satisfied that the accused has had the indictment and any amendment thereof served upon him and has sufficient time to prepare his defence”.<sup>218</sup> These principles continue today in all of the modern international criminal courts and tribunals. All modern trials feature a lengthy motion-laden pre-trial period.

### **2.7.7. Pre-Trial Motions and Decisions in an Adversarial Trial Process**

Dealing with procedural decisions before the commencement of an international criminal trial – although plainly heavily utilised in national systems – has a direct link with the Nuremberg procedures. The eight Nuremberg judges met privately 26 times before trial, occasionally with the prosecution, and held five public sessions to dispose of preliminary trial issues.<sup>219</sup> Their Rules, issued on 29 October 1945, just three weeks before trial, provided that pre-trial motions should be filed in writing with the Tribunal’s general secretary.<sup>220</sup>

At their first full meeting on 29 October 1945 the judges discussed the pre-trial issues for a trial scheduled to commence three weeks later on 20 November. Six public sessions were held to hear and rule on preliminary trial issues. These included representation of the defendants, securing documents requested by the defence, and reviewing and testing the new

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<sup>216</sup> Minutes of the Opening Session, 18 October 1945, Trial of Major War Criminals, vol. 1, p. 24, see *supra* note 27.

<sup>217</sup> Taylor, 1993, pp. 131–33, see *supra* note 4.

<sup>218</sup> 1953 Revised Draft Statute for an ICC, Art. 36(2), see *supra* note 50.

<sup>219</sup> Taylor, 1993, p. 143, see *supra* note 4.

<sup>220</sup> IMT, Rules of Procedure, Rule 7, see *supra* note 122: “Applications and Motions before Trial and Rulings during the Trial. (a) All motions, applications or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal at the Palace of Justice, Nuremberg, Germany”.

IBM simultaneous interpretation system.<sup>221</sup> Justice Biddle afterwards described this novel system as saving an enormous consumption of time.<sup>222</sup>

These procedural innovations from the 1940s are now a firm part of international criminal procedural law. Almost 50 years later, the initial ICTY Rules provided for pre-trial disposal of “preliminary motions by Accused”, defined as including challenges to jurisdiction and the form of the indictment.<sup>223</sup> The ICC has its own detailed and complex pre-trial regime.<sup>224</sup> The Nuremberg precedent represented a practical and sensible procedure.

### **2.7.8. Challenges to Jurisdiction: As a Preliminary Motion**

Challenges to jurisdiction in international criminal trials also emerged from the practice – but not the Charters or Rules – of the Nuremberg and Tokyo Tribunals. The statute of each international court and tribunal defines its own jurisdiction.<sup>225</sup> Both the IMT and IMTFE Charters specified

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<sup>221</sup> Taylor, 1993, p. 143, see *supra* note 4.

<sup>222</sup> Biddle, 1947, p. 200, see *supra* note 39

<sup>223</sup> ICTY, Rules of Procedure and Evidence, Rule 73(A), see *supra* note 89; ICC Statute, see *supra* note 88, and Rules of Procedure and Evidence, see *supra* note 153, contain similar provisions (see below).

<sup>224</sup> ICC Statute, Parts II and V, see *supra* note 88; and ICC, Rules of Procedure and Evidence, chs. 3, 4 and 5, see *supra* note 153.

<sup>225</sup> For example, ICTY Statute, Art. 8, see *supra* note 97:

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

SCSL Statute, Art. 1, see *supra* note 174, but by contrast uses the term “competence” and provides that:

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

SCSL Statute, Art. 1(2) excludes competence over international peacekeepers. Even the ECCC Internal Rules, Rule 89(1)(a), see *supra* note 164, allows for pre-trial challenges to jurisdiction, within 30 days of a closing order becoming final.

the jurisdiction of their Tribunals,<sup>226</sup> but neither provided for a manner of challenging it, and the IMT Charter actually prohibited challenges.

Two Tribunal members, Nikitchenko and the French alternate Falco, had represented their countries in the negotiations, and the American member, Biddle, who was the US Attorney General until 26 June 1945 – the date of the commencement of the negotiations in London – had been one of the main advocates of the Tribunal on which he was to sit. The chief American negotiator was its chief prosecution counsel. Likewise, the British Attorney General for all but the final negotiating session in London, Maxwell Fyfe, became the deputy chief prosecutor during the trial. These were the men who settled Article 3 of the IMT Charter stating that neither the court nor its composition could be challenged.

An early written motion filed by Hermann Göring’s lawyer – on behalf of all defendants – seeking to challenge the Tribunal’s jurisdiction was summarily denied during the court’s second session on the basis that it conflicted with Article 3.<sup>227</sup> An oral motion for Rudolf Hess, four

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<sup>226</sup> Both under the heading Jurisdiction and General Principles. IMT Charter, Art. 6, see *supra* note 27, referring to the London Agreement: “The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes”. IMTFE Charter, Art. 5, see *supra* note 6: “Jurisdiction over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace”.

<sup>227</sup> Motion adopted by all defence counsel, 19 November 1945, filed by Dr. Otto Stahmer on behalf of all defendants asking that “the Tribunal direct that an opinion be submitted by internationally recognized authorities on international law on the legal elements of this Trial under the Charter of the Tribunal”, Trial of the Major War Criminals, vol. 1, pp. 168–70, see *supra* note 27. It was rejected on 21 November 1945 with the Tribunal simply holding:

A motion has been filed with the Tribunal and the Tribunal has given it consideration, and insofar as it may be a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained. Insofar as it may contain other arguments which may be open to the defendants, they may be heard at a later stage.

Second Day, Wednesday, 21 November 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 2: *Proceedings. 14 November 1945–30 November 1945*, IMT, Nuremberg, 1947, p. 95, (“Trial of Major War Criminals, vol. 2”). Also see Taylor, 1993, p. 166, see *supra* note 4.

months later, challenging the Tribunal's jurisdiction outside of war crimes, was likewise immediately dismissed.<sup>228</sup>

The IMTFE Charter had no similar prohibitive provision. However, several challenges were brought against its jurisdiction or competence, and then also quickly dismissed. The challenges have been described as a “fair trial challenge”, the “MacArthur challenge” alleging that MacArthur lacked the power to establish the Tribunal, a challenge to his authority to include crimes against the peace, war crimes and murder in the Tribunal's jurisdiction, a challenge to the powers set out in the 1945 Potsdam Declaration and a challenge to “excluded wars” – those not listed in either the Potsdam Declaration or the Instrument of Surrender. Another challenge was “status based”, arguing that the Tribunal lacked the jurisdiction to try four of the accused who, it asserted, were prisoners of war under the 1929 Geneva Convention on Prisoners of War and hence only Switzerland could try them. A final challenge was based on the claimed diplomatic immunity of one defendant who had been the Japanese ambassador to Germany. As at Nuremberg, none succeeded.<sup>229</sup>

A contemporary public international law statute in the form of 1920 Statute of the Permanent Court of International Justice (‘PCIJ’) and the 1945 Statute of the International Court of Justice, however, had specific provisions dealing with challenges to the court's jurisdiction. Article 36 of both provides that disputes as to jurisdiction shall be determined by a decision of the Court, and Article 79 of the ICJ's (1978) Rules of the Court specify that this is a preliminary objection.

The reports of the negotiations establishing the IMT show that the Allies wanted a short non-technical trial. Allowing statutory challenges to jurisdiction – such as those based on accusations of victors' justice and the Tribunal's legality (or its right to exist) – would have been self-defeating.

Despite their lack of success, these defence attempts to challenge jurisdiction in an international criminal forum created a precedent for the Rules or Statutes of the modern international courts and tribunals, all of

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<sup>228</sup> On 22 March 1946, Hess's lawyer stated that he also “contests the jurisdiction of the Tribunal where other than war crimes proper are the subject of the Trial”. Moments later it was denied. *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 9: *Proceedings. 8 March 1946–23 March 1946*, IMT, Nuremberg, 1947, pp. 691–92.

<sup>229</sup> See Boister and Cryer, 2008, pp. 31–48, *supra* note 46.



which allow challenges to the jurisdiction of the court. Only eight years after the IMT Charter, Article 30 of the General Assembly's 1953 Revised Draft Statute for an International Criminal Court permitted challenges to jurisdiction, by either the person indicted or the relevant state. On the question of institutionalising this (now) fundamental right, the report of the Committee on International Criminal Jurisdiction merely commented that, by majority, it had decided it was better to determine these challenges before the trial had commenced and evidence had been heard.<sup>230</sup> It thus appears that by 1953 it was accepted that future international criminal courts and tribunals would allow such challenges. Moreover, international human rights law guarantees of the right to a fair trial should incorporate the right to challenge the jurisdiction of a court to hear a criminal case.<sup>231</sup>

As the first modern tribunal, the ICTY permitted – as a preliminary motion – defence challenges to jurisdiction, although the original rule did not define the term.<sup>232</sup> After several unsuccessful defence challenges to the Tribunal's legality (or its right to exist) – and to prevent further such challenges, the Rule was amended in 2000 to confine jurisdictional challenges to persons, territory, time period, and the violations specified in the Statute.<sup>233</sup> The ICC Statute, as a treaty based court – like the ICJ and the 1953 Draft Statute – specifies that the Court must satisfy itself that it has jurisdiction to hear a case, and may on its own motion determine the “admissibility” of a case or situation.<sup>234</sup> The Statute and Rules provide proce-

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<sup>230</sup> Report of the 1953 Committee on International Criminal Jurisdiction Para 115, General Assembly Official Records, 9th sess., suppl. no. 12, UN doc. A/2645 ('1953 Committee Report').

<sup>231</sup> International Covenant on Civil and Political Rights, adopted and opened for accession by General Assembly resolution 2200A (XXI), 16 December 1966, Art. 14 ('ICCPR') (<http://www.legal-tools.org/doc/2838f3/>) provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. And see also, for example, United Nations Universal Declaration of Human Rights, Art. 10, *supra* note 103: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

<sup>232</sup> ICTY, Rules of Procedure and Evidence, Rule 73(A)(i), see *supra* note 89.

<sup>233</sup> ICTY, Rules of Procedure and Evidence, 13 December 2000, IT/32/Rev.19, inserting Rule 72(D).

<sup>234</sup> ICC Statute, Art. 19(1), see *supra* note 88.

dures for disposing of preliminary challenges to admissibility and the Court's jurisdiction.<sup>235</sup>

### **2.7.9. Order of Trial Proceedings, including Presentation of Evidence**

As referred to above, the most fundamental issue of the order of events at trial – pleas, opening and closing statements and the presentation of evidence – required some negotiation between the Soviets and the Americans. The basic structure of the international criminal trial – as pioneered at Nuremberg and Tokyo – has more or less survived. But getting to that point in 1945 had its complexities. The outcome took many sessions of serious negotiations before final agreement was reached.<sup>236</sup> This very central issue of procedure is well settled in national systems, and consequently one that domestic lawyers know thoroughly. But for the first international criminal trial this particular wheel had to be reinvented into an international hybrid. A disagreement existed between the British and Americans on one side and the Soviets on the other, on specifying the trial procedure – pleas, opening and closing statements and the presentation of evidence. The Soviets and French, for example, had queried the American proposal to commence the trial with an opening statement by the prosecutors, saying that their domestic procedures contained “no such thing”. The Soviet negotiator, however, then decided that it “would be useful” and submitted a proposal mirroring the British and American position of commencing the trial with reading the indictment, arraigning the defendants and then proceeding to the prosecutor's opening statement.<sup>237</sup>

The basic Nuremberg and Tokyo trial structures have survived, namely a reading of the indictment, the accused entering a plea, an opening by prosecutor, and, if chosen, by the defendant.<sup>238</sup> The order of the presentation of evidence at Nuremberg was specified as follows:

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<sup>235</sup> ICC, Rules of Procedure and Evidence, Section III, Rules 5–62: “Challenges and preliminary rulings under articles 17, 18 and 19 (respectively, admissibility, preliminary rulings re admissibility, and jurisdiction)”.

<sup>236</sup> See Taylor, 1993, p. 74, see *supra* note 4.

<sup>237</sup> Jackson Report, pp. 191–93, see *supra* note 11, describing the negotiations on 10 July 1945.

<sup>238</sup> See, generally, Sergey Vasiliev, “Structure of Contested Trial”, in Sluiter *et al.*, 2013, p. 543, *supra* note 9, describing how the practice was different to the rule.

The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.<sup>239</sup>

At Nuremberg, the indictment was read in full even though the prosecutors and defence counsel had stipulated that it could be summarised.<sup>240</sup> At Tokyo, the reading of the indictment could be waived by all accused.<sup>241</sup>

According to the IMTFE Charter, the prosecution and defence “may offer evidence and the admissibility of the same shall be determined by the Tribunal”. Further, the prosecution and each accused “(by counsel only, if represented) may examine each witness and each accused who gives testimony”.<sup>242</sup> An accused, by counsel only, if represented, could then address the Tribunal, followed by a prosecution address. Judgment and sentence was to follow.

The IMTFE, in practice, allowed the parties to call rebuttal evidence.<sup>243</sup> The modern courts and tribunals specifically permit this. The order of closing arguments was in reverse from the modern practice. At Tokyo and Nuremberg, the defence went first with the prosecution having the last word.<sup>244</sup> International human rights law has since intervened with the first version of the ICTY Rules specifying a prosecution closing, then a defence closing, followed by a possible prosecution rebuttal and a possible defence rejoinder.<sup>245</sup> The only real procedural difference is that the defence now has the last word.

In 1993, in the short period allowed to draft the ICTY Statute, the drafters elected not to attempt to instruct the judges on how to run their trials. The ICTY and ICTR Statutes were deliberately silent on the manner of the presentation of evidence, stating only:

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase

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<sup>239</sup> IMT Charter, Art. 24(e), see *supra* note 27.

<sup>240</sup> See Taylor, 1993, p. 165, see *supra* note 4, re IMT Charter, Art. 24(a), see *supra* note 27.

<sup>241</sup> IMTFE Charter, Art. 15, Course of Trial Proceedings, Art. 15(a), see *supra* note 6.

<sup>242</sup> *Ibid.*, Art. 15(d) and (e). See, generally, Acquaviva *et al.*, 2013, p. 568, see *supra* note 9.

<sup>243</sup> See, Boister and Cryer, 2008, p. 92, see *supra* note 46.

<sup>244</sup> IMT Charter, Art. 24, see *supra* note 27.

<sup>245</sup> IMT, Rules of Procedure, Rule 86, see *supra* note 122.

of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.<sup>246</sup>

The SCSL Statute adopted the ICTR Rules,<sup>247</sup> which essentially mirrored the ICTY Rules. The original ICTY Rules specified the order of proceeding as evidence for the prosecution, defence, prosecution rebuttal, defence rejoinder, followed by evidence ordered by the Trial Chamber, “unless otherwise directed by the Trial Chamber in the interests of justice”.<sup>248</sup> The accused was allowed to appear as a witness in his or her own defence.

The ICC Statute specifies that “the presiding judge may give directions for the conduct of the trial”.<sup>249</sup> This compromise resulted from negotiations at Preparatory Commissions for the implementation of the Rules of Procedure and Evidence which led to a debate

between some civil lawyers, who considered that the judges should be the sole arbiters of the procedure with no further guidance from the Rules, and others, mainly coming from a common law tradition, who insisted that a predictable procedural scheme was essential to ensure fair trial and protect the rights of the accused.<sup>250</sup>

Those negotiations exposed serious tensions among the different legal traditions, particularly the civil law<sup>251</sup> and common law, and, according to

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<sup>246</sup> ICTY Statute, Art. 15, Rules of Procedure and Evidence, see *supra* note 97; ICTR Statute, Art. 14, see *supra* note 97.

<sup>247</sup> SCSL Statute, Art. 14(1), see *supra* note 174, applying them *mutatis mutandis* with Rule 14(2) allowing guidance in amending the Rules, where necessary, from the Criminal Procedure Act of Sierra Leone.

<sup>248</sup> ICTY, Rules of Procedure and Evidence, Rule 85, see *supra* note 89.

<sup>249</sup> ICC Statute, Art. 64(8)(b), see *supra* note 88.

<sup>250</sup> Fernández, 2001, p. 252, see *supra* note 155.

<sup>251</sup> For example, France had presented a proposed Article 120, Powers of the President, which would have provided that

he shall determine the order of the examination of the accused, the hearing of experts and depositions. The accused, the witnesses, the experts and any person called to the bar shall be examined first of all by the President. Following this, the Prosecutor and the defence counsel of the accused may also examine them with the authorization of the President.

one leading participant, “much effort was made to find solutions that would satisfy different domestic principles and approaches”.<sup>252</sup>

The resulting compromise – Article 64(8) – was considered by some to give insufficient guidance, with critics arguing that a more predictable procedural scheme was essential for a fair trial, upholding the rights of the accused and consistent practice or equal treatment before the court. Unresolved during the judicial rule-making of the Regulations was whether a Trial Chamber would adopt the strict adversarial approach of having a prosecution case followed by a defence case, or whether the approach would be more civil law inspired.<sup>253</sup> Regulation 43 provides some guidance to the method of examining witnesses in court and represents a compromise between the two domestic approaches used in the two dominant legal systems.<sup>254</sup> Rule 140, Directions for the Conduct of the Proceedings and Testimony, provides that the parties “shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber” if the court has not issued directions. The default order of presentation of evidence is of the party presenting the evidence may question that witness; the other party may then question the witness “about relevant matters related to the witness’s testimony and its reliability, the credibility of the witness and other relevant matters” (termed “cross-examination” in, for example, the ICTY Rules),<sup>255</sup> and the defence has the

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M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, vol. 2: *An Article-by-Article Evolution of the Statute*, Transnational Publishers, Ardsley, NY, 2005, p. 471.

<sup>252</sup> Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence and the Regulations of the Court”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff, Leiden, 2009, p. 806. Judge Fernández, Argentinian, and Professor Friman, Swedish, have civil law backgrounds.

<sup>253</sup> *Ibid.*, pp. 806–7.

<sup>254</sup> ICC, Regulations of the Court, Reg. 43, Testimony of Witnesses, see *supra* note 131, provides:

Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:

- (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth;
- (b) Avoid delays and ensure the effective use of time.

<sup>255</sup> ICTY, Rules of Procedure and Evidence, Rule 90(H)(i), see *supra* note 89:

right to question the witness last. The Trial Chamber may question the witness at any time.

### 2.7.10. Pleas of Guilty

Pleas of guilty do not typically feature in civil law criminal law systems, yet were adopted at both Nuremberg and Tokyo. Both Charters specified that the Tribunal was to commence with a reading of the indictment and pleas were then to be taken. Both Charters allowed the defendants and accused to plead guilty after the indictment was read.<sup>256</sup> The record of negotiations shows almost no discussion of this issue. Presumably a guilty plea would have resulted in a conviction with the Tribunal moving to judgment and sentence, but none were entered, so we will never know.<sup>257</sup> One defendant in an American Nuremberg Military Trial, however, actually pleaded guilty to one count after attempting a plea bargain.<sup>258</sup> The 1953 Revised Draft Statute for an International Criminal Court did not mention pleas of guilty, and this issue did not re-emerge until the 1990s.

Almost 50 years after Nuremberg, the ICTY Rules stated that the indictment was to be read to the accused and he was to be asked to enter a plea of guilty or not guilty, and if he failed to do so, to enter a plea of not

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Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

The opposing party also has to put its own (contradictory) case to the witness, and the Chamber may permit wider cross-examination, that is, “enquiry into additional matters”, Rule 90(H)(iii).

<sup>256</sup> IMT Charter, Art. 24(b), see *supra* note 27; IMTFE Charter, Art. 15(b), see *supra* note 6.

<sup>257</sup> Jackson Report, p. 283, see *supra* note 11. On 11 July 1945 the Draft of Agreement and Charter, Reported by Drafting Subcommittee submitted a draft Charter in which Art. 20(b) specified that the Tribunal would ask each defendant whether he pleads “guilty” or “not guilty” – in other words, an arraignment, as known to the Anglo-American system. On 18 July 1945 the UK representative explained to the French representative, André Gros, how a plea of guilty worked namely, “that a man is convicted on his own plea regardless of evidence”, *id.*

<sup>258</sup> In the Ministries case, the defendant Ernst Wilhelm Bohle asked the Tribunal to allow him to plead guilty to two counts in the indictment, and after some complicated procedural manoeuvring between the parties, the Tribunal entered a plea of guilty on one count of SS membership. Military Government for Germany, USA, *United States of America v. Ernst von Weizsaecker et al.*, 25 October 1946–20 August 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol XIV, US Government Printing Office, Washington, DC, 1949.

guilty on his behalf.<sup>259</sup> That mirrored the Nuremberg and Tokyo procedures where the defendants – one after the other – either pleaded not guilty or had the tribunal enter the plea for them. The original ICTY Rules neither specified the procedure after a plea of guilty nor for plea agreement but amendments were subsequently made to cover both scenarios.

The ICC Statute takes a slightly different slant, requiring a reading of the charges in open court. The Court then “shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty”.<sup>260</sup> This practice, common to those systems employing adversarial trials, survived the lengthy ICC Rome Statute negotiations.

#### **2.7.11. Conduct of the Trial: Rules for Receiving Evidence, Documents versus Witnesses, and Expeditious Trial**

A feature of all international courts and tribunals – both old and new – is the dearth of formal rules relating to the admissibility of evidence. Neither the IMT nor IMTFE was bound by “technical” or, in other words, “national” rules of evidence. Article 19 of the IMT Charter boldly stated:

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

To these words, Article 13 (a) of the IMTFE Charter added: “All purported admissions or statements of the accused are admissible”. Both further provided that the Tribunal “may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof”.<sup>261</sup> Describing why, Jackson wrote:

Accordingly, the charter adopted the principle that the Tribunal should admit any evidence which it deemed to have probative value and should not be bound by technical rules

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<sup>259</sup> ICTY, Rules of Procedure and Evidence, Rule 62, Initial Appearance, IT/32, adopted 11 February 1994, entered into force 14 March 1994, see *supra* note 89; see also ICTR, Rules of Procedure and Evidence, Rule 62, see *supra* note 191; SCSL, Rules of Procedure and Evidence, Rule 61, see *supra* note 191; STL, Rules of Procedure and Evidence, Rule 98, see *supra* note 194.

<sup>260</sup> ICC Statute, Art. 64(8)(a), see *supra* note 88. Art. 65 then provides for Proceedings on an Admission of Guilt.

<sup>261</sup> IMT Charter, Art. 20, see *supra* note 27; IMTFE Charter, Art. 13(b), see *supra* note 6 (with an insignificant wording difference).

of evidence. While this left a large and somewhat unpredictable discretion to the Tribunal, it enabled both prosecution and defense to select their evidence on the basis of what it was worth as proof rather than whether it complied with some technical requirement.<sup>262</sup>

And, because the common law rules of evidence had evolved in response to the peculiarities of trial by jury “we saw no reason to urge their use in an international trial before professional judges. We settled, therefore, upon one simple rule”, namely that in Article 19.

The reason why these procedures were adopted is relatively uncomplicated; the Allies wanted a fast and “efficient” trial at Nuremberg. This required speed-facilitating procedures such as excluding appeals, and prohibiting challenges to the tribunal or its composition. There were also no investigating judges spending their time compiling dossiers for a trial chamber. The speed of the proceedings is illustrated by the trial starting on 20 November 1945, a mere 30 days after the indictment was filed with the tribunal on 18 October 1945. The most effective way of achieving this speedy justice – in the absence of a dossier of evidence that could be accepted by a trial chamber – was to have a documents trial.

International trials, by their very definition, pose many challenges to firstly, finding witnesses, and then securing their testimony. Investigations may commence during a war or in a period of transitional justice. Typically, many witnesses will have been displaced or will have relocated. Witnesses may be traumatised, living in refugee camps, and without documents. Investigations, in the field, in a war zone or the aftermath of a war are, naturally, very, very challenging endeavours. The ECCC is the only modern court or tribunal that commenced its investigatory work many years after the crimes, which of course presents its own unique investigatory challenges.

International investigators actually have fewer tools than their domestic counterparts, typically lacking a capacity to summon witnesses and documents. Strict domestic rules for authenticating documents are explicable because domestically, it is much easier to do so; witnesses are available and at short notice. An international court must often receive and view many documents to obtain a picture that cannot be seen in individual

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<sup>262</sup> Jackson Report, p. xi, see *supra* note 11.



documents. They must be aggregated, but to do this, the standard for their admission into evidence may have to be lowered.<sup>263</sup>

From as early as January 1945 the Americans well recognised these challenges in international post-conflict investigations, with the US Secretaries of State and War and the Attorney General (Biddle) writing to Roosevelt observing: “Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions”.<sup>264</sup> That same month, the US Treasury advocated that in any trial, “[t]he representatives of the Allied governments should be completely unrestricted by rules of evidence and other technicalities in presenting their case against the defendants”.<sup>265</sup> Two months later, the American deputy Judge Advocate General wrote to the Assistant Secretary of War, noting that the rules of evidence as known to Americans did not exist in continental systems, where the court could receive anything probative, thus “such should be the rule in the war crimes trials”.<sup>266</sup>

From the beginning of the negotiations in London, the participants deliberately designed the procedures to facilitate admitting documentary evidence in preference to calling witnesses. The American planning memorandum, circulated in June 1945 for these negotiations, listed as source material: 1) documentary – divided into writings, speeches, organisational literature, literature under the defendants’ control, laws, decrees *et cetera*, military, political, diplomatic manuals *et cetera*, correspondence, public and secret diplomatic agreements, biographical records; 2) photographics – still and motion pictures; and, finally 3) “oral testimony”, comprising “film and other recordings” and, lastly, “witnesses”.<sup>267</sup> Jack-

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<sup>263</sup> See, for example, Alex Whiting, “The ICTY as a Laboratory of International Criminal Procedure”, in Swart *et al.*, 2011, pp. 94–95, *supra* note 199.

<sup>264</sup> Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, 22 January 1945, in Jackson Report, p. 5, see *supra* note 11.

<sup>265</sup> Memorandum from the Department of the Treasury. Re: The War Department Memorandum concerning the Punishment of War Criminals, 19 January 1945, in Smith, 1982, p. 128, see *supra* note 19.

<sup>266</sup> Memorandum. Subject: War Crimes Conference (General Weir), 27 March 1944, in *ibid.*, p. 145.

<sup>267</sup> Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945, in Jackson Report, p. 68, see *supra* note 11.

son himself strongly advocated running the prosecution case using documents.<sup>268</sup>

From a prosecutor's perspective, documents have many advantages over the live testimony of witnesses. From a purely pragmatic viewpoint documents have a quality of stability lacking in witnesses – they are predictable and easier to control – and, translation costs aside, are far more economical. Using documents also eliminates the potential for witnesses going “off-script”. But, on the debit side, documents do not have the emotional appeal of testifying witnesses. Film footage – such as that of Auschwitz – can, however, compensate.

Consequently, the Allies negotiated a Charter – and the judges promulgated rules – designed to favour documentary evidence and to accept affidavit and deposition evidence over live witness testimony. For the Americans and British this required a departure from their domestic criminal law procedures used in both civilian courts and in courts martial, but the contemporary documents reveal a drafting strategy designed to loosen the prosecution's burden of proof by using documents instead of witnesses.<sup>269</sup> The Nuremberg trial was, of course, and famously, a “documents case”. The chief prosecutors based the evidence on their counts on documents, rather than witnesses. Jackson described the planning process for the trial:

In preparation for the trial over 100,000 captured German documents were screened or examined and about 10,000 were selected for intensive examination as having probable evidentiary value. Of these, about 4,000 were translated into four languages and used, in whole or in part, in the trial as exhibits. Millions of feet of captured moving picture film were examined and over 100,000 feet brought to Nurnberg. Relevant sections were prepared and introduced as exhibits. Over 25,000 captured still photographs were brought to Nurnberg, together with Hitler's personal photographer who

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<sup>268</sup> There were some internal differences within the American team, with Donovan favouring oral evidence. Jackson, however, firmly supported using documents, using the example of a German doctor in Kiev writing up his daily assignment to liquidate 100 people per day with morphine injections, those “unworthy, mentally defective, terminally ill, or from inferior races, such as Jews and gypsies”. Persico, 1994, pp. 91–92, see *supra* note 81.

<sup>269</sup> See, for example, Memorandum from the Department of the Treasury. Re: The War Department Memorandum Concerning the Punishment of War Criminals, 19 January 1945, in Smith, 1982, p. 128, see *supra* note 19.

took most of them. More than 1,800 were selected and prepared for use as exhibits.<sup>270</sup>

In his opening, Jackson then stated: “We will not ask you to convict these men on the testimony of their foes. There is no count in the Indictment that cannot be proved by books and records”.<sup>271</sup> And after the trial, the British alternate member, Norman Birkett, described the quantity of documents, remarking that it was a mystery

why the Germans persisted in saving all their documents. They went to incredible lengths to do it. They hid them in salt mines, where they could be discovered by the invading armies; they hid them in every conceivable place where they thought they could never be detected; but one thing they could not bring themselves to do was to burn them.<sup>272</sup>

Birkett wrote this in 1947, but this incriminatory documentary treasure trove was well understood before the trial, and, as described, the Allies always intended to use it against the defendants.

The Nuremberg trial lasted 10 and a half months (216 days) and was mostly decided on documents.<sup>273</sup> In a trial of 21 (present) defendants, only 33 witnesses testified for the prosecution, and 80 for the defence (61 witnesses and 19 defendants). One hundred and thirteen witnesses testified live before the court. One hundred and forty-three additional witnesses gave testimony for the defence by interrogatory.<sup>274</sup> The Tribunal also

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<sup>270</sup> Document LXIII, Report to the President by Mr. Justice Jackson, 7 October 1946, in Jackson Report, p. 433, see *supra* note 11.

<sup>271</sup> Opening speech for the Prosecution, 21 November 1945, in *Trial of the Major War Criminals*, vol. 1, p. 6, see *supra* note 27.

<sup>272</sup> Norman Birkett, “International Legal Theories Evolved at Nuremberg”, in *International Affairs*, 1947, vol. 23, pp. 317–25, reprinted in Mettraux, 2008, p. 305, see *supra* note 39.

<sup>273</sup> The IMT, Judgment, p. 413, see *supra* note 208, recognised this:

Much of the evidence presented to the Tribunal on behalf of the prosecution was documentary evidence, captured by the Allied armies in German Army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.

<sup>274</sup> Taylor, 1993, p. 243, fn. 500, see *supra* note 4; Jackson Report, pp. 432–33, see *supra* note 11.

had to rule almost daily on the admissibility of documents.<sup>275</sup> Several thousand documents were received into evidence.<sup>276</sup> As foreshadowed in the American Planning Memorandum,<sup>277</sup> extensive use was also made of film and newspaper evidence. Neither the IMT Charter nor Rules expressly provided for “bar table motions” for admitting evidence, but they were used.<sup>278</sup>

Those prosecuting the trial, however, described an enormous problem of translation, as the documents, mostly in German, had to be presented to the judges in a language that they understood, and, additionally, defence counsel had to receive them in a timely fashion to allow challenges to their admissibility.<sup>279</sup> Importantly, as a result of the logistical problems of translating and copying (that is, mimeographing) documents in sufficient copies for the prosecution, defence and judges, the Tribunal ruled that only the portion of a document which was actually read onto the record would be deemed in evidence. Documents had to be read onto the record to be received into evidence, although the Tribunal would exceptionally permit documents to be received into evidence without being read when translations into the three languages were prepared for the Tribunal’s use.<sup>280</sup>

At Tokyo, by contrast, 419 witnesses testified; 109 for the Prosecution and 310 for the defence. Sixteen defendants testified. Four hundred and nineteen witnesses testified in person and 779 by affidavit; 4,335 exhibits were admitted. The trial transcript was of 48,412 pages, plus the judgments.<sup>281</sup> A good reason existed for these expansive rules for admissibility as most of the relevant documents had been destroyed. The IMT-FE concluded that it could admit any document needed to prove or disprove the charges – this included documents from the Red Cross, affida-

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<sup>275</sup> Biddle, 1947, p. 203, see *supra* note 39.

<sup>276</sup> See IMT, Judgment, p. 412, *supra* note 208: “The documents tendered in evidence for the prosecution of the individual defendants and the organizations numbered several thousands”.

<sup>277</sup> Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945, in Jackson Report, see *supra* note 11.

<sup>278</sup> See Fergal Gaynor, “Admissibility of Documentary Evidence”, in Sluiter *et al.*, 2013, p. 1048, see *supra* note 9. This allows a chamber to receive documentary evidence without requiring supporting oral testimony from a witness.

<sup>279</sup> See, for example, Dodd, 1947, p. 194, *supra* note 2.

<sup>280</sup> *Ibid.*, p. 195.

<sup>281</sup> Boister and Cryer, 2008, p. lix, see *supra* note 10.

vits, depositions, signed statements, diaries, letters or statements, sworn or unsworn copies, and hearsay.<sup>282</sup> However, “the abandonment of the common law exclusionary rules of evidence, dismayed the US defence counsel who repeatedly challenged its various manifestations in the procedural rulings made by the Tribunal but without success”.<sup>283</sup>

Another contemporary 1940s example of military courts taking a less than strict approach to the admissibility of evidence was in the more than 300 military trials conducted by Australia at Darwin and in the Asia-Pacific region under its 1945 War Crimes Act. Between 1945 and 1951, 952 Japanese military men were tried by these courts, which utilised what has been called a “dispensation from the traditional rules of evidence”. A tribunal could

take into consideration any oral statement or any document appearing on the face of it to be authentic, providing the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the statement or document would not be admissible before a field general court martial.<sup>284</sup>

Nor would the evidence have been admissible in an Australian criminal court of law trying minor legal infractions before a magistrate.

#### **2.7.11.1. Affidavit and Deposition Evidence: Statements in Lieu of Oral Testimony**

Both affidavit and deposition evidence in international criminal proceedings originated at Nuremberg and Tokyo. The IMTFE Charter allowed affidavit evidence.<sup>285</sup> But although the IMT Charter did not specifically

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<sup>282</sup> See Mark Klamberg, “General Requirements for the Admission of Evidence”, in Sluiter *et al.*, 2013, p. 1017, *supra* note 9, and the sources supporting this. See also Boister and Cryer, 2008, p. 103, *supra* note 46, stating that the reference in Art. 13(c)(40) to “a diary” was “obviously engineered [...] almost certainly to included to ensure the admissibility of the [Privy Seal] Kido diary”.

<sup>283</sup> Neil Boister, “The Tokyo Trial”, in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, Abingdon, 2011, p. 23; see also, Boister and Cryer, 2008, pp. 104–10, *supra* note 46.

<sup>284</sup> An Act to provide for the Trial and Punishment of War Criminals, Act No. 48 of 1945, Section 9(1) (‘War Crimes Act 1945’). See Georgina Fitzpatrick, “War Crimes Trials, ‘Victor’s Justice’ and Australian Military Justice in the Aftermath of the Second World War”, in Heller and Simpson, 2013, pp. 327, 333, see *supra* note 1.

<sup>285</sup> IMTFE Charter, Art. 13(c)(3), see *supra* note 6.

provide for this form of proof, affidavits were extensively used with cross-examination via a written “interrogatory”,<sup>286</sup> and 143 testified for the defence in this manner.<sup>287</sup> The safeguard was that if opposing counsel sought to cross-examine the witness, the party proposing the affidavit would have to produce the witness to the Tribunal.<sup>288</sup>

Deposition evidence also has its international criminal procedural origin at Nuremberg and Tokyo. The Charters of both institutions empowered the Tribunals to “have evidence taken on commission”.<sup>289</sup> This could include depositions, and, for example, by the start of the Nuremberg trial, according to the Russian prosecutors, the Soviets had collected over 55,000 depositions.<sup>290</sup> The defence could request that a deposition witness be presented before the Tribunal.<sup>291</sup> The ICTY, ICTR, SCSL and STL Rules also allow deposition evidence.<sup>292</sup> The closest provision in the ICC

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<sup>286</sup> Namely, admitting evidence ‘from the bar table’, without requiring a witness to testify to the document, see Gaynor, 2013, p. 1048, see *supra* note 278.

<sup>287</sup> Document LXIII, Report to the President by Mr. Justice Jackson, October 7, 1946, in Jackson Report, pp. 432–33, see *supra* note 11.

<sup>288</sup> Dodd, 1947, p. 196, see *supra* note 2.

<sup>289</sup> IMT Charter, Art. 17(e), see *supra* note 27; IMTFE Charter, Art. 11(e), see *supra* note 6.

<sup>290</sup> In the reports of the Extraordinary State Commission of the Soviet Union for the determination and investigation of the atrocities of the German fascist invaders and the accomplices, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 7: *Proceedings. 5 February 1946–19 February 1946*, IMT, Nuremberg, 1947, pp. 437–38.

<sup>291</sup> See Gaynor, 2013, p. 1047, see *supra* note 278, referring to a defence request to cross-examine five deposition witnesses, on day 185 of the trial, 24 July 1946.

<sup>292</sup> ICTY, Rules of Procedure and Evidence, Rule 71, see *supra* note 89; ICTR, Rules of Procedure and Evidence, Rule 71, see *supra* note 191; SCSL, Rules of Procedure and Evidence, Rule 71, see *supra* note 191; STL, Rules of Procedure and Evidence, see *supra* note 194, Rules 123, 157. Explaining why, the ICTY, 1st Annual Report, para. 79, see *supra* note 142, states:

In exceptional circumstances the prosecution and the defence are permitted to submit evidence by way of deposition, that is, testimony given by witnesses who are unable or unwilling to testify subsequently in open court (rules 71 and 90). This has the added advantage that it may enable the Tribunal to proceed on the basis of such evidence in cases where the witness has subsequently disappeared. Depositions may be made locally and may be taken by means of video-conference, if appropriate (rule 71). In order to protect the “equality of arms” (and, in particular, the rights of the accused), the procedure for taking depositions allows for cross-examination of the witness.

Statute and Rules is the taking of a record of proceeding in a “unique investigative opportunity”.<sup>293</sup>

The ICTY Statute did not distinguish between oral and written evidence – nor even specify how evidence was to be received – but the original ICTY Rules provided for the effective primacy of oral evidence. However, the length of trials resulted in rule amendments – for example, Rule 92*bis* – to shift testimony towards written statements. The ICTR followed this precedent. In 1999, explaining why – and attempting to encourage the ICC to follow the same route – the ICTY President Gabrielle Kirk McDonald, said:

With regard to the control of the trial itself, the judges have found that a recurring issue has been the number of witnesses called by the parties. For instance, in one case one of the parties proposes to call over 300 witnesses, which would have the effect of causing the proceedings to last for years. We have thus adopted a Rule which allows the Trial Chamber to reduce the number of witnesses if a party appears to be calling an excessive number of witnesses to prove the same fact, and it also allows us to reduce the estimated length of time required for each witness. Our Rules thus provide a means by which the trial may be conducted in a more expeditious manner.<sup>294</sup>

The ICC, by contrast, in 1998 – but before the ICTY’s December 2000 Rule amendments that produced Rule 92*bis* resulting from the experience of the long, slow and witness-heavy first ICTY trials (that were incomplete when the ICC Statute was adopted in July 1998) – followed the original ICTY model of oral testimony. The ICC Statute specified that testimony shall be in person.<sup>295</sup> However, in 2013 its Rules of Procedure and Evidence were amended to allow the introduction into evidence of “prior recorded testimony”.<sup>296</sup>

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<sup>293</sup> ICC Statute, Art. 56, see *supra* note 88, Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity.

<sup>294</sup> Remarks made by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, to the Preparatory Commission for the International Criminal Court, 30 July 1999, JL/P.I.S./425-E.

<sup>295</sup> ICC Statute, Art. 69 (2), see *supra* note 88, except to the extent provided in the Rules of Procedure and Evidence.

<sup>296</sup> ICC, Rules of Procedure and Evidence, Rule 68, Prior Recorded Testimony, see *supra* note 153:

### 2.7.11.2. Right to Test Evidence and the Exclusion of Evidence

Neither the IMT nor IMTFE Charters and Rules directly provided for the exclusion of evidence. Both were also silent on the assessment of evidence and any standard for its acceptance into evidence – such as its reliability or provenance. The IMT Charter provided that the Tribunal “shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence”.<sup>297</sup> The IMTFE Charter, provided similarly that “[t]he prosecution and defence may offer evidence and the admissibility of the same shall be determined by the Tribunal”,<sup>298</sup> and both had statutory procedures for dealing with challenges to the evidence offered by a party.<sup>299</sup> These procedures were consistent with an adversarial model of trial in which the parties present their own evidence, thus allowing the opposing party to object and causing the tribunal to rule on the objection. This is despite the expansive rules favouring the admissibility of evidence set out in Article 19 of the IMT Charter and Article 13 of the IMTFE Charter.

No guidance was offered as to its evaluation or the standard for admission or rejection of evidence. To illustrate, the defendant Hans Fritzsche, acquitted by the Nuremberg Tribunal, had complained in his testimony (while under cross-examination by the Soviet prosecutor) that his admission to his Soviet captors had been made under duress.<sup>300</sup> The judgment, despite the acquittal, is silent on this issue.

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When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony [...] in prescribed circumstances.

<sup>297</sup> IMT Charter, Art. 24(d), see *supra* note 27.

<sup>298</sup> IMTFE Charter, Art. 15(d), see *supra* note 6.

<sup>299</sup> IMT, Rules of Procedure, Rule 7(c), see *supra* note 122. Applications and Motions before Trial and Rulings during the Trial, stating that the Tribunal would rule on matters “such as questions as to admissibility of evidence offered during the trial”. IMTFE, Rules of Procedure, Rule 5(b), see *supra* note 126. See, generally, Klamberg, 2013, p. 1030, *supra* note 282; Taylor, 1993, p. 200, fn. 39, *supra* note 4.

<sup>300</sup> *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 17: *Proceedings. 25 June 1946–8 July 1946*, IMT, Nuremberg, 1947, pp. 202–4.



The IMT Charter also provided the defendants with the statutory right to challenge witnesses by cross-examination.<sup>301</sup> There was no statutory restriction on the subject matter of cross-examination, and counsel were allowed to use documents that were ready in the four languages.<sup>302</sup> Defendants (and the prosecutors) could also challenge the admissibility of evidence.<sup>303</sup> At Tokyo, the Tribunal confined cross-examination to matters arising in examination in chief, except for impeaching the credibility of witnesses,<sup>304</sup> although this restriction was specified in neither the Charter nor Rules. This represented a major departure from the practice of cross-examination in common law systems. (The ICTY Rules, as noted, replicated this.)<sup>305</sup>

The 1953 Revised Draft Statute contained nothing relevant relating to the exclusion of evidence at trial, nor on cross-examination.

By 1994, however, international human rights law had evolved to directly deal with the exclusion of evidence. (The right to confront an accuser – a part of international human rights law – was already incorporated into the Nuremberg and Tokyo procedural regimes.) The original ICTY Rules, from 1994, therefore provided for excluding “evidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights”,<sup>306</sup> and, for a chamber to “exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.<sup>307</sup>

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<sup>301</sup> IMT Charter, Art. 24(g), see *supra* note 27: “The Prosecution and Defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony”.

<sup>302</sup> Dodd, 1947, p. 195, see *supra* note 2.

<sup>303</sup> IMT, Rules of Procedure, Rule 7(c), see *supra* note 122. Applications and Motions before Trial and Rulings during the Trial, stating that the Tribunal would rule on matters “such as questions as to admissibility of evidence offered during the trial”. See, generally, Klamberg, 2013, p. 1030, *supra* note 282; Taylor, 1993, p. 200, fn. 39, *supra* note 4.

<sup>304</sup> See Boister and Cryer, 2008, p. 105, *supra* note 46, referring to the transcript of proceedings.

<sup>305</sup> ICTY, Rules of Procedure and Evidence, Rule 90(H), see *supra* note 89. See also ICTR, Rules of Procedure and Evidence, Rule 90(G), *supra* note 191; STL, Rules of Procedure and Evidence, Rule 150(I)–(K), *supra* note 194. Neither the SCSL, Rules of Procedure and Evidence nor the ICC, Rules of Procedure and Evidence contain a similar restriction; see ICC, Rules of Procedure and Evidence, Rule 140(2)(a)–(b), *supra* note 153.

<sup>306</sup> ICTY, Rules of Procedure and Evidence, Rule 95, see *supra* note 89. Generally, see Klamberg, 2013, pp. 1032–37, *supra* note 282.

<sup>307</sup> ICTY, Rules of Procedure and Evidence, Rule 89 (c)–(d), see *supra* note 89.

The 1998 ICC Statute also requires the exclusion of

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.<sup>308</sup>

The ICC Statute has a very limited statutory provision on evidence, providing that it may request the submission “of all evidence that it considers necessary for the determination of the truth”.<sup>309</sup> The Court may rule

on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.<sup>310</sup>

This is actually doctrinally quite similar to the Nuremberg and Tokyo procedures.

Writing in 1946, Arthur Goodhart posed the question of “whether the experience gained at Nuremberg may lead to some relaxation of the rules of evidence in Anglo-American law”.<sup>311</sup> While the common law rules relating to the admission and exclusion of evidence have, in many jurisdictions, certainly relaxed in the intervening period, finding a connec-

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<sup>308</sup> ICC Statute, Art. 69(7), see *supra* note 88.

<sup>309</sup> *Ibid.*, Art. 69(3): “The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”. Art. 69(4): “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”. ICC, Rules of Procedure and Evidence, Rule 63 (2), see *supra* note 153, complements this by providing: “A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”.

<sup>310</sup> ICC Statute, Art. 69(4), see *supra* note 88.

<sup>311</sup> Goodhart, 1947, p. 628, fn. 5, see *supra* note 123. At the time, Professor of Jurisprudence at Oxford University.

tion with the Nuremberg precedent would be very challenging. One commentator, in a modern critique, has written of the Nuremberg procedures:

The process as a whole was a breach of the principles of legality which require that rules of procedure and evidence, which are outcome-determinative, should be established in advance do that prosecution and defense know what to expect, know how to meet these expectations, and so judges are restricted in their discretionary powers over the course of trials.<sup>312</sup>

The practical difficulty with this perspective, however, is that Nuremberg was the first international criminal law trial, and was using new crimes and hybrid procedures. It is doubtful if anyone – judges, lawyers or defendants – knew “what to expect” when the trial started. It also ignores that the procedural rules were actually quite sophisticated, and the trial record shows daily rulings on procedural issues.

These rules now form some of the foundational points of contemporary international criminal trials. These keystone rules of international criminal procedure have not only survived, but indeed have thrived.<sup>313</sup> The basic principles from Nuremberg of admitting relevant and probative evidence continue. The ICTY Rules provide that “a Chamber may admit any relevant evidence which it deems to have probative value”.<sup>314</sup> Both the ICTY and ICC regimes, following the precedent of Nuremberg, pro-

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<sup>312</sup> Bassiouni, 2003, p. 585, see *supra* note 77.

<sup>313</sup> IMT Charter, Art. 19 (not be bound by technical rules of evidence), see *supra* note 27; IMTFE Charter, Art. 13(a), see *supra* note 6. See, for example, ICTY, Rules of Procedure and Evidence, Rule 89(A), *supra* note 89.

<sup>314</sup> ICTY, Rules of Procedure and Evidence, Rule 89(C), see *supra* note 89, while Rule 89(B) states:

In cases not otherwise provided for in this Section a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

ICTR, Rules of Procedure and Evidence, Rule 89(B) and (C), see *supra* note 191; SCSL, Rules of Procedure and Evidence, Rule 89(B) and (C), see *supra* note 191; and STL, Rules of Procedure and Evidence, Rule 149(C), see *supra* note 194. The SCSL equivalent Rule 89(C), see *supra* note 191, has no requirement that the evidence should be probative. STL, Rules of Procedure and Evidence, Rule 149(B), see *supra* note 194, adds the words “or in the Lebanese Code of Criminal Procedure”.

vide that national rules of evidence do not apply.<sup>315</sup> The STL Rules of Procedure and Evidence provide that a chamber “shall apply the rules of evidence set forth in these Rules and, in case of a lacuna, provisions of the Lebanese Code of Criminal Procedure consistent with the highest standards of international criminal procedure”.<sup>316</sup>

Common law criminal procedures have historically excluded hearsay evidence, except in defined circumstance, such as for example, business records prepared in the normal course of business. It is one of the primary common law rules of exclusion. Applying a strict rule against admitting hearsay evidence, however, would have defeated the objective of an expeditious document-laden prosecution at both Nuremberg and Tokyo. The Americans and British were thus quite content to relax this cherished general exclusionary rule in the interests of expanding the evidence that could be put before the Tribunals. At the time this was described as

perhaps the greatest possible departure from Anglo-American practice under which hearsay evidence is strictly excluded on the theory that no evidence should be admissible which cannot be subjected to the test of cross-examination. If this principle had been excluded at the Nuremberg trials much of the most relevant evidence would have had to be excluded because many of the persons closely identified with the events are dead.<sup>317</sup>

All modern international criminal courts and tribunals accept hearsay evidence. Allowing hearsay is a fundamental part of inclusionary rules for admitting evidence, consistent with a court not being bound “by technical rules of evidence” but accepting “any evidence which it deems to have probative value”. As a prerequisite for determining its relevance and probative value a court must assess the reliability of a document (as a piece of hearsay evidence) and it must be *prima facie* reliable to be admit-

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<sup>315</sup> ICTY, Rules of Procedure and Evidence, Rule 89(A), see *supra* note 89; ICTR, Rules of Procedure and Evidence, Rule 89(A), see *supra* note 191; SCSL, Rules of Procedure and Evidence, Rule 89(A), see *supra* note 191. ICC Statute, Art. 68(9), see *supra* note 88 provides: “When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law”.

<sup>316</sup> STL, Rules of Procedure and Evidence, Rule 149(A), see *supra* note 194.

<sup>317</sup> Goodhart, 1947, p. 628, see *supra* note 26, delivering a lecture on 5 February 1946.

ted into evidence.<sup>318</sup> This can include questions of its provenance and the circumstances of its creation and corroboration.

### 2.7.11.3. Expeditious Trial, or Fair and Expeditious Trial?

By modern standards, the Nuremberg and Tokyo trials were short, with Nuremberg lasting less than a year and Tokyo two and a half years. The Nuremberg IMT trial started hearing evidence on 20 November 1945, judgment was delivered on 30 September 1946 and sentence on 1 October 1946 (with execution of sentences occurring on 16 October 1946). The judgment was of 283 pages; the trial transcript of over 17,000 pages. Jackson described Article 19 of the IMT Charter<sup>319</sup> as being put to hard test by the experience of over 400 court sessions over 10 months.<sup>320</sup>

After the trial, the President of the Nuremberg IMT, Lord Justice Lawrence, wrote that because there were 22 defendants charged with conspiracy over a period of 10 to 20 years, “it will perhaps be realized that to hold a fair trial expeditiously was not altogether an easy task”.<sup>321</sup> And in practice, just like in a domestic criminal proceeding, the Tribunal ruled – in an early ruling – that irrelevant witnesses or cumulative should not be summoned.<sup>322</sup> A modern critique of these procedures used, however, asserted that the need to try a large number of accused quickly and efficiently predominated over some concerns of the rights of the accused.<sup>323</sup> The speed of the trial, and the procedures adopted to achieve this, gives some support to this critique.

The 12 US Nuremberg trials conducted under Control Council Law No. 10 held between December 1946 and April 1949 were also – at least

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<sup>318</sup> See, for example, ICTY, *Prosecutor v. Prlić et al*, Appeals Chamber, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, IT-04-74-AR73.16, 3 November 2009, paras. 33–34 (<https://www.legal-tools.org/doc/611876/>).

<sup>319</sup> IMT Charter, Art. 19, see *supra* note 27: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value”.

<sup>320</sup> Jackson, 1949, p. 361, see *supra* note 41.

<sup>321</sup> Lawrence, 1947, p. 294, see *supra* note 82.

<sup>322</sup> Klamberg, 2013, p. 1021, *supra* note 282, referring to a ruling of the Tribunal on its twenty-first day, 17 December 1945.

<sup>323</sup> Murphy and Baddour, 2014, p. 374, see *supra* note 146.

by today's examples – concluded relatively swiftly. Over those 29 months 142 of the 185 defendants charged were found guilty of at least one of the charges in the indictments.

The requirement for the proceedings to be expeditious has been a feature of international criminal justice since Nuremberg, but for evolving and different reasons. Article 1 of the IMT Charter specified the “just and prompt trial and punishment of the major war criminals of the European Axis”<sup>324</sup> while its Tokyo equivalent substituted the words “in the Far East”. Both Charters mandated an expeditious hearing, to “confine the Trial strictly to an expeditious hearing of the issues raised by the charges” and to “take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever”.<sup>325</sup> It did not provide that the trial had to be *fair and* expeditious, only that it be “prompt”. The need for a fair trial came in Article 16, but only in relation to the defence; it was silent on whether the prosecution had a similar interest.<sup>326</sup> The rationale for specifying expedition at Nuremberg was explained as partly to eliminate attempts to bring in political propaganda.<sup>327</sup> The Tribunal's judgment stated that it was necessary

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<sup>324</sup> IMT Charter, Art. 1, see *supra* note 27:

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called “the Tribunal”) for the just and prompt trial and punishment of the major war criminals of the European Axis.

See Yvonne McDermott, “General Duty to Ensure the Right to a Fair and Expeditious Trial”, in Sluiter *et al.*, 2013, p. 773, *supra* note 9.

<sup>325</sup> IMT Charter, Art. 18(a)–(b), see *supra* note 27; IMTFE Charter, Art. 12(a)–(b), see *supra* note 6.

<sup>326</sup> IMT Charter, Art. 16, see *supra* note 27; IMTFE Charter, Art. 9, see *supra* note 6.

<sup>327</sup> Document XVII, Minutes of Conference Session, 29 June 1945, Explanation of British Memorandum, where the British delegate, Sir David Maxwell Fyfe, in Jackson Report, p. 101, see *supra* note 11, explained the rationale behind the proposed Art. 18, as:

Subparagraph (a) deals with confining the trials to expeditious hearing of the issues raised by the charges; (b) takes strict measures to prevent any action which will cause any delay and rules out irrelevant issues, including attempts to bring in political propaganda. That is what we envisage. There are two possibilities: the defendants themselves may try and make a noise or interrupt the court or interrupt the witnesses

to limit the number of witnesses called in order to have the expeditious hearing specified in Article 18(c) of the IMT Charter.<sup>328</sup>

These duties of fairness were in the indictment having “full particulars specifying in detail the charges against the Defendants” and its translation with all the documents lodged with it to be translated into a language he understands and given to them “at reasonable time before the Trial”; the right of a defendant “during any preliminary examination or trial [...] to give any explanation relevant to the charges made against him”; to have a preliminary examination or trial to be conducted in or translated into a language he understands; the right to conduct his own defense before the Tribunal or to have the assistance of counsel; and the right through himself or through his counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution. The defendants could also seek the Tribunal’s assistance to summons witnesses and documents,<sup>329</sup> although the Tribunal, in its judgment, recognised that “the applications made by the defendants for the production of documents raised serious problems in some instances, on account of the unsettled state of the country”.<sup>330</sup> Although the 1953 Revised Draft Statute for an International Criminal Court contained a provision headed Rights of the Accused, it had no equivalent relating to expedition.<sup>331</sup>

By 1993 international human rights law had evolved to the extent that the rights of the accused to a fair trial, as set out in the Article 14 of the International Covenant on Civil and Political Rights, were firmly set out in the ICTY Statute.<sup>332</sup> Since the ICTY Statute, the two have largely

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and proceeding. With defendants who are likely to be sentenced to death, in the face of the court sending them to prison for a few weeks—the ordinary penalty for contempt of court—it would only be playing their game and interrupting the trial.

<sup>328</sup> IMT, Judgment, p. 412, see *supra* note 208.

<sup>329</sup> IMT, Rules of Procedure, Rule 4, see *supra* note 122.

<sup>330</sup> IMT, Judgment, p. 412, see *supra* note 208.

<sup>331</sup> 1953 Revised Draft Statute for an ICC, Art. 38, see *supra* note 50.

<sup>332</sup> ICCPR, see *supra* note 231. ICTY Statute, Art. 21, Rights of the Accused, see *supra* note 97:

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

been combined.<sup>333</sup> The Secretary-General, in his 1993 report on resolution 808, stated that it was

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3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
  4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
    - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    - (c) to be tried without undue delay;
    - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
    - (g) not to be compelled to testify against himself or to confess guilt.

See also the identical ICTR Statute, Art. 20, *supra* note 97.

<sup>333</sup> ICTY Statute, Art. 20(1). Commencement and Conduct of Trial Proceedings, see *supra* note 97:

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

STL Statute, Arts. 16(2) and 4(c), see *supra* note 8; ICTR Statute, Art. 19(1), see *supra* note 97; ICC Statute, Art. 69 (2), see *supra* note 88: “The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. The SCSL Statute, see *supra* note 174, has no equivalent except in Art. 17(4)(c) “to be tried without undue delay” under Rights of the Accused, which mirrors the same provisions in ICTY Statute, Art. 21 and ICTR Statute, Art. 20.



axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such [...] standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.<sup>334</sup>

The ICC Statute mirrors these and specifies the presumption of innocence.<sup>335</sup>

For some, the Tokyo trial is considered to have taken too long.<sup>336</sup> An experienced contemporary criminal law judge has written that the length of the modern trial is not the real problem; rather it is that “evidential debris weakens and ultimately destroys the court’s ability to establish the truth”.<sup>337</sup> In great contrast to the Nuremberg and Tokyo trials, at the ICTY, one of its later trials featuring multiple accused, *Prlić*, sat over 465 trial days, heard 249 prosecution witnesses, and received 4,914 prosecution exhibits, and 77 defence witnesses were called by five of the six accused. The Trial Chamber received 4,397 defence exhibits from the six accused; the Chamber also tendered 15 of its own exhibits and called one witness.<sup>338</sup>

#### 2.7.11.4. Disclosure

The defence was permitted access to prosecution material.<sup>339</sup> The Nuremberg Rules provided for pre-trial disclosure of documents that accompanied the indictment within thirty days of the start of the trial.<sup>340</sup> At the

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<sup>334</sup> Secretary-General’s Report on Resolution 808, para. 106, see *supra* note 64.

<sup>335</sup> ICC Statute, Arts. 66 and 67, see *supra* note 88.

<sup>336</sup> Boister and Cryer, 2008, pp. 97–98, see *supra* note 46.

<sup>337</sup> Murphy and Baddour, 2014, p. 379, see *supra* note 146.

<sup>338</sup> ICTY, *Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić and Pušić*, Trial Chamber, Judgment, IT-04-74, 29 May 2013 (<https://www.legal-tools.org/doc/2daa33/>). The evidentiary breakdown is Prlić: 1619, Stojić: 1032, Praljak: 1047, Petković: 764, Ćorić: 422, and Pušić: 63. Seven years and one month passed between the opening of the trial in April 2006 and the delivery of judgment in May 2013 – more than two years passed between the closing arguments and the delivery of judgment. The indictment had been confirmed in March 2004. This is not a good example of expeditious justice. But there are worse examples.

<sup>339</sup> See Vladimir Tochilovsky, “Defence Access to the Prosecution Material”, in Sluiter *et al.*, 2013, p. 1085, see *supra* note 9.

<sup>340</sup> IMT, Rules of Procedure, Rule 2(a), Rule 3, see *supra* note 122.

close of the prosecution case at Nuremberg, the Tribunal directed the defence to submit evidence on which they intended to rely, names of witnesses, matters to which they would testify. The prosecution had no statutory right to access the defence material and the Tribunal did not direct defence counsel to give it.<sup>341</sup> These practices continue today.

The technical rules relating to using documentary evidence have evolved, mainly in the regulation of inter-party disclosure. But the same fundamental principles allowing the mass tender of documents, including hearsay, so long as the evidence is considered relevant and probative, remain. Today this is of course subject to statutory exclusion if, for example,

the probative value of the evidence is substantially outweighed by the need to ensure a fair trial, or to if it was obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.<sup>342</sup>

Importantly, in relation to the documentary evidence available – for example, at the ICTY it took years for the Office of the Prosecutor to gain access to military and governmental records necessary for presentation in court.<sup>343</sup>

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<sup>341</sup> See Mark Klamberg, “Prosecution Access to the Defence Material”, in Sluiter *et al.*, 2013, p. 1099, see *supra* note 9.

<sup>342</sup> For example, STL, Rules of Procedure and Evidence, Rule 149(D), see *supra* note 194:

A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules.

See also *id.*, Rule 162, Exclusion of Certain Evidence, provides:

- (A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and seriously damage, the integrity of the proceedings.
- (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture.

<sup>343</sup> Based on the author’s personal knowledge from working in the ICTY’s Office of the Prosecutor between 2002 and 2008.

### 2.7.11.5. Testimony of a Defendant at Trial

At Nuremberg, the differences between the two legal systems continued when deciding the circumstances under which a defendant could testify. In some civil law systems, the court will question an accused before hearing any evidence and will rely on a dossier of evidence compiled by an investigating judge or a pre-trial chamber. The compromise reached between the civil law and common law systems was to allow the defendants to testify for themselves under oath and be subject to cross-examination, and to make final statements.<sup>344</sup> Of the negotiating process, Jackson wrote:

At least one of the procedural divergencies among the conferring nations worked to the advantage of defendants. The Anglo-American system gives a defendant the right, which the Continental system usually does not grant, to give evidence in his own behalf under oath. However, Continental procedure allows a defendant the right, not accorded him under our practice, to make a final unsworn statement to the tribunal at the conclusion of all testimony and after summation by lawyers for both sides without subjecting himself to cross-examination. The charter resolved these differences by giving defendants both privileges, permitting them not only to testify in their own defense but also to make the final statement to the court.<sup>345</sup>

The ICTY, STL and ICC Statute or Rules also permit accused persons to testify in their own defence and to make a statement.<sup>346</sup> At Nuremberg the defendants could make a statement to the Tribunal after the closing addresses of the parties.<sup>347</sup>

Both Tokyo and Nuremberg Tribunals required witnesses to take an oath or affirmation before testifying and both specified that a witness

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<sup>344</sup> Jackson, 1949, p. 361, see *supra* note 41; Taylor, 1993, p. 64, see *supra* note 4.

<sup>345</sup> Jackson Report, Preface, p. xi, see *supra* note 11. The OSS head, Donovan, proposed accepting Göring's proposal to testify against Ribbentrop, Kaltenbrunner, Schacht and Speer in return for death by firing squad. He also considered making a plea deal with Schacht so that Schacht could testify against Göring. Jackson intervened to prevent this. Persico, 1994, p. 119, see *supra* note 81.

<sup>346</sup> ICC Statute, Art. 69, see *supra* note 88; ICTY, Rules of Procedure and Evidence, Rule 84*bis*, see *supra* note 89; STL, Rules of Procedure and Evidence, Rule 144, see *supra* note 194.

<sup>347</sup> IMT Charter, Art. 24(j), see *supra* note 27.

could only be present in court when testifying,<sup>348</sup> this rule has survived in the modern courts and tribunals. There was no privilege regarding the testimony of family members – unlike in the modern courts, for example, in the ICC Rules.<sup>349</sup>

#### 2.7.11.6. Judicial Notice and Adjudicated Facts

The Nuremberg and Tokyo Tribunals could both use what their Charters expansively referred to as “judicial notice: for receiving evidence.”<sup>350</sup> In fact the modern rule is practically identical to that of those Tribunals in respect of “proof of facts of common knowledge”.<sup>351</sup> However, the Charter expanded the concept to include what later courts and tribunals have termed “adjudicated facts” – a related concept. The IMT Charter allowed the Tribunal to take judicial notice of “proof of facts of common knowledge” but, additionally, of the “official government documents and reports of the United Nations”. This included records of war crimes investigations.<sup>352</sup> The IMTFE Charter was worded slightly differently.<sup>353</sup> The US Military Tribunals used a similar rule on “judicial notice”.<sup>354</sup> During

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<sup>348</sup> IMT, Rules of Procedure, Rule 6, see *supra* note 122.

<sup>349</sup> ICC, Rules of Procedure and Evidence, Rule 75, Incrimination by Family Members, see *supra* note 153.

<sup>350</sup> See, generally, Fergal Gaynor, “Judicial Notice and Agreed Facts”, in Sluiter *et al.*, 2013, p. 1109, *supra* note 9.

<sup>351</sup> See, generally, *ibid.*, p. 1111 for an explanation of this culturally variable term.

<sup>352</sup> IMT Charter, Art. 21, see *supra* note 27:

The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations.

<sup>353</sup> IMTFE Charter, Art. 13(d), see *supra* note 6, stating:

The Tribunal shall neither require proof, of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.

<sup>354</sup> Uniform Rules of Procedure, Military Tribunals, Nuernberg, Rule 20, revised to 8 January 1948, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol XV: *Procedure, Practice and Administration, October 1946–April 1949*, US Government Printing Office, Washington, DC, 1949, pp. 70–78 (<https://www.legal-tools.org/doc/1b6df7/>):

its trials judicial notice was taken of official German documents and reports relating to the concentration camps, sentences of the US Military Courts, and official German decrees, such as the suspension of the right of *habeas corpus*. These documents did not need to be read onto the record to be received into evidence.<sup>355</sup> This, however, was not judicial notice in its usual sense.

The Americans were anxious to have some mechanism allowing the adjudication of the existence of a conspiracy in a single trial.<sup>356</sup> The Judge Advocate-General pointed out that a judgment of a tribunal like the IMT would be inadmissible hearsay against another accused in a US District Court trial, but not before a US Military Commission, with the rules of evidence relaxed to the point of elimination. He recommended adding this *res judicata* principle to any agreement establishing the tribunal, notwithstanding that it went “beyond anything now known to our criminal law”.<sup>357</sup> The Secretary of State and Secretary of War recommended to the President to allow such an adjudication determining the ambit of a conspiracy and its participants, and, if they were not before the court, allowing this judgment to be used against them in a subsequent trial – the role of the next court would be to identify the person, appraise their degree of participation and fix the punishment.<sup>358</sup> The Soviets, on the other hand, had actually emphasised that after a finding that an organisation was crim-

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When either the prosecution or a defendant desires the Tribunal to take judicial notice of any official government document or report to the United Nations, including any act, ruling, or regulation of any committee, board, or council heretofore established by or in the Allied nations for the investigation of war crimes, or any record made by, or finding of, any military or other Tribunal of any of the United Nations, this Tribunal may refuse to take judicial notice of such document, rule, or regulation unless the party proposing to ask this Tribunal to judicially notice such a document, rule, or regulation, places a copy thereof in writing before the Tribunal.

<sup>355</sup> Dodd, 1947, p. 198, see *supra* note 2.

<sup>356</sup> See, for example, the Draft Memorandum for the President from the Secretaries of State, War and Navy. Subject: Trial and Punishment of European War Criminals, 11 November 1944, in Smith, 1982, p. 41, see *supra* note 19.

<sup>357</sup> Judge Advocate-General’s Memorandum for the Assistant Secretary of War, Subject: Trial of European War Criminals (Comments on the Bernays Plan), 22 November 1944 (Major-General Myron C. Cramer, Judge Advocate General), in *ibid.*, p. 58.

<sup>358</sup> Memorandum to the President. Subject: Trial and Punishment of European War Criminals, 27 November 1944 from Secretary of State and Secretary of War, in *ibid.*, p. 61.

inal, an individual could deny his voluntary participation in it, and the prosecution would have to refute such claims.<sup>359</sup>

The first sentence of the IMT Charter's Article 21 is reproduced in the ICTY, ICTR and SCSL's Rules of Procedure and Evidence and in the ICC Statute,<sup>360</sup> thereby reverting to its more traditionally understood usage. An exception – closer to that of Nuremberg – was the ICTR Appeal Chamber's decision in 2006 to take judicial notice that a genocide had occurred in Rwanda,<sup>361</sup> while leaving it for each Trial Chamber to determine whether this was relevant to the proceedings or the actions of any individual accused person.

Rules on adjudicated facts also have their origins in the IMT Charter and the Rules of the US Military Tribunals. These provisions allowed the tribunals to take judicial notice of the “records and findings of military or other Tribunals of any of the United Nations”. The ICTY, ICTR, SCSL and STL Rules of Procedure and Evidence have followed suit.<sup>362</sup> The obvious rationale was to avoid the need to call evidence on matters that had already been adjudicated in earlier trials.

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<sup>359</sup> Ginsburgs, 1996, pp. 98–99, see *supra* note 26.

<sup>360</sup> ICTY, Rules of Procedure and Evidence, Rule 94, see *supra* note 89; ICTR, Rules of Procedure and Evidence, Rule 94, see *supra* note 191; SCSL, Rules of Procedure and Evidence, Rule 94, see *supra* note 191; ICC Statute, Art. 69(6), see *supra* note 88.

<sup>361</sup> ICTR, *Prosecutor v. Karemera et al.*, Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ICTR-98-44-AR73(C), 16 June 2006 (<https://www.legal-tools.org/doc/c7bd16/>).

<sup>362</sup> STL, Rules of Procedure and Evidence, Rule 160(B), see *supra* note 194:

At the request of a Party or proprio motu, the Trial Chamber, after hearing the Parties, may decide, in the interests of a fair and expeditious trial, to take judicial notice of adjudicated facts from other proceedings of the Tribunal or from proceedings of national and international jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to acts and conduct of the accused that is being tried.

This derives from ICTY, Rules of Procedure and Evidence, Rule 94(B), see *supra* note 89 and ICTR, Rules of Procedure and Evidence, Rule 94(B), see *supra* note 191:

At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

And the almost identical SCSL, Rules of Procedure and Evidence, Rule 94(B), see *supra* note 191.

The ICC Statute has no comparable provision. The factual situations in countries, or conflict specific courts and tribunals, are different to that of a permanent institution. In different cases in conflict-specific courts, such as the ICTR and ICTY, chambers may use the same already adjudicated, but not necessarily contested, “crime-base” evidence – especially in the trials of military or political leaders who are not charged with directly participating in the attack alleged.

#### 2.7.11.7. Summons and Subpoenas

The IMT and IMTFE Charters permitted the parties to summons witnesses and to require the production of documents.<sup>363</sup> If a witness or document was beyond the control of occupation authorities, the Tribunal could seek the assistance of the state concerned.<sup>364</sup> The modern courts and tribunals have similar regimes for obtaining documents.<sup>365</sup>

#### 2.7.11.8. Maintaining the “Integrity of the Proceedings”

The IMT and IMTFE Charters allowed the Tribunal to deal with “contumacy”, and their rules permitted the removal of any person from the courtroom.<sup>366</sup> No contempt charges were ever brought although at Tokyo some defence counsel were removed from the court room.<sup>367</sup> The IMT and IMTFE Charters provided that

[t]he Tribunal shall (a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges, and (b)

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<sup>363</sup> IMT Charter, Art. 17(a), see *supra* note 27; IMTFE Charter, Art. 11, see *supra* note 6. Also, IMT, Rules of Procedure, Rule 4, Production of Evidence for Defence, see *supra* note 122. Also, see generally, Nancy Combs, “Power to Subpoena Witnesses”, in Sluiter *et al.*, 2013, pp. 706–7, see *supra* note 9.

<sup>364</sup> IMT, Rules of Procedure, Rule 4(b), see *supra* note 122.

<sup>365</sup> See, for example, ICTY, Rules of Procedure and Evidence, Rule 54, see *supra* note 89; ICC Statute, Art. 64, see *supra* note 88.

<sup>366</sup> IMT Charter, Art. 12(c) see *supra* note 27; IMTFE Charter, Art. 18(c) see *supra* note 6; IMT, Rules of Procedure, Rule 5, see *supra* note 122; IMTFE, Rules of Procedure, Rule 3 see *supra* note 126.

<sup>367</sup> Boister and Cryer, 2008, p. 91, see *supra* note 46. See, generally, Yvonne McDermott, “General Duty to Ensure the Integrity of the Proceedings” in Sluiter *et al.*, 2013, pp. 744–45, see *supra* note 9. IMT, Rules of Procedure, Rule 5, see *supra* note 122, Order at the Trial: “Any defendant or any other person may be excluded from open sessions of the Tribunal for failure to observe and respect the directives and dignity of the Tribunal”; see also IMTFE, Rules of Procedure, Rule 3, see *supra* note 126.

Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.<sup>368</sup>

The original ICTY Rule 80 on control of proceedings allowed the exclusion or removal of a person from the court room to “protect the right of the accused to a fair and public trial or to maintain the dignity and decorum of the proceedings”. An accused could be removed for persistent disruptive behaviour after a warning. Under the heading Contempt of Court, ICTY Rule 77 provides that “[t]he Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice”. The ICC Statute has similar provisions under the heading, Offences against the Administration of Justice.<sup>369</sup>

#### **2.7.11.9. Victims and Witnesses**

The Charters of the post-Second World War Tribunals were silent on the rights of victims. The ICTY and ICTR Statutes, in identical terms, specify that the rules of procedure and evidence should provide for the protection of victims and witnesses.<sup>370</sup> The original ICTY Rules established a “victims and witnesses unit” under “the authority of the Registrar”.<sup>371</sup> Witness protection did not seem to be an issue in the 1940s; the 33 Nuremberg prosecution witnesses testified in open court and in their own names. Other issues now include expert witnesses. Neither the IMT nor IMTFE Charters had any specific provisions on expert evidence, but experts testified at Nuremberg, for example in the pre-trial proceedings regarding the fitness to stand trial of Gustav Krupp. The ICC, following the example of the ICTY and ICTR, has sophisticated witness and victim protection provisions.<sup>372</sup>

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<sup>368</sup> IMT Charter, Art. 18(a) and (b), see *supra* note 27; IMTFE Charter, Art. 12(a) and (b) under the heading Conduct of Trial, see *supra* note 6.

<sup>369</sup> ICC Statute, Art. 70, Offences against the Administration of Justice, and Art. 71, Sanctions for Misconduct before the Court, see *supra* note 88.

<sup>370</sup> ICTY Statute, Art. 22, see *supra* note 97; ICTR Statute, Art. 22, see *supra* note 97.

<sup>371</sup> ICTY, Rules of Procedure and Evidence, Rule 34, see *supra* note 89.

<sup>372</sup> For example, ICC Statute, Art. 68, see *supra* note 88; ICC, Rules of Procedure and Evidence, Rules 87, 88, see *supra* note 153.



#### **2.7.11.10. Closed Session Hearings**

Another feature of international criminal proceedings that appears to have originated at Nuremberg is hearing evidence in closed session.<sup>373</sup> The IMT Rules permitted “the closing or clearing of the Tribunal or take any other steps which to the Tribunal seem just”.<sup>374</sup> International human rights law also permits this in certain circumstances.<sup>375</sup>

### **2.8. Judgment**

#### **2.8.1. Reasoned and Dissenting Judgments, Decisions and Separate Opinions**

Majority judgments, dissents and reasoned decisions in international criminal law proceedings also originated at the IMT and IMTFE. In a common law jury trial – irrespective of the seriousness of the charges – the “judgment” of fact is expressed with the words, “guilty” or “not guilty”. Policy reasons for this can include protecting the sanctity or secrecy of jury de-

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<sup>373</sup> See, for example, ICTY, Rules of Procedure and Evidence, Rule 79, Closed Sessions, see *supra* note 89:

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

- (i) public order or morality;
- (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
- (iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

<sup>374</sup> IMT, Rules of Procedure, Rule 7(c), see *supra* note 122. 1953 Revised Draft Statute for an ICC, Art. 39, Publicity of Hearings, see *supra* note 50, provided:

1. The Court shall sit in public unless there are exceptional circumstances in which the Court finds that public sittings might prejudice the interests of justice.
2. The deliberations of the Court shall take place in private and shall not be disclosed.

There was no commentary on this in the committee’s report.

<sup>375</sup> See, for example, European Convention on Human Rights, Art. 6:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

liberations, and not requiring the legally non-qualified to provide quasi-judicial reasons for decisions carrying major legal consequences.<sup>376</sup> According to modern international human rights law, judges – but not juries – must reason their decisions and judgments.<sup>377</sup>

Since 1920, first the PCIJ and then the ICJ have had to issue reasoned judgments in open court.<sup>378</sup> This provided a good precedent for international judges sitting together to pronounce judgment. And in the environment of distrust prevailing at the beginning of the Cold War, what could provoke more legal dispute than a non-reasoned judgment on the conviction, or even worse, the acquittal, of a presumed Nazi or Japanese war criminal? The IMT Charter therefore required that the “judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based”.<sup>379</sup> The IMTFE Charter similarly specified that “[t]he judgment will be announced in open court and will give the reasons on which it is based”.<sup>380</sup> Neither specified how much reasoning would suffice – but as there was no right to appeal a judgment of guilt or acquittal, the rationale for reasoning was not as strong – notwithstanding the requirements at the PCIJ and ICJ. The IMTFE Charter stated that

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<sup>376</sup> Although this clearly does not apply in the United States, in which jurors almost seem obligated to give post-verdict interviews detailing what happened in the deliberation room.

<sup>377</sup> European Court of Human Rights, Guide on Article 6, Right to a Fair Trial (Criminal Limb), Council of Europe/European Court of Human Rights, 2014, para. 111, which has been interpreted to include the obligation to provide a reasoned decision:

Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence.

ECHR, *Papon v. France* (dec.), no. 54210/00, ECHR 2001-XII (p. 27 English translation), *Ruiz Torija v. Spain*, 9 December 1994, Series A no. 303-A, para. 29.

<sup>378</sup> League of Nations, Permanent Court of International Justice Statute, 16 December 1920, Arts. 56, 58 (‘PCIJ Statute’); International Court of Justice, Statute, 26 June 1945, Arts. 56(1), 58 (‘ICJ Statute’).

<sup>379</sup> IMT Charter, Art. 26, see *supra* note 27; it was also final and not subject to review.

<sup>380</sup> IMTFE Charter, Art. 17, see *supra* note 6. It too was not subject to an appeal, although unlike the IMT it provided the right of review on sentence, providing:

The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

the judgment had to be announced “in open court”,<sup>381</sup> and while there was no such requirement at Nuremberg, the judgment was accordingly so delivered. Given the theatre of the proceedings and the sentencing of 11 defendants to death, it is unimaginable that it could not have been delivered in open court.

In 1949, after surveying the differing practices of the post-war war crimes courts, George Brand wrote that “there is no rule of customary international law which provides that a court delivering a judgment in a war crime trial must state the reasons for its decision”.<sup>382</sup> That is consistent with the General Assembly’s 1951 Draft Statute for an International Criminal Court, which did not draw from the precedents of the judgments of Nuremberg, Tokyo and US Military Tribunals, nor the PCIJ or ICJ, but only required that the judgment “shall be read in open court”.<sup>383</sup>

However, since the ICTY’s inception – and consistent with both the Nuremberg and Tokyo precedents and the subsequent development of international human rights law – its Statute has required judgments that

shall be rendered by a majority of the Judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.<sup>384</sup>

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<sup>381</sup> *Ibid.*

<sup>382</sup> George Brand, “The War Crimes Trials and the Laws of War”, in *British Yearbook of International Law*, 1949, vol. 26, p. 417. He noted that the US Nuremberg Military Tribunal judgments under Control Council Law No. 10 gave reasoned judgments, as did Norwegian, French and Dutch courts, but the Canadian, Australian, British and other American Military Commissions generally did not.

<sup>383</sup> 1953 Revised Draft Statute, Art. 47, see *supra* note 50. The 1953 Committee Report, see *supra* note 230, is silent on this issue. Only Art. 38(4) under Rights of the Accused imposed a requirement to provide reasons:

If the Court considers it impossible to ensure a fair trial, the Court may, by a decision supported by reasons, suspend the proceedings and, if they are not resumed within a time limit determined by the Court, dismiss the case. If the case be dismissed, the accused shall be automatically released.

<sup>384</sup> ICTY Statute, Art. 23(2), see *supra* note 97; see also ICTR Statute, Art. 22(2), *supra* note 97; SCSL Statute, Art. 18, *supra* note 174; and STL Statute, Art. 23, *supra* note 8. The original ICTY, Rules of Procedure and Evidence, Rule 88, see *supra* note 89, did not specify any requirements for reasoning but in 1998 a new Rule 98ter(c) mirroring Art. 23(2) was inserted. Rule 117(B) and (D) mirror this in relation to appeal judgments.

The modern international courts and tribunals do not just allow, but strongly feature, dissenting and separate opinions – some very much so. Although neither the IMT nor IMTFE Charters expressly provided for the publication of dissenting or separate opinions, both provided for majority verdicts. The dissenting opinions at both Tribunals could be described as being particularly robust, with strong dissents on conviction and acquittal at both.<sup>385</sup>

Dissent is a continuing particularity of international criminal law proceedings. Many civil law systems do not feature dissenting judgments or decisions, at least at the trial level, although now, in common law systems featuring judge-made law, this is an essential feature. At Nuremberg, with judges from four wartime Allies, from different legal systems, dissent had to be allowed. Civil law jurisdictions tend to favour a single court judgment, at least at the trial level, in which it may not even be known if the decision has been made by a majority, nor why. The common law, on the other hand, has a long tradition of vigorous dissent, which assists the development of judge-made law and statutory interpretation. Majority judgments of conviction or acquittal, in the environment following the Second World War, clearly required reasoning. The historical record provided an obvious motive; while the need for transparency provided another.

Separate opinions were a feature of public international law at the time as both the 1920 Statute of the PCIJ and the 1945 ICJ Statute both allowed the publication of separate opinions.<sup>386</sup> Both the IMT and IMTFE

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<sup>385</sup> Five of the Tokyo judges issued separate out of court opinions, including dissenting on convictions. One judge, Judge Radhabinod Pal, wrote a 1,235-page dissent in which he would have acquitted all defendants. Apparently, publication of his opinion was prohibited in Japan until the Allied occupation ended in 1952. See IMTFE, *United States of America et al. v. Araki Sadao et al.*, Judgment of the Hon'ble Mr. Justice Pal Member from India, 1 November 1948 (<https://www.legal-tools.org/doc/712ef9/>). At Nuremberg, Judge Nikitchenko published a Dissenting opinion of the Soviet Member of the International Military Tribunal in which he dissented on the acquittals of Hjalmar Schacht, Franz von Papen and Hans Fritzsche, the life sentence imposed on Rudolf Hess (preferring a death sentence) and not declaring criminal the Reichscabinet, the General Staff and the Oberkommando der Wehrmacht, the Supreme Command of the Armed Forces. The dissent was announced immediately after sentencing on the afternoon of 1 October 1946 and the written dissent was published with the judgment. IMT, Judgment, see *supra* note 208.

<sup>386</sup> PCIJ Statute, Art. 57, see *supra* note 378 and ICJ Statute, Art. 57, see *supra* note 378, the only difference being the use of the word “dissenting” in the PCIJ Statute.

Charters specified that decisions could be by majority.<sup>387</sup> At Nuremberg the presiding judge's vote could decide a deadlock, except for a conviction which required three votes out of four. The acquittal of Franz von Papen by tied vote illustrates this, as does the stinging dissent of the Soviet judge, Nikitchenko, for the three majority acquittals.<sup>388</sup> The Tokyo Tribunal had judges from 11 different nationalities, but a quorum of the 11 judges was six, with the casting vote of the president being decisive in the event of an even split. This meant that the votes of three judges could be decisive. Judicial absence was also permitted, as it is in the modern rules of procedure and evidence, and even substitution<sup>389</sup> (this is permitted by the Rules of the ICTY, but not at the ICC or STL, for example). The 1953 Revised Draft Statute for an International Criminal Court provided: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion".<sup>390</sup>

The modern courts and tribunals also allow simple majority verdicts,<sup>391</sup> only the ECCC specifies the nationality requirement in needing an international judge to be in the majority.<sup>392</sup> In practice, in three-bench

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<sup>387</sup> IMT Charter, Art. 4(c), see *supra* note 27: "Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those Members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive". (The emphasis being on the word "present".) See also IMTFE Charter, Art. 4(b), see *supra* note 6.

<sup>388</sup> See Nina H.B. Jørgensen and Alexander Zahar, "Deliberation, Dissent, Judgment", in Sluiter *et al.*, 2013, p. 1157, see *supra* note 9.

<sup>389</sup> IMTFE Charter, Art. 4(c). See, generally, Boister and Cryer, 2008, pp. 95–96, *supra* note 46. One judge arrived two weeks late, another five and a third, two months into the trial.

<sup>390</sup> The 1953 Committee Report, para. 138, see *supra* note 230, stated re Art. 57:

Other members, however, thought that separate and dissenting opinions would contribute to the development of international criminal law. It had been found in countries where dissenting opinions were allowed that the development of the law was often much influenced by them.

<sup>391</sup> ICTY Statute, Art. 23(2), see *supra* note 97; ICTR Statute, Art. 22(2), see *supra* note 97; SCSL Statute, Art. 18, see *supra* note 174; ICC Statute, Art. 74(3), see *supra* note 88. See also ICTY, Rules of Procedure and Evidence, Rule 87(A), see *supra* note 89; ICTR, Rules of Procedure and Evidence, Rule 87(A), see *supra* note 191; SCSL, Rules of Procedure and Evidence, Rule 87(A), see *supra* note 191. The original ICTY Rule 87, Deliberations, specified that a majority of judges had to be satisfied of the guilt of the accused beyond reasonable doubt.

<sup>392</sup> Requiring four out of five judges of the Trial Chamber, and five out of the seven judges of the Appeals Chamber for decisions, Law on the Establishment of the Extraordinary Cham-

panels, it is a two-thirds majority. In this sense, the Nuremberg Tribunal requirement of a three-quarters majority for a conviction, allowed a higher standard in favour of the defence. Today, by contrast, all international courts and tribunals allow prosecution appeals against majority Trial Chamber acquittals that could be allowed by an Appeals Chamber majority; the consequence could be four judges could be for a conviction and four for an acquittal.

The ILC's 1994 Draft Statute would not have permitted dissenting judgments at trial or on appeal,<sup>393</sup> and some states at the Rome Conference did not want published dissents.<sup>394</sup> Judge McDonald, the ICTY President, had urged the conference to allow dissenting opinions, saying that the ICTY's "rules allowing for separate and dissenting opinions had proved highly beneficial to the development of international criminal law, and the availability of differing interpretations of that embryonic body of law had contributed to its maturation".<sup>395</sup> The Nuremberg, Tokyo, ICJ, ICTY and ICTR precedent prevailed and the ICC Statute allows a written reasoned decision, to which the decision shall contain the views of the

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bers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004, NS/RKM/1004/006, Art. 14(1) new (<https://www.legal-tools.org/doc/9b12f0/>).

<sup>393</sup> 1994 Draft Code of Crimes, commentary, p. 59, see *supra* note 187:

Different views were expressed on the desirability of allowing separate or dissenting opinions. Some felt that they could undermine the authority of the court and its judgements. Other members believed that judges should have the right to issue separate, and especially dissenting, opinions as a matter of conscience, if they chose to do so, pointing out that this was expressly allowed by article 23 paragraph 2, of the statute of the International Tribunal. It was also suggested that these opinions would be important in the event of an appeal. On balance the Commission preferred the former view.

<sup>394</sup> See generally, Jørgensen and Alexander Zahar, 2013, pp. 1178–79, *supra* note 388. During the Rome Conference, Syria, the Philippines and Canada proposed allowing dissenting judgments. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, vol. III, Reports and other documents, United Nations, New York, pp. 321–23, 2002, UN doc. A/CONF.183/C.1/WGPM/L.53; UN doc. A/CONF.183/C.1/WGPM/L.6; UN doc. A/CONF.183/C.1/WGPM/L.73 ('UN Diplomatic Conference').

<sup>395</sup> United Nations Diplomatic Conference, Official Records, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 2002, p. 79; UN doc. A/CONF.183/SR.2.

majority and the minority. The decision or a summary thereof shall be delivered in open court.

The decision (that is, the judgment) must be in writing and “shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions”.<sup>396</sup> Although expressed to be a single document, it may contain a dissent or a separate decision. McDonald was correct. The judges of the ICC, irrespective of their juridical origin have likewise fully embraced this prerogative.

## 2.9. Sentencing Procedure

In April 1945, before the British agreed to an international military tribunal, their Lord Chancellor declared that the judges should not decide punishment, as he would “never consent to allow British judges to mount the Bench for the purpose of carrying out the orders of any Governments or combinations of Governments”.<sup>397</sup> The Nuremberg and Tokyo trial processes, unlike typical common law or adversarial proceedings, were not bifurcated. Sentencing followed a verdict of guilt, meaning that any evidence regarding mitigation had to be given during the trial. Neil Boister and Robert Cryer write: “The record is full of examples of rules alien to the American process being made up as the trial progressed. For example, the Tribunal insisted in spite of defence howls of protest that evidence in mitigation be given before judgment”.<sup>398</sup> Some American and US military trials used the more familiar bifurcated procedures. The Nuremberg and Tokyo precedent has been followed by two modern tribunals – the ICTY and the ICTR. The original ICTY and ICTR Rules also allowed this but were later amended to delete the procedure.<sup>399</sup> The SCSL has a bifurcated

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<sup>396</sup> ICC Statute, Art. 74(4), see *supra* note 88, for trial judgments, and, identically, for appeals, see Art. 83(4).

<sup>397</sup> Memorandum to Judge Rosenman from Lord Simon (Lord Chancellor) Smith, 6 April 1945, in Smith, 1982, p. 150; see also letter from US Ambassador to UK to Secretary of State, 7 April 1945, in *Foreign Relations of the United States: Diplomatic Papers*, vol. III, US State Department, Washington, DC, 1945, p. 1158, enclosing Lord Simon's letter.

<sup>398</sup> Boister and Cryer, 2008, p. lxii, see *supra* note 10.

<sup>399</sup> ICTY, Rules of Procedure and Evidence, see *supra* note 89, the original Rule 100, Presentencing Procedure, now Rule 98ter, Judgment, and Rule 101, Penalties. ICTR, Rules of Procedure and Evidence, Rules 88 and 101, see *supra* note 191.

process and the STL Rules contemplate one.<sup>400</sup> The ICC Statute requires a bifurcated process and it was utilised in the ICC's first contested trial.<sup>401</sup>

## 2.10. Conclusion

So, to return to the question posed in the title. Evolutionary, revolutionary, or something more sinister? The answer combines the three themes.

Evolutionary, yes, this is self-evident. Nuremberg and Tokyo were the first internationalised criminal tribunals. Their hybrid procedures, which persevere, have evolved. They have evolved over 70 years to encompass the international human rights law guarantees to defendants including the right to appeal a conviction or sentence. The evolution includes other features such as the role of victims and witnesses, sophisticated state co-operation regimes and sentencing regimes.

Revolutionary? Also, yes. Uniting the Allies behind the American and Soviet plan to hold internationalised criminal trials before a military tribunal at Nuremberg was revolutionary. This was a world first. The procedures were also revolutionary. For the first time, these hybrid procedures were used in an internationalised criminal trial – and they required invention. This was a true revolution in criminal procedural thinking. National criminal procedures evolve over many, many years. The Nuremberg procedures were instantaneous. They were revolutionary.

And sinister? Well, yes, in some respects at least. The records of the Nuremberg negotiations between the Allies, and those internal to the American and British governments reveal a strong desire to buttress the prosecution and to suppress defence rights. The four governments each appointed two judges and their own prosecutors. They controlled the collection of evidence and with their own prosecutors, the selection of charges and defendants. Tokyo was similar. The Allies at Nuremberg wanted a swift trial on an embracing conspiracy count that hopefully would ensnare all defendants. They wanted to use the Tribunal's findings on the conspiracy and conspirators as an adjudicated fact in succeeding trials. And, to

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<sup>400</sup> SCSL, Rules of Procedure and Evidence, Rule 100(A), see *supra* note 191; STL, Rules of Procedure and Evidence, Rule 171(A), see *supra* note 194.

<sup>401</sup> ICC Statute, Art. 76(2), see *supra* note 88. ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, 10 July 2012 (<https://www.legal-tools.org/doc/c79996/>).



restrict the defence's capacity to challenge the prosecution's case, they had to dispense with any "technical" rules of evidence. They wanted to use the Nazi documents against the defendants but without oral evidence. The procedures were accordingly designed. But, at the same time, the trial had to appear fair. The judges added certain defence procedural rights relating to, for example, the timing of disclosure – the 15 days between the service of the indictment and the start of trial. So, yes, from the perspective of defence rights, it was less than desirable.

Why, therefore – despite these shortcomings – have these pioneering procedures more or less survived, such as the adversarial trial process, including the manner and order of presenting evidence, the independent prosecutor, guilty pleas, the indictment, and inclusive and non-technical rules of evidence? A major reason is their built-in transparency, resulting from needing a public showing of both the evidence and the prosecution case of each Nuremberg Ally. This persists. Transparency is the bedrock of international trials. International trials – such as those at the ICC, SCSL and STL – may involve devolved sovereignty. The states concerned, their communities and the "international community" need confidence in this process of devolution. Procedural transparency can build such confidence.

In the same vein, adversarial trials are transparent. The evidence is presented publicly. The prosecution, defence and participating victims may call or challenge evidence. The precise order of questioning witnesses is less important than its being done publicly. Pleas of guilty are also transparent. Transparency also requires independent prosecutors and judges who are not appointed by national governments. Independent prosecutors who investigate cases also provide procedural transparency when presenting the evidence in court, as do independent defence counsel who can investigate and then present their own cases in the courtroom.

This ties in with the theme of mutual mistrust and suspicion – a less polite way of referring to mutually assured transparency.

The best explanation for the ICTY and then the ICTR, the SCSL, the STL and, to a large extent, the ICC keeping the Nuremberg evidentiary procedures – inclusionary rules, not bound by technical rules, the evidence having to be relevant and probative, hearsay being admissible *et cetera* – is cost, pragmatism and precedent. On cost, long trials cost more, and much political pressure is applied to reduce their length. Judges sitting in rule-making plenaries may not be immune to outside diplomatic

pressure to expedite matters. Regarding pragmatism, atrocity crimes demand attention. Something must be done, and war criminals attract little public support (at least from those of the other side). Relaxed rules of admissibility against the defence attract minuscule approbation. And as for precedent, if it worked at Nuremberg and Tokyo – and defence rights can be tacked onto the model – maybe it will work again, so why reinvent the wheel? But Nuremberg had only 33 witnesses but thousands of documents.

And the ICTY did reinvent the wheel when experience showed that 33 witnesses multiplied over in each case – with each lasting longer than the Nuremberg trial – and its “completion strategy” did not go together. The rules were then made even more document-friendly.

In 1949 Telford Taylor wrote of the procedures used at Nuremberg:

A particularly fruitful field for research and publication is that of legal procedure. Almost all the war crimes trials have presented procedural questions to which different answers might be given depending upon what system of law the court chose to follow. The evidentiary weight to be given hearsay evidence or affidavits is a common example of this type of problem. Furthermore, the unsettled state of the world and the unusual nature of the trials precipitated many novel procedural matters which the tribunals had to determine without much in the way of past practice to guide them. Based upon the records of the Nurnberg trials alone a most useful study could be made, but a full treatment would require examination of the records of many other trials in order to make a comparative study. From such a study, the outlines of international legal procedure should emerge.<sup>402</sup>

Taylor was correct, and overall, despite all their shortcomings, the procedures have worked for large and complex international criminal trials. Thomas J. Dodd, in 1946, fittingly identified that “[t]he procedures worked out at the trial I feel sure will make it easier for similar courts to operate in the future”. Ironically – because these cases are supposed to be the world’s most serious – compromises are required if international criminal justice is to succeed.

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<sup>402</sup> Telford Taylor, “Forum Juridicum: An Outline of the Research and Publication Possibilities of the War Crimes Trials”, in *Louisiana Law Review*, 1949, vol. 9, no. 4, p. 501.

But even so, this convergence of mistrust and common interest demanded public transparency in the procedures of any resulting international criminal tribunal – whatever its composition. The situation was similar in the Far East after Japan’s defeat in August 1945.

The 1940s procedural rules and tribunal structures were undoubtedly “results orientated” and produced the transparency required in the post-war environment while guaranteeing that the trial processes would be rapid and at least notionally fair. But, at the same time, mutual suspicion and even antipathy existed within the victorious European Allies – generally with the Soviet Union on the one side, and the United Kingdom, the United States and France on the other. An expedient solution – one promising the defendants a fair trial but nonetheless designed to lessen the burden on the prosecution and tribunal – and workable for all Allies, was required.

Although the form of trial required negotiation and compromise, the Allies had shared goals in prosecuting perceived Nazi war criminals in an international criminal trial. This paramount aim easily overcame any parochial concerns about whose system was better – and the parties admitted this in the negotiations. The hybrid, produced after long negotiations, was fit for purpose. The Americans and the British, at least according to Americans such as the American chief prosecutor, Justice Jackson, were more concerned about this semblance of due process than the Soviets, and stressed this during the negotiations.

The conflict though was less about legal cultures – between the civil law and common law traditions, or even between authoritarian and more democratic regimes – than about the appearance of justice. The US negotiating proposals of April 1945 for the London negotiating drafts compromised into the Nuremberg IMT procedures and rules. And then – by the 1993 accident of history of a tribunal in search of a structural form and procedures – they mutated into a legal hybrid that has more or less survived today in the modern international criminal courts and tribunals.



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## Contribution of the United Nations *Ad Hoc* Tribunals to the Development of International Criminal Law

LIU Daqun\*

It has been over 20 years since the establishment of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR'), set up by the United Nations Security Council to address serious violations of international humanitarian law in the armed conflicts occurring in the former Yugoslavia<sup>1</sup> and the ICTR for the genocide in Rwanda.<sup>2</sup> They were established to bring to justice persons responsible for violations of international humanitarian law, to provide justice for victims, to deter further crimes and to aid the reconciliation process and restoration of peace. The Tribunals started their work in the midst of conflict. When the ICTY was set up in 1993 and the ICTR in 1994, they were necessary measures, since the countries which constituted the former Yugoslavia were still in the midst of furious armed conflicts and unable to investigate and prosecute the worst atrocities that were taking place, and Rwanda was still undergoing the trauma of genocide.

At that time, few could have imagined the two *ad hoc* Tribunals would be so successful. Take the ICTY for example; 161 individuals have been indicted and all of them arrested and put on trial.<sup>3</sup> This is a remarkable achievement if one considers that the *ad hoc* Tribunals do not have law enforcement mechanisms of their own. Both Tribunals have an im-

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<sup>1</sup> United Nations Security Council resolution 808, 22 February 1993 and United Nations Security Council resolution 827, 25 May 1993.

<sup>2</sup> United Nations Security Council resolution 955, 8 November 1994.

<sup>3</sup> Bosnian Serb president Radovan Karadžić and his military commander Ratko Mladić were arrested and brought to The Hague for trial in 2008 and 2011 respectively.

pressive record of activities. They have handled the most serious, complex and sensitive cases and established a jurisprudence that guides national jurisdictions and also other international courts. They send a very strong signal that the international community will no longer tolerate impunity, and those who commit serious international crimes will eventually be prosecuted and put on trial. The Tribunals have created a large body of jurisprudence that will influence the prosecution of international crimes in the future and has been largely adopted by the permanent International Criminal Court ('ICC') founded in 2002.

It is a formidable task to discuss the contributions of the two *ad hoc* Tribunals to the jurisprudence of international criminal law, since it is almost related to every aspect of the functions of the Tribunals, from substantive law to procedural law, from the legitimacy of the Tribunals to the outreach efforts. The task is even more difficult given that some of the legal norms and judicial practice are still in the process of development. As such, this chapter only deals with some selected issues.

### **3.1. Lawfulness of the Two *Ad Hoc* Tribunals**

It is submitted that the establishment of the *ad hoc* Tribunals by the UN Security Council through the resolutions adopted pursuant to Chapter VII of the UN Charter is, by and of itself, a development of international law.

On 25 May 1993 the Security Council established the ICTY by adopting resolution 827. One year later, on 8 November 1994, the Security Council set up the ICTR. Both Tribunals were established as temporary institutions for the specific purposes of investigating crimes committed during the wars in the former Yugoslavia and the genocide in Rwanda, and to prosecute those responsible. Great expectations were pinned on these two *ad hoc* Tribunals, including contributing to the restoration of peace and security; reconciliation by association; ending impunity through impartial prosecutions; delivery of justice to victims; and later, providing capacity building for reinforcing the national legal and judicial systems. However, some doubts existed among the politicians, diplomats and academics on whether it was lawful for the Security Council to establish *ad hoc* Tribunals. In addition, the defendants before the ICTY and ICTR filed motions challenging the jurisdiction of the *ad hoc* Tribunals.<sup>4</sup>

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<sup>4</sup> ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, the Defence filed a preliminary motion on 23 June 1995 pursuant to Rule 72 (A)(i) of the Rules of Procedure and Evidence, chal-

The traditional approach of establishing an international body is by treaty, which reflects the sovereign wills of states. The setting up of the ICC in 1998 through the adoption of the ICC Statute is an illustration of this traditional approach. When the establishment of the ICTY was proposed, the former Yugoslavia was still in the middle of an armed conflict. The Security Council needed to take swift action to safeguard world peace and security. The traditional method had at least two practical disadvantages. First, a treaty requires a lengthy process of negotiation, signature and ratification. It may take several years to conclude the whole process and a treaty only has binding force over its contracting State parties. In principle, it has no effect over the non-contracting States. It was very much doubtful that the States in the former Yugoslavia, still in the furious armed conflict, would have joined the treaty to establish a criminal tribunal.<sup>5</sup> In order to effectively and expeditiously implement the decision to set up a tribunal, the only alternative was to adopt a resolution by the Security Council under Chapter VII of the UN Charter, which would bind all States, regardless of their membership status in the UN. In this regard, it must be noted that Croatia and Bosnia and Herzegovina were admitted as members of the UN in 1992, after their respective declarations of independence from the former Yugoslavia.

In the first case before the ICTY – the *Tadić* case – the defendant challenged the lawfulness of the power of the Security Council to establish an *ad hoc* tribunal. The Appeals Chamber points out that

the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42.<sup>6</sup>

The Appeals Chamber further adds:

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lenging the jurisdiction of the ICTY. ICTR, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Kanyabashi filed a motion challenging the jurisdiction of the ICTR on 17 April 1997.

<sup>5</sup> Ralph Zacklin, “Some Major Problems in the Drafting of the ICTY Statute”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 362.

<sup>6</sup> ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 31 (‘*Tadić* Appeal Decision on Jurisdiction’).

It is evident that the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve “the use of force.” It is a negative definition. [...]

The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia. [...]

In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus “established by law.”<sup>7</sup>

An ICTR Trial Chamber reached essentially the same conclusions with respect to the legality of the establishment of the Rwandan Tribunal.<sup>8</sup>

### 3.2. Contributions to Substantive Criminal Law

Prior to the establishment of the *ad hoc* Tribunals, there was little or no mechanism to enforce the concept of international humanitarian law. Therefore the concept of international humanitarian law was seen as little more than a far-fetched doctrine. The *ad hoc* Tribunals answered this criticism by providing a remedy for the violations of international humanitarian law. They were the first international criminal courts to enforce the existing body of international humanitarian law, which was first tested at Nuremberg and Tokyo and later enshrined in conventions and treaties. In particular, the Tribunals have developed the application of customary law, not least in the interpretation of the Geneva Conventions of 1949, the Convention on the Prevention and Suppression of the Crime of Genocide (‘Genocide Convention’), and other international instruments addressing international crimes.

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<sup>7</sup> *Ibid.*, paras. 35, 38, 47, emphasis original.

<sup>8</sup> ICTY, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997.



### 3.2.1. Geneva Conventions

Ever since the adoption of the four Geneva Conventions of 1949, they had not been applied or tested in any international criminal jurisdictions before the establishment of the two *ad hoc* Tribunals. In their judicial practice, the ICTY and ICTR have articulated the component elements of each crime, developed the legal ingredients of “grave breaches” of the Geneva Conventions of 1949, further defined the test of overall control, re-interpreted the elements of an international armed conflict, and extended the definition of “protected persons” under the Conventions.

The ICTY holds that the test to be applied to determine if the armed conflict is or has been “international” is, *inter alia*, whether the other State has “overall control” over participants in the conflicts. This finding marks a departure from the “effective control” standard established by the International Court of Justice (‘ICJ’) in the *Nicaragua* case.<sup>9</sup> According to the *Tadić* Appeal Judgment, the overall control test requires an assessment of all the elements of control taken as a whole and a determination to be made on that basis as to whether there was the required degree of control. “Effective control” means a foreign country exercised the potential for control over the army of another country or organised group and which otherwise placed itself under the control of that foreign country. To be specific, “overall control” means a foreign State “has a role in organising, coordinating, [...] training and equipping or providing operational support to the group”, but does not require “the issuing of specific orders by the State, or its direction of each individual operation”.<sup>10</sup>

As an author correctly pointed out,

it is clear that in terms of defining international armed conflict for the purposes of the application of the grave breaches regime, the test has since been uniformly followed in the jurisprudence of the ICTY and a new path has been charted for international criminal jurisdictions.<sup>11</sup>

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<sup>9</sup> International Court of Justice, *Nicaragua v. United States of America*, Judgment of 27 June 1986, paras. 14–150.

<sup>10</sup> ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999 (‘*Tadić* Appeal Judgment’), para. 137.

<sup>11</sup> Ken Roberts, “The Contribution of the ICTY to the Grave Breaches Regime”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, p. 749.

It is submitted that there is no conflict between the two criteria, since effective control was used by the ICJ to determine the responsibility of State, while overall control applied by the *ad hoc* Tribunals to prove the contextual element, in which individual responsibility might be incurred. As a result, the overall control threshold may be easier to meet.

### 3.2.2. War Crimes

The Tribunals have narrowed the perceived differences between the laws or customs of war applicable in international and non-international conflicts, thus considering both standards for the protection of individuals. According to the Four Geneva Conventions and their Additional Protocol I, the regime of “grave breaches” could only be applied to international armed conflicts, not to non-international armed conflicts.<sup>12</sup> Unlike the ICTR Statute, the ICTY Statute does not explicitly provide for, nor does it exclude the criminalisation of serious violations of the laws or customs of war if they are committed within the context of an internal armed conflict. In the *Delalić et al. (Čelebići)* case, the Appeals Chamber observed that

to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.<sup>13</sup>

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<sup>12</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949, (‘Geneva Convention I’), Article 50; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12 August 1949, (‘Geneva Convention II’), Article 51; Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, (‘Geneva Convention III’), Article 130; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, (‘Geneva Convention IV’), Article 147; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (‘Additional Protocol I’), Article 85.

<sup>13</sup> ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeals Chamber Judgment, 20 February 2001, para. 172. Further note that the ICTY Appeals Chamber in *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 19 concludes:

States have come to consider that they have a common interest in the observance of certain minimum standards of conduct in certain matters; this includes certain aspects of conduct in an internal armed conflict.

As for the “protected persons”, the Appeals Chamber of the ICTY observes:

[the] legal approach [for defining protected persons], hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. [...]

In granting its protection, Article 4 [of Geneva Convention IV] intends to look to the substance of relations, not to their legal characterisation as such.<sup>14</sup>

It is therefore clear that by redefining the criteria for “protected persons”, the ICTY extends to the greatest extent the protection of civilians under the Geneva Conventions.

As for the crimes in violation of the laws or customs of war under Article 3 of the ICTY Statute, the Appeals Chamber of the ICTY provides more definite criteria:

Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>15</sup>

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To that extent, internal armed conflict is now the concern of international law without any question of reciprocity.

<sup>14</sup> Tadić Appeal Judgment, *supra* note 10, paras. 166, 168.

<sup>15</sup> ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002 (‘Kunarac Appeal Judgment’), para. 66.

The Appeals Chamber also finds that Common Article 3 of the 1949 Geneva Conventions has “gradually become part of customary law”,<sup>16</sup> and it “applies regardless of the internal or international character of the conflict”.<sup>17</sup>

### 3.2.3. Genocide

The Tribunals have considered the elements of genocide, in particular the definition of the target of such crime, as well as the *dolus specialis*, or specific intent of the crime.

The trial of Jean-Paul Akayesu before the ICTR was the first case of genocide to be tried since the enactment of the Genocide Convention nearly half a century earlier – genocide was not charged at Nuremberg and Adolf Eichmann was tried for an offence against the Jewish people. The *Akayesu* Trial Judgment states:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. [...]

[T]he offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.<sup>18</sup>

In *Krstić*, the Trial Chamber finds that able-bodied Muslim men in Srebrenica qualifies as part of a group and concluded that as such, they fell within the definition of victims of genocide. The crime of genocide

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<sup>16</sup> Tadić Appeal Decision on Jurisdiction, *supra* note 6, para. 98.

<sup>17</sup> ICTY, *Prosecutor v. Mladen Naletilić et al.*, Trial Chamber, Judgment, IT-98-34-T, 31 March 2003, para. 228 (‘Naletilić Trial Judgment’) (<https://www.legal-tools.org/doc/f2cfef/>).

<sup>18</sup> ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, ICTR-96-4-T, 2 September 1998 paras. 498, 520 (‘Akayesu Trial Judgment’) (<https://www.legal-tools.org/doc/b8d7bd/>).

does not necessarily require the killing of every individual of a group, but only part of it. The Appeals Chamber points out:

It is well established that where a conviction for genocide relies on the intent to destroy a protected group “in part”, the part must be a substantial part of that group. The aim of Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole. [...]

The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. [...] If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.<sup>19</sup>

Indeed, the decision in *Krstić* has been described as the “most important achievement”<sup>20</sup> of the ICTY in the sense that an international tribunal has finally recognised and labelled the events in Srebrenica by its proper name: genocide. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica genocide. Putting a name to the crime means that there is now a recorded historical document affirming that crimes committed at Srebrenica are in fact genocide.<sup>21</sup> Those responsible will bear this stigma and it will “serve as a warning to those who may in the future contemplate the commission of such a heinous act”.<sup>22</sup>

For the first time, the ICTR in the *Akayesu* Case finds that rape and other acts of sexual violence constitute infliction of serious bodily or men-

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<sup>19</sup> ICTY, *Prosecutor v. Radislav Krstić*, Appeals Chamber, Judgment, IT-98-33-A, 19 April 2004 paras. 8, 9, 12 (‘Krstić Appeal Judgment’) (<https://www.legal-tools.org/doc/86a108/>).

<sup>20</sup> Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, Open Society Institute, New York, 2010, p. 18.

<sup>21</sup> Rebecca Devitt, “Justice and Peace: The Role of International Tribunals in Transitional Justice” (<http://www.e-ir.info/2012/01/24/justice-and-peace-the-role-of-international-tribunals-in-transitional-justice/>).

<sup>22</sup> Krstić Appeal Judgment, para. 37, see *supra* note 19.

tal harm on members of the group,<sup>23</sup> and also destruction which may fall short of causing death. The Trial Chamber states:

These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of Tutsi group as a whole. [...]

Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.<sup>24</sup>

The Trial Chamber further holds that measures intended to prevent births within the group

should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.<sup>25</sup>

The Chamber notes that the measures may be mental as well as physical: “For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate”.<sup>26</sup>

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<sup>23</sup> Akayesu Trial Judgment, paras. 688, 706–7, 731–34, see *supra* note 18. See also ICTR, *Prosecutor v. Clement Kayishema et al.*, Trial Chamber, Judgment, ICTR-95-1-T, 21 May 1999, para. 108 (‘Kayishema Trial Judgment’) (<https://www.legal-tools.org/doc/0811c9/>); *Prosecutor v. Musema*, Trial Chamber, Judgment, ICTR-96-13-T, 27 January 2000, para. 156 (‘Musema Trial Judgment’) (<https://www.legal-tools.org/doc/1fc6ed/>).

<sup>24</sup> *Ibid.*, paras. 731–32.

<sup>25</sup> *Ibid.*, para. 507.

<sup>26</sup> *Ibid.*, para. 508. See also ICTR, Kayishema Trial Judgment, para. 117, *supra* note 23.; ICTR, *Prosecutor v. Rutaganda*, Trial Chamber, Judgment, ICTR-96-3-T, 6 December 1999, para. 53 (<https://www.legal-tools.org/doc/f0dbbb/>); Musema Trial Judgment, para. 158, see *supra* note 23.

Since the Genocide Convention had never been applied before the setting up of the *ad hoc* Tribunals, the issue of whether conspiracy, incitement, attempt and complicity to commit genocide are forms of responsibilities or crimes was not quite settled. Some states regard them as forms of responsibility and some as crimes in their domestic jurisdictions. The ICTR in the *Nahimana et al.* case points out that “conspiracy is an inchoate offence, and as such has a continuing nature that culminates in the commission of the acts contemplated by the conspiracy”.<sup>27</sup>

The next question is whether a court may convict for both genocide and conspiracy to commit genocide. In the Trial Chamber of the ICTR, the findings of this issue were not consistent. In the *Musema* case, the Trial Chamber alleges the accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts.<sup>28</sup> In another case, the Trial Chamber says that

distinct crimes may justify multiple convictions, provided that each statutory provision that forms the basis for a conviction has a materially distinct element not contained in the other. [...] The offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy. Accordingly, the Chamber considers that the Accused can be held criminally responsible for both the act of conspiracy and the substantive offence of genocide that is the object of the conspiracy.<sup>29</sup>

The Appeals Chamber of the ICTR in the *Gatete* case concludes that “a trial chamber is bound to enter convictions for all distinct crimes which have been proven in order to fully reflect the criminality of the convicted person”.<sup>30</sup> The Appeals Chamber adds that

criminalising conspiracy to commit genocide, as an inchoate crime, aims to prevent the commission of genocide. However, the Appeals Chamber considers that another reason for criminalising conspiracy to commit genocide is to punish the collaboration of a group of individuals resolved to commit genocide. [...] [T]he Appeals Chamber finds [...] that the in-

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<sup>27</sup> ICTR, *Prosecutor v. Nahimana et al.*, Trial Chamber, Judgment, ICTR-96-11-T, 3 December 2003, para. 1044 (‘*Nahimana* Trial Judgment’) (<https://www.legal-tools.org/doc/45b8b6/>).

<sup>28</sup> *Musema* Trial Judgment, *supra* note 26, para. 198.

<sup>29</sup> *Nahimana* Trial Judgment, *supra* note 27, para. 1043.

<sup>30</sup> ICTR, *Prosecutor v. Jean-Baptiste Gatete*, Appeals Chamber, Judgment, ICTR-00-61-A, 9 October 2012, para. 261.

choate nature of the crime of conspiracy does not obviate the need to enter a conviction for this crime when genocide has also been committed by the accused, since the crime of genocide does not punish the agreement to commit genocide.<sup>31</sup>

### 3.2.4. Crimes against Humanity

The Nuremberg and Tokyo Charters require acts of crimes against humanity committed before or during the war, while the Statute of the ICTR uses a different contextual formulation: “a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”. In their judicial practice, both Tribunals severed the nexus to armed conflicts and discriminate intent for the crimes against humanity, thus crimes against humanity become a *sui generis* crime in international criminal law, which could occur in war or in peace time without discriminate intent as a general requirement.

Unlike the Statute of the ICTR, the Statute of the ICTY follows the IMT Charter, requiring the crimes against humanity be connected with the armed conflicts.<sup>32</sup> Along with the development of the jurisprudence of international criminal law, nowadays, crimes against humanity do not require any linkage with armed conflicts. The Appeals Chamber interprets Article 5 of the Statute as “imposing the additional jurisdictional requirement that crimes against humanity be committed in armed conflict, the Security Council intended to limit the jurisdiction of the Tribunal to those crimes which had some connection to armed conflict in the former Yugoslavia”.<sup>33</sup> The Appeals Chamber holds that “the existence of an armed conflict is not a constitutive element of the definition of crimes against humanity, but only a jurisdictional prerequisite”.<sup>34</sup>

It is submitted that the requirement of the linkage with armed conflict does not necessarily reflect the trend of the development of interna-

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<sup>31</sup> *Ibid.*, para. 262.

<sup>32</sup> Article 5 of the ICTY Statute states that the “[t]ribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population”.

<sup>33</sup> ICTY, *Prosecutor v. Šešelj*, Decision on the Interlocutory Appeal Concerning Jurisdiction, IT-03-67-AR72.1, 31 August 2004, para. 12 (<https://www.legal-tools.org/doc/a64634/>).

<sup>34</sup> ICTY, *Prosecutor v. Šešelj*, Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal Concerning Jurisdiction”, IT-03-67-AR72.1, 15 June 2006, para. 21 (<https://www.legal-tools.org/doc/d31d67/>).



tional law, but is only applicable to the ICTY jurisdiction. The same is true for the ICTR Statute, which requires discriminate intent with regard to crimes against humanity.<sup>35</sup> The Appeals Chamber in the *Akayesu* case holds explicitly that “Article 3 [...] does not require that all crimes against humanity [...] be committed with a discriminatory intent”.<sup>36</sup>

As for the contextual element of crimes against humanity, the English text of the ICTR Statute reads “widespread or systematic”, while the French text “*généralisée et systématique*”. When the two versions are not consistent, the ICTR Trial Chamber looks into customary international law and finds that customary international law requires that the “act can be part of a widespread or systematic attack and need not be a part of both”.<sup>37</sup>

### 3.2.5. Torture

Determining the status of torture has been one of the greatest jurisprudential achievements of the *ad hoc* Tribunals. They have identified a general prohibition of torture in international law that cannot be derogated from by a treaty, national law or any other instruments. In the *Furundžija* case, the Trial Chamber declares that “the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has correlative right”.<sup>38</sup> The crime of torture is now subject to universal jurisdiction and its *jus cogens* status under international law has been consolidated.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘Torture Convention’) requires the individual committing the crime of torture act in an official capacity, which the ICTY eventually departs from. The Appeals Chamber in *Kunarac* states that

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<sup>35</sup> Article 3 of the ICTR Statute states that the “[t]ribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious ground [...]”.

<sup>36</sup> ICTR, *Prosecutor v. Jean-Paul Akayesu*, Appeals Chamber, Judgment, , ICTR-96-4-A, 1 June 2001, paras. 447–69 (<https://www.legal-tools.org/doc/b8d7bd/>).

<sup>37</sup> *Akayesu* Trial Judgment, para. 579, see *supra* note 18.

<sup>38</sup> ICTY, *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, IT-95-17/1-T, 10 December 1998, para. 151 (<https://www.legal-tools.org/doc/e6081b/>).

[t]he definition of the crime of torture, as set out in the Torture Convention, may be considered to reflect customary international law. The Torture Convention was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity. Consequently, the requirement set out by the Torture Convention that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture only when those acts are committed by “a public official [...] or any other person acting in a non-private capacity”.<sup>39</sup>

However, in the later judicial practice, the Appeals Chamber does not follow the definition of the Torture Convention nor the previous jurisprudence, but adopts the definition applicable to the specific situation in former Yugoslavia by concluding that

[t]he Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.<sup>40</sup>

The Trial Chamber in *Limaj et al.* declares that “[u]nder customary international law and the jurisprudence of the Tribunal it is not necessary that the perpetrator has acted in an official capacity” and “this issue is now settled by the Appeals Chamber”.<sup>41</sup>

### 3.2.6. Rape

Both Tribunals have examined and considered the definition of rape as a crime against humanity. The legal approach to sexual violence during wartime had not been effectively developed before the creation of the two *Ad hoc* Tribunals, considering that rape is one of the “grave breaches” under the Geneva Conventions. The question therefore arose as to whether rape committed during an armed conflict should be distinguished from

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<sup>39</sup> Kunarac Appeal Judgment, para. 146, *supra* note 15.

<sup>40</sup> *Ibid.*, para. 148.

<sup>41</sup> ICTY, *Prosecutor v. Limaj et al.*, Trial Chamber, Judgment, IT-03-66-T, 30 November 2005, para. 240 (‘Limaj Trial Judgment’) (<https://www.legal-tools.org/doc/4e469a/>).

rape as an ordinary crime in domestic jurisdiction. In *Kunarac*, the Trial Chamber criticises previous judgments for adopting too narrow a definition of rape. The previous judgments focus on the elements of coercion, force or threat of force. The *Kunarac* Trial Chamber holds that the use or threat of force is just one factor – among others – to indicate the absence of consent on the part of the victim. In *Akayesu* the ICTR Trial Chamber goes further, stating that rape can also constitute genocide if other requirements are satisfied. Indeed, the decision by the Tribunals in recognising that crimes of sexual violence can constitute war crimes, crimes against humanity, and genocide when other elements of these crimes are established has been hailed for recognising violence against women as a means of warfare and for empowering many victims, including women who are among thousands of the raped in the course of “ethnic cleansing”.<sup>42</sup>

### 3.3. Development of the Modes of Liability

The modes of liability were not elaborated in detail in the Nuremberg or the Tokyo Trials. The ICTY and ICTR have not only articulated the specific ingredients of each form of participation, for instance, the *actus reus* and *mens rea* of each mode,<sup>43</sup> but also expanded meanings of the present modes of liabilities on the basis of customary international law, as the Statutes of the *ad hoc* Tribunals do not purport to be a detailed code providing for every possible scenario and every solution thereto. The Statutes only set out in somewhat general terms the jurisdictional framework within which the Tribunals have been mandated to operate.

#### 3.3.1. Joint Criminal Enterprise (‘JCE’)

In the situations of the former Yugoslavia and Rwanda, most of the crimes under international criminal law are of a systematic, large-scale and collective character. Without a certain degree of co-operation and co-ordination of actions, it is virtually impossible to perpetrate atrocities such

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<sup>42</sup> Orentlicher, 2010, p. 44, see *supra* note 20.

<sup>43</sup> According to Art. 7(1) of the ICTY Statute and Art. 6(1) of the ICTR Statute: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [...] the present Statute, shall be individually responsible for the crime”.

as genocide or crimes against humanity. The political and military leaders were normally not at the crime scene when a particular crime was committed, but they are the masterminds behind the acts and use their subordinates to do the ‘dirty work’.

The *Tadić* Trial Chamber applies the JCE doctrine to deal with the situation at hand. JCE is characterised by the existence of a common criminal plan or purpose pursued by a plurality of persons, with all individuals contributing to the carrying out of crimes in execution of a common purpose. All participants are guilty regardless of the part they played. In *Tadić*, the Appeals Chamber holds the view that

the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called “concentration camp” cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in

which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).<sup>44</sup>

As for the application of the third form of JCE to the crimes requiring specific intent, such as genocide and persecution under crimes against humanity, there are still some different opinions among the judges of the ICTY.<sup>45</sup>

JCE is not a crime itself, but a mode of liability. It is a form of commission under Article 7(1) of the Statute.<sup>46</sup> JCE and conspiracy are two related but different concepts. Whilst mere agreement is sufficient in the case of conspiracy as a crime, the liability of a member of a JCE depends on the commission of criminal acts in furtherance of that enterprise.

It is therefore clear that the concept of JCE has become a useful tool in international criminal law, which allows for an attribution of criminal responsibility for consequences of such group activities to the mastermind behind the crime scene, especially for those high-level perpetrators that use their subordinates for criminal aims.

### 3.3.2. Extension of Commission

According to the *Tadić* Appeal Judgment, “committing” refers to a) “the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law”; or b) “participation in the realisation of a common design or purpose” (or participation in a JCE).<sup>47</sup>

The ICTR Appeals Chamber in the *Gacumbitsi* case expands the definition of commission by stating that

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<sup>44</sup> *Tadić* Appeal Judgment, para. 220, see *supra* note 10 (emphasis in original).

<sup>45</sup> ICTY, *Prosecutor v. Sainović et al.*, Appeals Chamber, Judgment, Partially Dissenting Opinion and Declaration of Judge Liu, IT-05-87-A, 23 January 2014, pp. 744–52.

<sup>46</sup> ICTY, *Prosecutor v. Kvočka et al.*, Appeals Chamber Judgment, IT-98-30/1-A, 28 February 2005, para. 79 (‘Kvočka Appeal Judgment’) (<https://www.legal-tools.org/doc/006011/>).

<sup>47</sup> *Tadić* Appeal Judgment, para. 188, see *supra* note 10.

[i]n the context of genocide, however, “direct and physical perpetration” need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime. Here, the accused was physically present at the scene of the Nyarubuye Parish massacre, which he “directed” and “played a leading role in conducting and, especially, supervising”. It was he who personally directed the Tutsi and Hutu refugees to separate – and that action, which is not adequately described by any other mode of Article 6(1) liability, was as much an integral part of the genocide as were the killings which it enabled.<sup>48</sup>

Some of the judges of the ICTR Appeals Chamber raise doubts about the extended form of commission, since it is far beyond the jurisprudence of the Tribunals and customary law and it is very easy to get confused with the modes of liability of JCE and co-perpetratorship which is rejected by the Appeals Chamber in the *Stakić* case.<sup>49</sup>

### 3.3.3. Aiding and Abetting

Aiding and abetting is a form of liability in most jurisdictions in the world. As opposed to the commission of a crime, aiding and abetting is a form of accessory liability.<sup>50</sup> According to the jurisprudence of the ICTY, “[a]iding and abetting” has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.<sup>51</sup>

On 27 February 2013 the Appeals Chamber of the ICTY rendered its judgment on the *Perišić* case, reversing the Trial Chamber’s conviction of aiding and abetting all the crimes charged by the prosecution. This re-

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<sup>48</sup> ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber, Judgment, ICTR-2001-64-A, 7 July 2006, para. 60 (<https://www.legal-tools.org/doc/aa51a3/>).

<sup>49</sup> ICTY, *Prosecutor v. Milomir Stakić*, Appeals Chamber, Judgment, IT-97-24-A, 22 March 2006 (<https://www.legal-tools.org/doc/09f75f/>). See also ICTR, *Prosecutor v. Gacumbitsi*, Appeals Chamber, Judgment, Partially Dissenting Opinion of Judge Guney, ICTR-2001-64-A, 7 July 2006; ICTR, *Prosecutor v. Munyakazi*, Appeals Chamber Judgment, Separate Opinion of Judge Liu, ICTR-97-36A-A, 28 September 2001; and ICTR, *Prosecutor v. Seromba*, Appeals Chamber, Judgment, Dissenting Opinion of Judge Liu, ICTR-2001-66-A, 12 March 2008.

<sup>50</sup> ICTY, *Prosecutor v. Dusko Tadić et al.*, Trial Chamber, Judgment, IT-94-1-T, 7 May 1997, para. 666 (<https://www.legal-tools.org/doc/0a90ae/>).

<sup>51</sup> Kunarac Appeal Judgment, para. 516, *supra* note 15.

versal is predicated on the finding that the Trial Chamber errs in holding that specific direction is not a required element of the *actus reus* of aiding and abetting liability.<sup>52</sup>

The specific direction requirement as an element of the *actus reus* of aiding and abetting liability was first mentioned in the *Tadić* Appeal Judgment rendered in 1999, which described the *actus reus* of criminal liability for aiding and abetting as follows:

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc), and this support has a substantial effect upon the perpetration of the crime.<sup>53</sup>

It is submitted that the *Tadić* Appeal Judgment does not intend to give a thorough definition of aiding and abetting. The inclusion of the specific direction element in the *actus reus* of aiding and abetting is only there to distinguish this mode of liability with the JCE. It has no independent meaning and it is a part of the substantial effect requirement.

In the *Mrkšić and Šljivančanin* case, the Appeals Chamber clarifies “that ‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting”.<sup>54</sup> In the *Blagojević* case, the Appeals Chamber holds that

specific direction has not always been included as an element of the *actus reus* of aiding and abetting [...] such a finding [of specific direction] will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime.<sup>55</sup>

This decision is upheld by the Appeals Chamber in *Lukić and Lukić*.<sup>56</sup>

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<sup>52</sup> ICTY, *Prosecutor v. Momčilo Perišić*, Appeals Chamber, Judgment, IT-04-81-A, 28 February 2013, paras. 25–36 (<https://www.legal-tools.org/doc/f006ba/>).

<sup>53</sup> *Tadić* Appeal Judgment, para. 229, see *supra* note 10.

<sup>54</sup> ICTY, *Prosecutor v. Mrkšić et al.*, Appeals Chamber, Judgment, IT-95-13/1-A, 5 May 2009, para. 159 (<https://www.legal-tools.org/doc/40bc41/>).

<sup>55</sup> ICTY, *Prosecutor v. Vidoje Blagojević et al.*, Appeals Chamber, Judgment, IT-02-60-A, 9 May 2007, para. 189 (<https://www.legal-tools.org/doc/c32768/>).

<sup>56</sup> ICTY, *Prosecutor v. Lukić and Lukić*, Appeals Chamber Judgment, IT-98-32/1-A, 4 December 2012, para. 424 (<https://www.legal-tools.org/doc/da785e/>).

On 23 January 2014 the Appeals Chamber rendered its judgment on *Šainović* case, pointing out that

the interpretation given in the *Perišić* Appeal Judgement would appear to be at odds not only with a plain reading of the *Mrkšić and Šljivančanin* Appeal Judgement, which states that specific direction is not an “essential ingredient” of aiding and abetting liability, but also with the *Lukić and Lukić* Appeals Judgment, which confirmed this holding. [...] [W]hen interpreting a particular judgement, primary consideration should be given to positions expressly taken and clearly set out in the judgement concerned. It is not clear that this approach was adopted in the *Perišić* Appeal Judgement with respect to the issue of specific direction as expressed in the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements. It would thus be more appropriate to conclude that the *Mrkšić and Šljivančanin* Appeal Judgement and the *Lukić and Lukić* Appeal Judgment, on one hand, and the *Perišić* Appeal Judgment, on the other hand, diverge on the issue of specific direction.<sup>57</sup>

Where it is faced with previous decisions that are conflicting, the Appeals Chamber is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice. Mindful of its duty to act in the interests of legal certainty and predictability while ensuring that justice is done in all cases, the Appeals Chamber considers the jurisprudence of the ICTY and the ICTR as well as customary international law to ascertain where the law stands on the issue of specific direction.

After in-depth analysis and careful consideration, the Appeals Chamber confirmed that

the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements stated the prevailing law in holding that “‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting”, accurately reflecting customary international law and the legal standard that has been constantly and consistently applied in determining aiding and abetting liability. Consequently, the Appeals Chamber, [...] unequivocally rejects the approach adopted in the *Perišić* Ap-

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<sup>57</sup> ICTY, *Prosecutor v. Šainović et al.*, Appeals Chamber, Judgment, IT-05-87-A, 23 January 2014, para. 1621 (<https://www.legal-tools.org/doc/81ac8c/>).



peal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.<sup>58</sup>

#### 3.3.4. Command Responsibility

The Tribunals have applied the modern doctrine of criminal responsibility of superiors – the so-called command responsibility. It has clarified that a *de jure* superior–subordinate relationship is not necessarily required for criminal responsibility. In the same vein, the Tribunals have removed uncertainty about the level of knowledge to be expected from a superior whose subordinates were about to commit crimes or have actually committed crimes.

The nature of command responsibility was not clear during the post-Second World War trials of Nazi and Japanese military and civilian officials. In the *Yamashita* case in 1945, the US Military Commission in Manila pointed out that

while commander of armed forces of Japan at war with the United States of America and its allies, [he] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he [...] thereby violated the laws of war.<sup>59</sup>

It appears that the Commission adopts the principle of objective liability for command responsibility since it does not require the commander to have effective control over his subordinates when they committed the crimes nor does it pay enough heed to the commander's knowledge of the crimes. The commander shares the criminal responsibilities with his subordinates who committed the crimes.

The first and most comprehensive judgment on the doctrine of superior responsibility at the ICTY is the *Čelebići* Trial Judgment, which makes an invaluable contribution to the development of the doctrine. The

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<sup>58</sup> *Ibid.*, para. 1650.

<sup>59</sup> Supreme Court of the United States, *Yamashita v. Styer*, Judgment, 4 February 1946, 317 US. 1.

Trial Chamber identifies three elements of superior responsibility pursuant to Article 7(3):

- i. The existence of a superior-subordinate relationship;
- ii. The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- iii. The superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>60</sup>

The judgment further points out that

in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.<sup>61</sup>

The *Aleksovski* Trial Chamber makes a distinction between individual responsibility under Articles 7(1) and 7(3) of the ICTY Statute by stating that the

doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the Statute but for his failure to act. A superior is held responsible for the acts of his subordinates if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.<sup>62</sup>

According to the conclusion of the Trial Chamber in *Halilović*, this responsibility is *sui generis*, distinct from other modes of participation of the crimes, namely planning, instigating, ordering, aiding and abetting or commission.<sup>63</sup> In light of this principle, the accused is individually crimi-

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<sup>60</sup> ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, IT-96-21-T, 16 November 1998, para. 346 ('Čelebići Trial Judgment') (<https://www.legal-tools.org/doc/6b4a33/>).

<sup>61</sup> *Ibid.*, para. 378.

<sup>62</sup> ICTY, *Prosecutor v. Zlatko Aleksovski*, Trial Chamber, Judgment, IT-95-14/1-T, 25 June 1999, para. 67 (<https://www.legal-tools.org/doc/52d982/>).

<sup>63</sup> ICTY, *Prosecutor v. Sefer Halilović*, Trial Chamber, Judgment, IT-01-48-T, 16 November 2005, para. 42 (<https://www.legal-tools.org/doc/abda04/>). See also ICTY, *Prosecutor v. Dragan Obrenović*, Trial Chamber, Judgment, IT-02-60/2-S, 10 December 2003, para. 100 (<https://www.legal-tools.org/doc/3f6409/>):

[w]hen a commander fails to ensure compliance with the principles of international humanitarian law such that he fails to prevent or punish

nally responsible for his failure to carry out his duty as a superior to exercise control and he is not charged with the crimes of his subordinates.<sup>64</sup> Therefore, a causal link “has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal responsibility on superiors for their failure to prevent or punish offences committed by their subordinates”.<sup>65</sup>

There is only one legal issue on command responsibility which has not been fully settled, that is the successor commander’s responsibility. The Appeals Chamber in *Hadžihasanović* concludes that a commander should not be held criminally responsible for his subordinates’ actions before his assumption of office, as it does not meet the effective control test established in *Čelebići*.<sup>66</sup> However, some of the judges are of a different opinion. They believe that such concurrence should be between the time at which the commander exercises effective control over the perpetrator and the time at which the commander fails to prevent or punish his subordinates.<sup>67</sup> Therefore the successor commander should be held responsible if he failed to punish his subordinates who committed the crime before he took the office.

### **3.4. Enrichment of the International Criminal Procedural Law**

#### **3.4.1. Drafting and Amendments of the Rules of Procedure and Evidence**

Unlike other international criminal Tribunals, the Rules of Procedure and Evidence (‘RPE’) of the two *ad hoc* Tribunals were drafted by the judges

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his subordinates for the commission of crimes that he knew or had reason to know about, he will be held liable pursuant to Article 7(3). When a commander orders his subordinates to commit a crime within the jurisprudence of the Tribunal, he will be held liable pursuant to Article 7(1) of the Statute.

<sup>64</sup> ICTY, *Prosecutor v. Milorad Krnojelac*, Appeals Chamber, Judgment, IT-97-25-A, 17 September 2003, para. 171 (<https://www.legal-tools.org/doc/46d2e5/>).

<sup>65</sup> *Čelebići* Trial Judgment, *supra* note 60, para. 398.

<sup>66</sup> ICTY, *Prosecutor v. Enver Hadžihasanović*, Appeals Chamber, Judgment, IT-01-47-A, 22 April 2008, paras. 18–22 (<https://www.legal-tools.org/doc/2705b3/>).

<sup>67</sup> ICTY, *Prosecutor v. Orić*, Appeals Chamber, Judgment, IT-03-68-A, 3 July 2008, Separate and Partially Dissenting Opinion of Judge Schomburg, pp. 86–99; Partially Dissenting Opinion and Declaration of Judge Liu, pp. 73–83.

themselves. Although Articles 18 to 29 of the ICTY Statute deal with procedural issues, they only provide a framework for the court and are not fully operational. The Security Council is not a legislative body, so the drafting of the detailed Rules of Procedure and Evidence was left to the judges of the Tribunals, while the RPE of the ICC was adopted and amended by the Assembly of the State Parties with a two-thirds majority.<sup>68</sup> The Tribunals established a Rules Committee comprising judges, prosecutors, defence counsel and registrar to screen the proposals for the inclusion and amendments of the RPE. If consensus is reached in the Committee, the proposal will be submitted to the plenary meeting of the Tribunal for further discussion and adoption. A new rule or proposals for amendment is adopted if no less than 10 permanent judges agree in the plenary meeting or unanimously approve the measures put forward by the Rules Committee.<sup>69</sup> This method ensures that views from all parties are taken into consideration and the rules could be amended and changed according to the latest developments. There are a few principles that the amendment of the RPE should comply with. First, the rules should be functioning within the framework of the Statute. Second, the right of the accused should be protected according to the relevant international human rights conventions, especially Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'). Finally, it must guarantee the trial proceedings are conducted in a fair and expeditious manner.

### **3.4.2. Protection of the Right of the Accused**

The ICTY and ICTR have created a unique and independent system of law of procedure and evidence, comprising of elements from adversarial and inquisitorial traditions, which sets a good example for the harmonisation and unification of criminal procedural law for all the states in the world. As Meron pointed out:

the path that the judges of the ICTY have blazed in the area of international criminal procedure will have just as much influence on future international criminal prosecutions as the

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<sup>68</sup> Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3, Rule 52.

<sup>69</sup> Rules of Procedure and Evidence of the ICTY, IT/32/Rev. 49, Rule 6.

substantive doctrines of criminal law that the ICTY enunciates in its decisions and judgments.<sup>70</sup>

At the early phase of the Tribunals, judges may have been more inclined to follow common law principles either because of their individual legal backgrounds or because an adversarial common law procedure was regarded as more appropriate for an international court, following the precedence of Nuremberg and Tokyo Trials. The RPE adopted more elements of the common law adversarial legal system than of civil law inquisitorial practice at the first. In court, the parties play an active role in developing their cases, collecting and presenting evidence, making submissions and examining witnesses, while the judges play a neutral role as mere arbiters of proceedings. In order to achieve fairness and expeditiousness of trials, judges of the ICTY and ICTR make use of the concept of pre-trial judge from civil law system, who is tasked with the preparation of the case, for instance, co-ordinating communications between the parties, convening status conferences, ordering the parties to meet to discuss issues related to the preparation, recording the points of differences and agreements, and compiling a list of witnesses agreed by both side to be called during the proceedings. The function of the pre-trial judge ensures that the preparation of the trial will continue without undue delay. The situation is also true during the preparatory stage of the appeals process. Article 20 of the Statute of the ICTY states that

[t]he Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses,<sup>71</sup>

Article 21 specifically lays down the right of the accused.<sup>72</sup>

The ICCPR had never been applied in an international criminal tribunal since its adoption. The two *ad hoc* Tribunals are the first to apply the human rights principles and guarantees embodied in the ICCPR. As for the presumption of innocence, on many occasions, the Appeals Chamber points out that the accused enjoys the presumption of innocence and the prosecution bears the burden of proof to establish guilt beyond rea-

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<sup>70</sup> Theodor Meron, "Procedural Evolution in the ICTY", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 520.

<sup>71</sup> ICTY Statute, Art. 20.

<sup>72</sup> *Ibid.*, Art. 21.

sonable doubt. The accused's decision to testify, failure to dispute that crimes occurred, rely on the alibi defence or consider mitigating factors agreed to in plea agreement do not alter the burden of proof. The accused's rights to remain silent and right against self-incrimination are also guaranteed. There is an absolute prohibition against consideration of silence in the determination of guilt or innocence and addressing sentencing as part of closing does not violate the right against self-incrimination. The accused has the right to a fair and public trial and enjoys the same right as the prosecution in trial proceedings. According to the Appeals Chamber,

[t]he principle of equality of arms falls within the guarantee of a fair trial provided by the Statute, and has been described as obligating a judicial body to ensure that neither party is put at a disadvantage when presenting its case.<sup>73</sup>

### 3.4.3. Disclosure

The RPE of the two *ad hoc* Tribunals imposes disclosure obligation on the prosecution. Within 30 days of the initial appearance of the accused, copies of the supporting materials accompanying the indictment and all prior statements obtained by the Prosecutor from the accused shall be made available to the accused. Within the time limit prescribed by the Trial Chamber, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trials and all the other materials related to the trial shall be disclosed to the accused.<sup>74</sup> The Prosecutor has the special obligation to disclose to the accused any material which may suggest the innocence or mitigate the guilt of the accused. Indeed this is regarded by the Appeals Chamber as "essential for the conduct of fair trials before the Tribunal".<sup>75</sup>

The accused has the right to self-representation or to be represented by his lawyer. The ICTY Appeals Chamber points out that

[b]oth the Trial Chamber and the Prosecutor recognize that defendants have a presumptive right to represent themselves before the Tribunal. It is not hard to see why. Article 21 of the ICTY Statute, which tracks Article 14 of the Internation-

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<sup>73</sup> ICTY, *Prosecutor v. Kordić et al.*, Appeals Chamber, Judgment, IT-95-14/2-A, 17 December 2004, para. 175 (<https://www.legal-tools.org/doc/738211/>).

<sup>74</sup> RPE of the ICTY, Rule 66, *supra* note 69.

<sup>75</sup> Krstić Appeal Judgment, para. 211, *supra* note 19.

al Convention on Civil and Political Rights, recognizes that a defendant is entitled to a basic set of “minimum guarantees, in full equality,” including the right “to defend himself in person or through legal assistance of his own choosing.” This is a straightforward proposition: given the text’s binary opposition between representation “through legal assistance” and representation “in person,” the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation. Nor should this right be taken lightly. The drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants’ right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves.<sup>76</sup>

#### 3.4.4. Right of Appeal

The Charters of the Nuremberg and Tokyo Tribunals have no provisions on appeal, though the IMTFE Charter allows the convicted to file a petition to the Supreme Commander of the Allied Powers in the Far East to review his case.<sup>77</sup> The right of appeal is now generally recognised as a fundamental human right in criminal proceedings, owing to the development of human rights law after the Second World War.<sup>78</sup> The two *ad hoc* Tribunals have kept abreast with the trend of international human rights law. The Appeals Chamber in the *Tadić* case holds that despite Rule 77 does not mention the right to appeal from a conviction by the Appeals Chamber for contempt, the Rules of the Tribunal must be interpreted in conformity with the Tribunal’s Statute, which requires respect of the “internationally recognized standards regarding the rights of the ac-

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<sup>76</sup> ITCY, *Prosecutor v. Slobodan Milošević*, Appeals Chamber, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, IT-02-54-AR73.7, 1 November 2004, para. 11 (<https://www.legal-tools.org/doc/b62746/>).

<sup>77</sup> Article 17 of the International Military Tribunal for the Far East Charter, 19 January 1946, provides: “A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity” (<https://www.legal-tools.org/doc/a3c41c/>).

<sup>78</sup> Article 14(5) of the International Convention on Civil and Political Rights states: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.

cused' including Article 14 of the International Covenant on Civil and Political Rights".<sup>79</sup>

Although the Statutes of the two *ad hoc* Tribunals do not mention the right of interlocutory appeal, the RPE provides two channels for interlocutory appeal if an immediate resolution by the Appeals Chamber may materially advance the proceeding. One is in the case of motion challenging jurisdiction, where the accused has an automatic right to appeal. The other scenario requires certification granted by the Trial Chamber in order to prevent frivolous motions or an abuse of process.<sup>80</sup>

The two *ad hoc* Tribunals have also articulated the specific standards for appeal in their judicial practice. The Appeals Chamber emphasizes that an appeal is not an opportunity for the parties to reargue their cases – it does not involve a trial *de novo*.<sup>81</sup> The Appeals Chamber in *Kvočka et al.* states that "[o]n appeal, the Parties must limit their arguments to legal errors, which invalidate the decision of the Trial Chamber and to factual errors, which occasion a miscarriage of justice within the scope of Article 25 of the Statute".<sup>82</sup> As for the error of facts,

[t]he Appeals Chamber will determine whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If a reasonable trier of fact could have reached such a conclusion, then the Appeals Chamber will affirm the finding of guilt.<sup>83</sup>

As for the error of law, "[t]he Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt".<sup>84</sup>

The two *ad hoc* Tribunals also set up a review procedure for any new facts discovered after the delivery of the final judgment. If a new fact

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<sup>79</sup> ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, IT-94-1-A-AR77, 27 February 2001, p. 3 (<https://www.legal-tools.org/doc/3bce6b/>).

<sup>80</sup> RPE of the ICTY, Rule 72(B), see *supra* note 69.

<sup>81</sup> ICTY, *Prosecutor v. Kupreškić et al.*, Appeals Chamber, Judgment, IT-95-16-A, 23 October 2001, para. 22 (<https://www.legal-tools.org/doc/c6a5d1/>).

<sup>82</sup> *Kvočka* Appeal Judgment, para. 14, see *supra* note 46.

<sup>83</sup> ICTY, *Prosecutor v. Tihomir Blaškić*, Appeals Chamber, Judgment, IT-95-14-A, 29 July 2004, para. 24 (<https://www.legal-tools.org/doc/88d8e6/>).

<sup>84</sup> *Ibid.*



is discovered and was not known to the moving party at the time of proceedings and could not have been discovered through the exercise of due diligence, the parties may file a motion for review of the judgment. For the defence, there is no time limit for filing the motion; while for the prosecution, there is a one-year time limit.<sup>85</sup> The Tribunals' practice can therefore be considered as an edifying example for the future.

#### **3.4.5. Victim Involvement**

By holding individuals responsible for the crimes committed in the former Yugoslavia and Rwanda, the Tribunals ensure that the victims can see those responsible for their sufferings convicted by an international criminal court and sent to prison.

The Tribunals have established, developed and maintained effective victims and witnesses programmes, as witnesses and victims play a crucial role in the proceedings at the Tribunals. By testifying at the Tribunals, they contribute to the process of establishing the truth. The Tribunals' proceedings provide these victims and witnesses with the opportunity to be heard and to speak about their sufferings. To date, over 100,000 witnesses have taken the opportunity to tell their stories while testifying before the ICTY. Through this, they have contributed to the creation of an extensive historical record of violations of international humanitarian law. As the work of the *ad hoc* Tribunals progresses, important historical accounts of the conflicts in the former Yugoslavia in the 1990s and the 1994 Rwanda genocide have emerged. Facts once subject to dispute have been established beyond reasonable doubt and are recorded for posterity in the judgments. The Tribunals have created a judicial database providing access to a vast amount of jurisprudence in international procedural and criminal law.

#### **3.5. Evidence**

One of the functions of the rules of evidence is to limit the admissibility of certain types of materials into evidence. The common law system has very strict rules for the admission of evidence – given that the criminal trials are mostly conducted with a jury – while the civil law system has

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<sup>85</sup> RPE of the ICTY, Rule 119, see *supra* note 69; Rules of Procedure and Evidence of the ICTR, 13 May 2015, Rule 120.

more flexible rules as the trial is conducted by professional judges. One of the differences between the two legal systems with regards to the rules of evidence lies in how big the door shall be open for the evidence to come in.

In the early days of the Tribunals, following the precedence of Nuremberg and Tokyo Trials, judges may have been more inclined to follow common law principles. The cases before the ICTY and ICTR are very complex and difficult compared to domestic ones. In only one case, hundreds of witnesses may be called to prove what had happened many years ago and to testify about the authenticity of a document. Thousands of documents may be admitted into evidence. As a result, a trial is very time-consuming and may even last for a few years.

In the practice of the two *ad hoc* Tribunals, it is not difficult to see the change from the strict common law rule of evidence to civil law practice. As Judge McDonald puts it:

The International Tribunal has ten rules of evidence which are designed only to provide a framework for the conduct of the proceedings. Certainly our Rules could not anticipate every trial procedure that litigants from a variety of countries may expect to utilize and the International Tribunal did not establish hyper-technical detailed rules typical of a jury system to cover every such possibility. In civil law systems technical rules are not available, and all evidence that aids in the search of the truth is allowed. Our Rules provide the Judges with the power to review all relevant evidence, and when necessary, to make further rulings to aid in the adjudication before the Trial Chamber. Because of the absence of specific rules, the Trial Chamber has made rulings which it considers would best facilitate the process.<sup>86</sup>

In order to reach the aim of fairness and expeditiousness of trials, the *ad hoc* Tribunals began to have more elements of civil law system, especially in the admission of evidence. First, the RPE gives judges the power to freely assess the evidence and the emphasis is shifted from the admission of evidence to the weight to put in each piece of evidence. The Trial Chamber in *Limaj et al.* states:

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<sup>86</sup> ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald, Decision on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996, para. 34 (<https://www.legal-tools.org/doc/c6bb3e/>).

The Chamber has been required to weigh and evaluate the evidence presented by all parties. It would emphasise that the mere admission of evidence in the course of the trial has no bearing on the weight which the Chamber subsequently attaches to it.<sup>87</sup>

Second, the RPE set up three criteria for the admission of evidence, which are relevance, reliability and probative value. If the three criteria are fulfilled, any materials tendered by the parties during the proceedings will be admitted, even the hearsay evidence. Third, generally speaking, the rule divides the evidence into two major categories: essential evidence which goes to the acts and conducts of the accused; contextual evidence which goes to the context where a crime occurred. For the essential evidence, the common law principles of orality and immediacy are applied, while for the contextual evidence, written statements could be admitted in lieu of oral testimony.

Since 2000 Rule 92 has been amended several times to extend the power of the judges and to facilitate the trial proceedings. The Trial Chamber has the power to request evidence and summon witnesses to testify, functions which are clearly inquisitorial in character. Rule 92*bis* allows the admission of evidence in written form in lieu of oral testimony as long as the evidence does not concern the actual conducts of the accused. The Rule lists six examples of situations in which a written statement or transcript could be admitted into evidence: A. the evidence is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; B. the evidence relates to relevant historical, political or military background; C. the evidence consists of a general or statistical information on the ethnic composition of the population; D. the evidence concerns the impact of crimes upon victims; E. the evidence relates to issues of the character of the accused; or F. the evidence relates to factors to be taken into account in determining sentence.<sup>88</sup> Rule 92*ter* may relieve the prosecution from direct examination of the witnesses by admitting the witnesses' written statements subject to the right of cross-examination by the defence.<sup>89</sup> The Trial Chamber also has the power to admit the written statements of persons unavailable owing to various reasons.<sup>90</sup>

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<sup>87</sup> Limaj Trial Judgment, para. 12, see *supra* note 41.

<sup>88</sup> RPE of the ICTY, Rule 92*bis*, see *supra* note 69.

<sup>89</sup> *Ibid.*, Rule 92*ter*.

<sup>90</sup> *Ibid.*, Rule 92*quater*.

It is submitted that while the procedural rules of the *ad hoc* Tribunals are still adversarial in nature, the evidence rules have adopted more elements of inquisitorial traditions. It is a stand alone system comprising the advantages of major legal systems in the world. As has been stated:

The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.<sup>91</sup>

### 3.6. Outreach Programmes

To support the process of reconciliation and the re-establishment of the rule of law in the former Yugoslavia and Rwanda, both the ICTY and ICTR have played a pioneering role in international law and paved the way for a number of other initiatives. In October 1999, Judge McDonald – the then President of the Tribunal, launched the ICTY Outreach Programme, when it was time for action to be taken to bridge the mistrust and misunderstanding between the Tribunal in The Hague and the communities it was serving. This is seen by many as a milestone in the development of the ICTY’s practice and innovation in international judicial system. To fulfil its mandate of contributing to peace and security in the region, the Tribunal recognised its role in the process of dealing with the past in the former Yugoslavia and the importance of post-conflict measures.

The Tribunals realised that sustainable rule of law could not be imposed. It must come from the inside. The products of the *ad hoc* Tribunals should truly belong to the audiences in the regions, so as to ensure the local understanding of the work done by these tribunals in the interest of assisting the re-establishment of the rule of law following the conflicts. One key initiative which helped with this process was the Bridging the Gap initiative introduced by the ICTY Outreach Programme in 2004–5. As the name implies, the initiative aims to bridge the informational gap between the Tribunal and local communities in Bosnia. Under this initiative, once the trial proceedings are completed, ICTY staff will travel to

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<sup>91</sup> ICTY Press Release, “*Blaškić* case: Defence objection to the admission of hearsay is rejected”, 23 January 1998.

the town where the adjudicated crimes occurred and meet with local citizens and officials to explain the procedure followed in investigating the crimes and the outcome that the Tribunal reached. This initiative has been employed in Prijedor, Srebrenica and other relevant towns.<sup>92</sup>

The two *ad hoc* Tribunals are actively involved in training legal professionals from the former Yugoslavia and Rwanda to enable them to deal with war crimes cases in domestic trials and assist them in enforcing international legal standards in their own systems. Domestic judges, lawyers and other professionals in the former Yugoslavia and Rwanda have benefited from their participation in various training programmes and study visits. The Tribunals also sent legal experts to judiciaries in the regions to help with the establishment of specialised organs for war crimes investigation and adjudication, and to increase the capacity of local courts to adjudicate on war crimes cases and to facilitate the implementation of international standards and best developed practices at the local level.

In the case of the ICTY, following Security Council resolution 1534 of 26 March 2004,<sup>93</sup> the positive developments in the judiciaries in the region have allowed the ICTY to refer some cases back to national courts in Bosnia and Herzegovina, Croatia and Serbia and facilitated the transfer of investigative materials collected by the ICTY Office of the Prosecutor to prosecutorial authorities in the region for review and further investigation. The referral of cases to domestic jurisdictions has proved and strengthened the capacity of national court systems to adjudicate on serious violations of international humanitarian law. By transferring evidentiary materials and making electronic databases and archives available to national institutions, the Tribunals have ensured the effective transition from international courts to domestic judiciaries.

Every year, through a variety of activities such as visits to the premises, thousands of people – among them students, lawyers, prosecutors and judges – come into direct contact with the *ad hoc* Tribunals. For instance, in 2013 over 6,000 young people from across the world came to the ICTY to observe the ongoing cases and to speak to the staff and judges.<sup>94</sup> The Outreach Programme focuses on engaging with communities in

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<sup>92</sup> Devitt, “Justice and Peace”, see *supra* note 21.

<sup>93</sup> United Nations Security Council resolution 1534, 26 March 2004, UN doc. S/RES/1534 (2004).

<sup>94</sup> ICTY Outreach Programme, *Annual Report 2013*, The Hague, 2014, p. 11.

the region, since the success of the Tribunal's legacy in the fight against impunity and efforts to deal with the past will be determined by the local communities themselves. It does so by helping the relevant national judiciaries with capacity building and working with the younger generation, grassroots communities and the media.

The ICTY and ICTR also share their expertise with other international courts. The Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon have already considered and adopted elements of the ICTY and ICTR Statutes, Rules and jurisprudence as they continue to develop the international criminal law. The Statute of the Iraq Special Tribunal contains a provision allowing it to resort to the relevant decisions of international tribunals as a persuasive authority for its own decisions. The *ad hoc* Tribunals' work provides important precedents for the ICC and various national jurisdictions. They have made an essential contribution to international peace and justice in the twenty-first century and beyond.

### 3.7. Some Justified Criticisms?

The work of the *ad hoc* Tribunals has been criticised in some circles for being "too costly, too inefficient and too ineffective".<sup>95</sup> These criticisms mainly arise from the fact that both Tribunals are distant from the local populations and the time and length of trials. The fact that the ICTY and the ICTR are removed from the local populations means that victims and families are denied access to the work of the Tribunals. However, as illustrated above, the Outreach Programme introduced by the ICTY has gone a long way in overcoming this difficulty, although it is accepted that the ICTR must do more in overcoming "a perception that the Tribunal is ineffective and ignorant of the needs of the Rwandan people".<sup>96</sup>

With regard to the criticism that the length of trial proceedings in the Tribunals has caused widespread frustration, it must be pointed out that the *ad hoc* Tribunals are "hardly unique in taking a long time to investigate and prosecute war criminals".<sup>97</sup> Furthermore, the *ad hoc* Tribunals' work relies on assistance and co-operation from the international

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<sup>95</sup> Ralph Zacklin, "The Failings of Ad Hoc International Tribunals", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 545.

<sup>96</sup> Devitt, "Justice and Peace", see *supra* note 21.

<sup>97</sup> Orentlicher, 2010, p. 73, see *supra* note 20.

community. Therefore, the refusal of the local authorities and international forces to arrest Karadžić and Mladić can be viewed as a “failure of the international community as a whole to effectively set up a mechanism for enforcing indictments”,<sup>98</sup> and consequently prolonging the time that the ICTY has taken in bringing war criminals to justice.

Finally, there has been some criticism with regards to the lenient and inconsistent sentences handed down by the *ad hoc* Tribunals. It must be pointed out that guilty pleas by defendants are viewed as a mitigating factor in sentencing. This is in line with the practice of many common law systems such as the British legal system where a defendant who submits an early guilty plea is entitled to secure maximum credit on his/her sentence. It is submitted that by viewing a guilty plea as a mitigating factor, the *ad hoc* Tribunals aim to relieve the stress and anxiety felt by victims, witnesses and defendants by finalising their cases more quickly. Moreover, with respect to the practice of the ICTY to grant early release to defendants who have served two-thirds of their sentences,<sup>99</sup> one must appreciate that this practice plays a key role in the defendant’s rehabilitation and reintegration into the society.

### 3.8. Conclusion

In conclusion, a key purpose of the *ad hoc* Tribunals is to contribute to national reconciliation and the restoration and maintenance of peace in the regions of the former Yugoslavia and Rwanda. While healing and national reconciliation cannot be realised with the stroke of a pen, history will show that the two *ad hoc* Tribunals strengthened the judicial institutions of the former Yugoslavia and Rwanda, thus creating the primary conditions for peace.

While it is true that “[t]rials cannot bring husbands, children, and parents back to life or dispel the lasting trauma of being raped or detained in conditions evocative of Nazi-era concentration camps”,<sup>100</sup> it can be argued that the establishment of the *ad hoc* Tribunals was in many ways a “road to Damascus” moment for international humanitarian law. It was so because the *ad hoc* Tribunals provided a voice for the voiceless who had

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<sup>98</sup> Devitt, “Justice and Peace”, see *supra* note 21.

<sup>99</sup> RPE of the ICTY, Rules 123–125, see *supra* note 69; RPE of the ICTR, Rules 124–126 of the RPE of the ICTR, see *supra* note 85.

<sup>100</sup> Orentlicher, 2010, p. 13, see *supra* note 20.

suffered violations of their human rights. It provided a remedy for rights which had only existed in name but not in practice. Furthermore, the *ad hoc* Tribunals have made major contributions to the development of international criminal law. They have provided a detailed definition of the legal ingredients of crimes of international concern – genocide, crimes against humanity and war crimes – and stretched the boundaries of criminal liability beyond its classical scope. It is hoped that the work of *ad hoc* Tribunals will also prove to be a deterrent for the violations of citizens' human rights by their own state, or indeed any neighbouring states.

The legacy of the *ad hoc* Tribunals to international law can also be measured in the influential role they played in establishing the ICC. The work of the two Tribunals gave new impetus to the debate calling for the establishment of a permanent international court addressing the most serious violations of international humanitarian and human rights law. Although the ICC has been criticised for its limited capacity and restrictive jurisdictional provisions, one must appreciate that the establishment of such an international court is a step in the right direction for creating an international criminal jurisdiction with the potential for promoting international justice. One must appreciate that even the longest journey begins with a single step; while achieving the notion of transparent international justice is indeed a long journey, the work of the *ad hoc* Tribunals is a major step towards that goal.



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## From Primacy to Complementarity: The International Criminal Tribunal for the Former Yugoslavia, 1993–2015

Serge Brammertz\* and Kevin C. Hughes\*\*

### 4.1. Introduction

When the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was established in 1993, there were many hopes that this step heralded a new dawn for criminal justice dispensed by international courts. Reacting to widespread atrocities committed during the conflicts attending the disintegration of the former Socialist Federal Republic of Yugoslavia, the United Nations Security Council for the first time established an international criminal tribunal to bring the perpetrators of crimes to justice, and hopefully contribute to restoring peace and security in the region. Consistent with other developments in international organisations and relations following the end of the Cold War, the creation of the ICTY

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was seen as both a return to the original ideals of the United Nations and an important step in constructing an international legal order capable of sanctioning criminal violations of international law.

Twenty-three years later, many of these initial hopes seem to have been realised, at least in part. The establishment of the ICTY greatly contributed to finally reaching an agreement to create the International Criminal Court ('ICC') after decades of inertia. At the time of writing, three international tribunals are in operation – the ICTY, the International Criminal Tribunal for Rwanda ('ICTR') and the ICC – securing accountability for crimes committed in conflicts. In addition, two more hybrid courts are active: the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Tribunal for Lebanon ('STL') – with another, the Special Court for Sierra Leone ('SCSL'), having recently completed its mandate in December 2013. International criminal law is now an established field of law, and hundreds of individuals have been convicted and sentenced for violating it. Accountability is an important part of discussions on responses to contemporary conflicts, and proposals to establish new courts to achieve post-conflict justice have been proliferating.

At the same time, many features of today's landscape would be unfamiliar to the pioneers who helped create the ICTY in 1993. The commitment to post-conflict accountability has remained strong, and the law of international crimes has greatly developed. Yet international courts are no longer seen as the primary, much less the only, mechanism to achieve justice. The paradigm of a supranational world court dispensing justice to all over the recalcitrance of sovereign states has been supplanted. While a coherent model is still in the process of formation, today international justice is being increasingly nationalised. National criminal justice mechanisms are no longer seen as obstacles to be surmounted, but as essential elements of the solution, particularly in partnership with the international community. The international legal order is being built in national courtrooms around the world, not simply in The Hague.

The relationship between international tribunals and national courts has thus taken on a new meaning and urgency. In practice, post-conflict justice continues to often be presented and seen as a binary choice in the contest over sovereignty between international institutions and states. Yet experiences over the last two decades have shown the limits of this approach and the possibilities to surmount it that begin by acknowledging

that justice for war crimes is not the exclusive preserve of international courts.

This chapter explores the historical development over the last two decades in relationships between international tribunals and national criminal justice sectors through the example of the ICTY, particularly the Office of the Prosecutor ('OTP'). Since its establishment in 1993 and continuing today, the ICTY has been a real-world laboratory for evolving theories and practices of international criminal justice. In the specific context of interaction with national judiciaries, the ICTY has undertaken three paradigmatic shifts.

Upon its establishment as the first contemporary international criminal tribunal, the ICTY was the archetype of international primacy. Under this model, international justice was conceived as wholly removed from national criminal justice, and was in fact designed to remedy the failings of national accountability by replacing it with an international justice mechanism.

Through the impetus of the Completion Strategy, the ICTY significantly reorientated itself, moving away from primacy towards the then-developing model of complementarity. This shift prompted far greater engagement by the ICTY, particularly the OTP, with national judiciaries in the region of the former Yugoslavia. This is best represented by the *11bis* process through which cases were referred from the ICTY to national courts for prosecution. Distinct from complementarity as practised at the ICC, the ICTY engaged in a programme of positive complementarity that dramatically altered the *status quo* and led to substantial improvements in the capacities of national judiciaries to process war crimes cases.

Finally, with the completion of the *11bis* process, the OTP pushed beyond notions of complementarity by beginning to construct a framework of collaboration between international and national prosecutors. As developed by the OTP, collaboration sets aside the traditional dichotomy between international and national jurisdictions by recognising that post-conflict justice necessarily involves a multiplicity of jurisdictions. The OTP has accordingly sought to integrate international and national jurisdictions into an informal system that can help ensure more comprehensive justice.

To situate these developments in their historical context, this chapter begins in section 4.2. by surveying the work of international criminal

tribunals since Nuremberg with particular reference to their interaction with national courts. In section 4.3. the shift at the ICTY from primacy to complementarity is described, illustrating how these theories were translated into law and providing examples of primacy and complementarity in practice at the ICTY. Section 4.4. discusses the most recent developments at the ICTY that it is suggested move beyond the existing models of primacy and complementarity. The OTP's contemporaneous programmes and activities with national judiciaries in the former Yugoslavia and around the world are described to indicate the possible contours and practical realities of a new collaborative approach to international criminal justice. Finally, section 4.5. concludes by reflecting on the lessons from the ICTY's experiences that may help inform future accountability efforts.

This chapter can only provide snapshots of a particular issue across twenty-three years of operations at the ICTY. It is hoped that other scholars will find the perspective offered of interest, and will be encouraged to further study other areas of the ICTY's work that equally deserve careful attention.

## **4.2. Historical Overview of International–National Co-operation**

### **4.2.1. Post-Second World War**

On 21 November 1945 Justice Robert H. Jackson, Chief of Counsel for the United States, opened the trial of 22 former senior leaders of the Nazi German regime before the International Military Tribunal ('IMT') in Nuremberg, Germany.<sup>1</sup> This trial, Jackson noted in his opening statement, was "the first trial in history for crimes against the peace of the world", representing "the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war".<sup>2</sup>

Even from our perspective 70 years later, the international character of the proceedings is striking. The IMT was established pursuant to the

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<sup>1</sup> While 24 individuals were indicted, one committed suicide before trial and another was declared medically unfit for trial.

<sup>2</sup> International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 2: *Proceedings, 14 November 1945–30 November 1945*, International Military Tribunal, Nuremberg, 1947, pp. 98–99 ('Trial of the Major War Criminals, vol. 2').

London Agreement of 8 August 1945, an international agreement signed by the four major Allied powers, subsequently ratified by 19 more states, and deposited with the Secretary-General of the United Nations.<sup>3</sup> The accused, German nationals, were prosecuted for crimes under international law. As the Tribunal declared: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>4</sup> The prosecution was led by a committee of four chief prosecutors, each representing one of the four major Allied powers. The prosecution and defence evidence was heard by a panel of eight judges, two from each of the four major Allied powers. The Tribunal announced its judgment on 30 September and 1 October 1946, convicting 19 of the accused and acquitting three,<sup>5</sup> marking the beginning of international criminal justice.

While Nuremberg became synonymous with the prosecution of war crimes by international courts, Jackson’s opening statement also alluded to a much broader post-conflict justice process that was already underway in national and occupation courts throughout Europe. The IMT in Nuremberg had been established to bring to trial 24 senior Nazi officials, “men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils”.<sup>6</sup> At the same time, Jackson noted, other suspected war criminals – those “less responsible and less culpable” – would be “turned over to individual governments for trial at the scene of their outrages”.<sup>7</sup>

In fact, the scale of war crimes trials conducted by national civilian and military tribunals dwarfed the international proceedings before the IMT in Nuremberg. By March 1948, less than three years following the end of the war and only one and a half years after the Nuremberg judg-

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<sup>3</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 (‘London Agreement’) (<https://www.legal-tools.org/doc/844f64/>). The Charter of the IMT (‘IMT Charter’) was annexed to the Agreement (<https://www.legal-tools.org/doc/64ffdd/>).

<sup>4</sup> International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1: *Official Documents*, International Military Tribunal, Nuremberg, 1947, p. 223.

<sup>5</sup> *Ibid.*, pp. 366, 367.

<sup>6</sup> Trial of the Major War Criminals, vol. 2, p. 99, see *supra* note 2.

<sup>7</sup> *Ibid.*, p. 101.

ment, 1,911 war crimes trials for crimes committed in the European and Asian theatres had been conducted before the courts of nine nations.<sup>8</sup> In Europe alone, there had been 967 cases involving 3,470 accused, of whom 2,857 were convicted.<sup>9</sup> At the same time, investigations were still underway for tens of thousands of suspects. In total, nearly 32,000 German nationals had been identified as suspected war criminals by national authorities, including 12,000 by French authorities, 7,700 by Polish authorities and 4,000 by Belgian authorities.<sup>10</sup> Notably, the above figures do not include war crimes investigations and trials conducted by the Soviet Union, Hungary, Bulgaria and Romania.<sup>11</sup>

The pace of trials by national courts was equally astonishing. By February 1946, less than a year after Germany's surrender, 93 cases involving 282 accused had been tried in Europe. By October 1946 those numbers had grown to 256 cases involving 1,108 accused. In the next one and a half years, approximately 500 cases against more than 2,000 accused were conducted.<sup>12</sup>

War crimes trials in national courts continued in subsequent years and decades. War crimes prosecutions were conducted in civilian and military courts in countries like the Netherlands, Norway, Yugoslavia and Greece.<sup>13</sup> Within Germany itself, the occupying powers established military tribunals to prosecute suspected war criminals. Between 1945 and the mid-1950s, 2,107 German nationals were convicted by French military tribunals, 1,814 by United States military tribunals and 1,085 by British military tribunals.<sup>14</sup> Prosecutions by the United States included the Nuremberg Military Tribunal proceedings against 177 German military and

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<sup>8</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15: *Digest of Laws and Cases*, His Majesty's Stationery Office, London, 1949, p. xvi.

<sup>9</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948, Appendix IV, p. 516.

<sup>10</sup> *Ibid.*, Appendix III, pp. 509, 510.

<sup>11</sup> *Ibid.*, Appendix IV, p. 515.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, Appendix IV, p. 518.

<sup>14</sup> M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1980, p. 9.

civilian officials alleged to be next in responsibility to the Nuremberg IMT defendants, of whom 142 were convicted.<sup>15</sup>

In certain countries, the number of war crimes prosecutions was many orders of magnitude greater, particularly because nationals of the relevant countries were also prosecuted for war crimes. It has been estimated that the Soviet Union prosecuted and sentenced up to 18,000 German nationals in its occupation zone immediately following the war.<sup>16</sup> Total estimates of war crimes prosecutions conducted by the Soviet Union vary significantly, ranging from 45,000<sup>17</sup> to 72,000.<sup>18</sup> In Austria, 28,000 defendants were charged and 13,607 were convicted between 1945 and 1955, while 46 were charged and 18 convicted between 1955 and 1975.<sup>19</sup> In Poland, it has been estimated that between 18,000 and 20,000 defendants were brought to trial for war crimes,<sup>20</sup> while in Hungary, approximately 27,000 defendants were brought to trial for war crimes.<sup>21</sup>

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<sup>15</sup> Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10*, US Government Printing Office, Washington, DC, 1949, p. 91.

<sup>16</sup> Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany – the ‘Euthanasia’ and ‘Aktion Reinhard’ Trial Cases*, Martinus Nijhoff, The Hague, 1996, p. 19.

<sup>17</sup> John P. Teschke, *Hitler’s Legacy: West Germany Confronts the Aftermath of the Third Reich*, Peter Lang, New York, 1999, p. 242.

<sup>18</sup> Andreas Hilger, “Die Gerechtigkeit nehme ihren Lauf? Die Bestrafung deutscher Kriegs- und Gewaltverbrecher in der Sowjetunion und der SBZ/DDR”, in Norbert Frei (ed.), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, Wallstein Verlag, Gottingen, 2006, p. 191.

<sup>19</sup> Winfried R. Garscha and Claudia Kuretsidis-Haider, “War Crimes Trials in Austria”, Paper Presented at the 21st Annual Conference of the German Studies Association, Washington, DC, 25–28 September 1997 ([http://www.doew.at/cms/download/a184m/en\\_war\\_crime\\_trials.pdf](http://www.doew.at/cms/download/a184m/en_war_crime_trials.pdf)). See also Winfried R. Garscha, “Reprimere il crimine, frenare i processi: L’esperienza delle corti del popolo in Austria” [Repressing both the Crimes and Their Punishment War Crimes Trials before the Austrian Peoples Courts of the Immediate Post-war Period and Austrian Politics of Memory], in Luca Baldissara and Paolo Pezzino (eds.), *Giudicare e punire: I processi per crimini di guerra tra diritto e politica*, L’Ancora del mediterraneo, Naples, 2005.

<sup>20</sup> Alexander V. Prusin, “Poland’s Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948”, in *Holocaust and Genocide Studies*, 2010, vol. 24, no. 1, pp. 1–25; Andrzej Rzepliński, “Prosecution of Nazi Crimes in Poland 1939–2004”, Paper Presented before the First International Expert Meeting on War Crimes, Genocide, and Crimes Against Humanity, INTERPOL, 23–25 March 2004.

<sup>21</sup> Laszlo Karsai, “Crime and Punishment: People’s Courts, Revolutionary Legality, and the Hungarian Holocaust”, in *Intermarium*, vol. 4, no. 1, 2000, p. 5; Laszlo Karsai, “The Peo-

In total, it has been estimated that approximately 60,000 German and Austrian nationals were prosecuted for war crimes by non-German national courts.<sup>22</sup> In German national courts, 5,228 accused were convicted for war crimes between 1945 and 1950, 638 between 1950 and 1955, and 611 between 1955 and 1992.<sup>23</sup>

As these figures demonstrate, the understandable tendency to focus on the international proceedings at Nuremberg can obscure the reality that post-conflict justice following the Second World War was predominately the responsibility of and implemented by national courts. Even more, the predominance of national war crimes proceedings was neither accidental nor unexpected. In fact, a systematic, comprehensive and collaborative approach to post-conflict justice in Europe bringing together both international and national prosecutions was established by international agreement, structured by legal frameworks and operational mechanisms, and implemented in a surprisingly co-operative manner as intended.

#### **4.2.2. *Ad Hoc* Tribunals**

After Nuremberg, nearly four decades would pass before the international community embarked on its second major international criminal justice initiative. In the second half of the twentieth century the predominant character of armed conflicts changed, from interstate industrial warfare to intrastate wars of national liberation and ideological struggle. The suffering of civilian populations in armed conflicts intensified, and mass atrocities and conflict-related crimes continued to be committed. In the face of near universal impunity, Nuremberg proved to be an exception, not the vanguard of a new dedication to international justice.

Modern international criminal justice was only reborn with the end of the Cold War. The violent internal armed conflicts that followed the collapse of the Cold War-era bipolar international order were not necessarily more intense, but the international community, particularly the Security Council of the United Nations, was now more willing to evoke in-

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ple's Courts and Revolutionary Justice in Hungary, 1945–46", in Istvan Deák, Jan T. Gross and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and Its Aftermath*, Princeton University Press, Princeton, NJ, 2000, p. 233.

<sup>22</sup> De Mildt, 1996, p. 18, see *supra* note 16.

<sup>23</sup> David Cohen, "Transitional Justice in Divided Germany after 1945", in Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy*, Cambridge University Press, Cambridge, 2006, pp. 82–85.



ternational law and criminal accountability in response to threats to international peace and security. International co-operation and action also became more feasible after decades of deadlock between rival superpowers.

In 1993 and 1994, respectively, the Security Council established the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>24</sup> These two tribunals were established to prosecute crimes committed in two particular conflicts: those that arose with the dissolution of the Socialist Federal Republic of Yugoslavia from 1991 to 1995, and the 1994 Rwandan genocide.<sup>25</sup> Given their limited jurisdiction and that they were established for precise purposes, the ICTY and ICTR have been collectively described as the “*ad hoc* tribunals” to distinguish them from later tribunals. As responses to conflicts that were identified as threats to international peace and security, the *ad hoc* tribunals were created with the special mission of helping to bring peace to the affected regions and to protect compelling humanitarian interests.<sup>26</sup>

In the context of later developments in models of international criminal jurisdiction, the defining characteristics of the ICTY and ICTR are three-fold. First, these courts were United Nations bodies, created by the Security Council and fully-funded by the UN. Second, their seats were outside the conflict areas, and judges and prosecutors were internationals, that is, not nationals of the countries that were parties to or involved in the conflicts. Finally, the *ad hoc* tribunals were granted primacy of jurisdiction, which meant that they had superior jurisdiction to any national court

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<sup>24</sup> United Nations Security Council resolution 827, UN doc. S/RES/827, 25 May 1993 (‘Resolution 827’) (<http://www.legal-tools.org/doc/dc079b/>); United Nations Security Council resolution 955, UN doc. S/RES/955, 8 November 1994 (‘Resolution 955’) (<https://www.legal-tools.org/doc/f5ef47/>).

<sup>25</sup> While the ICTY was created in response to the conflicts in Croatia and Bosnia and Herzegovina that lasted from 1991 to 1995, its jurisdiction was not temporally limited, while it was granted geographical jurisdiction across the territory of the former Yugoslavia. Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Art. 1 (‘ICTY Statute’) (<https://www.legal-tools.org/doc/b4f63b/>). This allowed the ICTY to later assert jurisdiction over crimes committed during conflicts in Kosovo and the Former Federal Republic of Macedonia (‘FYROM’). See, for example, International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), *Prosecutor v. Šainović et al.*, IT-05-87 (prosecution for crimes committed in Kosovo); ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, IT-04-82 (prosecution for crimes committed in FYROM).

<sup>26</sup> Resolution 827, p. 2, see *supra* note 24; Resolution 955, p. 1, see *supra* note 24.

that would also possess jurisdiction, particularly the courts of the countries of the former Yugoslavia and Rwanda.

Since its inception in 1993 the ICTY has indicted 161 individuals, none of whom remains a fugitive from justice.<sup>27</sup> At the time of writing, seventy-nine individuals have been convicted, 18 have been acquitted, and proceedings have been terminated against 36. In addition, the cases against 13 accused were referred to courts in the former Yugoslavia for prosecution under Rule 11*bis* of the ICTY Rules of Procedure and Evidence ('RoPE'). As of the date of writing, the last proceedings at the ICTY against 15 accused remain ongoing. Notable cases include those against senior political and military leaders of the Republic of Yugoslavia, the Republika Srpska, the Republic of Bosnia and Herzegovina and the Republic of Croatia. The ICTY is currently projected to finish its work by the end of 2017, after 24 years of operations.

The ICTR has indicted 93 individuals since 1995, nine of whom remain fugitives as of the date of writing.<sup>28</sup> Sixty-one individuals have been convicted, 14 have been acquitted, and proceedings have been terminated against four. The cases against 10 accused have been referred to various national courts in Africa and Europe for prosecution. Notable cases prosecuted at the ICTR include political and military leaders of the Republic of Rwanda, leaders and supporters of the governing political party during the genocide, and media figures. As of the date of writing, the final appeal proceeding against six accused is ongoing and expected to be completed by the end of 2015. The ICTR will then close its doors after 21 years of work.

Certain residual functions of both the ICTY and ICTR have now been transferred to a new institution, the United Nations Mechanism for International Criminal Tribunals ('MICT'). The MICT began its operations even while trials and appeals are still underway at the ICTY and ICTR, and it will hear certain appeals from ICTY and ICTR trials, including potential appeals in the ICTY cases against Radovan Karadžić and Ratko Mladić. The simultaneous work of institutions with overlapping

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<sup>27</sup> See International Criminal Tribunal for the Former Yugoslavia, Infographic: ICTY Facts & Figures (<http://www.icty.org/sid/11186>).

<sup>28</sup> See International Criminal Tribunal for Rwanda, Infographic: The ICTR in Brief, (<http://www.unictr.org/en/tribunal>).

mandates has presented a new set of challenges for international criminal tribunals.

### 4.2.3. Hybrid Tribunals

Criticisms of the *ad hoc* tribunals quickly prompted consideration of alternative models for international criminal tribunals that would be physically and symbolically closer to the societies affected by armed conflict, more expeditious and less costly. Less than a decade after the establishment of the *ad hoc* tribunals, the model of “hybrid” tribunals began to be put in place.

The growth of such tribunals was rapid. The SCSL was established in January 2002 by agreement between the United Nations and the Republic of Sierra Leone,<sup>29</sup> while after three years of negotiations the ECCC was established in 2003 by agreement between the United Nations and the Royal Government of Cambodia.<sup>30</sup> The STL, which prosecutes the crime of terrorism, was established in 2007 by Security Council resolution 1757.<sup>31</sup> Related developments included the temporary inclusion of international judges and staff in the State Court of Bosnia and Herzegovina in 2004,<sup>32</sup> the establishment of the Special Panel for Serious Crimes in East

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<sup>29</sup> Statute of the Special Court of Sierra Leone, Art. 8(2) (<http://www.legal-tools.org/doc/aa0e20/>), attached to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN doc. S/2002/246, 16 January 2002 (<https://www.legal-tools.org/doc/797850/>).

<sup>30</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea Phnom Penh, 6 June 2003, approved by General Assembly resolution 57/228, UN GAOR, 57th sess., 85th plen. mtg., Annex, Agenda Item 109(b), UN doc. A/Res/57/228B, 2003 (<https://www.legal-tools.org/doc/3a33d3/>).

<sup>31</sup> United Nations Security Council resolution 1757 (2007), adopted 30 May 2007, UN doc. S/RES/1757 (2007) (<https://www.legal-tools.org/doc/a394fe/>).

<sup>32</sup> Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes, Organized Crime, Economic Crime and Corruption of the Prosecutor’s Office of Bosnia, Official Gazette of Bosnia and Herzegovina – International Agreements, No. 12/04, 1 December 2004 (‘BiH Registry Agreement’) (<https://www.legal-tools.org/doc/27562c/>).

Timor ('SPSC') in 2000,<sup>33</sup> and the integration of international judges and prosecutors into the Kosovar judiciary that same year.<sup>34</sup>

Unlike the *ad hoc*s and the ICC, the hybrid tribunals have both international and national characteristics. They are staffed by both international and national judges and prosecutors; some have a majority of internationals, while others have a majority of nationals. With the exception of the STL, all of them are physically located in the affected countries. Hybrids typically apply national law or both international and national law, and many of them are legally part of the national judiciary. Hybrid tribunals have generally been established through an agreement between international and national authorities.<sup>35</sup>

The blending of the international and national that defines hybrid tribunals reflected increasing attention to the concept of complementarity and national ownership of post-conflict justice initiatives, as well as the related focus on building the capacity of criminal justice sectors in post-conflict and transitional societies. Separate from its precise meaning in the Rome Statute of the ICC ('ICC Statute'), complementarity more generally developed in opposition to the principle of primacy that was implemented at the *ad hoc* tribunals and reflects the belief that international criminal justice should not displace national criminal justice, but complement and support it.

Hybrid tribunals attempted to put complementarity into practice by increasing the engagement of national judicial authorities in post-conflict justice while retaining key characteristics of international courts, primarily independence, impartiality and the application of international practices

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<sup>33</sup> Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN doc. UNTAET/REG/2000/15, 6 June 2000 (<http://www.legal-tools.org/doc/c082f8/>). See Yann Kerbrat, "Les conflits entre les tribunaux pénaux hybrides et les autres juridictions répressives (nationales et internationales)", in Hervé Ascensio (ed.), *Les juridictions pénales internationalisées: Cambodge, Kosovo, Sierra Leone, Timor Leste*, Société de législation compare, Paris, 2006, p. 189.

<sup>34</sup> Regulation No. 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors, UN doc. UNMIK/REG/2000/6; UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/6. See generally Laura A. Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review*, vol. 37, no. 4, 2003, p. 1062.

<sup>35</sup> While the SPSC and United Nations Interim Administration Mission in Kosovo ('UNMIK') panels were established by the United Nations as transitional administrators, successor institutions sharing similar characteristics continued after the transitional period.

and standards. Some hybrid courts, like those in Kosovo and Bosnia and Herzegovina, were established to continue the work of an existing international tribunal (the ICTY) in the respective national judicial systems. Others, like the ECCC and SCSL, were the exclusive fora for war crimes prosecutions and thus united international and national justice in one institution. While different circumstances prompted different solutions, the end result was the same: national justice actors took on increasing responsibility, together with international counterparts, for post-conflict accountability.

In addition to the symbolic value of increased national ownership, stakeholders also hoped that hybrid tribunals would enable sustainable improvements to the capacity of national criminal justice sectors both in war crimes prosecutions and more generally. This goal has been typically referred to as positive complementarity. As national justice actors would directly participate in the proceedings, they would become familiar with international practices and standards, and related training initiatives would further improve their skills and knowledge. In addition, the establishment of hybrid tribunals would provide opportunities for a range of capacity-building measures, including physical infrastructure, such as courtrooms, and new justice institutions such as witness support and protection services. While the practice of positive complementarity can still be further improved, it appears that hybrid tribunals have achieved important results already. On the eve of completing its mandate, President Shireen Fisher of the SCSL reported to the Security Council: “As the Special Court’s success proves, complementarity is a reality, not just an aspiration. [...] What is special about the Special Court is the synergy of local commitment, knowledge and talent with international financial and human resources. Complementarity works”.<sup>36</sup>

The SCSL indicted 13 individuals comprising the leadership of the three main factions in the Sierra Leone civil war, one of whom remains a fugitive from justice. Ten individuals were convicted, none was acquitted, and proceedings were terminated against two accused who died. After completing its last and most notable case, against the former President of Liberia Charles Taylor, the SCSL completed its mandate after 11 years of operations in December 2013. The ECCC has indicted five individuals so

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<sup>36</sup> United Nations Security Council, 6844th Meeting, 9 October 2012, UN doc. S/PV.6844, p. 3.

far, with two cases still in the investigation phase. One individual has been convicted, the case against two accused is still ongoing, and proceedings were terminated against two other accused. The STL has initiated one case *in absentia* against five accused, which is currently ongoing.

#### 4.2.4. The International Criminal Court

The shift from *ad hoc* to hybrid tribunals and from primacy to complementarity took place contemporaneously with the establishment of the ICC as a permanent, treaty-based international tribunal with jurisdiction over international crimes. The ICC Statute was adopted in 1998 and entered into force in 2002. As of the date of writing, there are 123 states parties.

Like the *ad hoc* tribunals, the ICC is an international court located outside the affected countries. Nonetheless, the ICC Statute departed from the primacy principle by “*emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”.<sup>37</sup> Unlike with the later hybrid tribunals, however, the ICC Statute does not implement complementarity by bringing together international and national justice actors or by contributing directly to the capacity of national judiciaries. Rather, as a legal rule, complementarity at the ICC regulates the relationship between what remain distinct international and national institutions, specifically in the matter of determining the appropriate forum for the prosecution of particular cases. The determination of the appropriate forum in the ICC Statute is addressed through the rules of “admissibility”.<sup>38</sup>

In theory, the ICC will act as a “court of last resort” and a case will be admissible when national courts have failed to investigate and prosecute a case or demonstrated inability or unwillingness to do so in a genuine manner.<sup>39</sup> In such circumstances, the ICC can assert jurisdiction, dis-

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<sup>37</sup> Rome Statute of the International Criminal Court, 12 July 1998, Preamble (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>38</sup> *Ibid.*, Art. 17.

<sup>39</sup> See, for example, Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, Oxford 2008, p. 3: “[I]n answering the question of the relationship between the ICC and national criminal jurisdictions, States sought a formula designed to establish an ICC with the potential of filling the gaps left by the ineffectiveness of national criminal jurisdictions. The debate about the proper relationship between the ICC and national criminal jurisdictions thus evolved with two principal

placing the jurisdiction of national courts with respect to the particular case in question. The result is in effect the same as when the *ad hoc* tribunals asserted their primacy of jurisdiction through the deferral process; the primary difference is the triggering criteria.<sup>40</sup> The ICC thus complements national jurisdictions in the sense that it is an alternative forum that will step in to prosecute a case when national courts have failed to do so. In practice, this determination has proved difficult.<sup>41</sup>

Otherwise, the ICC Statute is largely silent on how international and national justice initiatives relate to one another. Numerous provisions detail the obligations of national judiciaries to the ICC, but, like the *ad hoc* tribunals, the ICC is not required to co-operate with or support national jurisdictions, although it is granted the authority to do so if requested.<sup>42</sup> While there has been limited litigation of these issues in practice so far, the ICC has already strongly indicated that it considers complementarity as expressed in the ICC Statute and support to national courts to be exclusive issues. The Office of the Prosecutor has averred that it is not obliged to assist national authorities pursuant to the ICC Statute, although it stated that as a matter of policy it would assist and support genuine investigations by states.<sup>43</sup> The Court has held it also does not have such an obligation.<sup>44</sup> The Court has gone further by holding that in determining

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considerations in mind: accommodating State sovereignty and ensuring the criminal accountability of perpetrators of genocide, crimes against humanity and war crimes”.

<sup>40</sup> See *infra*, section 4.3.1.

<sup>41</sup> See, for example, International Criminal Court (“ICC”), Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, Decision on the Admissibility of the Case against Abdullah Al-Senussi, ICC-01/11-01/11, 11 October 2013 (<https://www.legal-tools.org/doc/af6104/>); ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, 31 May 2013 (<https://www.legal-tools.org/doc/339ee2/>).

<sup>42</sup> ICC Statute, Art. 93(10), see *supra* note 37; ICC, Rules of Procedure and Evidence, adopted 3–10 September 2002, ICC-ASP/1/3, Rule 194 (<http://www.legal-tools.org/doc/8bcf6f/>).

<sup>43</sup> ICC, Situation in the Republic of Kenya, Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194”, ICC-01/09-80, 6 October 2011, paras. 11, 24 (<https://www.legal-tools.org/doc/60318b/>).

<sup>44</sup> ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-63, 25 September 2012, para. 29 (<https://www.legal-tools.org/doc/ed9407/>).

whether a case is admissible, it is “irrelevant” whether existing national investigations could be strengthened or new investigations launched by support from the ICC, particularly by providing evidence in the possession of the OTP or Court.<sup>45</sup>

As of the date of writing, the ICC has brought 23 cases in nine situations.<sup>46</sup> Three cases involving three individuals have been completed, with two convictions and one acquittal. Five proceedings have been terminated or withdrawn, while charges against two suspects were not confirmed. One case has been declared inadmissible. Twelve suspects currently remain at large.

### **4.3. From Primacy to Complementarity at the ICTY**

#### **4.3.1 International Primacy at the ICTY**

##### **4.3.1.1. The Context**

When in 1993 the United Nations Security Council considered the establishment of the ICTY, the relationship and allocation of jurisdiction between international criminal tribunals and national criminal courts was already a well-recognised issue. It had been repeatedly debated from the outset of efforts to establish an international criminal court. Articles 26 and 27 of the International Law Commission’s (‘ILC’) 1953 Revised Draft Statute for an International Criminal Court provided that this proposed court would only have jurisdiction when conferred by the accused’s state of nationality and the state where the crimes were committed.<sup>47</sup> Even

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<sup>45</sup> ICC, Situation in the Republic of Kenya, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-02/11, 30 August 2011, para. 121: “For the determination of the Admissibility Challenge, the question revolved around whether, on the available evidence, the case against the three suspects was being investigated by Kenya. Whether specific evidence should be made available to Kenya which could have reinforced existing investigations or led to new investigations was irrelevant for the outcome of the Admissibility Challenge” (<https://www.legal-tools.org/doc/c21f06/>). Compare with *infra*, section 4.3.3.3.

<sup>46</sup> See the ICC web site, Situations and Cases.

<sup>47</sup> Revised Draft Statute for an International Criminal Court, Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953, UN General Assembly Official Records, 9th sess., supp. no. 12, at 21, UN doc. A/2645, 1954.



more, such jurisdiction was merely permissive at the initiative of the concerned state(s), not mandatory.<sup>48</sup> These provisions resolved any potential jurisdictional conflicts in favour of national courts unless expressly decided otherwise, while also providing political assurance to states that their sovereignty would not be impinged. The ILC's 1993 Draft Statute proposed more intricate jurisdictional relationships between the international court and national courts, but the principle remained that the relevant states had to consent before the international court could assert jurisdiction.<sup>49</sup>

Yet the Secretary-General's recommendation that the ICTY have primary jurisdiction was accepted without amendment by the Security Council. While the Secretary-General's report discussed in detail a number of issues, it was merely proposed that under Article 9 of the ICTY Statute, the ICTY and national courts would have concurrent jurisdiction and that "[t]his concurrent jurisdiction, however, should be subject to the primacy of the International Tribunal".<sup>50</sup> The Secretary-General further proposed that "the details of how the primacy will be asserted" would be left to the Tribunal's judges as part of the rules of procedure and evidence.<sup>51</sup>

Security Council members were aware that this was an important issue, yet even so contented themselves with statements noting their understanding of specific limitations. The strongest reservations were expressed by China, which contended that giving "the Tribunal both preferential and exclusive jurisdiction is not in compliance with the principle of

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<sup>48</sup> As the ILC's report noted, paragraph 3 of Article 26 "made it clear that, by conferring jurisdiction upon the court a State was not bound to bring specific cases before the court. Such a State had the right to do so but it might well choose to bring cases before its own national courts according to the laws determining national criminal jurisdiction (article 26, paragraph 4) or before special international tribunals (article 53)". *Ibid.*, para. 95, p. 14.

<sup>49</sup> Report of the Working Group on the Draft Statute for an International Criminal Court, Annex to Report of the International Law Commission on the work of its forty-fifth session, UN General Assembly Official Records, 48th sess., supp. no. 10, UN doc. A/48/10, 1993, Arts. 23–26 (<https://www.legal-tools.org/doc/83c6d3/>). See also Report of the Working Group on the Question of an International Criminal Jurisdiction, Annex to Report of the International Law Commission on the work of its forty-fifth session, UN General Assembly Official Records, 47th sess., UN doc. A/47/10, 1992.

<sup>50</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993), UN doc. S/25704, 3 May 1993, para. 65 ('Report of the Secretary-General').

<sup>51</sup> *Ibid.*

State judicial sovereignty”.<sup>52</sup> France and the United States expressed their understanding that the ICTY’s primacy was limited to the case of sham prosecutions addressed in Article 10,<sup>53</sup> while the United Kingdom understood that it was limited to the countries of the former Yugoslavia.<sup>54</sup> The Russian Federation suggested that Article 9(2) only imposed a duty on the relevant state to consider a request for deferral.<sup>55</sup> Japan limited itself to noting that more study could have been given to “measures to establish a bridge with domestic legal systems”.<sup>56</sup> These reservations notwithstanding, the Security Council adopted the ICTY’s statute unanimously as proposed by the Secretary-General.<sup>57</sup>

There were evident explanations for the surprising contentment with the ICTY’s primacy over national jurisdictions. As nearly all Security Council members noted, the establishment of the ICTY was an exceptional measure in exceptional circumstances.<sup>58</sup> It would not, in other words, become a precedent. Moreover, many Security Council members referenced the Council’s repeated and unheeded demands that crimes be halted and the fact of ongoing impunity.<sup>59</sup> Finally, the United States raised an issue of which many were aware: there was a possibility if not a likelihood that no suspects would be brought to trial.<sup>60</sup>

There is another aspect of primacy in the ICTY Statute that did not draw attention. Article 29 of the ICTY Statute mandates that states shall co-operate with the Tribunal, which would include providing evidence to the Tribunal relevant to crimes under their concurrent jurisdiction. The Statute is, however, silent on any obligations that the ICTY had to co-operate with national criminal courts. Although the Secretary-General’s report noted that national authorities should be encouraged to exercise

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<sup>52</sup> United Nations Security Council, Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, UN doc. S/PV.3217, 1993, p. 33.

<sup>53</sup> *Ibid.*, p. 11 (France), p. 16 (United States).

<sup>54</sup> *Ibid.*, pp. 18, 19.

<sup>55</sup> *Ibid.*, p. 46.

<sup>56</sup> *Ibid.*, pp. 24, 25.

<sup>57</sup> *Ibid.*, p. 6.

<sup>58</sup> *Ibid.*, p. 7 (Venezuela), p. 18 (United Kingdom), p. 26 (Japan), p. 33 (China), pp. 34–37 (Brazil), p. 41 (Spain).

<sup>59</sup> *Ibid.*, pp. 17, 18 (United Kingdom), pp. 22, 23 (New Zealand), p. 27 (Morocco), p. 32 (Pakistan).

<sup>60</sup> *Ibid.*, p. 13.

their jurisdiction, the ICTY was not mandated to co-operate in realising this goal.<sup>61</sup> This was not simply an oversight; the United States had proposed including provisions allowing the ICTY prosecutor to defer cases to national judiciaries and enabling it to assist in the investigation and prosecution by national authorities.<sup>62</sup> While subtle, this absence of reciprocal obligations served to further strengthen the Tribunal's primacy in practice.

The ICTY's primacy was, therefore, a system designed only to support international prosecutions. This result is striking given that it stood in direct opposition to the consistent efforts of many states to limit the powers of international courts and safeguard national sovereignty. Some Security Council members expressed views that the ICTY's primacy was limited to particular circumstances. Nonetheless, the fact remained that Article 9 is expressly not limited.

#### **4.3.1.2. The Rules of Deferral**

The Secretary-General's report noted that it would be for the judges of the Tribunal to develop the details of primacy in practice. They did so through the Rules of Procedures and Evidence, which set out the process by which the ICTY could assert that primacy. As became clear, the conception of primacy that would be reflected in the RoPE was far more sweeping than Security Council members had envisioned.

The ICTY Statute vested wide authority in the prosecutor to select cases for investigation and prosecution. Article 16(1) broadly established that the prosecutor "shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991". Article 18(1) provided that the prosecutor would assess information gathered during investigations and "decide whether there is sufficient basis to proceed", while Article 19(1) provided that an indict-

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<sup>61</sup> Report of the Secretary-General, para. 64, see *supra* note 50.

<sup>62</sup> Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, UN doc. S/25575, 12 April 1993, p. 7, proposing that the Statute include a provision that: "The Tribunal may, at its discretion, defer to the prosecution of an accused person by a State or States, when it is satisfied that such trial will be in the interests of justice and without prejudice to its authority under paragraph (a). The Office of the Chief Prosecutor may also assist in the investigation and prosecution of persons by a State or States".

ment submitted by the prosecutor would be confirmed so long as “a *prima facie* case has been established by the Prosecutor”.

As Article 9 of the ICTY Statute highlighted, primacy would be realised in practice through the ICTY’s authority to request national courts to defer cases to its jurisdiction. The procedures governing the deferral process are set out in Rules 8–10. Under Rule 8 of the RoPE, when proceedings that seem to concern crimes within the jurisdiction of the Tribunal start in any state, the prosecutor may request information from that state. Rule 9 sets out three grounds under which the prosecutor may then ask that the Trial Chamber issue a formal request for deferral of the case. Rule 9(i) permits deferral when an international crime is characterised as an ordinary crime. Rule 9(ii) concerns situations where it appears that the national proceedings are a sham. These two grounds closely parallel the provisions of Article 10 of the ICTY Statute. The third ground, however, is not drawn from the Statute directly. Rule 9(iii) provides that a deferral may be requested if what is at issue in the national proceedings “is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal”. Finally, Rule 10 broadly provides that the Trial Chamber may grant the prosecutor’s request for deferral if “deferral is appropriate”.

The RoPE thus adopted an expansive vision of primacy. Under Rule 9(iii), primacy can be asserted and deferral requested in the absence of any deficiency in the national proceedings; rather, the imperatives of international justice are sufficient alone. The only qualification is that the factual or legal issues must be significant, although the implications themselves need not be. Even Rule 9(i) and (ii) represent an assertive form of primacy, as these provisions can be invoked at an early stage of the proceeding and before a judgment has been issued, unlike the limited exception to *ne bis in idem* provided in Article 10 of the ICTY Statute on which these rules are based. In addition, it is notable that Rule 9 does not include any geographic or other limitation.

#### **4.3.1.3. Primacy in Practice**

What remained to be seen was how the law on deferral and the primacy principle would be applied in practice. The OTP had wide discretion in determining which cases to investigate and prosecute, as well as in requesting deferral of national proceedings in favour of the ICTY. The

Court, for its part, could regulate primacy through judicial interpretation and application of the Statute and RoPE, such as clarifying primacy's guiding principles and establishing tests to determine when the assertion of primacy would be "appropriate".

These questions were answered in the ICTY's first case. Both the OTP and the Court adopted expansive understandings of the ICTY's primacy, compared to those expressed by Security Council members. Both saw primacy as an instrument to achieve important goals. However, the goals differed, and thus their understandings of primacy differed. For the OTP, primacy was, to a degree, a practical matter of case allocation that would enable it to pursue a coherent prosecutorial strategy and ultimately more successful prosecutions. The ICTY had precedence over national jurisdictions, but that precedence only would be asserted when it was in the interests of the OTP's prosecutions to do so.

In the *Tadić* jurisdiction appeal decision, the Court articulated a rather stronger notion of primacy. For the Appeals Chamber, primacy is inherent to international justice because, it suggested, state sovereignty is linked to impunity. Primacy was thus in part justified by and in part furthered a perceived broader trend in international law from a near-exclusive focus on state sovereignty towards an acceptance that human rights are equal if not paramount.

In February 1994 Duško Tadić, a Bosnian Serb, was arrested in Germany.<sup>63</sup> Tadić had resided in Kozarac,<sup>64</sup> a village in the Prijedor region of Bosnia and Herzegovina where widespread crimes against Bosnian Muslims and Croats had been committed.<sup>65</sup> Tadić had been a local leader of the Srpska Demokratska Stranka (SDS), the Bosnian Serb nationalist party, but had left for Germany in late 1993, joining his family in Munich.<sup>66</sup> Following his arrest, he was indicted by German authorities for crimes under German law, including genocide, torture and murder.<sup>67</sup> Hav-

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<sup>63</sup> ICTY, *Prosecutor v. Duško Tadić et al.*, Trial Chamber, Opinion and Judgment, IT-94-1-T, 7 May 1997, para. 6 ('Tadić Trial Judgment') (<https://www.legal-tools.org/doc/0a90ae/>).

<sup>64</sup> *Ibid.*, para. 180.

<sup>65</sup> See, for example, *ibid.*, paras. 127–79.

<sup>66</sup> *Ibid.*, paras. 188, 191, 192.

<sup>67</sup> See ICTY, *In the Matter of a Proposal for Formal Request for Deferral to the Competence of the International Tribunal*, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Crim-

ing been notified of the arrest and initiation of proceedings, the OTP applied to the Trial Chamber to request Germany to defer to the ICTY's jurisdiction.

In moving for deferral of the case, the OTP did not assert that there were any deficiencies in the German proceedings against Tadić.<sup>68</sup> Rather, it relied on Rule 9(iii), and its submissions were ultimately founded on the contention that if Tadić were prosecuted in Germany, it would adversely affect the OTP's investigations and prosecutions of other suspects.<sup>69</sup> This was primarily premised on what it regarded as the significant factual questions involved. The important legal issues – such as questions of international law, interpretation of armed conflict and the nature and manner of proof – the OTP highlighted were not unique to Tadić's case, and would have been similarly implicated in the first prosecution the OTP brought.<sup>70</sup> The factual questions involved were, however, more specific to Tadić.

In contending that there were significant factual questions, the OTP pointed to Tadić's suspected role in the broader pattern of notorious crimes committed in Prijedor in 1992.<sup>71</sup> The OTP detailed its understanding of the ethnic cleansing campaign in Prijedor, including preparatory activities, the large number of crimes committed and the organised and systematic manner in which they were committed.<sup>72</sup> It submitted that

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inal Tribunal for the former Yugoslavia in the Matter of Dusko Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), IT-94-1-D, 8 November 1994 ('Tadić Deferral Decision').

<sup>68</sup> ICTY, *An Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadic also known by the names Dusan "Dule" Tadic*, 12 October 1994, Application, IT-94-1-D, 12 October 1994 ('Tadić Application for Deferral'). See also ICTY, *Prosecutor v. Duško Tadić et al.*, Appeals Chamber, Decision on the Defence Motion for interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 52: "The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany" ('Tadić Jurisdiction Appeal Decision') (<https://www.legal-tools.org/doc/866e17/>).

<sup>69</sup> Tadić Application for Deferral, p. 2, see *supra* note 68.

<sup>70</sup> ICTY, *An Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadic also known by the names Dusan "Dule" Tadic*, Transcript, IT-94-1-D, 8 November 1994, pp. 11, 12 ('Tadić Application Hearing').

<sup>71</sup> ICTY, *An Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadic also known by the names Dusan "Dule" Tadic*, Declaration of Michael J. Keegan, IT-94-1-D, 11 October 1994, 2.1-2.3 ('Keegan Declaration').

<sup>72</sup> *Ibid.*, 3.1–5.7.

there was evidence that Tadić had participated in these crimes,<sup>73</sup> and contended that Tadić’s prosecution “would provide a clear illustration of a plan for the widespread and systematic persecution against the civilian population of the Prijedor Region”.<sup>74</sup> The OTP further clarified its understanding of primacy during oral arguments. Following questioning by the judges, the Prosecutor stated: “The policy that we have adopted in my Office is that we certainly do not intend to ask for deferral of all cases before national courts related to or arising from events in the Former Yugoslavia”.<sup>75</sup> Rather, deferral of the *Tadić* case was requested because it related “to a specific investigation, an important investigation, which was in any event under way in the Prosecutor’s Office”.<sup>76</sup> The *Tadić* case, he explained, thus “relate[s] directly to potential indictments which will be brought out by the Prosecutor [...]”.<sup>77</sup> In all these respects, primacy was asserted to allow the OTP to bring appropriate cases that would enable it to build a factual record and establish important precedents for future prosecutions.

The Trial Chamber granted the OTP request for deferral, reciting and accepting all submissions put forward without placing particular weight on the relationship between the *Tadić* case and future investigations and prosecutions.<sup>78</sup> Of more significance, however, was the Appeals Chamber’s decision one year later on the Defence Motion for Interlocutory Appeal on Jurisdiction.

Among a number of important contentions, the defence asserted that the ICTY’s “primacy over domestic courts constitutes an infringe-

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<sup>73</sup> *Ibid.*, 6.1–6.8.

<sup>74</sup> *Ibid.*, 2.2. The OTP further pointed to related factual and procedural issues, such as the likelihood that potential co-offenders would not be subject to German jurisdiction, and that important witnesses were not present in Germany. Tadić Application Hearing, pp. 27–31, see *supra* note 70.

<sup>75</sup> Tadić Application Hearing, p. 31, see *supra* note 70.

<sup>76</sup> *Ibid.*, p. 32.

<sup>77</sup> *Ibid.* In contrast, he noted, the OTP had not requested deferral in a proceeding underway in Denmark, because it was not as important to other investigations and prosecutions.

<sup>78</sup> Tadić Deferral Decision, see *supra* note 67. Indeed, in noting that there were significant factual questions, it highlighted the OTP’s contentions regarding Tadić’s direct participation in the commission of crimes and the severity of the crimes, rather than the broader pattern of crimes the OTP had identified.

ment upon the sovereignty of the States directly affected”.<sup>79</sup> In response, the OTP contended that an individual could not assert sovereign rights and that the relevant states (Germany and Bosnia and Herzegovina) had accepted the ICTY’s assertion of jurisdiction.<sup>80</sup> The OTP further argued that the ICTY’s assertion of jurisdiction did not violate any state’s sovereignty, because the crimes were of universal concern and subject to universal jurisdiction. The ICTY, representing the world community, could thus prosecute universal crimes that any state itself could have prosecuted.<sup>81</sup> The Trial Chamber accepted the OTP’s submissions.<sup>82</sup>

On appeal, the Appeals Chamber agreed in the result, but adopted a significantly different framework to resolve the matter. The OTP and Trial Chamber had largely avoided framing the ICTY’s primacy as a violation of state sovereignty, focusing instead on the right of sovereign states, individually or as a community, to prosecute international crimes wherever they may have been committed. The Appeals Chamber accepted this view, but did not fully rely on it. It suggested that while the ICTY’s primacy may infringe state sovereignty, this was justified by a competing legal norm, individual human rights. The Appeals Chamber situated this development within what it saw as a more general shift in international law from a “state-sovereignty approach” to a “human-beings-oriented approach”.

The Appeals Chamber first disagreed with the OTP and Trial Chamber that the accused did not have standing to assert a violation of state sovereignty. However, it did not do so out of concern for the prerogatives of sovereignty. Rather, it relied on human rights law in favour of the accused, holding that the principle that only states could assert their sovereignty

[d]at[es] back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, [but] this concept recently has suffered progressive erosion at the hands of

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<sup>79</sup> ICTY, *Prosecutor v. Duško Tadić et al.*, Motion on the Jurisdiction of the Tribunal, IT-94-1-T, 2 October 1995, para. 2.

<sup>80</sup> ICTY, *Prosecutor v. Duško Tadić*, Prosecution Response to the Motion of the Defence on the Jurisdiction of the Tribunal, IT-94-1-T, 7 July 1995, pp. 29–31.

<sup>81</sup> *Ibid.*, pp. 32, 33.

<sup>82</sup> ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995, paras. 41, 42 (<https://www.legal-tools.org/doc/ddd6b0/>).



the more liberal forces at work in the democratic societies,  
particularly in the field of human rights.<sup>83</sup>

This position was fully consistent with its reasoning elsewhere in the decision to conclude that it had competence to review the ICTY's establishment.

While accepting the plea of state sovereignty in light of the accused's rights, the Appeals Chamber rejected the merits. The Appeals Chamber held that "[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights".<sup>84</sup> Here, the human rights were not of the accused, but of his victims, and humanity as a whole. These interests superseded state sovereignty, in the Appeals Chamber's view.

The Appeals Chamber went further by arguing that the ICTY's primacy was not merely permissible, but mandatory. It suggested:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)). If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.<sup>85</sup>

The Appeals Chamber saw this as a progressive development. It later noted:

[O]ne cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, in-

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<sup>83</sup> Tadić Jurisdiction Appeal Decision, para. 55, see *supra* note 68.

<sup>84</sup> *Ibid.*, para. 58.

<sup>85</sup> *Ibid.*, para. 58.

dependent and disinterested judges coming, as it happens here, from all continents of the world.<sup>86</sup>

This reasoning was consistent with the Appeals Chamber's approach to other questions of international law. In the course of assessing international law applicable to non-international armed conflicts, the Appeals Chamber noted that the dichotomy between the two "was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands".<sup>87</sup> In contrast, the Appeals Chamber understood that

the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community.<sup>88</sup>

In its words,

[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.<sup>89</sup>

In his separate opinion, Judge Sidwa articulated a similar view. Before proceeding to the merits of the accused's challenge to the ICTY's primacy, he first outlined his understanding of the concept.

At the root of primacy is a demand for justice at the international level by all States and constitutes the first step towards implementation of international judicial competence. [...] The rule obliges States to accede to and accept requests for deferral on the ground of suspension of their sovereign rights to try the accused themselves and compels States to accept the fact that certain domestic crimes are really international in character and endanger international peace and thus such

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<sup>86</sup> *Ibid.*, para. 62.

<sup>87</sup> *Ibid.*, para. 96.

<sup>88</sup> *Ibid.*, para. 97.

<sup>89</sup> *Ibid.*, para. 96.

international crimes should be tried by an international tribunal, that being an appropriate and competent legal body duly established for this purpose by law.<sup>90</sup>

The two different conceptions of primacy articulated by the OTP and the Appeals Chamber led to the same result in the *Tadić* case and would continue to do so in other cases.<sup>91</sup> In fact, the only significant disagreement between the OTP and the Chambers on issues of deferral would later arise when the OTP put forward a proposal to exclude national authorities from investigating and prosecuting a broad range of crimes committed in the Former Yugoslav Republic of Macedonia.<sup>92</sup> This contention, arguably consistent with the Appeals Chamber's view of primacy, was rejected by the Trial Chamber. It noted in particular that the ICTY Statute provides for concurrent jurisdiction with states and that the Secretary-General had stated that national proceedings should be encouraged.<sup>93</sup>

The similarities and differences between the views of the OTP and Chambers are relevant to understanding primacy in practice at the ICTY. It is striking that there was unanimity that primacy would not be limited to the conditions in Article 10 of the ICTY Statute, despite the contrary views expressed by Security Council members. Both the OTP and Chambers embraced a more expansive view of primacy that strongly shifted the default forum for the prosecution of these crimes from the national to the international.

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<sup>90</sup> *Ibid.*, Separate Opinion of Judge Sidwa, para. 83.

<sup>91</sup> See, for example, ICTY, *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Slijvančanin*, Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal, IT-95-13-R61, 10 December 1998 (<https://www.legal-tools.org/doc/671a68/>); ICTY, Trial Chamber, *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić, and Mičo Stanišić*, Decision, IT-95-5-D, 16 May 1995 (<https://www.legal-tools.org/doc/d2ab12/>); ICTY, *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Crimes Against the Population of the Lašva River Valley*, Decision, IT-95-6-D, 11 May 1995.

<sup>92</sup> ICTY, *In Re: The Republic of Macedonia*, Decision on the Prosecutor's request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, IT-02-55-MISC.6, 4 October 2002, para. 45.

<sup>93</sup> *Ibid.*, paras. 49–52.

The OTP's perspective was fundamentally operational and rooted in the requirements of a successful prosecutorial strategy. On the other hand, the Appeals Chamber's articulation of the meaning of primacy stands as a high-water mark of belief in the transformative power of international criminal courts. Brought into relation with larger developments underway in international law, the Appeals Chamber suggested that the ICTY's primacy was a significant development that would lead to more justice by overcoming state sovereignty and recalcitrance, vindicating international human rights, and ensuring that perpetrators were held accountable.

Yet less than three years later, the ICC Statute, an international treaty unlike the ICTY Statute, was adopted. It reflected state opinion that primacy was not essential to the work of an international criminal tribunal. Moreover, even as it was being articulated, primacy was confronting significant challenges in its implementation.

#### **4.3.2. A New Approach**

##### **4.3.2.1. Challenges to Primacy in Practice**

The ICTY OTP was tasked with investigating and prosecuting mass atrocities committed over the course of many years and involving many victims and perpetrators. Investigations formally began in June–July 1994 in the midst of ongoing conflicts that would not end until a year and a half later. During the conflicts and for some years after, the OTP was only able to carry out limited investigations, primarily obtaining accounts of mass atrocities from refugees and other witnesses. There were no security services available to accompany ICTY investigators in the field or to secure crime scenes on its behalf. In order to obtain evidence such as mapping crime scenes, exhuming mass graves and interviewing potential insider witnesses, the OTP needed co-operation from state and local authorities to access locations and individuals. Unfortunately, such co-operation was often not forthcoming.

For example, when the Srebrenica genocide was committed in July 1995, there was no infrastructure in place to secure the crime scenes. It was 12 months before OTP investigators were able to access the sites to carry out exhumations and collect other evidence. Delayed access enabled the perpetrators to remove the bodies from primary graves and relocate them to secondary graves in an attempt to cover up the crimes. Even though many of the primary and secondary mass graves were finally

found and exhumed, the reburial operation had disrupted the crime scenes.

During the investigation of crimes in the Republika Srpska, one of the two entities in Bosnia and Herzegovina, the OTP was repeatedly denied access by the authorities and advised by the international community not to enter the area due to security concerns even after the conflict. It was not until December 1997 that the first search and seizure mission was conducted in Prijedor, one of the municipalities where in 1992 thousands of victims were brutally killed or detained in life-threatening conditions. The OTP also faced serious difficulties accessing military records and other documents from military and civilian archives.

The situation was even more difficult in Croatia and Serbia. It took 10 years to get hold of documentation from those governments. Both states invoked sovereignty and stated in no uncertain terms that the OTP had no right to the documents. Even with the legal authority of the Security Council through Chapter VII of the United Nations Charter, the OTP had to negotiate for access, in many instances with the same people who were in power during the conflict, including suspected perpetrators of crimes or their superiors. By the time access to archives was obtained, records had been destroyed or hidden.

Executing arrest warrants was equally problematic. The Dayton Peace Accords ended the conflict in the Republic of Bosnia and Herzegovina, and a peacekeeping mission was established. But while Dayton required the states of the former Yugoslavia to co-operate with the ICTY, the peacekeeping forces were not under the same obligation. States who contributed peacekeepers were initially very reluctant to arrest fugitives in the Republic of Bosnia and Herzegovina indicted by the ICTY. There were many anecdotes about ICTY fugitives passing through checkpoints without problem. In 1996, three years after the ICTY's establishment, only four indictees were in custody. By mid-1997, only seven indictees were in custody, while more than 50 were at large.

Even once arrests finally began in Bosnia and Herzegovina, rapidly increasing the number of accused in the ICTY's custody,<sup>94</sup> there contin-

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<sup>94</sup> By mid-1998 there were already 30 indictees in the Tribunal's Detention Unit, almost four times as many as the year before. In late 1998 peacekeepers successfully carried out the highest-level arrest until that time, arresting General Radislav Krstić, former commander of the Drina Corps of the Bosnian Serb Army and indicted for the Srebrenica genocide.

ued to be significant problems obtaining arrests in other states. The case of Ratko Mladić, former commander of the Main Staff of the Bosnian Serb Army and among the ICTY's most wanted fugitives, illustrated the problem. Mladić was indicted in 1995,<sup>95</sup> and an international warrant for his arrest was issued in 1996.<sup>96</sup> Until 2001 he was moving freely in Belgrade, fully aware that the government would not transfer him to The Hague. He was seen in restaurants and at football matches on a regular basis. Similar situations arose with other Serbian fugitives, who lived openly, secure in the knowledge that the Serbian government refused to co-operate with the ICTY. In Croatia, the situation was different, with the handover of indictees delayed and suspicions that a high-profile indictee had been allowed to escape.

The difficulties arresting fugitives posed significant risks to the IC-TY and the principle of primacy. The then President, Antonio Cassese remarked: “[I]t was politically difficult to get rid of [the Tribunal]. However, one could paralyze it. A tribunal without defendants, without trials, would cost a fortune and produce nothing of value”.<sup>97</sup>

At the same time, political fatigue and frustrations arose within the Security Council. The international community started questioning when, if ever, the ICTY would complete its mandate. The Tribunal's projected completion date of 2016 was already seen as too distant,<sup>98</sup> and it was said that “the wheels of justice are turning too slowly”.<sup>99</sup> These concerns were compounded by the overall negative public perception of the ICTY's legitimacy in the affected countries.<sup>100</sup>

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<sup>95</sup> ICTY, *Prosecutor v. Ratko Mladić*, Initial Indictment, IT-95-5-I, 24 July 1995.

<sup>96</sup> ICTY, *Prosecutor v. Karadžić and Mladić*, Review of Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R61/IT-95-18-R61, 11 July 1996.

<sup>97</sup> Pierre Hazan, *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia*, Texas A&M University Press, College Station, 2004, p. 69.

<sup>98</sup> The Ukrainian representative in the Security Council declared: “We recognize the huge workload facing the Tribunal. Of course, the need for changes is obvious. Based on the perspective that the Tribunal will complete its task by the year 2016, I should simply like to ask a rhetorical question: Could one have imagined that the Nuremberg tribunal would end its work in 1968, 23 years after its creation?”, United Nations Security Council, 4161st Meeting, 20 June 2000, UN doc. S/PV.4161, p. 16.

<sup>99</sup> *Ibid.*, p. 12 (Dutch delegation).

<sup>100</sup> See the comprehensive country-by-country survey regarding the attitudes towards the IC-TY, carried out in 2002 by the International Institute for Democracy and Electoral Assis-

While the ICTY had been granted primacy, that framework did not prove to be a sufficient solution to the challenges it was facing in practice. The absence of effective enforcement mechanisms in international law meant that asserting international judicial authority, without more, did not generate results. What was needed was more engagement by the OTP with judicial and political authorities in the region. Over time, this approach, combined with pressure from the international community, resulted in obtaining the necessary access to evidence and the arrests of fugitives.

Concurrently, developments in the affected countries began creating the conditions necessary to envisage genuine prosecutions at the national level.<sup>101</sup> These developments were further supported by international diplomatic encouragement for the affected countries to address war crimes prosecutions and rule of law issues, particularly in the context of the European Union’s negotiations on association and accession with Serbia, Bosnia and Herzegovina, and Croatia.<sup>102</sup> It thus became increasingly apparent that not only was there a need for more national prosecutions, but that the necessary conditions could be created and national judiciaries could be brought into a more complementary relationship with the ICTY.

#### 4.3.2.2. The Shift: The Completion Strategy

In 2001 President Claude Jorda reported to the Security Council on the ICTY’s priorities in the coming years. The starting point was that there was a need to expedite proceedings at the Tribunal. The judges had discussed that the ICTY “should focus more on prosecuting crimes constitut-

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tance (IDEA), *Brifing za Medije: Pregled Rezultata Istraživanja* ([http://www.idea.int/europe\\_cis/balkans/upload/serbian\\_press\\_release.pdf](http://www.idea.int/europe_cis/balkans/upload/serbian_press_release.pdf)). The key conclusion was that the more accused come from these ethnic communities, the less popular the ICTY is in these regions. According to the survey, the approval rating of the Tribunal was highest in Kosovo (83 per cent) and the Federation of Bosnia and Herzegovina (51 per cent), and lowest in Serbia (8 per cent) and Republika Srpska (4 per cent).

<sup>101</sup> See William Burke-White, “The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina”, in *Columbia Journal of Transnational Law*, 2008, vol. 46, pp. 279, 288; Rod Rastan, “Complementarity: Contest or Collaboration?”, in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 111.

<sup>102</sup> See Iavor Rangelov, “EU Conditionality and Transitional Justice in the Former Yugoslavia”, in *Croatian Yearbook of European Law and Policy*, 2006, vol. 2, pp. 365–75.

ing the most serious breaches of international public law and order, primarily those committed by high-ranking military and political officials”. At the same time, the judges did not intend that other cases not be prosecuted. Rather, Jorda made an important proposal that would become an essential element of the ICTY’s “Completion Strategy”:

The cases of lesser importance for the Tribunal – although, as we would all agree around this table, all criminal matters are important – could, under certain conditions, be relocated; that is, tried by the courts of the States created out of the former Yugoslavia. This solution would have the advantage of considerably lightening the International Tribunal’s workload, thereby allowing it to complete its mission even earlier. Moreover, it would make the trial of the cases referred to the national courts more transparent to the local population and make a more effective contribution to reconciliation among the peoples of the Balkans.<sup>103</sup>

Jorda noted that for this to be possible, “[t]he national courts must be in a position to accomplish their work with total independence and impartiality and with due regard for the principles of international humanitarian law and the protection of human rights”. He pledged that the ICTY would be prepared to contribute to this process.

The Completion Strategy was formally submitted to the Security Council a year later.<sup>104</sup> In addition to identifying deadlines for the completion of its work, the ICTY recommended that a number of cases involving lower- and intermediate-level accused be transferred to a State Court of Bosnia and Herzegovina (‘Court of BiH’) which was then in the process of being established,<sup>105</sup> with the possibility to broaden the process to other countries if there were further developments.<sup>106</sup> The ICTY noted that national prosecutions had been encouraged by the Secretary-General when

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<sup>103</sup> United Nations Security Council, 4429th Meeting, 27 November 2001, UN doc. S/PV.4429, p. 5.

<sup>104</sup> ICTY, Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National court, 17 June 2002, Attached to a Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN doc. S/2002/678, 19 June 2002.

<sup>105</sup> *Ibid.*, paras. 63–68.

<sup>106</sup> *Ibid.*, para. 45.



the ICTY's Statute was proposed, and that national prosecutions were intended to play an important role under the ICC Statute.<sup>107</sup>

The ICTY indicated that a number of legal reforms would be needed to implement this recommendation. It was suggested that there were some questions among the judges as to whether referral of cases was possible under Article 9 of the ICTY Statute, and that the preferred solution was for the Security Council to amend the Statute.<sup>108</sup> Regardless, the ICTY further noted that significant changes would need to be made to Rule 11*bis* to permit the referral process that was envisaged.<sup>109</sup>

The ICTY also indicated that significant legal reforms and capacity-building would also be needed in Bosnia and Herzegovina, as well as any other countries to which referrals might later be considered. In particular, reforms were needed to ensure independence and impartiality, fair trial standards, equality of treatment, minimum conditions of detention and the abolition of the death penalty.<sup>110</sup> The ICTY further proposed a number of measures necessary to adapt national proceedings to the specific requirements of war crimes prosecutions, including integrating international judges in the national courts, training national judges on international criminal law, making provision in national law for the protection of witnesses, and ensuring that the crimes and provisions on individual criminal liability in the ICTY Statute were incorporated in national law.<sup>111</sup>

In resolutions 1503 and 1534, the Security Council endorsed the Completion Strategy. The Security Council further called on the donor community to support the establishment of a war crimes chamber in the Court of BiH.<sup>112</sup>

The Completion Strategy thus began shifting the ICTY from primacy to a potential model of complementarity. The ICTY and national courts would be brought into a relationship whereby national prosecutions of

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<sup>107</sup> *Ibid.*, paras. 33, 34.

<sup>108</sup> *Ibid.*, para. 37.

<sup>109</sup> *Ibid.*, paras. 37–44.

<sup>110</sup> *Ibid.*, para. 72.

<sup>111</sup> *Ibid.*, para. 73.

<sup>112</sup> United Nations Security Council resolution 1503, UN doc. S/RES/1503, 28 August 2003 (<https://www.legal-tools.org/doc/9037f5/>); United Nations Security Council resolution 1534, UN doc. S/RES/1534, 26 March 2004 (<https://www.legal-tools.org/doc/4e06ee/>). See also United Nations Security Council, Statement by the President of the Security Council, 23 July 2002, UN doc. S/2002/PRST/21.

intermediate- and low-level suspects would complement international prosecutions of high-level suspects in order to achieve more comprehensive accountability.<sup>113</sup>

This division of labour, even if logical, represented a significant shift in attitudes at the ICTY. As noted, the ICTY's primacy had been strongly supported by both the OTP and the Chambers. Primacy was seen as not only acceptable, but mandatory. For the OTP, primacy was understood to be necessary for more successful prosecutions of senior-level suspects; referring cases, even against intermediate-level suspects, thus could be seen as creating a risk for the OTP's remaining trials. For the Chambers, primacy symbolised and contributed to significant trends perceived to be underway in international law, where international courts applying international law would be able to overcome barriers to justice raised by state sovereignty. From this perspective, justice was almost synonymous with international courts alone.

Yet in the face of a range of challenges, not the least the time required to prosecute complex war crimes cases, the ICTY was beginning to adapt by recognising the importance of national judiciaries. Admittedly, this process did not begin out of concern for increased national participation in post-conflict justice. Had the ICTY been able to secure the necessary co-operation from the outset and thus manage its caseload more expeditiously, it may have never found it necessary to look at national courts as potential partners. Regardless, circumstances arose that forced the ICTY to look beyond its courtrooms to ensure that more accountability was achieved, and with the Completion Strategy the ICTY proposed a complementarity framework incorporating both international and national prosecutions to meet that goal.

### **4.3.3. Positive Complementarity at the ICTY**

#### **4.3.3.1. Reform at the ICTY**

In order to move from primacy to a more complementary model, legal and operational reforms were first required at the ICTY. The Completion Strategy had set the ICTY a new mandate, but the OTP and judges would need to implement it, just as they had to implement primacy in practice.

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<sup>113</sup> United Nations Security Council, 4429th Meeting, 27 November 2001, UN doc. S/PV.4429, p. 5.

The Security Council declined to amend the ICTY Statute as the judges requested, with the result that legal reform to enable complementarity would have to be done through the RoPE, particularly Rule 11*bis*.

Already by November 1997, an early form of Rule 11*bis* had been adopted, although it was never utilised in its first form. Entitled “Suspension of Indictment in case of Proceedings before National Courts”, this initial Rule 11*bis* allowed the prosecutor to in effect “defer” a case. Its application was limited to the state where the accused had been arrested. Thus, while it would have allowed the prosecutor to defer the *Tadić* case back to German authorities, there was no possibility to transfer the case to Bosnia and Herzegovina, where the crimes had been committed and of which *Tadić* was a national. This early form of Rule 11*bis* was not an example of complementarity, but rather further regulation of the ICTY’s primacy to address the situation where the OTP later determined that a deferred case was not appropriate for prosecution at the ICTY.

Following the adoption of the Completion Strategy, Rule 11*bis* was significantly amended, changing it from a mechanism to regulate primacy to the means to begin implementing complementarity at the ICTY.<sup>114</sup> The amendments to Rule 11*bis* adopted on 30 December 2002 changed the title of the rule to “Referral of the Indictment to Another Court”. To change the Rule from an undeferral to a referral mechanism, Section (A) first expanded the eligible states to include the state where the crime was committed. Later, this was further amended to enable referral to any “having jurisdiction and being willing and adequately prepared to accept such a case”.

The procedure for referral was also significantly changed. Reflecting the procedure for deferral in Rule 9, only the prosecutor could initiate the procedure under the initial Rule 11*bis*. The revised 11*bis* now also allowed the Trial Chamber to initiate a referral proceeding *proprio motu*.<sup>115</sup> In addition, the revised 11*bis* for the first time required the prosecu-

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<sup>114</sup> ICTY, Rules of Procedure and Evidence, Rule 11*bis*, adopted 12 November 1997, revised 30 September 2002, amended 10 June 2004, 28 July 2004, and 11 February 2005 (<http://www.legal-tools.org/doc/02712f>).

<sup>115</sup> Despite this revision, all referral motions have been filed by the OTP. See Aleksandar Kontić and David Tolbert, “The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) and the Transfer of Cases and Materials to National Judicial Authorities: Lessons in Complementarity”, in Carsten Stahn and Mohamed M. El Zeidy, ed., *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, p. 888.

tor to transfer “appropriate” material to the state authorities, as this had previously been entirely at the prosecutor’s discretion. Revisions were also made to clarify that the Trial Chamber could issue orders for the protection of witnesses or victims that would apply during the national proceedings.

The final significant amendments to Rule 11*bis* addressed the requirements for referral. First, the Trial Chamber was required to consider the criteria identified in the Completion Strategy, namely the gravity of the crimes charged and the level of responsibility of the accused. Second, the Trial Chamber was required to satisfy itself that the accused would receive a fair trial and would not face the death penalty.

It is remarkable that an international criminal tribunal endowed with primacy in its Statute was able to, relatively easily and uncontroversially, transition to a complementarity model through amendments to its RoPE alone. This is perhaps all the more surprising given the expansive interpretation of primacy that initially developed at the ICTY.

Moreover, there are many aspects of the legal regime for complementarity at the ICTY that commend it. The standards for referral are clear and relatively uncontroversial. If the accused is not among those most responsible, and the concerned state is willing and able to prosecute the case, the case would be appropriate for referral to national authorities. Referral motions did not create an adversarial relationship between the ICTY and national authorities. To the contrary, the ICTY was largely eager to refer cases, and so it was in the interests of both the ICTY and national authorities to establish the conditions for a fair trial based on the ICTY’s indictment. Finally, referral at the ICTY involved strong evidentiary support to national authorities, who were not expected to independently investigate the cases with their own resources, but would instead receive the evidence gathered and analysed by the OTP.

While the legal reforms at the ICTY were one part of the work required to implement complementarity, they were not sufficient. The OTP would have a decisive role in ensuring that referred cases could be successfully prosecuted by national courts. For the strict purposes of Rule 11*bis*, it would have likely been sufficient for the OTP to simply transfer the indictment and relevant evidence. However, given the limited experience national prosecutors and judges had with complex war crimes cases, it was recognised that more needed to be done to prepare the national ju-

diciaries to conduct these cases. In particular, it was necessary to assist national prosecutors to understand the cases as prepared by the ICTY, so that they could then present the cases coherently and comprehensively to national judges.

Accordingly, in 2004, the OTP established a small special unit – the “Transition Team” – to co-ordinate the Office’s co-operation efforts with national prosecutors from the former Yugoslavia. The Transition Team’s mandate was to support domestic prosecutions, initially with respect to the *11bis* cases, and later more generally. At its largest, the Transition Team was staffed by three lawyers and 13 support staff, including investigators, research assistants, language assistants and document managers. More typically, it was a smaller unit of just a few staff.

To support the *11bis* cases, the Transition Team undertook activities in two primary areas. First, in addition to the ICTY indictment and supporting evidence, the Transition Team collected and handed over other relevant evidence and information. ICTY investigators and trial lawyers identified evidence that was not specifically required to prove the facts alleged in the indictment but which would assist national prosecutors to better understand the case and its context, such as analyses of relevant military organisations and crime patterns in other locations. In addition, the Transition Team collected OTP documents that provided additional information and detail about the transferred case, such as motions for protection measures applicable to the witnesses in the transferred cases that provided further detail about the particular protection needs of those witnesses. Generally, these activities sought to provide national prosecutors with access to the OTP’s institutional knowledge of the cases, information that was not strictly necessary to prosecute the case but which allowed national prosecutors to have a better understanding of the history of the case and its context.

Second, the Transition Team enabled direct communications between OTP staff and their national counterparts on case-specific issues. Through teleconferences and missions to the region arranged by the Transition Team, OTP prosecutors were able to explain and discuss critical matters such as the prosecutorial theory of the case, how the evidence transferred established the elements of the offences, issues that had arisen in related cases with the evidence, possible defence arguments, and any particular strengths or identified weaknesses in the case. OTP investigators and prosecutors further prepared and discussed information on the

witnesses, including inconsistencies or credibility issues and the evidence that could be elicited from key witnesses. The Transition Team further acted as a point of contact for national prosecutors working on *11bis* cases who had questions that could be answered by OTP staff.

#### **4.3.3.2. Reform in the Region: The Example of Bosnia and Herzegovina**

For the *11bis* process to begin, legal reforms at the ICTY had to be matched by legal reforms in the countries of the region, particularly Bosnia and Herzegovina. In large measure, these legal reforms were spearheaded by the Office of the High Representative of Bosnia and Herzegovina ('OHR'), which worked together with Bosnian political and governmental authorities to ensure that necessary legislation was passed. ICTY representatives also participated in working groups and provided advice to the OHR.

In 2003 new criminal and criminal procedure codes were adopted at the national level to create an appropriate legal regime for the transferred proceedings. The 2003 Criminal Code of Bosnia and Herzegovina ('CC BiH') represents a unique synergy of customary international law and treaty law applicable to international crimes with national law.<sup>116</sup> It incorporates key elements from the 1949 Genocide Convention, the 1993 ICTY Statute and the 1998 ICC Statute, as well as the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia ('CC SFRY'). Article 171 on genocide directly incorporates the relevant provisions of the Genocide Convention. Article 172 on crimes against humanity is taken verbatim from Article 7 of the ICC Statute. Articles 173–175 and 177–179, defining war crimes, are largely drawn from the CC SFRY, with updates and revisions to reflect additional conduct recognised as war crimes in international law. Finally, Article 180 on individual criminal responsibility is taken from Article 7 of the ICTY Statute.

At the same time, the Court of BiH was established to apply the new criminal and criminal procedure codes and prosecute cases trans-

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<sup>116</sup> Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 27 June 2003, No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10. See Yaël Ronen, "The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina", in *Penn State Journal of Law & International Affairs*, 2014, vol. 3, no. 1, p. 148.

ferred by the ICTY, as well as other complex crimes like corruption and organised crime. Following legislative approval in 2004, a War Crimes Chamber was created within the Court of BiH in 2005, while a Special Department for War Crimes was created within the Prosecutor's Office of Bosnia and Herzegovina ('PO BiH'). To ensure that the PO BiH and Court of BiH would be seen as independent and impartial in the adjudication of war crimes cases, an agreement was reached to further establish the Registry of the Court of BiH as an international component of the Court.<sup>117</sup> Through the Registry, the Court of BiH and the PO BiH temporarily became a hybrid tribunal composed of both international and national prosecutors and judges. Through the Registry, international assistance was also provided to defence counsel who would represent clients before the Court of BiH in war crimes cases.

To meet the specific needs of war crimes prosecutions, the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses ('LoPW') was adopted in 2003. Generally, the LoPW provides that the Court "may order such witness protection measures provided for by this Law as it considers necessary".<sup>118</sup> A wide range of protection measures are specifically addressed in the law, from using technical means to protect the identity of witnesses from the public, to allowing, in the most exceptional cases, the testimony of witnesses whose identities are not known to the defence.

Finally, a Law on the Transfer of Cases ('LoTC'), compatible with the new Criminal Procedure Code of Bosnia and Herzegovina ('CPC BiH'), was adopted in 2004.<sup>119</sup> It established the mechanisms necessary under domestic law for the *11bis* procedure, the transfer of the accused, and the transfer of evidence to the Court of BiH. The LoTC provides that national prosecutors are required to submit a national indictment according to the facts and charges in the ICTY's indictment, amending the ICTY's indictment only to bring it in compliance with national procedure.<sup>120</sup>

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<sup>117</sup> BiH Registry Agreement, see *supra* note 32.

<sup>118</sup> Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, Official Gazette of Bosnia and Herzegovina, 24 January 2003, No. 03/03, 21/03, 61/04, 55/05 ('LoPW').

<sup>119</sup> Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 61/04, 46/06, 53/06, 76/06 ('LoTC')

<sup>120</sup> *Ibid.*, Art. 2(1).

National prosecutors can, however, add new charges based on their investigations.<sup>121</sup>

The most significant features of the LoTC, however, are its provisions regarding evidence. Article 3 establishes a presumption that evidence gathered in accordance with the ICTY Statute and Rules is admissible, while also reiterating the fair trial protection of Article 6(3) of the European Convention on Human Rights ('ECHR'). Articles 5–7 address in more detail the admission and use of ICTY testimonies, expert witnesses and investigative statements. Article 8 provides that electronic copies of documentary and forensic evidence certified by the ICTY are to be considered properly authenticated under national law. Perhaps most striking, Article 4 provides that adjudicated facts from ICTY judgments are admissible in Court of BiH proceedings.

#### 4.3.3.3. Complementarity in Practice

The Office of the Prosecutor made full use of the Rule 11*bis* transfer procedure. It filed its first 11*bis* motions in August 2004, and the last one in July 2007. In total, eight 11*bis* cases involving 13 persons indicted by the ICTY were referred to courts in the former Yugoslavia. Of the eight, six were transferred to Bosnia and Herzegovina, one to Croatia and one to Serbia.<sup>122</sup> Seven of the eight cases were fully completed, while the eighth was suspended due to the inability of the accused to stand trial. Ten accused were convicted, one pled guilty to the charges and one accused was acquitted.

In fact, the OTP was more overzealous in proposing cases for referral than the judges were willing to accept.<sup>123</sup> The Court's rationale was the gravity of the crimes and the position of the accused. The Referral Bench applied these conditions strictly, although the OTP had proposed a more flexible approach that also considered judicial resources and the relation-

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<sup>121</sup> *Ibid.*, Art. 2(2).

<sup>122</sup> ICTY, Infographic: Transfer of Cases (<http://www.icty.org/sections/TheCases/TransferofCases>).

<sup>123</sup> See, for example, ICTY, *Prosecutor v. Dragomir Milošević*, Referral Bench, Decision on Referral of a Case Pursuant to Rule 11*bis*, IT-98-29/1-PT, 8 July 2005 (<https://www.legal-tools.org/doc/404de4/>); ICTY, *Prosecutor v. Rasim Delić*, Decision on Motion for Referral of Case Pursuant to Rule 11*bis*, IT-04-83-PT, 9 July 2007; ICTY, *Prosecutor v. Milan Lukić et al.*, Appeals Chamber, Decision on Milan Lukić's Appeal Regarding Referral, IT-98-32/1-AR11*bis*.1, 11 July 2007 (<https://www.legal-tools.org/doc/87d5b6/>).



ship of the case proposed for referral to other cases already completed by the ICTY.

In assessing the *11bis* proceedings as complementarity measures, it is immediately apparent that complementarity at the ICTY differed significantly from complementarity at the ICC. At the ICC, complementarity is only triggered with the existence of parallel cases at both the national and international levels, and the national case is then scrutinised to determine whether national authorities are willing and able to prosecute the case. In this framework, the ICC can only complement national courts to the extent that they have failed to undertake their responsibilities to investigate and prosecute a case.

At the ICTY, by contrast, complementarity began from the premise that the relevant case was not being investigated and prosecuted by national authorities. The only case at issue was the case initiated by the ICTY, which the OTP had already fully investigated. The absence of a national case, then, was the issue to be addressed by inquiring whether the situation could be remedied by referring the case to national authorities for prosecution. As the ICTY had already investigated the case, issues of willingness and ability were narrowed to the prosecution phase, and ultimately were resolved by determining whether the relevant state had enacted the necessary legislation for a fair trial and suitable punishment of convicted persons. Both conceptually and legally, complementarity at the ICTY can thus be seen as a form of positive complementarity because it sought to change the *status quo* by increasing the number of national prosecutions concerning grave crimes.

From this perspective, the *11bis* process represented eight more cases for national judiciaries to prosecute. In context, from July 1997 to January 2005, national authorities in Bosnia and Herzegovina had only tried 94 predominately low-level accused for war crimes.<sup>124</sup> Moreover, the crimes at issue in the six *11bis* cases referred to Bosnia and Herzegovina authorities were more complex and grave than their previous prosecutions. The impact of the ICTY's complementarity efforts was thus relatively significant in these terms alone.

The *11bis* proceedings also had important symbolic value. The referral of a case meant that international judges had concluded national law provided the necessary conditions for a fair and impartial trial. The fair-

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<sup>124</sup> Kontić and Tolbert, 2011, see *supra* note 115.

ness of the proceedings in practice was further regularly monitored by an international organisation, the Organization for Security and Co-operation in Europe ('OSCE'). National authorities thus had the invaluable opportunity to demonstrate to the ICTY and the international legal community that they were willing and able to fairly prosecute those suspected of serious crimes.<sup>125</sup> As the Head of the OSCE Mission to Bosnia and Herzegovina remarked: "The [11*bis*] mechanism has been a great success [...] [in] demonstrating that the country's Court and Prosecutor's Office have the necessary independence, professionalism and capacity to handle complex war crimes proceedings".<sup>126</sup>

Ultimately, however, the ICTY's complementarity efforts through the 11*bis* process should be assessed in terms of their broader impact on national prosecutions of war crimes in the relevant countries, particularly Bosnia and Herzegovina.<sup>127</sup> If national courts only prosecuted the 11*bis* cases, or if the 11*bis* cases were *sui generis* proceedings in national courts, complementarity in practice would be very limited. National courts would support the ICTY by reducing its caseload, but the ICTY would have provided little support to national courts. In the context of the ICTY's initial primacy and the shift envisaged by the Completion Strate-

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<sup>125</sup> Burke-White, 2008, p. 324, see *supra* note 101; Ronen, 2014, p. 143, see *supra* note 116.

<sup>126</sup> ICTY, Joint Press Release, "ICTY Prosecutor and OSCE say the justice system of Bosnia and Herzegovina is capable of efficiently processing war crimes cases", 1 November 2011 (<http://www.icty.org/sid/10839>). See also Organization for Security and Co-operation in Europe, "The Processing of ICTY Rule 11*bis* cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE monitoring", A Report of the Capacity Building and Legacy Implementation Project, January 2010 ([http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122314321282eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122314321282eng.pdf)).

<sup>127</sup> See, for example, Alejandro Chehtman, "Developing Bosnia and Herzegovina's Capacity to Process War Crimes", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, p. 558–59, explaining that 11*bis* transfers strengthened BiH courts by "an enormous transfer of information and evidence", contributing to "the establishment of organic links between the ICTY and local courts" that facilitated "more horizontal forms of collaboration between the institutions", and, finally, 11*bis* transfers were "of crucial importance in helping to secure funding for the Court of BiH by presenting it as a necessary tool for the success of its Completion Strategy"; Tarik Abdulhak, "Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina", *International Criminal Law Review*, 2009, vol. 9, no. 2, p. 337, notes that "it was through the establishment of special sections for war crimes in 2005 that the Court and the Prosecutor's Office would receive a major boost in financial, technical, and expert support".

gy, what was required and what is of interest is whether the *11bis* proceedings promoted positive complementarity.

As a court with the core mandate of investigating and prosecuting crimes, the ICTY had a limited scope for building the capacity of national courts. At the same time, however, its contributions could be particularly decisive because it had built its own capacity in specific areas that could be invaluable to national courts and could not be provided by other actors. Specifically, from the perspective of practitioners, war crimes cases are unique in terms of the evidence required and the law to be applied, which in turn require new skills and knowledge. In its decade of work prior to the *11bis* process, the ICTY had built strong capacity in both areas. For national courts, these would be the key areas that had to be strengthened if further national prosecutions were to be successful.

Each of the *11bis* cases transferred to Bosnia and Herzegovina presented challenging issues of law and fact for national prosecutors and judges. Of these, three issues can be identified that arose from legal reforms in Bosnia and Herzegovina to meet the ICTY's requirements for referral of cases, were raised in a number of the *11bis* proceedings and which would continue to be decisive to the success of national war crimes cases. The first is the use of evidence gathered by the ICTY OTP and ICTY adjudicated facts through the LoTC. The second is the protection of vulnerable and threatened witnesses, particularly in cases of sexual violence. The third is the application of international law defining international crimes.

One of the most striking technical aspects of the *11bis* proceedings in Bosnia and Herzegovina was that effectively all evidence in those cases was gathered by a foreign judicial authority, the OTP. This evidence of course addressed both the crime base and the individual criminal responsibility of the accused. A broad range of evidence was represented, including *viva voce* fact and expert witnesses who had previously given statements to and testified at the ICTY, and documentary evidence that had been gathered by the OTP, both through requests for assistance to Bosnia and Herzegovina authorities and search and seizure operations.

The use of foreign evidence is often problematic in criminal proceedings, particularly when it was not gathered in strict accordance with the procedural regulations of the receiving state. Yet in the *11bis* proceedings, the LoTC operated smoothly and large amounts of evidence relevant

to the charges against the accused were admitted. The PO BiH was able to directly introduce nearly all evidence they received from the ICTY.<sup>128</sup> The accused were similarly able to introduce ICTY evidence in their defence.<sup>129</sup>

This success was of course partly attributable to the LoTC's clear standards favouring admission. Equally, though, the Court of BiH developed, through the *11bis* cases, a sophisticated, flexible and fair framework for applying the LoTC. Critically, while promoting the interests of justice by broadly favouring the free admission and evaluation of evidence from the ICTY, the Court of BiH ensured that this was balanced by careful and detailed attention to the accused's fair trial rights under national and regional law, particularly the ECHR. As the Trial Panel explained in *Trbić*, "the LoTC is a *lex specialis* so as to eliminate the risk of inadmissibility of evidence collected by the ICTY pursuant to the CPC BiH".<sup>130</sup> This was fully consistent with the free evaluation of evidence principle in the CPC BiH.<sup>131</sup> However, the Panel further explained that the LoTC's aim to broadly permit the admission of ICTY evidence was ultimately subject to "the duty of the court to ensure a fair trial for the defendant".<sup>132</sup> In particular, Articles 6(1) and 6(3) of the ECHR, directly incorporated into the Constitution of Bosnia and Herzegovina, establish safeguards that must be satisfied when admitting any evidence from the ICTY.

A particularly clear example of this approach's value was in *Trbić*, which was the last and largest *11bis* proceeding in BiH. In the first *11bis* cases, witnesses who had previously testified before the ICTY were again called to testify *viva voce* before the Court of BiH. However, in the inter-

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<sup>128</sup> Proposed evidence from the ICTY was only partially rejected in *Janković* and *Trbić*. See Court of Bosnia and Herzegovina ('Court of BiH'), *Prosecutor's Office of Bosnia and Herzegovina v. Gojko Janković*, First Instance Judgment, X-KR-05/161, 16 February 2007, pp. 20–26 ('Janković First Instance Judgment') (<http://www.legal-tools.org/doc/fac09f/>); Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić*, First Instance Judgment, X-KR-07/386, 29 April 2010, pp. 358–79 ('Trbić First Instance Judgment').

<sup>129</sup> See, for example, Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mejakić et al.*, First Instance Judgment, X-KR/06/200, 30 May 2008, pp. 25–32, listing defence evidence, much of which originated with the ICTY, as evidenced by the Evidence Registration Numbers.

<sup>130</sup> *Trbić* First Instance Judgment, p. 365, see *supra* note 128.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, p. 366.

ests of judicial economy and to avoid retraumatizing witnesses, the PO BiH proposed to rely, particularly for crime base witnesses, on the transcripts of those prior ICTY testimonies and written statements introduced at the ICTY in lieu of oral testimony, supplemented by statements given to OTP investigators. In addition, as related proceedings had already been completed at the Court of BiH, the PO BiH sought to introduce testimonies from those cases as well. These methods followed similar developments at the ICTY, where amendments to the RoPE permitted increasing reliance on prior testimonies and written witness statements. However, neither was clearly addressed in the LoTC or CPC BiH.

In *Trbić*, applying the framework developed in prior cases, the Trial Panel generally accepted the proposed evidence,<sup>133</sup> agreeing that although the CPC BiH did not address the situation, the PO BiH could choose to introduce transcripts rather than call the witnesses for direct examination.<sup>134</sup> To ensure that the fair trial rights of the accused were protected, the Panel specifically noted those witnesses for whom the defence had waived its right of cross-examination, and recalled that if the remaining witnesses were not available for cross-examination their evidence could not be the decisive basis for a conviction.<sup>135</sup> Notably, the Panel refused to accept investigative statements given to OTP investigators that had not been introduced into evidence at the ICTY unless the statements otherwise met the admission requirements of Article 273(2) of the CPC BiH.<sup>136</sup> This was a strong protection for the accused's fair trial rights, as it ensured that only statements admissible under the ICTY RoPE or CPC BiH could be admitted under the LoTC. Finally, the Trial Panel accepted the admission of transcripts from prior proceedings at the Court of BiH, even though this was not specifically addressed in either the LoTC or the CPC BiH.<sup>137</sup> It reasoned that the same standards should apply to testimonies given before the ICTY and Court of BiH, particularly since evidence before the Court of BiH necessarily complied with national law.

Similar to the admission of ICTY evidence, the *11bis* proceedings also enabled BiH judicial authorities to develop the law and practice on

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<sup>133</sup> *Ibid.*, pp. 358–79.

<sup>134</sup> *Ibid.*, p. 366.

<sup>135</sup> *See ibid.*, pp. 366, 367, 369.

<sup>136</sup> *Ibid.*, p. 369.

<sup>137</sup> *Ibid.*

accepting adjudicated facts from ICTY judgments. The LoTC generally permits the admission of adjudicated facts, but the Court of BiH and parties had to develop the applicable law and standards to regulate this process. Relying heavily on ICTY jurisprudence, the Court of BiH again recognised that the admission of adjudicated facts, like the admission of evidence from the ICTY, required balancing the interests of justice with the fair trial rights of the accused. As the Trial Panel explained in *Rašević and Todović*,

[t]he purposes of judicial economy and consideration for witnesses, however, can put at risk the accused's right to a fair trial and the presumption of innocence. Therefore the Panel may only promote those purposes in a way that respects those rights.<sup>138</sup>

The *Rašević and Todović* case demonstrates the evidentiary value of admitting adjudicated facts from the ICTY. In that case, the Trial Panel accepted a large number of adjudicated facts, proposed by the PO BiH and the defence, related to the general course of the conflict in Foča Municipality, that is, the context in which the crimes charged were committed.<sup>139</sup> The Panel then relied heavily on these adjudicated facts, together with witness testimony, to establish the *chapeau* elements for crimes against humanity.<sup>140</sup> The Trial Panels in *Stanković* and *Janković* likewise found that the *chapeau* elements in those cases were established by adjudicated facts and witness testimony.<sup>141</sup> Trial Panels in later cases have similarly relied on adjudicated facts from prior ICTY cases, together with other evidence, to establish the context of events and the *chapeau* elements of crimes against humanity.<sup>142</sup>

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<sup>138</sup> Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Mitar Rašević and Savo Todović*, First Instance Verdict, X-KR/06/275, 28 February 2008, p. 34 ('Rašević and Todović First Instance Judgment').

<sup>139</sup> *Ibid.*, pp. 25–33.

<sup>140</sup> *Ibid.*, pp. 42–46.

<sup>141</sup> Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Radovan Stanković*, First Instance Judgment, X-KR-05/70, 14 November 2006, p. 18 ('Stanković First Instance Judgment'); *Janković* First Instance Judgment, p. 35, see *supra* note 128.

<sup>142</sup> See, for example, Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Soldat et al.*, First Instance Judgment, S1 1 K 011967 12, 5 May 2014, paras. 101–201 ('Soldat et al. First Instance Judgment'); Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Marko Adamović and Boško Lukić*, Second Instance Judgment, S1 1 K 003359 12, 17 April 2014, paras. 76–112 ('Adamović and Lukić Second Instance Judgment').

While the approaches adopted by the Court of BiH are generally consistent with practices at international tribunals, they are innovative in the BiH context. BiH legal practice historically had been characterised by strict application of rules that were detailed in the criminal procedure code. However, the LoTC specifically, and the unique characteristics of war crimes cases more generally, required the Court of BiH and the parties to now apply a more standard-based approach, where principles and factors would have to be weighed in order to reach a determination. Their success in developing their capacity to apply such methods of legal reasoning can be seen in the fact that it is now common practice for both the PO BiH and the defence at the Court of BiH to use evidence and adjudicated facts from the ICTY, when appropriate.<sup>143</sup> The Court of BiH has continued to apply a sophisticated approach to these issues, considering whether the admission of proposed evidence from the ICTY was consistent with the accused's fair trial rights.<sup>144</sup>

The protection of vulnerable and threatened witnesses was another area in which the 11*bis* cases enabled important developments in the capacity of the PO BiH and Court of BiH to ensure the necessary production of evidence in war crimes proceedings. Achieving fair and just accountability for war crimes requires effective protection of witnesses. Prior to the commencement of the 11*bis* cases, there were significant concerns

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<sup>143</sup> See, for example, Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Jević et al.*, First Instance Judgment, S1 1 K 003417 10 (X-KR-09/823-1), 22 August 2012, Annex II ('Jević et al. First Instance Judgment'); Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Kos et al.*, First Instance Judgment, S1 1 K 0003372 10 (X-KR-10/893-1), 17 September 2012, pp. 144–54, 172–81 ('Kos et al. First Instance Judgment'); *Soldat et al.* First Instance Judgment, pp. 138–46, 150–63, see *supra* note 142; Adamović and Lukić Second Instance Judgment, pp. 196–230, see *supra* note 142; Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Veselko Raguž and Ivo Raguž*, First Instance Judgment, S1 1 K 005528 11, 18 April 2014, pp. 71–79; Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Krsto Savić*, Second Instance Judgment, X-KRŽ-07/400, 8 November 2011, pp. 17–20, 119–30 ('Savić Second Instance Judgment'); Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Saša Baričanić*, First Instance Judgment, S1 1 K 004648 12, 9 November 2011, paras. 21–58.

<sup>144</sup> See, for example, *Jević et al.* First Instance Judgment, paras. 947–95, see *supra* note 143, deciding to admit statements that the accused gave as suspects to the ICTY; *Kos et al.* Second Instance Judgment, paras. 52–59, see *supra* note 143, upholding the Trial Chamber's decision to admit much of the proposed evidence, but to exclude statements of facts from ICTY plea agreements, on the ground that they were not subject to cross-examination.

that protection practices in Bosnia and Herzegovina were inadequate.<sup>145</sup> The adoption of the LoPW was a necessary step to improve the capacity of the Court of BiH to protect witnesses, but the law would need to be effectively applied in practice. This was complicated by the fact that nearly all witnesses in the 11*bis* proceedings had previously testified at the ICTY and been granted witness protection measures. The Court of BiH was thus required to apply the LoPW as national law while also adhering to protection measures previously ordered by a foreign court, the ICTY.<sup>146</sup>

The first two 11*bis* cases – *Stanković* and *Janković* – presented crucial challenges in witness protection. Both cases concerned horrific crimes of sexual violence perpetrated in the eastern Bosnian town of Foča, including torture, rape and sexual slavery as crimes against humanity, as well as murder, forcible transfer and imprisonment as crimes against humanity. These cases also presented acute witness protection issues, both in the courtroom and outside it. A number of witnesses were victims of sexual violence perpetrated by the accused. The very act of testifying thus created significant risks of retraumatisation, on the one hand, and a potential opportunity for the accused to abuse the witnesses, on the other. The public nature of the trials also posed significant risks, as the families and friends of the victims were not fully aware that the victims had suffered sexual violence.

As in the other 11*bis* cases, witnesses in *Stanković* and *Janković* were granted a range of protection measures that were in accordance with national law and the orders of the ICTY, including the widespread use of pseudonyms to protect personal information and arrangements for testimonies using voice and/or image distortion. The experience implementing these measures in practice immediately generated one lesson: the Trial Panel was able to identify the need to provide new pseudonyms to wit-

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<sup>145</sup> Human Rights Watch, “Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro”, *Human Rights Watch Report*, 13 October 2004, vol. 16, no. 7, p. 21.

<sup>146</sup> See Rašević and Todović First Instance Judgment, p. 36, see *supra* note 138: “All prosecution witnesses, except for Ekrem Zeković and Amor Masović, are identified by pseudonyms and testified under certain protection measures. These witnesses were granted protection of their personal details and identities in the proceedings before the ICTY, which is a decision the Court was anyhow obliged to respect, therefore all the witnesses testified before the Court of BiH in that capacity”.



nesses who had previously testified before the ICTY, in order to improve the protection of their personal information.<sup>147</sup>

However, these two cases presented such extreme circumstances that the Trial Panels were required to go even further to ensure that witnesses were able to testify freely and without harm to their physical and mental well-being. In *Janković*, two witnesses who were granted voice and image distortion in order to protect their identities were still distressed about testifying.<sup>148</sup> Having been satisfied that testifying would be an extremely traumatic step for these witnesses, the Trial Panel ordered that the witnesses would testify in closed session, and that the accused would be removed from the courtroom while still having the opportunity to follow the proceedings by video and consult with his defence counsel during cross-examination.<sup>149</sup> The Court was satisfied that these measures were consistent with the accused's fair trial rights under the ECHR.<sup>150</sup> The Appeals Panel agreed.<sup>151</sup>

In *Stanković*, the Trial Panel adopted even stronger protection measures by largely closing the proceedings to the public during the presentation of the prosecution's evidence. As the Panel explained, this step was required in light of both the need to protect witnesses and the accused's demonstrated willingness to use public proceedings to put witnesses at risk.<sup>152</sup> Relatedly, but separately, the Panel continued the proceedings in the absence of the accused after he refused to attend his trial. While the decision to largely close the trial to the public could be criticised,<sup>153</sup> it was affirmed on appeal, with the Appeals Panel accepting that the protection of the witnesses in light of the accused's threats "could not be achieved in any other way but by the exclusion of the public".<sup>154</sup>

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<sup>147</sup> Stanković First Instance Judgment, p. 12, see *supra* note 141.

<sup>148</sup> Janković First Instance Judgment, pp. 26–28, see *supra* note 128.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Gojko Janković*, Second Instance Judgment, X-KR-05/161, 23 October 2007, pp. 6, 7.

<sup>152</sup> Stanković First Instance Judgment, pp. 12, 13, see *supra* note 141.

<sup>153</sup> See ICTY, *Prosecutor v. Radovan Stanković*, Prosecutor's Third Progress Report, IT-96-23/2-PT, 7 June 2006, Annex A: Second OSCE Report, Case of Defendant Radovan Stanković Transferred to the State Court pursuant to Rule 11bis.

<sup>154</sup> Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Radovan Stanković*, Second Instance Judgment, X-KR-05/70, 28 March 2007, p. 7.

Moreover, the Appeals Panel concluded that the Trial Panel had properly “t[aken] into account the need to strike a balance between the rights of the accused to a public trial and the protection of morality and interests of the witnesses”, as it had opened the trial whenever possible.<sup>155</sup>

Witness protection measures have continued to be regularly applied in war crimes proceedings before the Court of BiH with great success. Both the prosecution and the defence have utilised protection measures in order to ensure that witnesses are able to testify freely without fear and trauma. The Court of BiH has continued to implement ICTY protection orders, and to balance the interests of the witness and the rights of the accused in determining whether protection measures should be ordered.<sup>156</sup> To date, there have not been any significant failures in the protection of witnesses who testified before the Court of BiH. Indeed, in later cases, fewer witnesses have requested and been assigned protection measures, indicating that the Court’s early successes in protecting witnesses in the 11*bis* cases had increased the public’s confidence in the judicial process.<sup>157</sup>

Separate from evidentiary issues, the 11*bis* proceedings also significantly contributed to building the legal capacity of national authorities to process war crimes cases. This is evident in the application of international law defining the crime of genocide in the *Trbić* case. The *Trbić* case was the only 11*bis* case in which the accused was charged with genocide committed in Srebrenica in July 1995. It was not the first genocide case at the Court of BiH; the *Kravica* case was completed in September 2009, a month before the trial judgment was issued in *Trbić*.<sup>158</sup> But *Trbić* was, and as of the time of writing still remains, the most significant genocide case prosecuted at the Court of BiH in terms of the scope of the charges and the accused’s military rank.<sup>159</sup>

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<sup>155</sup> *Ibid.*

<sup>156</sup> See, for example, *Kos et al.* First Instance Judgment, pp. 154–59, see *supra* note 143.

<sup>157</sup> See, for example, *Adamović and Lukić* Second Instance Judgment, pp. 196–98, see *supra* note 142.

<sup>158</sup> Court of BiH, *Prosecutor v. Stupar et al.*, First Instance Judgment, X-KR-05/24, 13 January 2009 (‘*Kravica* First Instance Judgment’); Court of BiH, *Prosecutor v. Stupar et al.*, Second Instance Judgment, X-KRŽ-05/24, 9 September 2009. This case involved five soldiers convicted of aiding and abetting genocide by participating in the killing of over 1,000 Bosnian Muslim men and boys at the *Kravica* farming co-operative warehouse.

<sup>159</sup> Milorad Trbić, Assistant for Security Affairs in the Vojska Republike Srpske (VRS, Bosnian Serb Army) Zvornik Brigade, had initially been charged together with other senior-

In addition to the general challenges of the law of genocide, the *Trbić* case presented a particular legal challenge that would continue to be critical in future genocide prosecutions at the Court of BiH: how the law of genocide, particularly the requirement of genocidal intent, applies to those other than the most senior leaders who formulated and organised the plan to commit genocide in Srebrenica. Prosecutions for the Srebrenica genocide at the Court of BiH are expected to involve intermediate- and lower-level accused, those who did not design the genocidal plan, but who participated in implementing it by carrying out the executions and other tasks. In this regard, *Trbić* was clearly not among the most senior leaders and it was never alleged that he participated in designing the genocidal plan. In referring his case to Bosnia and Herzegovina, the ICTY Referral Bench expressed its view that “his level of responsibility was relatively low”, particularly as he was the subordinate of the accused in the *Popović et al.* case at the ICTY.<sup>160</sup> Nonetheless, *Trbić* was still alleged to be an intermediate link between the most senior leaders in the political and military hierarchy and the soldiers on the ground who carried out the crimes, and he was also alleged to have personally perpetrated some killings.<sup>161</sup>

The Trial Panel in *Trbić* first conducted a thorough analysis of the law of genocide, relying in particular on the jurisprudence of the ICTY and ICTR and building on the analysis provided by the *Kravica* First Instance Judgment.<sup>162</sup> It correctly distinguished between the legal elements

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and mid-level VRS and Serbian Ministry of Internal Affairs (MUP) officials in the *Popović et al.* case at the ICTY. The indictment that was referred to the Court of BiH charged *Trbić* with individual criminal responsibility as a member of a joint criminal enterprise for effectively all crimes committed in Srebrenica, including the forcible transfer of over 25,000 Bosnian Muslim women, children and elderly, all mass executions committed between 12 and 22 July 1995, and the reburial and concealment of the victims’ bodies. The indictment alleged that *Trbić* was a member of a joint criminal enterprise with and shared the genocidal intent of senior VRS officials including Colonel Ljubiša Beara and Lieutenant Colonel Vujadin Popović, both of whom were convicted for perpetrating genocide by the ICTY. See *Trbić* First Instance Judgment, para. 276, *supra* note 128; ICTY, *Prosecutor v. Popović et al.*, Consolidated Amended Indictment, IT-05-88-PT, 11 November 2005 (<https://www.legal-tools.org/doc/9f73a8/>); ICTY, *Prosecutor v. Milorad Trbić*, Indictment, IT-05-88/1-PT, 18 August 2006 (<https://www.legal-tools.org/doc/bd5d46/>); ICTY, *Prosecutor v. Milorad Trbić*, Decision on Referral of Case under Rule 11bis with Confidential Annex, IT-08-88/1-PT, 27 April 2007, para. 6.

<sup>160</sup> ICTY, *Prosecutor v. Milorad Trbić*, Decision on Referral of Case under Rule 11bis with Confidential Annex, IT-08-88/1-PT, 27 April 2007, para. 23.

<sup>161</sup> See *ibid.*, para. 14 (and citations therein).

<sup>162</sup> *Trbić* First Instance Judgment, paras. 166–202, see *supra* note 128.

of the underlying genocidal act and the unique requirement of the crime of genocide, genocidal intent or *mens rea*.<sup>163</sup> Relying on the jurisprudence of the ICTY and ICTR, the Panel fully set out the law on genocidal intent, including the requirements that there must be an intent to physically destroy<sup>164</sup> the group in whole or in part.<sup>165</sup> It concluded that the intent to destroy the Bosnian Muslim population of Srebrenica constituted genocidal intent,<sup>166</sup> and that there was a joint criminal enterprise involving Colonel Ljubiša Beara and Lieutenant Colonel Vujadin Popović, among others, who intended to commit genocide in Srebrenica.<sup>167</sup>

The Panel's analysis of the law of genocide was subsequently adopted and applied in later cases.<sup>168</sup> Trial Panels have consistently concluded that genocide was committed in Srebrenica.<sup>169</sup> They have further correctly rejected contentions that are not in accordance with the legal definition and elements of genocide,<sup>170</sup> and applied the law of genocide in light of the totality of the facts.<sup>171</sup>

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<sup>163</sup> *Ibid.*, para. 174.

<sup>164</sup> *Ibid.*, para. 188.

<sup>165</sup> *Ibid.*, para. 189.

<sup>166</sup> *Ibid.*, para. 790.

<sup>167</sup> *Ibid.*, para. 770.

<sup>168</sup> See, for example, Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Željko Ivanović*, Second Instance Judgment, S1 1 K 003442 14, 1 July 2014, paras. 41-58, 171 ('Ivanović Second Instance Judgment'); *Kos et al.* First Instance Judgment, paras. 605-7, see *supra* note 143; *Jević et al.* First Instance Judgment, paras. 927-59, see *supra* note 143; Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Momir Pelemiš and Slavko Perić*, First Instance Judgment, S 11 K 003379 09, 31 January 2012, paras. 156-73 ('Pelemiš and Perić First Instance Judgment').

<sup>169</sup> *Pelemiš and Perić* First Instance Judgment, paras. 141-73, 436-45, see *supra* note 168; *Ivanović* Second Instance Judgment, para. 357, see *supra* note 168; *Kos et al.* First Instance Judgment, paras. 608, 634, see *supra* note 143; Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Radomir Vuković and Zoran Tomić*, Second Instance Judgment, S1 1K 006124 11, 25 January 2012, para. 415 ('Vuković and Tomić Second Instance Judgment'); Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Božidar Kuvelje*, First Instance Judgment, S 1 1K 004050 11, para. 483.

<sup>170</sup> See, for example, *Pelemiš and Perić* First Instance Judgment, para. 166, see *supra* note 168, noting "the total number of the men killed in Srebrenica is not one such fact that must be established beyond a reasonable doubt, and that this fact is more important from the historical rather than the legal and factual aspect of the case at hand"; *Vuković and Tomić*, Second Instance Judgment, paras. 439-43, see *supra* note 169: rejecting contention that the number of killed must be sufficient to threaten the physical existence of the group.

<sup>171</sup> See, for example, *Pelemiš and Perić* First Instance Judgment, para. 167, see *supra* note 168: the members of the JCE to commit genocide "had to know that the mass killing of the

After surveying the law of genocide generally, the Trial Panel in *Trbić* then further undertook a thorough review of the law on proof of genocidal intent.<sup>172</sup> Recognising that proving genocidal intent is often a matter of inference, the Panel set out an extensive list of factors, drawn from the jurisprudence at the ICTY, ICTR and Court of BiH, that it would analyse. This test focused on four particular issues: the general context of events including any plan to commit genocide, the accused's knowledge of any plan, the specific nature of the accused's acts, and the character of the crimes in which the accused directly participated.<sup>173</sup> The Panel further noted that it would consider acts and circumstances that would tend to create reasonable doubt that the accused possessed genocidal intent.<sup>174</sup>

The Panel concluded that Trbić personally acted with the specific intent to destroy the Bosnian Muslim group in whole or in part.<sup>175</sup> At the outset of its analysis, the Trial Panel held that the key element distinguishing those who possessed genocidal intent from aiders and abettors is whether the accused “personally aim[ed] at the destruction of the

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men from Srebrenica [...] would have a significant impact on both the Muslims of Srebrenica and Bosnian Muslims as a whole. Without a man in a family the family as a union would be destroyed and the family would not have its head. Moreover, by destroying men in such patriarchal society the principal perpetrators ensured that the majority of Muslims from this area would not return to the central valley of the Drina River. Without men the women and children stay without protection, there is not anyone to do all traditional male duties, and the future generations will not have husbands and fathers. The evidence adduced in these proceedings indicates beyond a doubt that they wanted to achieve exactly such a goal”.

<sup>172</sup> Trbić First Instance Judgment, paras. 191–202, see *supra* note 128.

<sup>173</sup> *Ibid.*, para. 202; the factors specifically enumerated were: “1) The general context of events in which the perpetrator acted including any plan to commit the crime; 2) The perpetrator's knowledge of that plan; and 3) The specific nature of the perpetrator's acts including the following: 1) No acts to the contrary for genocidal intent; 2) Single mindedness of purpose; 3) Efforts to overcome resistance of victims; 4) Efforts to overcome the resistance of other perpetrators; 5) Efforts to bar escape of victims; 6) Persecutory cruelty to victims; 7) Ongoing participation within the act itself; 8) Repetition of destructive acts i.e. more than one act or site; 9) The acts themselves (The *Kravica* test): a. the number of victims; b. the use of derogatory language toward members of the targeted group; c. the systematic and methodical manner of killing; d. the weapons employed and the extent of bodily injury; e. the methodical way of planning; f. the targeting of victims regardless of age; g. the targeting of survivors; and h. the manner and character of the perpetrator's participation”.

<sup>174</sup> *Ibid.*, para. 202.

<sup>175</sup> *Ibid.*, paras. 792–827.

group”.<sup>176</sup> In analysing each of the factors it had identified, the Panel repeatedly pointed to the facts establishing that Trbić played his role in the genocidal plan willingly and fully.<sup>177</sup> It noted that Trbić was not “a simple ‘tool’” or simply “‘procured to commit the crimes’ by the responsible hierarchy”, but rather “was an actor who joins into the plan himself sharing the plan with the key players in the VRS Security Organ”.<sup>178</sup> The Panel concluded:

It is sufficient to say that Trbić did everything that was asked of him. When the situation required more he assisted on his own initiative. He didn’t complain or comment. He knew what the plan was and he understood his role. He was not fearful. He didn’t object or complain. He followed through. He was a hard worker. [...] In fact, unlike others, he goes from site to site. He does not participate in this crime once, but repeatedly. Having participated thoroughly in the killings at Orahovac he knows what it is like and he goes back for more. He is in demand because of his experience. This is not just following orders. This is a man who supported the genocidal plan. He was not part of the original planning or its architect but he made sure it worked to the extent of his capacity at the time and helped along others to conceal it from the world.<sup>179</sup>

The Panel’s identification and application of the law in *Trbić* has influenced subsequent proceedings at the Court of BiH, particularly its focus on the accused’s knowledge of the genocidal plan and whether the accused joined the plan or was merely a tool of those who designed it. In *Pelemiš and Perić*, the Panel specifically referred to the factors identified in *Trbić*,<sup>180</sup> and concluded after analysing these factors that the accused<sup>181</sup>

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<sup>176</sup> *Ibid.*, para. 264.

<sup>177</sup> See, for example, *ibid.*, para. 797: “he understood what was needed from him and he participated fully”; para. 807: “he showed no remorse or hesitation”; para. 812: “[h]e was completely resolute in his execution of the plan [...] [he] ‘gave himself utterly to its accomplishment’”; para. 816: he “joined in”; para. 817: “[h]e had days between events to contemplate his own participation [...] [t]he evidence indicates he just proceeds with the tasks assigned”.

<sup>178</sup> *Ibid.*, para. 774.

<sup>179</sup> *Ibid.*, paras. 825, 826.

<sup>180</sup> Pelemiš and Perić First Instance Judgment, paras. 448, 449, see *supra* note 168.

<sup>181</sup> The accused were the Acting Commander and Assistant Commander for Security and Intelligence of the 1st Battalion of the 1st Zvornik Infantry Brigade. *Ibid.*, para. 1.

knew of the genocidal plan but did not act with genocidal intent.<sup>182</sup> In *Jević et al.*, the Panel similarly referred to the law set out in *Trbić*<sup>183</sup> and concluded that the accused<sup>184</sup> knew of the genocidal plan but did not personally intend the destruction of the Bosnian Muslim group.<sup>185</sup> Although the accused in these two cases were mid-level commanders like Trbić, the Panels found that their contributions to the implementation of the genocidal plan was limited to discrete incidents, and, unlike Trbić, they did not otherwise support the implementation of the genocidal plan. They were therefore convicted for aiding and abetting genocide. Other Panels have applied similar reasoning.<sup>186</sup>

*Trbić* thus played a significant part in determining the law and practice at the Court of BiH to distinguish between those who committed crimes in Srebrenica with genocidal intent and those who did not. What must be emphasised is that the approach developed in *Trbić* and applied in subsequent cases is drawn from and fully consistent with the jurisprudence and findings of the ICTY.<sup>187</sup> In *Trbić*, the Trial Panel assessed this

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<sup>182</sup> *Ibid.*, para. 448. In particular, the Court concluded that the nature of the accused's acts – ordering and supervising soldiers under their command in guarding prisoners, taking them to executions and loading dead bodies – did not prove beyond reasonable doubt that they personally intend the destruction of the Bosnian Muslim group. *Ibid.*, para. 450.

<sup>183</sup> *Jević et al.* First Instance Judgment, paras. 960–65, see *supra* note 143.

<sup>184</sup> Assistant to the Commander of the Special Police Brigade and Commander of the 1st Company of the Jahorina Training Center. *Ibid.*, Verdict.

<sup>185</sup> *Ibid.*, para. 968.

<sup>186</sup> See, for example, Vuković and Tomić Second Instance Judgment, para. 482, see *supra* note 169: Vuković knew of the genocidal plan but only “allowed himself to be used as a weapon which, when deployed in conjunction with other weapons, was capable of destroying a protected group”; Ivanović Second Instance Judgment, para. 359, see *supra* note 168: Ivanović likewise was “aware of the scope of the wider genocidal design envisaged by the superior structures of the Serb authorities” and “consented to serve as an instrument which contributed to the eradication of the protection group”; *Kos et al.* First Instance Judgment, paras. 609–13, 622, see *supra* note 143; *Kuvelje* First Instance Judgment, paras. 491, 503, see *supra* note 169.

<sup>187</sup> The ICTY has found that some senior officials were not guilty of genocide because they knew of the genocidal plan but did not themselves possess genocidal intent, or did not know of the genocidal plan. See ICTY, *Prosecutor v. Radislav Krstić*, Appeals Chamber, Judgment, IT-98-33, 19 April 24, para. 134: finding that while Radislav Krstić, Commander of the Drina Corps, knew of the genocidal intent of others, he did not have genocidal intent (<https://www.legal-tools.org/doc/86a108/>); ICTY, *Prosecutor v. Popović et al.* Trial Chamber, Judgment, IT-05-88, 10 June 2010, para. 1414: finding that while Drago Nikolić, Chief of Security of the Zvornik Brigade, knew of the genocidal intent of others, he did not have genocidal intent; para. 1589: finding that Ljubomir Borovčanin, Deputy

law and identified a number of factors, appropriate for mid- and lower-level accused, to determine whether the accused personally intended to destroy the group in whole or in part. It can be expected that in future prosecutions against mid-level officials, the factors and approach identified in *Trbić* will be of particular assistance.

The impact of the 11*bis* proceedings can also be seen by comparing prosecutions by the PO BiH for complex war crimes, before and after the 11*bis* cases. The first complex war crimes prosecuted by the PO BiH was against Momčilo Mandić, the former Bosnian Serb Minister of Justice, who was charged with responsibility for the crimes committed in prison camps under the authority of Ministry of Justice. The Trial Panel acquitted Mandić due to lack of evidence.<sup>188</sup> In reviewing the case, it can be seen that there were particular problems with the prosecutorial theory of the case, which focused on the relationship between Mandić and those who physically perpetrated the crimes, as well as a lack of evidence on institutional arrangements and Mandić's interactions with other senior Bosnian Serb officials.

By contrast, after the 11*bis* proceedings, the PO BiH was able to secure convictions in complex cases that it brought itself, such as *Adamović and Lukić* and *Savić*.<sup>189</sup> In both cases, the prosecutorial theory of the case did not focus solely on the accused's relationship with the physical perpetrators of the crimes, but also on the accused's participation with other local political and military leaders in designing and implementing policies that involved the commission of crimes. The PO BiH further led extensive evidence, obtained in large measure from the ICTY, demonstrating the accused's interaction and co-ordination with other local and regional leaders, and the consistent patterns of crimes that were committed in the implementation of their common policies.

A review of the Court of BiH's work thus suggests that the 11*bis* cases had valuable results in building the capacity of national prosecutors and judges to process both the 11*bis* cases and all war crimes cases more

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Commander of the Special Police Brigade, did not know of the genocidal intent of others; para. 2090: finding that Vinko Pandurević, Commander of the Zvornik Brigade, did not know of the genocidal intent of others (<https://www.legal-tools.org/doc/481867/>).

<sup>188</sup> Court of BiH, *Prosecutor's Office of Bosnia and Herzegovina v. Momčilo Mandić*, First Instance Judgment, X-KRŽ-05/58, 18 July 2007.

<sup>189</sup> *Adamović and Lukić* Second Instance Judgment, see *supra* note 142; *Savić* Second Instance Judgment, see *supra* note 143.



generally.<sup>190</sup> Of course, the positive results were not solely due to the *11bis* proceedings. In particular, the participation of international judges, prosecutors and staff in the work of the Court of BiH and PO BiH was essential to building the capacity of their national colleagues and developing many of the practices that continue to be applied today. Donors made other necessary contributions, including providing resources for witness protection and appropriate physical infrastructure.

Nonetheless, it is important to recognise that the *11bis* cases were successful positive complementarity measures, even if the referral of cases does not immediately appear to be a mechanism to build capacity. The impact of the *11bis* proceedings is likely attributable in large measure to three aspects.

First, the *11bis* process established clear, verifiable targets that would need to be met for the referral of cases to be triggered. These targets focused on overarching structural issues – fair trial standards, independence and impartiality of the judiciary, and abolition of the death penalty – that were needed to create the necessary conditions for the criminal justice sector to then operate. Necessarily, willingness and ability were thus to be demonstrated through a dynamic, evolving process that was primarily the responsibility of political authorities. Following referral, the fairness of the proceedings in practice was monitored by independent international experts. Moreover, the international community and others generated strong positive incentives at the political and judicial levels, and a large rule of law sector was able to participate in and contribute to the process.

Second, as these cases were prepared by the OTP, they served as templates of international practices and standards for national prosecutors and judges unfamiliar with complex war crimes cases. They could see the quality and amount of evidence collected by the OTP, and understand how international prosecutors organised that evidence according to a prosecutorial theory of the case and used it to prove each of the elements

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<sup>190</sup> See also Burke-White, 2008, p. 345, see *supra* note 101; Abdulhak, 2009, p. 335, see *supra* note 127: “Considering the limited resources previously devoted to investigations and prosecutions of these crimes in BH, it would appear that, were it not for the ICTY Completion Strategy, national capacities such as those which have now in existence may never have been created”.

of the offences. These insights could then be applied to subsequent cases, thus domesticating international standards from the ICTY.<sup>191</sup>

Third, national prosecutors and judges learned from the experience of adjudicating well-supported cases that raised challenging evidentiary and legal issues. Of course, all trials are a learning experience for practitioners. But, particularly in the context of Bosnia and Herzegovina, it was important that national prosecutors had the opportunity to learn from successful cases. Knowing that international prosecutors had been satisfied that there was sufficient evidence in support of the indictment, national prosecutors could focus their attention on the practice of war crimes cases, including the domestication and application of international law, the protection of threatened and vulnerable witnesses, how to lead witnesses in the courtroom, how to handle difficult procedural matters in complex cases, and how to persuasively put forward a theory of the case based on the evidence adduced.

#### **4.4. Beyond Complementarity: Co-operation, Integration and Capacity Building**

##### **4.4.1. The Challenge of Comprehensive Justice**

The *11bis* proceedings were important positive complementarity measures. Having successfully referred and supported these cases, the OTP would have been justified in concluding that the necessary tasks under the Completion Strategy had been completed and returning to an exclusive focus on its own work, the prosecution of those most responsible for the crimes.

However, the OTP was fully aware of the immense work remaining to be done to achieve more comprehensive justice for crimes committed during the conflicts in the former Yugoslavia. Because primacy had been the initial framework for the OTP's activities, combined with a bottom-up prosecutorial strategy, extensive investigations had been undertaken covering thousands of crimes. With the adoption of the Completion Strategy,

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<sup>191</sup> Kontić and Tolbert, 2011, p. 888, see *supra* note 115: finding that “national authorities, particularly in BiH were able, by working with ICTY counterparts, to develop their capacities. We would argue that the capacity building aspect, provided by the ICTY [...] worked hand in hand with the evidence provided, thus the evidence would not have had nearly as great of value without the capacity building element provided by the ICTY”.

it was clear that justice for these crimes depended on prosecutions by national courts, rather than the OTP. The OTP considered, however, that national ownership of further accountability efforts was not inconsistent with continued OTP involvement and support.

To give a sense of the scale of the issue, Prosecutor Carla Del Ponte noted when the Completion Strategy was first presented to the Security Council in 2001 that the OTP estimated there were approximately 8,000 individuals responsible for war crimes in the former Yugoslavia.<sup>192</sup> The National War Crimes Strategy (‘NWCS’) for Bosnia and Herzegovina, adopted in 2008, estimated that 1,285 investigations involving 5,895 known suspects were then underway, with another few hundred cases of known crimes for which no suspects had yet been identified. It is likely that even these figures underestimate the number of cases to be investigated and prosecuted. The NWCS set the goal of prosecuting the most complex and highest priority cases by 2015, and all remaining cases by 2023. While not at the same scale, hundreds of more war crimes cases remained to be investigated and prosecuted in other countries in the region, and it was also increasingly evident that third-party states were pursuing accountability for these crimes in their own domestic justice systems.

While there was increasing capacity in national criminal justice sectors in the region, including as a result of the *11bis* proceedings, the OTP concluded that it was best placed to undertake specific measures that would further strengthen national judiciaries. In particular, the OTP, uniquely among rule of law and criminal justice actors, possessed a resource essential to successful national war crimes prosecutions: its evidence collection. In addition, the OTP had developed trust, goodwill and influence with key actors across sectors, including the international community, civil society, national legal practitioners and national political authorities. With these advantages, the OTP was in the position to continue the process of transferring capacity from the ICTY to national courts that was begun with the *11bis* proceedings.

Over the last decade and continuing today, the OTP has undertaken a range of related programmes and informal activities. Some can be de-

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<sup>192</sup> United Nations Security Council, 4429th Meeting, 27 November 2001, UN doc. S/PV/4429, p. 31. See also ICTY, Infographic: Investigations, describing ICTY investigation and investigation strategy (<http://www.icty.org/sid/97>).

scribed, while others must remain confidential because they concern ongoing investigations and prosecutions. These programmes and activities certainly can be labelled as positive complementarity measures, as they have improved the capacities of national courts to prosecute war crimes cases. Equally, however, they represent a further shift at the ICTY beyond complementarity towards a new model of international collaboration.

Both primacy and complementarity are often posed as a dichotomy: either international or national prosecutions of war crimes. The collaboration model that has been developed by the OTP begins from a different perspective: a multiplicity of jurisdictions will necessarily be involved in post-conflict accountability. From this perspective, the challenge is not simply to decide whether cases will be allocated to one or another court, but rather how to use both; that is, how to harness the work of multiple courts in a more coherent way in order to achieve more comprehensive justice. This model necessarily builds on the principle of complementarity, as it recognises that national courts have an integral role in the justice process. However, it further develops complementarity by understanding the need to integrate multiple national jurisdictions into a single system, while also recognising that international institutions, courts as well as others, can play a variety of important substantive roles in addition to national capacity building.

In the collaborative model that has developed for the former Yugoslavia, the OTP's role has evolved to serve as a hub loosely connecting the disparate activities of different courts. In part, the OTP serves this function because it is the primary repository of evidence and knowledge of the crimes for war crimes prosecutions related to the conflicts in the former Yugoslavia. For many national prosecutors and judges, liaising with the OTP to search its evidence collection, obtain materials and develop a deeper understanding of the crimes and successful prosecutions has become a regular routine. By opening access to its evidence collection and in-house expertise, the OTP is able to significantly improve the efficiency of national war crimes prosecutions and ensure that additional value is achieved from the resources invested in obtaining that evidence and developing that expertise. Duplicative investigations are inefficient, costly, and can pose significant risks to successful prosecutions.

In addition, the OTP has been able to forge more links between national judicial systems prosecuting these cases and with other actors. Over the course of its mandate, the OTP developed strong relationships with a

variety of institutions, from international organisations like the United Nations to national prosecution services around the world. However, the links between these actors were far less developed. The OTP thus could and has worked to bring its partners into closer mutual relationships. Improving regional co-operation among prosecutors in the former Yugoslavia has been an important activity in this respect. Likewise, the OTP has used its position of trust to improve interaction and resolve difficulties between civil society and national judiciaries.

Finally, the OTP has increasingly engaged in monitoring and advisory functions, particularly with respect to regional war crimes prosecutions. With its established record of successful prosecutions and the trust it has developed with both international and national authorities, the OTP is in the unique position to monitor war crimes cases, objectively assess achievements and challenges, and provide advice. These activities are distinct from the trial monitoring of the *11bis* cases undertaken by the OSCE, as the OTP does not seek to determine whether national cases meet criteria such as international fair trial standards. Rather the OTP monitors whether there are areas to further improve efficiency and effectiveness and identifies challenges that may be impeding successful prosecutions.

It should be noted that beyond the adoption of the Completion Strategy by the Security Council, the OTP was not specifically mandated to engage in efforts to develop a collaborative framework with national courts. As a result, the OTP has only been able to devote limited time and resources from within its existing capacities to engage in these efforts. Moreover, the OTP must rely primarily on informal, rather than legal, authority, constraining the role it can play. Nonetheless, even with these limitations, the OTP has been able to take significant steps towards realising a model of collaboration for the prosecution of war crimes committed in the former Yugoslavia.

#### **4.4.2. Access to Evidence**

In the course of its investigations from 1994 to 2004, the OTP collected immense amounts of evidence on the crimes committed during the conflicts in the former Yugoslavia. While much of this evidence has been introduced in the OTP's cases, more has not, as it relates to crimes scenes and suspects that have not figured prominently in cases at the ICTY. Evidence that has not been introduced in ICTY cases can only be obtained

from the OTP, which must regulate access in order to protect confidential information and the safety of witnesses.

The OTP's evidence collection totals more than nine million pages of evidence, including witness statements given during investigations, documentary evidence obtained from governmental and military archives, and expert reports in subjects such as forensic pathology, ballistics, demography, military analysis and other specialised forensic fields. The evidence collection also includes thousands of hours of video and audio records, such as amateur videos, media footage and intercepts, as well as a variety of physical evidence, such as weaponry and artefacts. All of this evidence has been logged and entered into electronic databases. The OTP's databases are fully searchable, although sophisticated search techniques are often required to address the challenges of digitising handwritten documents and documents in a variety of languages. All databases are protected by security measures, and different access levels are available to ensure that only authorised users are able to view confidential information.

The OTP Transition Team, which had been incorporated into the Immediate Office of the Prosecutor at the time of writing, is responsible for searching the OTP's databases in response to Requests for Assistance ('RFA') submitted by national judiciaries. The Transition Team conducts searches of databases, identifies relevant and available material, and provides certified electronic copies to the requesting party. As necessary, the Transition Team consults with ICTY investigators and prosecutors familiar with the evidence or issues to target valuable evidence responsive to the RFA. The Transition Team can also inform the requesting party of the existence of relevant confidential material, so that the OTP can request, on behalf of the requesting party, clearance to provide the material. For example, Rule 70 material has been provided to the OTP with strict confidentiality requirements and can only be disclosed to another party with express authorisation from the provider. While the OTP cannot disclose such material without authorisation, it can assist national authorities to request such authorisation and liaise with the information provider. Similarly, national prosecutors can request access to statements given by protected witnesses. In such cases, the Transition Team can assist the requesting party to file a Rule 75(H) application for variation of protection measures to allow the requesting party access to protected information. To

date, the OTP has received and processed more than 5,500 RFAs from authorities around the world.

The RFA process is functional, but cumbersome in the context of thousands of cases being investigated by a number of national prosecutors. This is particularly true when large amounts of material must be searched to gather evidence on a range of issues. Accordingly, for a number of years now the OTP has further enabled remote access to its public databases by prosecutor's offices in the region, using secure encryption keys. This remote access system was built upon the OTP's disclosure system, obviating the need to develop a new system. Through remote access, investigators and prosecutors in the region are able to conduct searches of the OTP's evidence collection themselves to identify relevant evidence for their investigations and generate leads. If material is identified, the Transition Team can then quickly and easily certify and provide official electronic records.

In 2009, following discussions with national counterparts during a regional war crimes meeting, the OTP decided to take a further step in enabling more effective access to its evidence collection by establishing the Liaison Prosecutors project with funding provided by the European Union.<sup>193</sup> Under this project, the state-level prosecutor's offices from Bosnia and Herzegovina, Croatia, and Serbia have effectively seconded one prosecutor from each office to work together with the OTP's Transition Team. The liaison prosecutors enjoy three key advantages. First, the liaison prosecutors have unrestricted access to search the OTP's non-confidential databases, allowing them to access more evidence than through the remote access system. Second, the liaison prosecutors receive direct assistance from the Transition Team in performing their searches, allowing them to better target relevant information and improve the effectiveness of their searches. Finally, by being on-site, liaison prosecutors can consult and liaise directly with OTP investigators and prosecutors with knowledge of the crimes being investigated. This allows liaison prosecutors to support their colleagues in their home office by accessing the in-house expertise and institutional knowledge of the OTP.

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<sup>193</sup> See, for example, Serge Brammertz, "The Legacy of the ICTY: Fair Trials and Cooperation with Local Courts", in Richard H. Steinberg (ed.), *Assessing the Legacy of the ICTY*, Martinus Nijhoff, Leiden, 2011, p. 31; European Commission, Fact Sheet: Training War Crimes Prosecutors: Fighting Impunity in the former Yugoslav Countries.

The Liaison Prosecutors project has achieved important results. Over the course of the project, the liaison prosecutors have focused their activities in different ways, depending on the particular needs of their offices. Some have conducted large numbers of searches for a wide array of cases, allowing their colleagues in their home offices to focus less on obtaining evidence and more on analysing and compiling the evidence for an effective case. Others have focused on following developments in the ICTY's trials and appeals and updating their home office on new evidence that has been led and evidentiary issues that have arisen in proceedings. Still others have targeted their activities on specific, high priority cases for which evidence from the OTP is essential, allowing them to investigate the case, at least in part, from The Hague and take maximum advantage of the availability of OTP investigators and prosecutors.

The provision of access to the OTP's evidence collection is not only important with affected states, but also with third-party states that are conducting their own prosecutions or enforcing "no safe haven" immigration policies. To date, the OTP has received large numbers of RFAs from countries outside the former Yugoslavia, including Australia, Canada, Germany, Sweden and the United States. Initially, the majority of these RFAs were in connection with immigration by refugees from the former Yugoslavia and more in the nature of background checks. More recently, however, prosecutors from third-party states dealing with either war crimes or immigration fraud cases have sought access to OTP evidence in order to support their prosecutions. Similarly, OTP experts are being increasingly called upon to assist investigations and prosecutions by judiciaries in third-party states.

#### **4.4.3. Category II Cases**

As a follow-up to the *11bis* proceedings, the OTP initiated the Category II case programme. While the *11bis* process was limited to cases that the OTP had indicted, there were a number of investigations underway involving intermediate-level suspects that would likely have led to an indictment if the Completion Strategy had not focused the OTP's remaining prosecutions on the most senior leaders and terminated further investigations in 2004. These Category II cases were at various stages in the investigation process, with some almost ready for indictment, while others required further investigations to determine whether an indictment would be appropriate. To ensure that these cases would be processed, the OTP in



June 2005 began transmitting them to the appropriate national authority for further action. By the end of this programme in December 2009, the OTP had transferred 17 files involving 43 suspects to prosecutors' offices in Bosnia and Herzegovina, Croatia and Serbia.

Over the last few years, the OTP has monitored the progress of the Category II cases and reported the status of this work to the Security Council.<sup>194</sup> The Category II cases have not, as of the date of writing, achieved the same positive results as the *11bis* proceedings. While some have proceeded to trial and been completed, others have not moved out of the investigative phase after a number of years. The OTP continues to work with the relevant judicial authorities to process these cases, including providing direct advice on evidentiary issues and the prosecutorial theories of the case.

On reflection, while it was necessary for the OTP to transfer these cases to ensure that there was not an impunity gap, it likely would have been better if the transfer had been done through a formal process, like the *11bis* proceedings. An option that could have been explored would have

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<sup>194</sup> See, for example, Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2015/342, 15 May 2015, para. 46 ('OTP May 2015 Completion Strategy Report'); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2014/827, 19 November 2014, paras. 43–46 ('OTP November 2014 Completion Strategy Report'); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2014/351, 16 May 2014, paras. 44–46 ('OTP May 2014 Completion Strategy Report'); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2013/678, 18 November 2013, paras. 40, 41 ('OTP November 2013 Completion Strategy Report'); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2013/308, 23 May 2013, paras. 44–46 ('OTP May 2013 Completion Strategy Report'); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2012/847, 19 November 2012, paras. 50, 51 ('OTP November 2012 Completion Strategy Report'); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2012/354, 23 May 2012, paras. 57, 58 ('OTP May 2012 Completion Strategy Report').

been to revisit the mechanisms put in place by the original Rule 11*bis* to allow the cases to be “deferred”. Formal processes have many advantages, including judicial oversight, the possibility of imposing binding obligations and the availability of official monitoring mechanisms. Deferral of cases from an international court to a domestic one is a valuable tool for complementarity, as the 11*bis* cases demonstrated. But deferral should not be seen as the only option. Measures can be explored in the future to apply the same lessons from the 11*bis* proceedings to the transfer of other cases.

#### **4.4.4. Regional Co-operation**

One of the greatest challenges for national war crimes prosecutions in the former Yugoslavia, and indeed for collaboration as a model, is co-operation between national prosecutors’ offices. When crimes, victims and perpetrators cross borders, as can be expected in most post-conflict situations, transnational judicial co-operation is essential. In the countries of the former Yugoslavia, this problem is significantly exacerbated by a number of factors, including constitutional provisions and treaties precluding extradition, suspects who are nationals of more than one country, political distrust and diverging legal systems. The results can be daunting. Multiple states may be able to assert jurisdiction over the same crime based on the location of the crime, the nationality of the victims and the nationality of the suspect. One state may have custody of the suspect, while another state may be in possession of the majority of relevant evidence. Two or more states may, unknowingly or not, be conducting parallel investigations. Co-operation between prosecutors’ offices is the only way to address these situations.<sup>195</sup>

Accordingly, the OTP has consistently identified the need to address challenges in regional co-operation and actively supported, through formal and informal channels, the development of mechanisms to strengthen it.<sup>196</sup> In 2005 the prosecution services of Croatia and Bosnia

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<sup>195</sup> See, for example, OTP May 2015 Completion Strategy Report, para. 40, see *supra* note 194.

<sup>196</sup> See, for example, OTP November 2013 Completion Strategy Report, para. 53, see *supra* note 194; OTP May 2013 Completion Strategy Report, para. 55, see *supra* note 194; OTP November 2012 Completion Strategy Report, para. 63, see *supra* note 194; OTP May 2012 Completion Strategy Report, para. 72, see *supra* note 194; Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to

and Herzegovina signed the “Protocol on Agreement in Establishing Mutual Cooperation in Combating All Forms of Serious Crime”, followed by agreements between Serbia and Croatia and between Croatia and Montenegro for the extradition of those convicted of organised crime and corruption. Specific mechanisms for war crimes prosecutions then began to be put in place in 2006, with the adoption of the “Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide” between the prosecution services in Serbia and Croatia. Finally, in January 2013, after strong encouragement and active participation by the OTP, the prosecution services of Serbia and Bosnia and Herzegovina adopted the “Protocol of the Prosecutor’s Office of Bosnia and Herzegovina and the Office of the War Crimes Prosecutor of the Republic of Serbia on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide”. This was followed by similar protocols between other prosecutions services in the region.

Given that it is unlikely barriers to extradition will be removed, the protocols between prosecutor’s offices supported by the OTP focus on operational measures to transfer evidence from the national prosecutor that investigated the case to the national prosecutor who can obtain custody of the suspect. They supplement, but do not replace, agreements on mutual assistance in criminal matters. The protocols provide for a number of significant advancements in regional co-operation on war crimes cases. The respective prosecution services commit to exchange information on all pending cases so that parallel investigations can be identified. This commitment is continuous and continues to apply as new suspects are identified. The protocols further require the prosecutors to exchange case files for further review and analysis. The prosecutor’s office that can obtain custody of the suspect identified by another investigation retains the discretion to determine whether it should pursue the case or not. If that prosecutor’s office determines that a case can be prosecuted, it can submit a binding request to the other prosecution service to hand over all evidence and necessary documentation. However, if the prosecutor’s office

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the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2011/716, 16 November 2011, para. 64 (‘OTP November 2011 Completion Strategy Report’); Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN doc. S/2011/316, 18 May 2011, para. 67 (‘OTP May 2011 Completion Strategy Report’).

receiving such a request has territorial jurisdiction, based on the location of the crime committed, it may refuse to transfer the relevant evidence if the victims of the crime object.

Over time, these protocols have been increasingly utilised to address the problem of cross-border fugitives. There have recently been a number of high-profile<sup>197</sup> and other cases<sup>198</sup> that utilised the protocols, at least in part, building trust both among prosecutors and the general public in the regional co-operation process. The protocols have further created space for increasing informal regional co-ordination between prosecutors. Improved co-operation is already moving the accountability process forward in ways that could not have been foreseen a decade ago.<sup>199</sup>

However, while useful and offering the possibility to continue strengthening regional co-operation, the protocols are imperfect. As agreements between the respective prosecution services, the protocols do not have the same legal status as treaties or formal agreements between the respective states. The inevitable result is that while the protocols are functional for many cases, they may be more difficult to objectively utilise for contentious situations that become political, as well as legal, issues.<sup>200</sup> Unfortunately, it is precisely for such cases that regional co-operation regulated by objective legal criteria is most needed.

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<sup>197</sup> See, for example, Rick Lyman, “15 Serbs are Arrested in Connection with 1993 Massacre”, in *New York Times*, 5 December 2014; Ian Traynor, “Serbia Arrests Seven Men over 1995 Srebrenica Massacre”, in *The Guardian*, 18 March 2015.

<sup>198</sup> See, for example, Republic of Serbia, Office of the War Crimes Prosecutor, Press Release, “As a result of Serbian and BiH Prosecutors’ Cooperation, Three Indicted for War Crimes against 300 Serb Civilians in Livno”, 2 April 2015 ([http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2015/VS\\_2015\\_04\\_02\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2015/VS_2015_04_02_ENG.pdf)); Republic of Serbia, Office of the War Crimes Prosecutor, Press Release, “Cooperation Brings Indictment for Crimes Against Serbs in Bosanska Krupa”, 16 January 2015, ([http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2015/VS\\_2015\\_01\\_16\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2015/VS_2015_01_16_ENG.pdf)).

<sup>199</sup> See, for example, Republic of Serbia, Office of the War Crimes Prosecutor, Press Release, “Fifteen Under Arrest on Suspicion of 1993 Seizure and Killing of 20 Passengers in Štrpci”, 5 December 2014: “After 21 years, owing to joint efforts of the Offices of the Serbian War Crimes Prosecutor and BH Prosecutor, a great step forward has been made in the clarification of crimes against citizens of the then Federal Republic of Yugoslavia” ([http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2014/VS\\_2014\\_12\\_05\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_12_05_ENG.pdf)).

<sup>200</sup> See, for example, “Switzerland to Extradite Acquitted War Crimes Suspect Oric to Bosnia, not Serbia”, in *Deutsche Welle*, 25 June 2015 (<http://www.dw.com/en/switzerland-to-extradite-acquitted-war-crimes-suspect-oric-to-bosnia-not-serbia/a-18541296>); “Dacic, Pusic Urge Resolution of Open Issues”, in *b92*, 12 March 2015 (<http://www.b92.net/eng/>)

More broadly, the protocols do not and could not fully address the essential issue of strategic co-ordination and co-operation between regional prosecutors' offices. The protocols enable prosecutors to share information about cases under investigation and agree to the transfer of particular cases to another jurisdiction when appropriate. However, to improve efficiency and ultimately enable more comprehensive justice, national prosecutors would ideally co-operate at a strategic level as well. Such strategic co-operation would involve, *inter alia*: identifying a common set of priorities for war crimes prosecutions; relating resources available at a regional level to the activities needed to achieve those priorities; establishing objective criteria to determine which prosecution service would be best placed to conduct investigations and prosecutions in particular cases; and adopting a regional strategy for war crimes prosecutions bringing together the individual efforts of national prosecutors into a more comprehensive plan to achieve accountability at the regional level.

In the context of the former Yugoslavia, such strategic co-operation would be very difficult to achieve for a variety of reasons, particular at this late stage. Nonetheless, in future situations, an early focus on transnational co-operation between national prosecutors could yield valuable results. In this regard, it is important that legal reforms are implemented that not only improve co-operation between national and international authorities, like the BiH LoTC, but also ensure that mechanisms are in place to support co-operation between national prosecutors.

#### **4.4.5. Monitoring and Advice**

Since the arrest of the OTP's last remaining fugitives in 2011 and particularly following delays in processing the Category II cases, the OTP has increasingly devoted efforts to monitoring the status of war crimes prosecutions in the countries of the former Yugoslavia and providing advice on measures to resolve challenges and further improve the efficiency and effectiveness of national prosecutions. These are ongoing activities that

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news/politics.php?yyyy=2015&mm=03&dd=12&nav\_id=93456); Kristina Kukulja, "Croatia Responds to Serbia's Plea Against Snedden Extradition", in *SBS*, 4 January 2015 (<http://www.sbs.com.au/news/article/2015/01/04/croatia-responds-serbias-plea-against-snedden-extradition>).

the OTP then summarises and reports to the Security Council in its regular, biannual Completion Strategy reports.<sup>201</sup>

The OTP has consistently monitored and drawn the attention of the international community to delays in the implementation of the Bosnia and Herzegovina National War Crimes Strategy.<sup>202</sup> The OTP has underscored that in accordance with the NWCS, the PO BiH and Court of BiH should be focusing their activities on the most complex and highest priority cases, including in particular those involving senior- and mid-level suspects and cases of sexual violence.<sup>203</sup> In addition, the OTP has identified a number of technical and operational issues in national war crimes prosecutions, including the need to jointly prosecute related suspects, quality control issues in the preparation of indictments, charging practices related to crimes against humanity, and others.<sup>204</sup> The OTP has also pointed to the needs of prosecutors, including in particular appropriate resources and training.<sup>205</sup> Finally, the OTP has addressed strategic issues in national war crimes prosecutions. The OTP has identified barriers to regional co-operation while also encouraging prosecutors to better co-ordinate their activities.<sup>206</sup> The OTP has also specifically noted that one of the most sig-

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<sup>201</sup> See OTP Completion Strategy Reports, *supra* notes 194, 196.

<sup>202</sup> See, for example, OTP May 2015 Completion Strategy Report, para. 47, see *supra* note 194; OTP November 2014 Completion Strategy Report, paras. 47–48, see *supra* note 194; OTP May 2014 Completion Strategy Report, paras. 47–51, see *supra* note 194; OTP November 2013 Completion Strategy Report, paras. 47–50, see *supra* note 194; OTP May 2013 Completion Strategy Report, paras. 52–54, see *supra* note 194; OTP November 2012 Completion Strategy Report, paras. 57–59, see *supra* note 194; OTP May 2012 Completion Strategy Report, paras. 64–67, see *supra* note 194; OTP November 2011 Completion Strategy Report, paras. 61, 62, see *supra* note 196; OTP May 2011 Completion Strategy Report, para. 64, see *supra* note 196.

<sup>203</sup> See, for example, May 2015 OTP Completion Strategy Report, para. 47, see *supra* note 194; November 2014 OTP Completion Strategy Report, paras. 41, 48, see *supra* note 194; May 2014 OTP Completion Strategy Report, paras. 52, 53, see *supra* note 194.

<sup>204</sup> See, for example, May 2015 OTP Completion Strategy Report, para. 47, see *supra* note 194; November 2014 OTP Completion Strategy Report, paras. 45, 48.

<sup>205</sup> See, for example, May 2013 OTP Completion Strategy Report, paras. 54, 69–72.

<sup>206</sup> See, for example, May 2015 OTP Completion Strategy Report, paras. 40–44, see *supra* note 194; November 2014 OTP Completion Strategy Report, paras. 54–56, see *supra* note 194; May 2014 OTP Completion Strategy Report, paras. 59–61, see *supra* note 194; November 2013 OTP Completion Strategy Report, paras. 53–55, see *supra* note 194; May 2013 OTP Completion Strategy Report, paras. 55–58, see *supra* note 194; November 2012 OTP Completion Strategy Report, paras. 60–63, see *supra* note 194; May 2012 OTP Completion Strategy Report, paras. 70–74, see *supra* note 194; November 2011 OTP Comple-

nificant barriers to improvements in the processing of war crimes cases at the national level is that national prosecutors have not yet adopted and implemented strategic approaches to war crimes cases.<sup>207</sup>

The OTP's increasing role providing monitoring and advisory services for national justice efforts has been welcomed by both international partners and national counterparts. Of course, other organisations, such as the OSCE, monitor national war crimes prosecutions and produce important analyses.<sup>208</sup> Nonetheless, the OTP's expertise in the practice of war crimes prosecutions and extensive knowledge of the crimes enables it to not only identify issues but also understand how they arose and what solutions are necessary to resolve them. The OTP's experiences highlight the need for continuing, in-depth engagement by international prosecutors with national war crimes prosecutions.

#### 4.5. Conclusion

Writing in 2002, before the Completion Strategy was put in place, a distinguished practitioner commented with regret:

The ICTY has had little impact on the region's justice systems or on war crimes prosecutions and proceedings. [...] The possibility that local prosecution of war crimes can be conducted in a reasonably fair and impartial manner is now a very distant prospect indeed.<sup>209</sup>

At the time, this was an entirely fair and accurate assessment.

Thankfully history developed in a different direction, as this chapter has shown. Beginning in 2003, the ICTY successfully transitioned from its primacy framework to an approach implementing the principle of complementarity. The OTP then further continued this evolution by beginning to develop a collaborative model bringing together international and national courts to achieve more comprehensive justice for war crimes

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tion Strategy Report, paras. 63–68, see *supra* note 196; May 2011 OTP Completion Strategy Report, paras. 65–67, see *supra* note 196.

<sup>207</sup> May 2015 OTP Completion Strategy Report, paras. 35–39, see *supra* note 194.

<sup>208</sup> See, for example, Organization for Security and Co-operation in Europe, “Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges (2004–2014)”, June 2015 (<http://www.osce.org/bih/171906>).

<sup>209</sup> David Tolbert, “The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings”, in *Fletcher Forum of World Affairs*, 2002, vol. 26, no. 2, p. 18.

committed in the former Yugoslavia. National judiciaries continue to face many significant challenges in prosecuting war crimes, and even with the progress achieved so far many cases still remain to be processed. Nonetheless, the fact remains that hundreds of war crimes cases are being fairly adjudicated in the national courts of the countries of the former Yugoslavia. The ICTY played an important role in creating the necessary conditions and, even more, ensuring that national prosecutions of war crimes could be successfully conducted.

In a historical perspective, the interactions between international and national courts during the ICTY's 23 years of operations offer many valuable insights and lessons learned for international criminal justice practitioners and policy makers. Of these, three in particular can be highlighted.

First, complementarity between international tribunals and national courts should not be reduced to mere matters of case allocation. Jurisdictional issues are important, but successful complementarity requires much more. In particular, there needs to be careful attention to technical and operational issues that are essential to the practice of war crimes prosecutions. Most important, measures are needed to promote and allow extensive sharing of evidence between jurisdictions. War crimes cases require enormous volumes of evidence in a wide variety of forensic fields. It is unrealistic to expect that any national prosecutor's office would receive the necessary resources to gather and analyse this evidence. This obstacle can only be overcome if prosecutors, national and international, can share the investigative burden by more easily exchanging the evidence they have obtained and potentially co-ordinating their investigative activities. International organisations – criminal courts, commissions of inquiry and related justice sector actors like Interpol – can play a critical part by sharing evidence they have obtained and offering their forensic expertise. In addition, measures like the acceptance of adjudicated facts from international judgments can help to reduce the evidentiary burden on national courts and allow them to focus on the individual criminal responsibility of the accused. As the example of Bosnia and Herzegovina shows, extensive evidence sharing is effective, cost-efficient and fully consistent with international fair trial standards. In the future, consideration should be given at the outset as to measures and reforms that will link a multiplicity of judiciaries through effective sharing of evidence.



Second, more attention is needed to the mandates of international courts and related accountability mechanisms like commissions of inquiry, as well as creative solutions to institutionalise frameworks for judicial co-operation. Complementarity is too important and too complex to be left to chance. Moreover, given the resource constraints that all courts face, difficult choices have to be made in determining institutional priorities. Clear mandates to co-operate with other courts in a collaborative justice programme are needed to confirm priorities, ensure that appropriate resources are allocated, and provide legal grounds to overcome barriers. In a similar vein, the ICTY's experience shows the value of agreements between jurisdictions to further regulate co-operation matters. While agreements like the protocols in the former Yugoslavia focused on important operational matters, consideration can also be given to higher-level agreements on matters like prosecutorial strategies and the allocation of cases based on criteria such as the rank of the accused. States and judicial officials should not consider contentious admissibility litigation as the only avenue to resolve key issues of complementarity.

Finally, the reality is that the landscape of international justice is changing. The investigation and prosecution of international crimes is being increasingly nationalised. This is a positive development that should be welcomed, because the ultimate challenge is to provide more justice in more post-conflict and transitional societies. In its early years, the ICTY could have more deeply engaged with national judiciaries. The ICTY learned this lesson and reorientated itself following the adoption of the Completion Strategy, producing significant results. All international courts should embrace the positive role that national courts must play, while national courts should recognise that in post-conflict situations they will necessarily need to engage with counterparts in other jurisdictions. For practitioners, scholars and policy makers, more attention is now needed to the practical implications of complementarity and prosecutorial collaboration. This chapter has underscored the importance of evidence, witness protection and substantive law. There are many additional areas for future study and consideration. In the end, the ICTY's most profound legacy for international justice may be that it proved that national justice should always be part of the solution to the challenge of impunity.



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## Article 17 of the Rome Statute of the International Criminal Court: Complementarity – Between Novelty, Refinement and Consolidation

Patricia Pinto Soares\*

### 5.1. Introduction

The coming into force of the Rome Statute ('ICC Statute') and the establishment of the first permanent International Criminal Court ('ICC') are some of the most remarkable achievements in the history of international criminal law. The core of the functioning of the ICC is inextricably related to the principle of complementarity, often equated to a quasi-fascinating creation of the ICC Statute. On the basis of a historically based approach, this chapter will propose a different conclusion. It starts by scrutinising the principle of complementarity as enshrined in the ICC Statute as well as few creative examples of national implementing laws in relation to it.

The chapter then argues that complementarity as such is not a brand-new construction of the ICC Statute. To that effect, it follows an analysis of the setting on which the relationship between national and international jurisdictions concerning the prosecution of the most serious perpetrators of crimes under international law has been based, from the penalty provisions of the Treaty of Versailles to the *ad hoc* tribunals'

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Completion Strategy. Also taken into account is the interplay between domestic and international jurisdictions established by the most relevant international criminal law treaties. On the basis of this assessment, it is submitted that complementarity is not a new creation of the ICC Statute. Rather, four models of complementarity are proposed, illustrated by historical and concrete examples.

Against this background, the chapter concludes that a more far-reaching concept of complementarity has for long been intrinsic to international criminal law: the principle of substantive complementarity. It proposes that this is a structural principle of core crimes law, comprising but going beyond the terms of complementarity under Article 17 of the ICC Statute. The legal nature of this principle is briefly assessed with a view to proposing an effective model of accommodation of national and international judicial competences. This model aims at ensuring that those most responsible for serious crimes of international concern are brought before an able and willing judicial system, thus assisting in closing the impunity gap.

## **5.2. The Principle of Complementarity as Enshrined in Article 17 of the ICC Statute**

The principle of complementarity is mirrored in paragraph 10 of the Preamble and Article 1 of the ICC Statute.<sup>1</sup> The terms for the operation of complementarity *in concreto* are enshrined in Article 17 which establishes the parameters for the inadmissibility of cases before the Court. In accordance with this provision, when one of the crimes listed in Article 5 of the Statute is committed, the ICC will be empowered to *admit* cases if: 1) the competent states are inactive, unwilling or unable to *genuinely* investigate and prosecute; 2) the opening of proceedings would not contravene the *ne bis in idem* principle; and 3) the gravity threshold that justifies the

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>). Paragraph 10 of the Preamble determines that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Article 1 reinforces this:

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.

involvement of the ICC is verified. In this regard, this chapter is mostly concerned with the concepts of “unwillingness” and “inability”.

### 5.2.1. Complementarity Standard

The negotiators of the ICC Statute rejected the model of the *ad hoc* tribunals whereby the ICC and domestic jurisdictions would work concurrently, with primacy afforded to the former in cases of conflict. There was no major controversy regarding the fact that the ICC should step back whenever municipal systems were capable and willing to carry out proceedings. Yet the difficulty remained of ensuring mechanisms able to guarantee the efficacy of the system drawn by the ICC Statute and to avoid deceitful manipulations of the principle of complementarity aimed at blocking the jurisdiction of the permanent Court.<sup>2</sup> The concepts of “unwillingness” and “inability” have then emerged. But the conundrum was not solved. The challenge remained of reconciling states’ sovereignty with regard to their primary right to investigate and prosecute, and the full application of the principle of complementarity which would permit the ICC to step in when states cannot or do not intend to complete the process. To this already difficult starting point was added the fact that the ICC was not intended to function as a court of appeal to review domestic decisions. Therefore, because the ICC was to be the judge of the extent of its own competence, it was necessary to set forth the criteria upon which to infer states’ unwillingness and inability as objectively as possible. Delegations finally managed to agree on the term “genuinely”<sup>3</sup> as the key to the inter-

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<sup>2</sup> For an account of the work of the International Law Commission (‘ILC’) on the Draft Statute of the International Criminal Court see Herman von Hebel, “An International Criminal Court: A Historical Perspective”, in Herman von Hebel, Johan G. Lammers and Jolien Shukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, TMC Asser, The Hague, 1999, pp. 22–31. See also on the steps towards the term “genuinely”, John T. Holmes, “Complementarity: National Courts *versus* the ICC”, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, Oxford University Press, Oxford, 2002, pp. 670–74.

<sup>3</sup> The ILC Draft Statute had opted for the term “ineffective” and the Preparatory Committee supported the concept. However, states argued that it was too subjective; that is, it could permit the ICC to step in if it considered itself to be in a position to undertake better investigations or prosecutions than the state in question. For example, the ICC should not step in on grounds that the state was conducting proceedings slower than other states or the ICC itself in similar cases. For the same reason, “good faith”, “diligently” and “sufficient grounds” were rejected.

pretation of the criteria that make complementarity a workable instrument.<sup>4</sup> The adverb “genuinely” is thus, in the framework of Article 17, the interpretative tool which permits both complementarity criteria (unwillingness and inability) to enforce the principle of complementarity. That is, cases will be admissible only whereas domestic systems did not or are not *genuinely* investigating and prosecuting. Article 17 reads as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of

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<sup>4</sup> The majority of delegates considered that this term, despite not having any precedent in legal usage, was the least subjective. On the one hand, it did not entail the *suspicious* scope of “inefficiency” and, on the other, it was more objective than “sufficient or reasonable grounds”. Close to “genuineness” is “good faith” which was declined because it was considered to be narrower. As exemplified by Holmes, 2002, p. 674, see *supra* note 2: “a State may in good faith undertake an investigation, but it is apparent to the outside observer that an objective result cannot be achieved, possibly because the domestic judicial system is partially disabled”. Accordingly, proceedings initiated by the state under such circumstances would not unveil *mala fide* but would lack genuineness.

shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
  - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, 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 evidence and testimony or otherwise unable to carry out its proceedings.

The Article thus determines a two-step test whereby the Court may deem a case admissible and open proceedings if 1) competent states are inactive,<sup>5</sup> or 2) domestic proceedings have been, or are being, undertaken but the state is unwilling or unable genuinely to investigate and prosecute. When the first condition is satisfied, the “unwilling or unable” test is irrelevant and does not have a role to play in the assessment of admissibility.<sup>6</sup> Inactivity amounts to the total absence of proceedings or of any act that might lead to that effect independent of whether the state is generally an able and willing system.<sup>7</sup>

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<sup>5</sup> “Inactivity” as the rationale to support the opening of proceedings by the ICC results from the heading of Art. 17(1): “the Court shall determine that a case is inadmissible”. The rule is that the Court might step in. The provision determines the terms upon which a case shall be deemed inadmissible rather than the opposite.

<sup>6</sup> Darryl Robinson, “The Mysterious Mysteriousness of Complementarity”, in *Criminal Law Forum*, 2010, vol. 21, no. 1, p. 67. Robinson explains in detail the two-step insight of Article 17 whereby inactivity undoubtedly dictates the admissibility of cases before the ICC (if gravity requirements are fulfilled). For the opposing view, considering that the Office of the Prosecutor and Chambers’ decision according to which the inexistence of domestic proceedings falls within the scope of cases’ admissibility is a manifestation of judicial activism, see William A. Schabas, “Prosecutorial Discretion v. Judicial Activism”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 731.

<sup>7</sup> In the Katanga case, the Trial Chamber considered the case admissible because, *inter alia*, the challenge had been filed out of time. Yet, it explained that even if this had not been the

### 5.2.2. Unwillingness

Article 17(2) establishes that, of the following factors, at least one has to be verified for the case to be admissible: 1) intent to shield the person from criminal accountability; 2) unjustified delay in the proceedings; or 3) proceedings lacking independence and impartiality. These are the criteria that integrate and are expected to solidify *genuineness* as far as willingness is concerned. They have been criticised for one reason or another. On the one hand, it can be argued that the ICC is required to prove excessively demanding standards before being able to adjudicate a case and that it might be blocked by admissibility challenges for years and years. On the other hand, one may consider the argument that the openness of the criteria may permit abuses by the Court. In view of the delicate balance at stake, the system delineated was the best possible compromise.

There are some indicators of unwillingness that are more or less uncontroversial. Excessive delays in the handling of proceedings when compared to similar cases in the same country, previous sham trials concerning some of the accused in respect of a particular crime, and departures from the normal procedural rules usually applicable in the state are all indicative of the intent to shield individuals from justice.<sup>8</sup> In addition, when assessing admissibility conditions, the ICC is bound to take into account principles of due process recognised by international law.<sup>9</sup> Ac-

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case, the ruling of admissibility would still prevail on the basis of a second form of unwillingness, not expressly stated in the ICC Statute: where a state “chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done”. ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19 (2) (a) of the Statute, ICC-01/04-01/07-949, 12 March 2009, paras. 4–6, 9, 14 (<https://www.legal-tools.org/doc/99f09e/>). Accordingly, the Chamber directly resorted to the second stage of the two-step admissibility test, applying the dichotomy of “unwilling or unable” in the absence of proceedings. The Appeals Chamber endorsed the decision of the Trial Chamber on different grounds. It ruled that inactivity was the ground of the admissibility of the case against Katanga; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on Admissibility of the Case, ICC-01/04-01/07-1497 OA8, 25 September 2009 (<https://www.legal-tools.org/doc/ba82b5/>).

<sup>8</sup> Holmes, 2002, p. 675, see *supra* note 2: “For example, bypassing the normal criminal (either civil or military) procedures by appointing a special investigator who is politically aligned with persons close to the accused could be also a determining factor”.

<sup>9</sup> See ICC Statute, Arts. 21(1)(c) and 33. The reference to the principles of due process recognised by international law was included during the Conference of Rome and aimed to stress that the Court should issue its decision on admissibility matters on the most objec-



Accordingly, the establishment, for instance, of secret tribunals would not in principle impede the admissibility of the case.

In respect of Article 17(2)(b), which relates to unjustified delays in the proceedings, the Court should adopt an objective approach. While the ICC Statute does not provide guidance on the matter the usual length of similar proceedings in the relevant country compared to the prosecution in question is likely to be an effective indicator.<sup>10</sup> Finally, Article 17(2)(c) refers to the impartiality and independence of proceedings. The inclusion of “independence” and “impartiality” was done with the aim of ensuring fairness, equality and equity. Thus, the ICC can develop jurisprudence in the sense that *bona fide* proceedings may fall under the umbrella of this provision when, for instance, other procedural phases do not offer the same guarantees of due process. Again, the comparison of the actual case with the normal practice for similar offences may be useful. Likewise, it is possible to maintain that where a state’s judicial system is affected and its substantial collapse appears only a question of time, Article 17(2)(c) calls for the adjudication of cases fulfilling gravity requirements so as to guarantee that current and future cases, which may be connected, will be submitted to fair and impartial proceedings. Nevertheless, it is important to note that these indicators are closely intertwined and their mutual relationship is permeated by some degree of overlapping.

### 5.2.3. Inability

Inability is a more objective concept. States were not as concerned about its possible impact on sovereignty. Inability was intended to address situations where the official structures of the state have collapsed. The destruction of the judicial system, the non-existence of courts, prosecutors or qualified legal personnel will lead, in principle, to the admissibility of

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tive ground. See John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, Martinus Nijhoff, The Hague, pp. 53–54.

<sup>10</sup> Holmes, 2002, p. 676, see *supra* note 2:

For example, if an investigation takes six months before charges are brought against an accused, this may not be an unjustified delay, if the national proceedings for similar, serious cases take approximately the same period of time. Conversely, proceedings which exceed the usual national practice and which are not convincingly explained may constitute an unjustified delay or even a shielding of the person from criminal responsibility.

cases on grounds of inability of the competent state. This notwithstanding, the need was felt to endow the ICC with more objective criteria as to make inability as precise as possible. In accordance with Article 17(3) inability may result from either: substantial or total collapse of national institutions. In the latter case, the incapacity of the state is obvious. In the former, some doubts may arise.<sup>11</sup> When asserting the incapacity of a specific judicial system, the ICC must ensure that at least one of the following factors is verified: 1) the state is unable to obtain the accused; 2) the state is unable to collect necessary evidence/testimony; or 3) the state is unable to otherwise carry out the proceedings.<sup>12</sup> The last factor is not a matter of mere factual determination thus allowing for a certain level of discretion by the Court which might be important when unforeseen circumstances arise.

Article 17(3) reads as follows:

In order to determine inability in a particular case, the Court shall consider whether, 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 evidence or testimony or otherwise unable to carry out its proceedings [emphasis added].

It would be pleonastic to consider that “unavailability” amounts, just like “total or substantial collapse”, to physical or material factors, such as the lack of judges or judicial infrastructures. Rather, unavailability is a form of inability that refers to legal or procedural obstacles that prevent the state from *genuinely* administering justice.<sup>13</sup> Procedural unavail-

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<sup>11</sup> The expression initially chosen by the Preparatory Committee and established in the Draft Statute was “partial”. The term “substantial” was an innovation arising out of the Rome Conference. The intent was to avoid the ICC taking on jurisdiction when an internal conflict existed and the national judicial apparatus was only partially defeated. In these situations, the state could still be capable of ensuring investigation and prosecution, namely by transferring resources or allocating the trial to another place.

<sup>12</sup> Because, for example, there are no qualified law professionals.

<sup>13</sup> Markus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity”, in *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, no. 1, pp. 614–16; Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process”, in *Criminal Law Forum*, 2006, vol. 17, nos. 3/4, pp. 255–66. By contrast, if a state prosecutes murder as an ordinary crime rather than as a war crime, but the punishment reflects the gravity of the conduct, it seems that the admissibility test would be (or at least could be) satisfied.

ability includes, for instance, immunities determined by national law. Legal unavailability refers first to the lack of legal provisions applicable to the case in question such that courts are unable to “carry out its proceedings” genuinely.<sup>14</sup> It is also concerned with sentencing and the qualitative difference between ordinary and international crimes. *Genuineness* implies that, for the *bonus pater familias*, the accused has been submitted to a fair trial and, if found guilty, a proportional punishment.<sup>15</sup> It also requires that the judicature has applied the law in conformity with principles of international law. Accordingly, it is hardly convincing that a sentence of few months for the crime against humanity of murder could dictate a finding of inadmissibility by the ICC Chambers. In other words, while the adequate normative framework may exist in the national system it is necessary, in the assessment of a judicial system’s availability, to take into account the policy and record of sentences usually applied to perpetrators in similar circumstances. Likewise, as noted by William A. Schabas, issues of unavailability may arise when the individual is prosecuted for an ordinary rather than international crime.<sup>16</sup>

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<sup>14</sup> This view is consistent with the “same conduct” test applied by the ICC in different cases: that is, a case is inadmissible only where the same individual is facing domestic proceedings for the same conduct he or she is charged with before the permanent Court. For instance, the prosecutor decided to undertake proceedings against Lubanga for the crime of enlistment of children under 15 when he had already been indicted in the Democratic Republic of Congo for crimes against humanity, genocide and other offences under national law, including murder. ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06, 10 February 2006 (<https://www.legal-tools.org/doc/59846f/>). Further, it seems logical to infer that situations where the same individual is being prosecuted for different crimes at the national level cannot determine a ruling of inadmissibility because they fall under the scope of ICC Statute, Art. 89(4), see *supra* note 1. This provision determines a consultation mechanism whereby the forum state, after receiving a request of surrender of the individual, may approach the Court with a view to maintain jurisdiction.

<sup>15</sup> This does not require that victims agree with the sentence.

<sup>16</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed., Cambridge University Press, Cambridge, 2004, p. 88:

There is some doubt about the application of complementarity and the *ne bis in idem* rule to situations where an individual has already been tried by a national justice system, but for a crime under ordinary criminal law such as murder, rather than for the truly international offences of genocide, crimes against humanity and war crimes. It will be argued that trial for an underlying offence tends to trivialize the crime and contribute to revisionism or negationism.

#### 5.2.4. The Duty to Investigate and Prosecute in the ICC Statute

The previous discussion endeavoured to highlight that the purpose of the principle of complementarity is to fill gaps capable of leading to impunity while national courts maintain primacy concerning the exercise of criminal jurisdiction. Yet, what was not scrutinised is whether such primacy constitutes a true legal duty or a right. The purpose of this section is to address this question.

Scholars, states' representatives and courts diverge on the matter. The French Court of Appeals considered, in the *Gadaffi* case, that the ICC Statute imposes on ratifying states the duty to investigate and prosecute perpetrators of crimes under international law.<sup>17</sup> Belgium derived from the ICC Statute obligations of “jurisdictional character”,<sup>18</sup> while South Africa held that “the Republic, [...] in line with the principle of complementarity [...] has jurisdiction and responsibility to prosecute persons accused of having committed a crime [listed in the Statute]”.<sup>19</sup> Some countries banned amnesties from the national system so as to fully comply with the obligations under the ICC Statute. In contrast, a few states saw no incompatibility between the granting of amnesties and the Statute.<sup>20</sup>

Paragraph 4 of the Preamble of the ICC Statute affirms that the “the most serious crimes of concern to the international community as a whole must not go unpunished [...] prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. Paragraph 6 recalls the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The question remains regarding what the reach and legal nature of this duty is.

Before examining in detail paragraphs 4 and 6 of the Preamble, a preliminary question emerges: may a legal obligation be imposed in the Pre-

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<sup>17</sup> France, Court of Appeals (Cour de Cassation), *In re Gadaffi*, 20 October 2000, *International Law Reports*, 2003, vol. 125, p. 462.

<sup>18</sup> Brussels, Tribunal of First Instance, *In re Sharon and Yaron*, 26 June 2002.

<sup>19</sup> South Africa, Implementation of the Rome Statute of the ICC, Act 27 of 2002, 16 August 2002 (<http://www.justice.gov.za/legislation/acts/2002-027.pdf>).

<sup>20</sup> Declaration made upon ratification of the Rome Statute by Colombia, 5 August 2002. See also Trinidad and Tobago, International Criminal Court Act 2006, 24 February 2006, Section 13, concluding that the ICC Statute was not incompatible with the principle of unlimited discretionary prosecution.

amble of a treaty though no reference thereto is made in the *dispositif*?<sup>21</sup> There are different views on the matter and this chapter will not delve thoroughly with the question. It is contended that the Preamble may enshrine legal obligations. It is an integral part of the treaty concerned;<sup>22</sup> therefore no reason subsists to deny binding effect to a certain determination because it is placed in the Preamble rather than in the operative part.<sup>23</sup> Certainly, the legal force of obligations may vary between provisions as a result of how they are drafted but not as a result of where they are placed within the treaty.<sup>24</sup>

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<sup>21</sup> Anja Seibert-Fohr contends that in spite of the terms of the Preamble, “there is no provision on prosecuting duties by States parties in the operative part of the Statute” which leads her to conclude that states are not under such a duty by virtue of the ICC Statute. Anja Seibert-Fohr, “The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions”, in *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, pp. 558–59.

<sup>22</sup> See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(1) and 31(2). The Preamble has legal interpretative force. Determining the context and the purpose of the treaty, it sheds light on the rationale that should guide the enforcement of rights and obligations so as to serve the purpose of the legal text. In this sense see International Court of Justice (‘ICJ’), *France v. United States of America (Case Concerning Rights of Nationals of the United States of America in Morocco)*, Judgment, 27 August 1952, ICJ Reports 1952, p. 196 (<https://www.legal-tools.org/doc/ab79cf/>); See also ICJ, *Columbia v. Peru (Colombian-Peruvian Asylum Case)*, Judgment, 20 November 1950, ICJ Reports 1950, p. 282 (<https://www.legal-tools.org/doc/cb94fc/>).

<sup>23</sup> Charles Rousseau, *Droit international public: introduction et sources*, vol. 1, Sirey, Paris, 1970, 87: “*On a parfois considéré le préambule des traités comme doué d’une force obligatoire inférieure à celle du dispositif. Mais c’est là une opinion isolée*”. Furthermore, the term used in paragraph 6 is legal in nature – duty. Had the drafters intended to simply establish a moral duty other language could have been used. See, for example, United Nations Security Council, resolution 1593 (2005), 31 March 2005, UN doc. S/RES/1593 (2005), by which the Security Council referred the situation on Darfur to the ICC. While expressly stating that non-parties had no obligation under the Statute, the Security Council incentivised states politically and morally to co-operate with the Court. Paragraph 2 adopted the term “urges”. For the opposite view see Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, LGDJ, Paris, 1980, p. 126, recognising interpretative relevance to the Preamble but “*il ne possède pas de force obligatoire*”.

<sup>24</sup> As rightly pointed out by Jann K. Kleffner, there is no reason to accept that United Nations General Assembly resolution 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. 1, UN doc. A/Res/3/260 (‘Genocide Convention’) (<https://www.legal-tools.org/doc/498c38/>) binds states to “prevent and punish” genocide and reject the same effect to the obligation to “exercise its criminal jurisdiction” imposed on states by the ICC Statute’s Preamble. Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, Oxford, 2008, p. 236. Accordingly, for their low specificity, particularly in respect of enforcement mechanisms, both provisions are bestowed upon with a low degree of normativity. See

Once asserted that the Preamble could determine obligations the question arises whether the “duty to exercise criminal jurisdiction” constitutes a positive legal obligation in view of the open scope of the language of paragraphs 4 and 6. That is to say, whether enshrined in the Preamble or in the *dispositive*, do provisions need to comply with parameters of certainty and precision in order to establish positive duties?

The duty to exercise criminal jurisdiction must be broadly understood. It cannot mean the obligation of any state party to prosecute.<sup>25</sup>

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Kleffner, *id.*, pp. 238–40, concluding at p. 240 that the level of normativity “ultimately depends on the individual preambular provision in question”. See, however, International Criminal Court, Office of the Prosecutor: “Informal Expert Paper: The Principle of Complementarity in Practice”, 2003, p. 19, fn. 24, where it is sustained that the “preamble does not as such create legal obligations” (<http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>).

<sup>25</sup> For the reasons explained, this chapter does not follow Kleffner’s view who, after concluding that the provisions on admissibility merely establish the consequence for the failure of states to administer justice and not a specific obligation to do so, argues that a combined reading of ICC Statute, paragraph 6 of the Preamble and Art. 17 gives rise to the obligation to investigate and prosecute. Kleffner, 2008, p. 249, see *supra* note 24. States might indeed be under an obligation to investigate and prosecute but that will be a duty derived from treaty, customary law or a consequence attached to the *jus cogens* nature of the prohibition to commit the crime at stake. The obligation of a state party to investigate and prosecute through its domestic courts is not enshrined in the ICC Statute. To argue that it is, implies an overstretching of the language of the Statute. As a matter of policy, though, it would be extremely important if states interpreted the “duty to exercise criminal jurisdiction” as an obligation to prosecute for the ICC has neither the resources nor the mandate to investigate all crimes begging for a legal response. Furthermore, states’ eager attachment to sovereignty is likely to lead them to do all within their reach, namely by undertaking criminal proceedings, so as not to be considered unwilling or unable. Yet, this will be a side effect of complementarity; not an obligation imposed by it. Finally, it could be argued that the spirit of the ICC Statute requires national systems to apply their maximum effort in administering criminal justice in respect of the most serious crimes of international concern. Consequently, in light of the telos of the ICC Statute, states would be bound to investigate and prosecute crimes falling under their jurisdiction or even to adopt universal jurisdiction so as to comply with such an obligation. In point of fact, the spirit of the Statute is that mentioned above. The conclusion derived therefrom is not, however, automatic or necessary. In case of doubt or when the language of a given provision contravenes the purpose of the treaty, the interpretation shall be corrected in view of the spirit of the convention. However, neither the Preamble nor Article 17 lead to a system contrary to the main objective of the establishment of the ICC. The major goal of the ICC Statute is to ensure that perpetrators will not find safe havens. As explained below, compliance with such a purpose does not imply an immediate duty to investigate and prosecute. Rather, core crimes law, where the ICC system is to be integrated and in light of which it is to be interpreted, already provides the framework for securing accountability. An objective reading of the ICC Statute is of utmost importance to preserve the credibility and legitimacy of the ICC as well as to gain the confidence of those states that still perceive the Court with suspicion.

First, if that had been the intent of the provision it would have explicitly stated so. Second, there is no article in the entire ICC Statute determining such an obligation. Third, the Statute is to be read within the general framework of international criminal law. The duty to prosecute or extradite as defined in particular conventions is to be acknowledged and function in parallel to the ICC system. Likewise, extradition agreements which may require the custodial state not to prosecute but to extradite to a forum able and willing to carry out genuine proceedings is, as clarified by Article 98(1), fully in line with the ICC Statute. Fourth, to impose on every state the duty to prosecute would, in borderline cases, create complex positive conflicts of jurisdiction that would seriously obstruct rather than favour international criminal justice as intended by the Statute. Fifth, within the functioning of complementarity nothing precludes a state from being inactive because, for example, of the political, economic or social impact of a prosecution. What complementarity ensures is that, in such a case, inactivity will not always amount to impunity, provided that the admissibility conditions set forth in the Statute are satisfied. Likewise, a state may self-refer a situation to the ICC prosecutor without breaching the duty to exercise its criminal jurisdiction. Nor does the ICC Statute determine an obligation on the territorial and national states to investigate and prosecute.<sup>26</sup> The only obligation on these states created by the Statute is that, in the case of their unwillingness or inability to administer justice, they are bound to accept the jurisdiction of the ICC, co-operate with the latter and deal with its final ruling.

Criminal jurisdiction is a broad concept, including jurisdiction to prescribe, to adjudicate and to enforce. By concluding extradition treaties, for example, states are administrating their adjudicative jurisdiction. Nothing prevents states from establishing networks of international cooperation aimed at consolidating a more efficacious international criminal order. The same happens, though with different contours, when the ICC takes on a case based on unwillingness of the state. Here, it is the state in any case that exercises jurisdiction as the Court is nothing more and nothing less than a body established to exercise prosecuting and judicial powers in the name of states on the basis of their delegation of sovereign prerogatives. The ICC appears as a subsidiary institutional body that states

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<sup>26</sup> Active personality and territoriality are the two jurisdictional grounds set forth in the ICC Statute, Art. 12, see *supra* note 1. See also the previous sections on Art. 12.

can resort to in order for it to exercise their (delegated) criminal jurisdiction. On the one hand, the ICC Statute reminds states of their duty to exercise their criminal jurisdiction and, on the other, it clarifies that it is through measures adopted at the national level and by enhancing international co-operation that such jurisdiction must be displayed. The ICC system – anchored on the principle of complementarity – represents a form of international co-operation with important repercussions at the national level. It is a specific concretisation of the duty of states to exercise criminal jurisdiction. In line with the above considerations, the duty to exercise criminal jurisdiction entails a right of choice, between prosecuting, extraditing or handing the case over to the ICC.

#### **5.2.4.1. The Duty to Exercise Criminal Jurisdiction: What Addressees?**

According to the *pacta tertiis* principle, the ICC Statute can only bind state parties. However, it can be argued that the duty to exercise criminal jurisdiction applies to all states. Three main arguments support this view. First, this duty is referred to in the Preamble and not in the operative part that is directly and exclusively addressed to the parties to the Statute. Second, the Preamble *recalls* the duty of *every state* to exercise its criminal jurisdiction. The term *recalling* discloses that such a duty pre-existed the Statute and therefore was compulsory for all states. Paragraph 6 resorts to the expression “every State” as opposed to “States party”, the term used in the *dispositif* in respect of obligations created by the Statute and, consequently, directed only to the ratifying states. In addition, paragraph 6 of the Preamble refers to international crimes whereas the Statute embraces, within that broader category, only “the most serious crimes of concern to the international community as a whole”. Accordingly, as the Statute cannot create obligations binding upon third states and the Preamble is referring to every state and crimes not comprised within the scope of the treaty, the duty to exercise criminal jurisdiction should be understood as a general “reminder” so that states recall their obligations beyond, and independent of, the ICC Statute.<sup>27</sup> In line with this approach, the “duty to

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<sup>27</sup> For a detailed exposition of these arguments see Kleffner, 2008, pp. 243–47, *supra* note 24. See also the declaration of the delegate of Dominican Republic during the Rome Conference according to which “each State still has the duty to exercise its penal jurisdiction over individuals responsible for crimes of international significance”. Dominican Republic: Proposal regarding the Preamble, A/CONF 183/13, in United Nations Diplomatic Con-



exercise its criminal jurisdiction” does not add anything new to the already pre-existing obligations under international law, for example, the duty to prosecute or extradite as enshrined in the Geneva Conventions or the duty impending on the territorial state to prosecute genocide and adopt all necessary measures to prevent this crime from going unpunished. In other words, the “duty to exercise criminal jurisdiction” is a mere re-statement of pre-existing commitments as opposed to a new, more wide-reaching obligation. Yet, Jann K. Kleffner points out that the ICC Statute came to classify as crimes of serious international concern some offences, for example, forced pregnancy and attacks against cultural property,<sup>28</sup> that previously were not qualified as such. Accordingly, he holds that it is difficult to consider that the Statute did not alter in any manner, or rather added something to, the pre-existing obligations to prosecute core crimes.<sup>29</sup> It is submitted that the Statute does not alter treaty, customary or *jus cogens* obligations prior to the ICC Statute. With 123 ratifications at the time of writing, the effect of the ICC Statute on such obligations is that of strengthening and enhancing existing duties, namely by consolidating their customary status or driving treaty obligations towards that same result.

### 5.2.5. Implementing Complementarity

Most states party to the ICC Statute adopted implementing laws intended to incorporate into national legislation the complementarity scheme determined in the ICC Treaty. The solutions varied. While some countries established last resort universal jurisdiction with regard to the crimes listed in Article 5, others adopted more restrictive views whereby universal jurisdiction was conceived in view of a handful of crimes, namely on grounds of international treaties, and the ICC Statute was seen only as determining obligations based on the principle of territoriality and active personality. Others followed somewhat original solutions. This is the case, for instance, of Belgium, Spain and Germany.

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ference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July 1998, Official Records, vol. III, Reports and Other Documents, 2002, p. 203, UN doc. A/CONF 183/13 (Vol. III).

<sup>28</sup> See ICC Statute, Arts. 2(f) and 7(1)(g), and Art. 8(2)(b)(ix) and 8(2)(e)(iv) respectively, *supra* note 1.

<sup>29</sup> Kleffner, 2008, pp. 243–47, *supra* note 24.

### 5.2.5.1. The Belgian Case

With the coming into force of the ICC Statute, it was necessary to articulate the principle of complementarity within the wider principle of universal jurisdiction in force in Belgium throughout the 1990s. In addition, there was significant pressure to adapt national law<sup>30</sup> to the *Yerodia* ruling, whereby the International Court of Justice ('ICJ')<sup>31</sup> reprimanded Belgium's rejection of immunity in respect of the Congolese Minister of Foreign Affairs, after a complaint presented by the Democratic Republic of Congo in respect of the arrest warrant issued by Belgian authorities against Abdoulaye Yerodia Ndombasi.<sup>32</sup> As a consequence, in 2003 the Belgian Legislature amended Article 5(3) of the 1993 Act relating to the Repression of Grave Breaches of International Humanitarian Law which now reads as follows: "International immunity attaching to the official capacity of a person does not preclude the applicability of this Act, other

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<sup>30</sup> Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces Conventions [Law of 16 June 1993 concerning the Repression of Grave Breaches of the 1949 Geneva Conventions and their 1977 Additional Protocols], published in *Moniteur Belge*, 5 August 1993, F. 93-1856, pp. 17751–55, as amended by the Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire [Law of 10 February 1999 relating to the Repression of Grave Breaches of International Humanitarian Law], published in *Moniteur Belge*, 23 March 1999, F. 99-809, pp. 9286–87. The 1999 Act excluded the application of immunities, including those derived from the exercise of official functions, to core crimes (Article 5(3)).

<sup>31</sup> ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Judgment, 14 February 2002, ICJ Reports 2002, p. 3 (<https://www.legal-tools.org/doc/c6bb20/>).

<sup>32</sup> *Ibid.*, p. 23, para. 54:

The functions of a minister of foreign affairs are such that for the duration of his or her time in office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability are to protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duty.

The opinion of the ICJ was, furthermore, that customary law did not recognise any exception to this rule in respect of war crimes or crimes against humanity, *id.*, para. 58. In para. 61, however, the ICJ stated that the individual protected would not be able to invoke immunity's protection before an international court which does not recognise it in its Statute.

than within the limits established by international law”.<sup>33</sup> The amendment leaves the way open to legal interpretation and integration.

Concerning the articulation between the principle of complementarity and universal jurisdiction, Belgium followed a cautious approach and introduced the so-called “inversion of the complementarity principle”. The 2003 Act reaffirms universality of jurisdiction but articulates it with the jurisdiction of the ICC, the *ad hoc* tribunals and other national jurisdictions. Furthermore, in specific cases, the initiation of criminal proceedings is the exclusive competence of the public prosecutor. Civil parties cannot for example present a complaint to the investigative judge. According to Article 10(1)*bis* and 12*bis* (prosecution of international crimes under the principle of universality) of the Preliminary Title of the Criminal Code of Procedure, the prosecutor may refuse to initiate proceedings if

the specific circumstances of the case show that is the interest of the proper administration of justice and in order to honour Belgium’s international obligations, said case should be brought either before the court of the place in which the acts were committed, or before the court of which the perpetrator is a national, or the court of the place in which he can be found, and to the extent that said court is independent, impartial, and fair, as may be determined from the international commitments binding on Belgium and that State.<sup>34</sup>

There is no rule demanding that prosecutions held in other states be *genuine*. The requirement that foreign courts be impartial is not convincing either. It is not clear whether it is to be evaluated in respect of a given case or in general. If courts adopt the second view, the scenario is not very promising. Furthermore, the assessment of foreign courts’ ability to proceed against the perpetrator shall take into account the “international commitments binding on Belgium and that State”. There are reasons for scepticism concerning the Belgian legislative decision in view of the pressure made by the United States threatening to transfer the headquarters of

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<sup>33</sup> Loi du 23 avril 2003 modifiant la loi du 16 Juin 1993 relative à la répression des violations graves du droit international humanitaire et l’article 144*ter* du Code judiciaire [Law of 23 April 2003 amending Law of 16 June 1993 relating to the Repression of Grave Breaches of International Humanitarian Law and Article 144*ter* of the Judicial Code], published in *Moniteur Belge*, No. 167, 2nd Edition, 7 May 2003, p. 24846, Art. 4 (‘2003 Act’) (<https://www.legal-tools.org/doc/120d0a/>).

<sup>34</sup> *Ibid.*, English translation available in *International Legal Materials*, 2003, vol. 42, p. 1267.

NATO from Brussels unless Belgium altered its broad conception of universal jurisdiction (1999 Act).

Moreover, the Legislature opted to invert the rule of complementarity as enshrined in the ICC Statute; that is, the ICC is allowed to step in and proceed against core crimes perpetrators when states are unable or unwilling to do so. In light of the latest amendment to the 1993 Act, Belgian courts will be competent to prosecute core crimes committed abroad by foreigners against foreign victims only if the ICC does not undertake to bring a prosecution. Against this background, the Minister of Justice can refer the situation to the ICC and, if the prosecutor starts investigations, the Court of Cassation shall declare that the domestic courts lack jurisdiction to proceed. The government may also intervene to transfer cases elsewhere, particularly to the home country of the accused.<sup>35</sup> The Belgian approach makes the ICC a court of first instance and the Belgian courts, the courts of last resort activated when necessary to fill in the lacunae resulting from the functioning of the Court. To be precise, domestic courts will recover jurisdiction over core crimes whenever the ICC prosecutor decides not to issue an indictment, the indictment is not confirmed, or the ICC concludes not to have jurisdiction or the case is considered inadmissible.<sup>36</sup>

In conclusion, nothing prevents states from referring cases to the ICC or passing information to the prosecutor hoping that he will open an investigation. However, it would be worrying if the ICC starts to be generally seen as a court of first instance. A system where states recover jurisdiction at a later stage if the ICC does not take on a case is likely to be a waste of time and resources of the Court and lead to the loss of evidence because of the time spent by the ICC in making a decision, especially if it decides not to step in.

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<sup>35</sup> See Human Rights Watch “Belgium: Questions and Answers on the ‘Anti-Atrocity Law’”, June 2003, p. 5.

<sup>36</sup> 2003 Act, Art. 7(2)(2), see *supra* note 33. In these cases, criminal proceedings could only be opened by the public prosecutor, the federal prosecutor or, alternatively, by the submission of a civil action or through the confirmation by the complainant of a civil action presented before to the original complaint.

### 5.2.5.2. The Spanish Case

The Law of Co-operation with the International Criminal Court ('LCICC')<sup>37</sup> was passed in Spain in 2003 to regulate the competence of national bodies and the main procedures to be followed when co-operating with the ICC.<sup>38</sup> The Spanish implementation of the ICC Statute also established the “inverted principle of complementarity”, which is similar to the regime adopted by Belgium. Yet the Spanish system is particular for the significant jurisprudence of domestic courts on core crimes, universal jurisdiction and obligations directly derived from international law, which the LCICC came somehow to weaken.

On grounds of Article 23(4)<sup>39</sup> of the Judicial Power Organic Law,<sup>40</sup> courts considered that in order to activate Spanish jurisdiction on the basis

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<sup>37</sup> Ley Orgánica 18/2003 de Cooperación con la Corte Penal Internacional [Law of Co-operation with the International Criminal Court], 10 December 2003 (<https://www.legal-tools.org/doc/10f4d4/>). A *ley orgánica* is one as such required by the constitution to regulate specific subject matters, for example, the organisation and competences of the judicial power. Usually, the adoption of an organic law is subject to extraordinary conditions such as absolute or qualified majority.

<sup>38</sup> Ley Orgánica 15/2003 [Organic Law 15/2003], 25 November 2003 amended the Ley Orgánica 10/1995, 23 November 1995, of the Código Penal [Penal Code Law 10/1995] (<https://www.legal-tools.org/doc/338859/>) which had previously implemented the ICC Statute provisions concerning the definition of crimes and general principles enshrined therein.

<sup>39</sup> At the time, Article 23(4) read as follows:

Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera el territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:

- a) Genocidio.
- b) Terrorismo.
- c) Piratería y apoderamiento ilícito de aeronaves.
- d) Falsificación de moneda extranjera.
- e) Los relativos a la prostitución.
- f) Tráfico ilegal de drogas psicotrópicas, tóxicas e estupefacientes.
- g) Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España.

With the reform of 2009, the provision was slightly altered. Ley Orgánica 1/2009, 3 November 2009, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985,

of universality it was necessary to prove that the case in question had not been previously investigated. This formulation is equated to the principle of subsidiarity of Spanish jurisdiction to other legal systems, which imposed on the claimant the onus to prove the necessity of Spanish intervention.<sup>41</sup> The LCICC reconceived the principle of subsidiarity of the Spanish jurisdiction in view of the competence of the ICC, by preventing, in the draft version of Article 7(2), national authorities from proceeding against suspects of crimes listed in the ICC Statute when committed abroad by foreigners. In such situations, the organ of state in question should merely notify the complainant of the possibility of informing the ICC's Office of the Prosecutor, in accordance with Article 13(c) of the Statute and Rule 15 of the Rules of Procedure and Evidence ('RPE'). Furthermore, the same provision disallowed judicial authorities from acting *ex officio* once aware that one of the core crimes had been committed abroad by foreigners.

This proposal was strongly criticised. On the one hand, it restricted the reach of universal jurisdiction as established in Article 23(4) of the Judicial Power Organic Law because it would not cover core crimes. One would have to arrive at the paradoxical conclusion that the coming into force of the ICC Statute would mean the end of universality of jurisdiction in Spain for core crimes. On the other hand, the regime was not in line with the principle of complementarity since it raised the ICC into a substitute of domestic jurisdictions rather than the complementary device it was envisaged to be. This notwithstanding, the LCICC was approved given that the majority of parliament concluded that the primacy of domestic jurisdiction in light of the ICC Statute referred only to crimes committed in Spanish territory or by Spanish nationals. A further paragraph was added granting the courts and the public prosecutor the power to adopt urgent provisional measures in order, *inter alia*, to preserve evi-

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de 1 de julio, del Poder Judicial [Organic Law 1/2009, Reform Act of Procedural Legislation for the Implementation of a new Judicial Office, modifying Organic Law 6/1985, 1 July, on Judicial Power] ('Organic Law 1/2009').

<sup>40</sup> Ley Orgánica 6/1985 del Poder Judicial [Organic Law 6/1985 on the Judiciary], 1 July 1985 (<https://www.legal-tools.org/doc/881df4/>).

<sup>41</sup> See Sentencia de la Sala de lo Penal del Tribunal Supremo de 20 de mayo de 2003 (STS de 20 mayo de 2003) 712/2003 fundamento jurídico sexto [Supreme Court Judgment of the Criminal Chamber of the Supreme Court, 20 May 2003 (STS of 20 May 2003) 712/2003 Legal Basis]. The complainant has to present reasonable evidence that the crime has not been judicially handled previously in a genuine way.

dence. Furthermore, in an attempt to overcome the criticism that universal jurisdiction would be banned for those crimes that most stridently called for it, Article 7(3) was adopted which permits the submission of claims to the Spanish courts that were previously presented to the ICC if the latter did not accept the case, either because it decided not to proceed with an investigation or because there was a ruling of inadmissibility. In these situations, national authorities will be competent to investigate with a view to prosecution.

It could be argued that the Spanish law implementing the Statute is based on the premise that the ICC is likely to develop an investigative capacity and expertise in respect of core crimes that will place it in better position to proceed against the authors of crimes which reveal no link with Spain. Additionally, it ensured that national courts would still be able to step in where the ICC could not intervene. However, the negative outcome of the system adopted is not light. The lack of competence of the judicial structures to refer a situation to the ICC combined with the exclusive competence of the Council of Ministers to do so leads to incongruent results. In particular, courts and the public prosecutor might find themselves in the situation of knowing that a core crime was or is being committed but are rendered inert, thereby assisting the consolidation of perpetrators' impunity. The paradox is more stringent given that the Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*) is established on the principle of legality rather than the principle of prosecutorial discretion (unbridled or restricted).<sup>42</sup> In addition, even considering that the intention of the legislature was to give priority to better prepared structures, the solution adopted does not seem the most efficient, opening the way for evident waste of time and resources, which, besides affecting the budget and resources of the ICC, potentially undermines the decision of the case irreversibly because of the consequences for the collection and preservation of evidence.<sup>43</sup> Finally, the Spanish legislative option largely allows

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<sup>42</sup> *Ley de Enjuiciamiento Criminal* [Code of Criminal Procedure], 14 July 1882, Arts. 105 and 299.

<sup>43</sup> An example: 1) *X* submits a claim before the Spanish prosecutor concerning the perpetration of one of the crimes listed in Article 5 of the ICC Statute, committed abroad by a person who is not Spanish (the prosecutor and judicial authorities are prevented from proceeding both *ex officio* and after an individual complaint); 2) the prosecutor informs the complainant that national authorities are not competent to intervene though the possibility exists to refer the case to the ICC; 3) the claimant tells the ICC prosecutor of the alleged crime; 4) the Office of the Prosecutor spends months or even years investigating the situa-

for the *politicisation* of core crimes prosecutions. In accordance with Article 7(1) of the LCICC the competence to refer a situation to the ICC lies exclusively with the government through the Council of Ministers (*Consejo de Ministros*), which is the body constitutionally responsible for Spain's foreign policy. Only the Minister of Foreign Affairs and the Minister of Justice are competent to propose a referral to the ICC to the Council of Ministers. The objective of this entitlement was likely to allow the political impact of a referral to the ICC on Spanish international relations to be assessed. There is, thus, a clear risk that referrals concerning "friendly" or "feared" states will be avoided. There is no space for judicial evaluation on the matter.<sup>44</sup>

On 25 June 2009 the Congress passed a bill amending Article 23(4) of the Law on Judicial Power and restricting the terms of operability of universal jurisdiction in Spain.<sup>45</sup> In the terms of the new amendment Spanish courts are competent to exercise universal jurisdiction over genocide, crimes against humanity and other serious crimes only when the perpetrator is in Spanish territory, victims are Spanish or there is some other relevant connection with Spain.<sup>46</sup> Article 1 of the Law determines

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tion and context within which the alleged crime was committed; 5) in the end, the prosecutor decides not to proceed or admissibility procedures have been initiated and the Pre-Trial Chamber holds the case inadmissible; 6) the claimant starts again at the beginning of the cycle, submitting (probably years later) the same claim to the Spanish prosecutor who is finally entitled, in accordance with LCICC, Art. 7(3), to investigate with a view to prosecution. This is all the more so the case in view of the fact that the LCICC was apparently drafted without the necessary attention towards the distinction made in the Statute between "situation" and "case". Significantly, when an individual refers a specific case to the ICC, the prosecutor will not solely investigate that case but also the entire situation in the context of which the crime was allegedly committed. The assessment of a "situation" is obviously more demanding in terms of time and resources. In the end, it might even be that the ICC prosecutor decides to proceed in respect of the situation but not of the actual case referred, for example, for questions of jurisdiction *ratione temporis* or because the gravity threshold is not met.

<sup>44</sup> This scenario becomes more concerning if one recalls that the prosecutor will only proceed if there is reasonable evidence concerning the perpetration of a crime listed in Article 5 of the ICC Statute and admissibility criteria are satisfied; that is, parameters which political organs are not in the best position to assess. It is submitted that although it is hardly possible to "sweep way" political considerations out of international criminal law, the establishment of a comprehensive system where the prosecution of core crimes is almost entirely controlled by the executive is to avoid.

<sup>45</sup> The Senate approved the bill on 15 October 2009 and it came into force on 3 November 2009, see *supra* note 39.

<sup>46</sup> See Organic Law 1/2009, see *supra* note 39. According to Art. 1:



that national courts are competent only where no proceedings have been initiated in other countries or by an international court. Further, proceedings initiated in Spain will be suspended if there is notice that another state or an international court started investigating the same facts.<sup>47</sup> Yet, the Law did not amend Article 7(2) of the LCICC and the terms under which domestic authorities may proceed with an investigation over crimes listed in the ICC Statute. This remains a concerning shortcoming. It has also been claimed that the new law means the death of universal jurisdiction in Spain and an enormous retreat in the fight against impunity. Despite the somewhat suspicious motivations that furthered the reform project,<sup>48</sup> the final outcome is not as negative as it would seem at first sight. The requisite custody of the suspect is entirely in accordance with the principle of universal jurisdiction. Such requirement is nothing more than

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*Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos: a) Genocidio y lesa humanidad. b) Terrorismo. c) Piratería y apoderamiento ilícito de aeronaves. d) Delitos relativos a la prostitución y los de corrupción de menores e incapaces. e) Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes. f) Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores. g) Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España. h) Cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España. Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentren en España o que existen víctimas de nacionalidad españolas, y, en todo caso, que en el país del lugar donde se cometieron los hechos delictivos o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles.*

<sup>47</sup> Ibid.: “El proceso penal iniciado ante la jurisdicción española se sobreseerá provisionalmente cuando quede constancia del comienzo de otro proceso sobre los hechos denunciados en el país o por el Tribunal a los que se refiere el párrafo anterior”.

<sup>48</sup> See *Le Monde*, 28 May 2009, stating that the opening of proceedings against the former Israeli Minister of Defence and members of the military forces for crimes committed in Gaza led to considerable political pressure on Spain and the amendment of the law on universal jurisdiction. On 29 January 2009 preliminary investigations were opened into claims that a bomb attack in Gaza in 2002 warranted the prosecution of the former Defence Minister Binyamin Ben-Eliezer, among others. The investigation was halted on 30 June by a decision of a panel of 18 judges of the Audiencia Nacional (National Court).

a procedural element which promotes the efficient development of universality of jurisdiction. In particular, it will prevent Spain from opening never ending proceedings due to the absence of suspects. It is significant that Spanish law allows the opening of proceedings in *absentia* but the presence of the accused is indispensable in order to start a trial.<sup>49</sup>

### 5.2.5.3. The German Case

The 2002 Code of Crimes Against International Law ('CCAIL', Völkerstrafgesetzbuch) implemented the ICC Statute and adapted German substantive criminal laws to its provisions. The Code adopted the principle of universal jurisdiction, thus permitting the prosecution of core crimes even in absence of any link between the crime and Germany. In addition, the German principle of mandatory prosecution – *Legalitätsprinzip* – is applicable, with some exceptions, to prosecutions under the CCAIL.<sup>50</sup>

The most progressive feature of the CCAIL is the treatment reserved to universal jurisdiction, permitting the best co-ordination between the fight against impunity and an effective and realistic allocation of jurisdiction and resources. It created a sophisticated network that provides for a logical efficiency that does not undermine criminal accountability and takes advantage of all resources available under international law.

Article 1 of the CCAIL determines that the jurisdiction of domestic courts applies to all crimes defined therein “even when the offence was committed abroad and bears no relation to Germany”.<sup>51</sup> On a second level, though, the exercise of universal jurisdiction is limited and regulated.

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<sup>49</sup> Organic Law 6/1985, Art. 23(4), see *supra* note 40.

<sup>50</sup> Germany: Völkerstrafgesetzbuch (VStGB) [Code of Crimes Against International Law], 29 June 2002 ('CCAIL') (<https://www.legal-tools.org/doc/fa8c3f/>). Art. 3 of the CCAIL contains the new section 153(f) of the Criminal Procedure Code, 7 April 1987 (<https://www.legal-tools.org/doc/19df38/>), which refers to the principle of mandatory prosecution.

<sup>51</sup> The wording of CCAIL, Art. 1 was an explicit response to a German jurisprudential mainstream according to which universal jurisdiction could only be exercised by German courts in presence of the so-called “legitimising link”. See Kai Ambos and Steffen Wirth, “Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts (1994–2000)”, in Horst Fischer, Claus Kreß and Sascha Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Arno Spitz, Berlin, 2001, pp. 778–83. Universal jurisdiction, like the non-application of statutory limitations, is not applicable to sections 12 and 13 of the CCAIL which deal with the so-called “less serious offences”.

To be precise, there are some circumstances under which the prosecutor has the discretion to decide not to prosecute. This solution aims to avoid unnecessary duplication of efforts and to prevent national courts from remaining mired in cases impossible to prosecute for practical reasons.

Section 152(2) of the Criminal Procedure Code already enshrined the principle of mandatory prosecution. However, section 153(c) gave the prosecutor discretion to decide whether or not to proceed against suspects of crimes committed abroad. The CCAIL Act amended the Code of Criminal Procedure. Specifically, an addition was made to section 153 (c)(1) so as to extend the principle of mandatory prosecution to crimes committed abroad with the much narrower exceptions provided for in section 153(f), which became the only field where the discretion of the prosecutor has a role to play. Both sections 153(c) and (f) apply to crimes committed abroad. The exceptions to the principle of mandatory prosecution are set out in subsection (1) and (2) of section 153(f) which partially overlap. Subsection (1) applies to both national and foreign accused. Subsection (2) disciplines those cases where neither the perpetrator nor victims are German. According to subsection (1), the prosecutor does not need to prosecute if the “accused is not present in Germany and such presence is not to be anticipated”. However, if the perpetrator is German, the discretionary principle only subsists if he is not present in German territory and he is not expected to be and, additionally, he is being prosecuted by the state of the nationality of the victim or before an international court. In cases covered by subsection (2), in order for the prosecutor to be entitled not to proceed it is necessary that: i) the accused be “beyond the reach of the German Executive”<sup>52</sup> (not present in Germany and not expected to be); *and* ii) the suspect be prosecuted outside Germany. In the latter case, the prosecutor is entitled to relinquish the prosecution if the suspect is within national territory but extradition or surrender procedures are in course and it is probable that they will succeed. This is so because in the case of proceedings abroad, the need for German intervention is less urgent.<sup>53</sup> It is important to note that these provisions are anchored on Article

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<sup>52</sup> Steffen Wirth, “Germany’s New International Crimes Code: Bringing a Case to Court”, in *Journal of International Criminal Justice*, 2003, vol 1, no 1, p. 159.

<sup>53</sup> In respect of both subsections (1) and (2) it should be noted that the requirement on the expected presence of the suspect in German territory is not to be understood in restrictive terms. That is, it is not to be applied to the suspicion that the accused has bought a ticket to, or is planning to have a holiday in, Germany. It applies also, for example, to extradition

17 of the ICC Statute: only *genuine* proceedings are able to activate the discretion of the German prosecutor. In the case of proceedings led by states unwilling or unable to bring perpetrators to justice the principle of mandatory prosecution remains intact. Once again, it emerges that the objective of the German law is not the exercise of unbridled universal jurisdiction but to resort to it as the last available remedy to prevent impunity where all other mechanism have failed.<sup>54</sup>

The principle of mandatory prosecution binds the prosecutor to investigate but not to present charges. If by the end of the scrutiny of evidence he or she is not convinced that a crime has been committed he or she will dismiss the case. This notwithstanding, even when the prosecutor decides not to press charges it is possible, under certain conditions, to apply to court for a review of the decision (*Klageerzwingungsverfahren*).<sup>55</sup>

The relationship between the possibility of reviewing a prosecutorial decision not to prosecute and the discretionary faculties of the prosecutor under section 153(f) of the CCAIL are particularly important for the purpose of this study. In accordance with section 172(2) of the Code of Criminal Procedure the request for review is inadmissible if the dismissal

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procedures that have been initiated and which may end with the delivery of the individual. *Ibid.*, p. 160.

<sup>54</sup> Although the legal framework created by the CCAIL is promising, the situation might be considerably different when extradition procedures are involved. In fact, while the prosecutor is empowered to, in certain circumstances, issue an international arrest warrant (No. 86 of the Guidelines for Dealings with Foreign States in Criminal Law Matters – *Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*), the decision to issue an extradition request belongs to the Federal Ministry of Justice who shall decide with the consent of the Ministry of Foreign Affairs after a request has been submitted by the prosecutor (Section 74 of the Law on International Assistance in Criminal Matters – *Gesetz über die Internationale Rechtshilfe in Strafsachen*). The Ministries will certainly consider political issues, namely the relations with the requested state. The principle of mandatory prosecution may thus be hampered.

<sup>55</sup> It is, however, necessary that the person presenting the appeal is a direct victim (or, in case of death, someone closely related to him or her). The claim is to be presented to a “higher” prosecutor. If the case has been handled by the chief federal prosecutor, the superior entity in these circumstances is the Federal Minister of Justice. Some commentators argue that in such situations the appeal should be presented directly to the court. Indeed, in highly sensitive cases as those covered by the CCAIL, the interference of political considerations might subvert the entire spirit of the Code. There are further difficulties in these circumstances. For example, when the victim is not in Germany it might be difficult to determine what is the competent court in light of the German Criminal Code. For an appraisal of this and other procedural difficulties, see Wirth, 2003, pp. 163 ff., *supra* note 52.

of the case was based on the discretionary powers recognised to the prosecutor. Yet, in the exercise of his or her discretion the prosecutor is required to set out in the report to be sent to the person who reported the crime the reasons that led him or her not to press charges. This obligation is relevant since the discretion of the prosecutor functions on two separate stages and only the second is unreviewable. At the first level, the prosecutor must ensure that the conditions for the exercise of discretion are verified. Only then he or she can found the decision on the principle of prosecutorial discretion. The decision on whether those conditions have been verified in practice is not a discretionary one. If it is shown that the prosecutor did not correctly understand the *ratio legis* of section 153(f) or, for any reason, did not respect it the decision may be subject to review. Were the prosecutor to resort to section 153(f) because, for example, he or she was wrongly convinced that the suspect was facing criminal proceedings in other state, the decision would be reviewable because discretion was exercised where the necessary conditions were not fulfilled. The mere invocation of section 153(f) does not constitute irrefutable evidence or presumption *iure et iuris* of the lawful exercise of discretionary powers. Finally, there is the opportunity to complain to the supervising authority (*Dienstaufsichtsbeschwerde*). Again, if the prosecutor was the chief federal prosecutor the competent authority will be the Federal Minister of Justice. This mechanism permits any decision of the prosecutor to be challenged. It might be useful in some cases (especially because the Ministry of Justice is responsible for extradition requests) but it is not likely to be a very successful policy since the decision of the Minister is completely discretionary.

Importantly, section 28 of the ICC Statute Implementation Act (*Romstatutausführungsgesetz*)<sup>56</sup> established an efficient interaction between domestic courts and the ICC: it permits German proceedings to be discontinued and the suspect transferred to the ICC if the latter agrees *a priori* to prosecute. This mechanism reveals a comprehensive understanding of complementarity that reaches beyond what is strictly posited in the Statute of Rome. By demanding that the Court accepts the case before relinquishing jurisdiction, Germany sidestepped the drawbacks of the

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<sup>56</sup> Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes, 17 July 1998, Bundesgesetzblatt I, 2144 (2002) [Act implementing the Rome Statute of the International Criminal Court].

Belgian and Spanish solutions and promoted a network of co-operation that is beneficial for both the ICC and the German judicial system.

In spite of the potential of the CCAIL to ensure core crimes prosecution, its application by German prosecutors has not always been convincing. An example which elucidates how politics may overpower law is provided by the famous *Donald Rumsfeld* case.<sup>57</sup> The Stuttgart Court of Appeals found that the intention of the Legislature had not been to submit a decision of the prosecutor based on the principle of discretion (including section 153(f)) to the scrutiny of section 172(2) because otherwise the risk would arise of assisting an unbridled extension of Germany's jurisdiction which is questionable under international law. It rejected the argument of the complainants that when the pre-conditions to the exercise of discretion are not met the decision of the prosecutor can be overruled through the *Klageerzwingungsverfahren*. The complainants argued that at least three of the suspects were on German territory and temporary stays could be expected from others. Furthermore, extensive opinions from experts and factual evidence provided showed that the prosecutions in the United States that the federal prosecutor had referred to were not concerned with officials of high rank. The argument was accepted by neither the federal prosecutor nor the Court of Stuttgart.<sup>58</sup>

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<sup>57</sup> On 10 February 2005 the federal prosecutor refused to open investigations against the former US Secretary of Defense Donald Rumsfeld and nine other suspects for alleged war crimes committed in the prison of Abu Ghraib, Iraq, from 2003 to 2005. Out of the 10 suspects at least three were present in Germany when the complaint was presented. The federal prosecutor justified its decision not to prosecute on the basis of section 153(f). He stated that the CCAIL established the principle of subsidiarity of German law in respect of crimes committed abroad which, combined with the principle of non-intervention in the affairs of foreign states, did not give competence to German authorities in the case in question. In the view of the prosecutor, this was so because the crimes were being investigated in the United States. The complainants and the civil rights organisation Centre for Constitutional Rights in New York as well as 17 victims from Iraq appealed the decision requesting that charges be brought against Rumsfeld and the other suspects or, at least, that investigations be initiated. The Stuttgart Court of Appeals found the request of review inadmissible. Decision of 13 September 2005, as cited in Wolfgang Kaleck, "German International Criminal Law in Practice: From Leipzig to Karlsruhe", in Wolfgang Kaleck, Michael Ratner, Tobias Singelstein and Peter Weiss (eds.), *International Prosecution of Human Rights Crimes*, Springer, Berlin, 2007, p. 105.

<sup>58</sup> The prosecutor interpreted section 153(f) of the CCAIL incorrectly in light of Art. 14 of the ICC Statute because he considered that the term "offence" should be understood as "situation" (the overall context in which the crimes in question and other similar cases had been committed) and not "case" (a specific crime attributed to specific individual(s)). By contrast, the provision should have been interpreted in light of Art. 17 of the ICC Statute

### 5.3. Complementarity beyond the ICC Statute

The previous section analysed the principle of complementarity under the ICC Statute. It further highlighted some *sui generis* models of implementation of the principle of complementarity that somehow curbed the immediate understanding of complementarity. This section will propose a reading of complementarity which includes but goes beyond the principle of complementarity as enshrined in the ICC Statute. To that effect, it follows an assessment of the early and or close manifestations of what came to be the ICC complementarity principle.

#### 5.3.1. Historical Assessment of the Interplay between National and International Jurisdictions

It was mostly in the aftermath of the Second World War that the co-ordination and possible division of labour between domestic and international jurisdictions became a pressing matter. However, one can already distinguish at the outset of the First World War elementary features of the principle of complementarity as crystallised in the ICC Statute. This historical analysis has been the focus of Mohamed M. El Zeidy's impressive study on complementarity.<sup>59</sup> Some of his findings will be highlighted and or scrutinised here for they are crucial to the argument of this work. It should be noted that El Zeidy's historical survey terminates with the establishment of the ICC. Instead, the analysis carried out herein expands beyond the borders of the ICC Statute.

With the end of the First World War, the international pressure to prosecute and punish those responsible for the atrocities committed during the conflict was significant. To that effect, the Allies established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('Commission on Responsibility'). The Commission on Responsibility was set up to investigate, assess evidence and identify perpetrators. This endeavour implied, *inter alia*, prosecuting the former Kaiser of Germany which gave rise to controversies vis-à-vis the

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because, like Article 153(f), it deals with admissibility conditions while Art. 14 regulates one of the possible "trigger mechanisms" of the ICC jurisdiction. The term "offence" is used in section 153(f) but has no precedent in German law. See Kaleck, 2007, pp. 93 ff., *supra* note 57.

<sup>59</sup> Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Brill, Leiden, 2008, pp. 11–152.

principle of sovereignty. To pursue its mandate, the Commission on Responsibility established Sub-Commission III to determine which bodies were most appropriate to investigate and prosecute. The Sub-Commission held that individuals of enemy countries who had directly ordered the commission of crimes or, having that responsibility, failed to prevent them should be submitted to the jurisdiction of a high court, international in nature.<sup>60</sup> The proposal did not pass as Japan and the United States argued such a body to be unprecedented. Most important for the purposes of this study are the so-called penalty provisions of the Versailles Treaty: Articles 228 to 230.<sup>61</sup> According to these provisions, Germany agreed to

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<sup>60</sup> The Tribunal should have been composed of 22 judges from different countries: United States, Portugal Romania, the British Empire, France, Italy, Japan, Belgium, Greece, Poland, Serbia and Czechoslovakia. See Carnegie Endowment for International Peace, *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919*, Pamphlet No. 32, 1919, pp. 58–60, 74.

<sup>61</sup> Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919 ('Versailles Treaty') (<http://www.legal-tools.org/doc/a64206/>). The provisions read as follows:

Article 228:

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

Article 229:

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

Article 230:

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders, and the just appreciation of responsibility.



deliver nationals suspected of war crimes to the Allies in order to be tried by Allied National Military Tribunals.<sup>62</sup> However, once the Commission on Responsibility issued a list of 895 suspects to be handed over,<sup>63</sup> the President of the German Peace Delegation in Paris refused to comply for it would be inconsistent with German sovereignty to deliver its citizens to be tried by foreign powers<sup>64</sup> and pleaded Germany's right to prosecute criminals before its own tribunals.<sup>65</sup> The Allies accepted the German offer to try some of the identified suspects before its Supreme Court in Leipzig. However, the Allies reserved the right to overrule German decisions in case they were unsatisfactory.<sup>66</sup> The scheme arising out of the aftermath of the First World War gave rise to what can be considered the prime example of the principle of complementarity as enshrined in the ICC Statute.<sup>67</sup> In the Allies' view,

the offer of the German Government was compatible with the execution of Article 228 of the Treaty of Peace, and the Allied Governments accordingly decided [...] to leave full and complete responsibility with the German Government [for] proceeding with the prosecution and judgement upon the understanding that the Allies would thereafter consider the results of these prosecutions and whether the German Government were sincerely resolved to administer justice in

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<sup>62</sup> Were the crimes to have affected victims from more than one nationality, Germany would submit suspects to the authority and jurisdiction of a Mixed Inter-Allied Military Tribunal. In case of crimes committed in the territory of another country, Germany agreed to submit suspects to the jurisdiction of the territorial state.

<sup>63</sup> Document dated 3 February 1920. See El Zeidy, 2008, p. 14, fn. 41, *supra* note 59, noting a divergence in doctrine concerning the number of suspects.

<sup>64</sup> *Ibid.*, p. 15.

<sup>65</sup> Furthermore, the list included several military personnel. High-ranking military personnel publicly affirmed that they would not accept to stand trial before foreign courts, as it would run against soldiers' honour. See James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood, London, 1982, p. 121.

<sup>66</sup> *German War Trials: Report of the Proceedings Before the Supreme Court in Leipzig*, His Majesty's Stationery Office, London, 1921, pp. 4 and 17 ('German War Trials'). See also El Zeidy, 2008, pp. 15–16, *supra* note 59.

<sup>67</sup> This affirmation addresses exclusively elements of co-ordination between different jurisdictions whereby vis-à-vis unwillingness or inability of the primary jurisdiction to carry out proceedings, complementary jurisdictions would immediately be entitled to step in in order to administer justice. It is, however, different from the ICC complementarity model because there was no autonomous international court involved.

good faith. If it should be shown that the procedure proposed by Germany did not result in just punishment being awarded to the guilty, the Allied Powers reserved in the most expressed manner the right of bringing the accused before their own tribunals.<sup>68</sup>

Even though the trials in Leipzig proved to be substandard, the Allied powers did not resort to the safety device of adjudicating proceedings to their “own tribunals”. It was this inaction on the side of the Allies that prevented complementarity from properly working in practice.<sup>69</sup>

As had happened with Germany, the Allies prepared agreements similar to the Versailles Treaty with other enemy governments. Specifically, peace treaties were concluded with Turkey, Bulgaria, Austria and Hungary. The penalty clauses in these treaties reproduced to a significant extent the corresponding provisions of the Versailles Treaty.<sup>70</sup> When the Allies presented these four states with the list of suspects to be extradited, the reaction was identical to the one Germany had had.<sup>71</sup> In the end, the

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<sup>68</sup> German War Trials, 1921, pp. 4, 17–18, see *supra* note 66. Clearly, the language of the Versailles Treaty, Art. 228 points to primacy of Allied courts. Although, so as to avoid internal disruption in Germany and control public sentiments of dissatisfaction, the Allies extended the scope of the relevant provision and ended up accepting the German offer. To that decision contributed legal difficulties within the domestic systems of the Allies since national law did not contemplated jurisdiction over crimes committed abroad, by foreigners and against foreigners.

<sup>69</sup> Claud Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Survey of German Mentality*, Grafts Inn, London, 1921, pp. 24–26.

<sup>70</sup> Treaty of Peace between the Allied and Associated Powers and Austria, Saint-Germain-En-Laye, 10 September 1919, Art. 173 (reproducing Art. 228 of the Versailles Treaty); Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27 November 1919, Art. 118 (reproducing Art. 228 of the Versailles Treaty); Treaty of Peace between the Allied and Associated Powers and Hungary, Trianon, 4 June 1920, Art. 157 (reproducing Art. 228 of the Versailles Treaty); Treaty of Peace between the Allied and Associated Powers and Turkey, Sèvres, 10 August 1920, Art. 226 (reproducing Art. 228 of the Versailles Treaty). The *travaux préparatoires* of the agreements reveal indeed that the Allied powers understood Art. 228 of the Versailles Treaty as the standard that should guide the relationship between the Allied powers and enemies in respect of adjudication of war crimes’ proceedings. “Article 228 [...] should be taken by the Drafting Committee as the basis for the preparation of corresponding articles in the Treaties of Peace with Austria and with Hungary”. See *The Council of Four: Meetings of May 9: Notes of A Meeting Held at President Wilson’s House in the Place des Etats-Unis, on Friday, May 9, 1919, at 4 p.m. (CF-4)*, reprinted in *Foreign Relations of the United States*, vol. V, 530, cited in El Zeidy, 2008, p. 19, see *supra* note 59.

<sup>71</sup> Hungary opposed the delivery of nationals to Allied Military Tribunals on the basis that it would be far too humiliating even for a defeated power. See Francis Déak, *Hungary at the*

Allies agreed to recognise the jurisdiction of national courts with the safety valve that permitted the adjudication of cases which did not appear to have been dealt with satisfactorily. Bulgaria and Austria achieved much better results than Germany.<sup>72</sup> The Turkish situation was notably different, mainly as a result of the international pressure to guarantee punishment of those responsible for the genocide against the Armenian people.<sup>73</sup> Generally, as before with the Versailles Treaty, the peace agreements represented a clear failure of complementarity which, although existing as law, was met with the lack of political will and the structural conditions necessary for it to be enforced.

In addition to the above-mentioned peace treaties, the aftermath of the First World War was prolific in other initiatives aimed at ensuring

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*Paris Peace Conference: The Diplomatic History of the Treaty of Trianon*, Columbia University Press, New York, 1942, p. 235. Accordingly, Hungary requested to try its nationals before its own courts, a possibility already acknowledged to Germany. For an overview of the reactions of Austria, Bulgaria, Hungary and Turkey, see El Zeidy, 2008, pp. 20 ff., *supra* note 59.

<sup>72</sup> Austria established the Commission of Inquiry within the Military Breaches of Duty which tried General Ljubic and Lütgendorff for ordering killings of Russian and Serbian war prisoners. Conversely, in Bulgaria criminals were divided in two groups: the first, composed of former high officials and their responsibility for the war; the second, composed of minor criminals. Reportedly 534 people or submitted to trial for violating the laws of war. See Willis, 1982, pp. 156 ff., *supra* note 65.

<sup>73</sup> The Allies were determined to prosecute and punish the responsible for the crimes committed against the Armenian people in 1915 and for the violations of the laws of war during the First World War, particularly in respect of the treatment given to prisoners. Trying to save the peace negotiations and maintain the sovereignty of the state as untouched as possible, Turkey passed legislation ensuring that the leaders of the Young Turk movement and the members of the Committee of Union and Progress would be subject of criminal proceedings for having led the Ottoman Empire to the First World War and for the killing and deportation of hundreds of Armenians. In 1919 few popular figures were tried and convicted which gave rise to a fervent movement of popular dissatisfaction. In view of this, the government released several prisoners. The police was ordered to suspend all arrests. The Allies reacted and deported Turkish prisoners to Malta to face trial. Yet, in 1921 these prisoners were released in exchange for British prisoners. The concern of the Allies with Turkish sovereignty led to the substitution of the Treaty of Sèvres, not yet ratified, by the Treaty of Lausanne, which had no provision on trials and punishment. Rather, it counted with an unpublicised annex which granted amnesty to Turkish officials. For a deeper analysis on the Turkish case see, *inter alia*, Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, Lynne Rienner Publishers, Boulder, 2004, pp. 55 ff.; Vahakn N. Dadrian, "The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime", in *University of West Los Angeles Law Review*, 1998, vol. 29, p. 43; El Zeidy, 2008, pp. 22 ff., *supra* note 59.

prosecution and punishment of war crimes. While a model of complementarity such as the one embodied in the Versailles Treaty did not emerge, it is possible to detect a commitment to articulate national and international jurisdictions in order to prevent loopholes able of creating safe havens for perpetrators of core crimes, as well as an effort (although not always successful) to set forth the legal landscape for the development of a complementary relationship between national courts and an international criminal court.

In 1920 the League of Nations established, on the basis of Article 14 of the Versailles Treaty, the Advisory Committee of Jurists to study the convenience of an international criminal court. Baron Édouard Descamps, President of the Committee, proposed that such a court should have jurisdiction over acts threatening “international public order”, including offences to “the universal law of nations”.<sup>74</sup> This proposal was rejected by the Third Committee of the Assembly of the League of Nations as states were not prepared at the time to bear further restrictions on their sovereignty.<sup>75</sup>

After the failure of the Advisory Committee, the International Law Association (‘ILA’), from 1922 to 1924, analysed the convenience of establishing an international court competent to judge violations of the laws

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<sup>74</sup> See Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16 June–24 July 1920, p. 500, cited in El Zeidy, 2008, p. 27, see *supra* note 59. Sustaining this view, Lapardelle argued:

It was now a question of building up the future [...] no one knew who would be the perpetrators of the crimes in the future, and therefore a Court could be constructed in abstracto. [...] A stable judicial organization was required which could take action against those guilty of crimes against international justice, no matter what nation they belonged to.

Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16 June–24 July 1920, pp. 500–1, cited in *id.*, p. 28.

<sup>75</sup> Records of the First Assembly of the League of Nations, Tenth Meeting of the Third Committee, 1920, p. 764., in Memorandum Submitted by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, United Nations General Assembly, New York, 1949, p. 11, UN doc. A/CN.4/7/Rev.1 (‘Historical Survey of International Criminal Jurisdiction’):

There is not yet any international penal law recognized by all nations and that, if it were possible, to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice. The Committee therefore considers that there is no occasion for the Assembly of the League of Nations to adopt any resolution on this subject.

and customs of war and acts contravening the laws of humanity.<sup>76</sup> The most important provision of the ILA's Draft Statute for the establishment of the court was Article 24.<sup>77</sup> It determined that during a conflict war criminals would be tried before their own military courts unless the state decided to submit the case to the international court. Charles Henry Butler was of the view that, during or after the war, the court should operate as a seat for appeals, always upon states' voluntary submission of cases.<sup>78</sup> Again, the proposals of the ILA did not progress further as states were not willing to restrict their sovereignty. In line with this view, during the 1925 Inter-Parliamentary Union Conference,<sup>79</sup> the main attempt was to reconcile sovereignty with the need of prosecuting human atrocities. To the scope of this work, the most relevant outcome of the mentioned Conference was Vespasien V. Pella's distinction between "interior" and "exterior" sovereignty. The latter was not absolute, for it was necessary to reconcile states' powers with the need to ensure harmony among nations. Exterior sovereignty was thus limited to the extent necessary to guarantee respect for other states' rights and the maintenance of order and international justice. Interior sovereignty would relate to the state action within

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<sup>76</sup> For references on the 1922–1924 conferences of the International Law Association, see El Zeidy, 2008, pp. 31–34, *supra* note 59.

<sup>77</sup> International Law Association, Draft Statute for the Permanent International Criminal Court, Report of the Thirty-Third Conference, Stockholm, 8 September–13 September 1924, Art. 24 ('ILA Report'):

The Court shall be open to the subjects or citizens of every state, whether belligerent or neutral, and whether during a war or after its conclusion. Provided always that no complaint or charge shall be entertained by the Court unless the complainant as first obtained the fiat or formal consent of the Law Officers, Public Prosecutor or Minister of Justice, as the case may be, of his own State.

<sup>78</sup> The court would thus determine "whether the national Court had properly executed justice in such a way as to satisfy the nation which claimed that the offence had been committed against its national". ILA Report, p. 103, cited in El Zeidy, 2008, p. 32, *supra* note 59. The expression "whether the national court had properly executed justice" seems to imply the concepts of unwillingness or inability revealing, on the one hand, a possible exception to the voluntarist approach, and, on the other, how the basic contours of complementarity as enshrined today in the Statute are not a brand novelty of the latter. However, Hugh H. Bellet was of the view that after the end of war, the international court should have exclusive jurisdiction over war crimes. ILA Report, *id.*, pp. 76–77.

<sup>79</sup> The Inter-Parliamentary Union met in 1925 for its 23rd meeting in order to discuss the report prepared by Pella on Criminality of Wars of Aggression and the Organization of International Repressive Measures. See Report of the 1925 Inter-Parliamentary Union, XXIII Conference, Washington and Ottawa, 1–13 October 1925.

its territory where it would be the *dominus*. However, this realm of sovereignty also knew limitations as the state could not act contrary to the most “elementary precepts of humanity and to the customs unanimously recognized by the civilized world”.<sup>80</sup> As to the interplay between domestic and international jurisdictions, Pella stressed that the need to repress international crimes required those states directly involved to be barred from carrying out criminal proceedings in order to “insure energetic repressive measures and also to avoid both excessive severity and culpable leniency”.<sup>81</sup> In the quest for impartiality, exclusive jurisdiction of the international court over the abovementioned crimes was sought. The idea of complementarity rests on the recognition that sovereignty is not absolute and cannot be called upon whenever it contradicts international order and justice.

The emergence of terrorism in Eastern Europe led to a climate of political instability that was supported by Fascist Italy and Nazi Germany. In 1934, continuing the developments of the period immediately after the First World War, the Council of the League of Nations passed a resolution setting up a committee of experts to study international responses to terrorism.<sup>82</sup> The committee analysed the proposals and comments of several governments<sup>83</sup> and considered that the most appropriate response to terrorism was through the establishment of an international court, bestowed with concurrent jurisdiction in relation to domestic courts.<sup>84</sup> The interna-

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<sup>80</sup> *Ibid.*, p. 101.

<sup>81</sup> *Ibid.*, p. 106.

<sup>82</sup> Report to the Council on the First Session of the Committee, 30 April–8 May 1935, League of Nations doc. C.184.M.102.1935V, p. 2, containing the resolution establishing the committee of experts.

<sup>83</sup> For an account on the discussion held during the meetings see El Zeidy, 2008, pp. 44–56, *supra* note 59; Antoine Sottile, *The Problem of the Creation of a Permanent International Criminal Court*, Kraus, Nendeln, 1966, pp. 16–22.

<sup>84</sup> League of Nations, Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937, Art. 3, Part I(2) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations doc. C.548.M.385.1937.V (‘League of Nations Convention’) read as follows:

1. In the cases referred to in Article 10 of the Convention for Prevention and Punishment of Terrorism, each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own tribunal, to send the accused for trial before the Court.

tional court was envisioned as a default jurisdiction as opposed to having exclusive jurisdiction over acts of terrorism. Again, the jurisdiction of the court was optional, with all the shortcomings that implies. The different views of states led the committee of experts to decide to elaborate two different drafts: one on the prevention and punishment of terrorism and the other on the creation of an international criminal court. In spite of views to the contrary,<sup>85</sup> the Convention for the Creation of an International Criminal Court maintained the abovementioned concept of concurrent jurisdiction: the state had the ability to choose between trying criminals before its own courts, extraditing them or resorting to the international criminal court.<sup>86</sup> The Convention for the Prevention and Punishment of Terrorism featured a regime based, subject to certain conditions, on the duty to extradite or prosecute.<sup>87</sup> The 1937 League of Nations Conventions never entered into force.<sup>88</sup>

It is after the beginning of the Second World War that the most explicit materialisation of complementarity can be found. El Zeidy argues that the London International Assembly of 1941 was the first body, even if not an official one, to propose a true complementary scheme between national and international courts.<sup>89</sup> The Assembly met to discuss the methods to pursue criminal accountability for atrocities committed during

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2. A High Contracting Party shall further be entitled, instead of extraditing, to send the accused for trial before the Court if the State demanding extradition is also a party to that Convention.

See also El Zeidy, 2008, p. 47, *supra* note 59.

<sup>85</sup> India argued that it opposed such a court as the country had the proper mechanisms to deal with terrorism. The United Kingdom stated it would not support the court for it was a premature solution to which the international community was not yet prepared. Many countries expressed similar views. See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism, and Draft Convention for the Creation of an International Criminal Court*, Series I, League of Nations Document A.24.1936. V., 4-10.

<sup>86</sup> League of Nations Convention, Art. 2.

<sup>87</sup> League of Nations, Convention for the Prevention and Punishment of Terrorism, Geneva, 16 November 1937, Arts. 8, 9 and 10, Part I(1) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations doc. C.548.M.385.1937.V ('Convention on Terrorism'). The regime enshrined in the Convention on Terrorism was also grounded on the *aut dedere aut judicare* principle.

<sup>88</sup> The Convention on Terrorism was ratified only by India while the Convention for the Creation of an International Criminal Court received no ratification at all.

<sup>89</sup> El Zeidy, 2008, p. 59, *supra* note 59.

the war. One of the most intricate issues on the table was that of the competence of an international court. It was argued that the court would never be able to judge all cases.<sup>90</sup> Therefore, domestic courts would necessarily maintain a fundamental role in administering criminal justice (with the exception of Germany because of the issue of impartiality) whereby only the most serious crimes were to fall under the jurisdiction of the international judicial body.<sup>91</sup> Delegates were opposed to a court with exclusive jurisdiction on grounds that it would become inoperative due to the amount of cases and that states linked to the crime were the *forum conveniens*. Nonetheless there was agreement regarding the fact that perpetrators should not escape justice as had happened after the First World War. The London Assembly ended in 1943 with the submission of a draft convention for the establishment of an international criminal court.<sup>92</sup> Articles 3 and 4 maintained the idea of a subsidiary court of last resort.<sup>93</sup> Its jurisdiction was defined by an all-encompassing clause determining that the court could step in where states were not in the position, or willing, to un-

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<sup>90</sup> London International Assembly, Commission II on the Trials of War Criminals, TS 26/873, p. 232.

<sup>91</sup> Marcel de Baer, the Belgian jurist, stated that only those cases in relation to which “a trial by a national court is impossible or inconvenient, should be tried by an international or United Nations Court”, London International Assembly, Commission I for Questions Concerned with the Liquidation of the War, TS 26/873, p. 282.

<sup>92</sup> Draft Convention for the Creation of an International Criminal Court, London International Assembly, Commission I for Questions Concerned with the Liquidation of War, TS 26/873, pp. 324–25.

<sup>93</sup> *Ibid.*, Art. 3:

1. As a rule, no case shall be brought before the Court when a domestic Court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.
2. Accused persons in respect of whom the domestic Courts of two or more United Nations have jurisdiction, may however, by mutual agreement of the High Contracting Parties concerned, be brought before the Court.
3. Provided that the Court consents, any crime as defined in Article 2 may be brought before the International Criminal Court, either by national legislation of the State concerned, or by mutual agreement, of the High Contracting Parties concerned in trial.

Article 4(1):

Each H.C.P. shall be entitled, instead of prosecuting before its own Courts a person residing or present in his territory who is accused of a war crime, to commit such accused for trial to the I.C.C.



undertake proceedings. The guiding principle of the system was still that of consent without which unwillingness and inability could not cause the jurisdiction of the international court to apply. There was no safety valve for cases where criminals were intentionally shielded from justice.

In 1941, at the request of the Belgian Minister of Justice, another body, the International Commission for Penal Reconstruction and Development, was established with a scope similar to that of the London International Assembly.<sup>94</sup> During the discussions regarding the type of judicial body best suited to administer justice, the proposal for an international tribunal with residual competence covering exclusively those crimes over which none of the Allies had jurisdiction gained considerable support. The corresponding report was submitted to the appropriate authority of each Allied government. El Zeidy considers this proposal reflected the main features of the principle of complementarity as determined in the ICC Statute because it included the primacy of national courts at the same time that the international court could be resorted to where domestic courts could not undertake proceedings. Yet, as in previous examples, there was no safety net for unwillingness; the entire regime was based on states making a voluntary appeal to the international court and it is debatable whether such a model truly corresponds to complementarity.<sup>95</sup>

In October 1943 the United Nations established the War Crimes Commission ('UNWCC'), which was mandated to investigate war crimes committed by the Axis powers during the Second World War and reflect on the possible creation of a judicial body competent to try war criminals. Within this framework, the United States presented a draft convention for the establishment of an inter-Allied court,<sup>96</sup> which became the starting point for future discussion and development within the UNWCC.<sup>97</sup> The inter-Allied court was expected to handle cases that did not fall under the jurisdiction of states or that states decided, for any *sufficient* reason, to

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<sup>94</sup> Conference held in Cambridge on 14 November of 1941. See Historical Survey of International Criminal Jurisdiction, *supra* note 75.

<sup>95</sup> See *infra* section 5.3.2.

<sup>96</sup> United Nations War Crimes Commission ('UNWCC'), Draft Convention on the Trial and Punishment of War Criminals, SC II/11, 14 April 1944 (<https://www.legal-tools.org/doc/8a326d/>).

<sup>97</sup> As a consequence, the Commission submitted a new draft. See UNWCC, Draft Convention for the Establishment of a United Nations War Crimes Court, C50(1), 30 September 1944 (<https://www.legal-tools.org/doc/36ed23/>).

submit to the court. Still, the state continued to be the single authority entitled to make the decision regarding its own unwillingness or incapacity.<sup>98</sup> In the end, the idea of an inter-Allied court was abandoned; instead, the proposal for a mixed military tribunal to deal with the crimes committed by the Axis was preferred because it would permit faster proceedings.<sup>99</sup> The ground was prepared for the International Military Tribunal ('IMT') at Nuremberg.

The competence of the Nuremberg Tribunal was very specific: to prosecute those most responsible for war crimes, crimes against humanity and crimes against peace committed during the Second World War. The division of labour between it and national courts was based on the gravity of crimes and the rank of the perpetrator. In accordance with the 1943 Moscow Declaration, referred to in the London Agreement,<sup>100</sup> crimes with no specific geographic location would fall within the jurisdiction of the Military Tribunal. The majority of cases were to be dealt with by domestic jurisdictions on the basis of the principle of territoriality. Accordingly, either the state where the crime had been committed or the Allies in their respective zones of occupation were to undertake proceedings.<sup>101</sup>

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<sup>98</sup> On the work of the UNWCC see United Nations War Crimes Commission Progress Report, C.48, 12 September 1944; UNWCC, Progress Report Adopted by the Commission on 19th September 1944, C48(1), 19 September 1944 (<https://www.legal-tools.org/doc/33d034/>); UNWCC, Questions as to the Jurisdiction of the Proposed Court, SC II/23, 29 June 1944 (<https://www.legal-tools.org/doc/4ad25e/>); UNWCC, Explanatory Memorandum to Accompany the Draft Convention for the Establishment of a United Nations War Crimes Court, C58, 6 October 1944, (<https://www.legal-tools.org/doc/f941b0/>).

<sup>99</sup> UNWCC, Suggestions to Accompany the Recommendation for the Establishment of Mixed International Tribunals, C59, 6 October 1944 (<https://www.legal-tools.org/doc/6c92a5/>). The inter-Allied court was also opposed on grounds of the Moscow Declaration, signed at the Tripartite Conference, Moscow, 19–30 October 1943, which required middle-ranking German criminals to be tried before national courts.

<sup>100</sup> Agreement for the Prosecution and Punishment of the Major War criminals of the European Axis, 8 August 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. I: Official Documents, IMT, Nuremberg, 1947, pp. 8–9 ('London Agreement') (<https://www.legal-tools.org/doc/844f64/>), which established the IMT.

<sup>101</sup> The Allied Control Council, as the legislative body with competence over the whole of Germany, passed Control Council Law No. 10 providing for "the punishment of persons guilty of war crimes, crimes against peace, crimes against humanity", aimed at setting a common foundation for the administration of criminal justice. Control Council Law No. 10, 20 December 1945, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949*, vol. XV: *Procedure, Practice and Administration*, US Government Printing Office, Washington, DC, 1949, pp.

In 1946 the United Nations General Assembly requested the Economic and Social Council to “undertake the necessary studies with a view to drawing up a draft convention on the crimes of genocide”.<sup>102</sup> Pursuant to resolution 260 (III) of 9 December 1948, the General Assembly, on the basis of the draft convention prepared by the *Ad Hoc* Committee, approved the Convention on the Prevention and Punishment of the Crime of Genocide (‘Genocide Convention’).<sup>103</sup> Article VI of the Genocide Convention determines that genocidal acts can be tried either by domestic courts or by an international tribunal bestowed with jurisdiction to that effect; however, it does not explain the nature of the relationship between domestic and international jurisdictions. The *travaux préparatoires* show that, as in the past, there were three main groups of states: 1) those favouring the exclusive jurisdiction of the international tribunal as it could not be expected that states endeavoured to prosecute such a politically sensitive crime;<sup>104</sup> 2) those supporting exclusive domestic jurisdiction;<sup>105</sup> and 3) those tending towards a system capable of efficaciously coordinating national and international jurisdictions whereby the international tribunal would be a last resort seeking to fill the gap left by incapable or unwilling states. The secretariat favoured an international court with optional jurisdiction in some cases and compulsory jurisdiction in others. It proposed two alternative models: either a court with jurisdiction over all international crimes or a special court with limited jurisdiction over genocide. The court would have jurisdiction where states were unwilling to prosecute or extradite, or when genocide had been committed

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23–28 (<https://www.legal-tools.org/doc/ffda62/>). Thereafter, it was the responsibility of Allies and states to give effect to Control Council Law No. 10 within their controlled territories.

<sup>102</sup> United Nations General Assembly resolution 96 (I), The Crime of Genocide, 11 December 1946, UN doc. A/Res/96(I) (<https://www.legal-tools.org/doc/44b386/>).

<sup>103</sup> Genocide Convention, see *supra* note 24. The *Ad Hoc* Committee was established by ECOSOC resolution 117 (VI), Genocide, 3 March 1948, UN doc. E/734.

<sup>104</sup> This was the position of France which did not rely on states to prosecute genocide. Chile was of the same view. *Ad Hoc* Committee on Genocide, Summary Record of the Seventh Meeting, 12 April 1948, UN doc. E/AC.25/SR.7 (‘*Ad Hoc* Committee on Genocide, Seventh Meeting’), in Hiram Abtahi and Philippa Webb (eds.), *The Genocide Convention: The Travaux Préparatoires*, vol. 1, Martinus Nijhoff, Leiden, 2008 p. 782 ff.

<sup>105</sup> *Ibid.* This was the view held, for example, by the Soviet Union, Venezuela and Poland.

with the support of the forum state.<sup>106</sup> The United States proposed that the international tribunal had jurisdiction solely when the territorial state could not or had failed to act.<sup>107</sup> Close to the principle of complementarity as determined in the ICC Statute, the Uruguayan delegation supported a model whereby the international court would gain jurisdiction when the territorial state failed to effectively punish perpetrators; yet, in such cases, the jurisdiction of the court would not be automatic but dependent on a referral by any of the parties to the Genocide Convention.<sup>108</sup>

Following the Second World War, the International Law Commission ('ILC') played a fundamental role on the design of models intended to co-ordinate national and international jurisdictions. A major effort was undertaken towards the creation of a code of offences against the peace and security of mankind.<sup>109</sup> The 1951 Draft Code did not elaborate any enforcement model because initially the mandate of the ILC was only directed at the definition of crimes.<sup>110</sup> The 1954 Draft Code did not include any considerable innovation in respect of an international criminal court. It is important to note that between 1949 and 1950 the ILC met periodically to discuss the question of international criminal jurisdiction. The General Assembly decided to establish a Committee separated from the ILC to analyse the desirability of an international criminal court and prepare preliminary draft conventions on the latter establishment.<sup>111</sup> In 1952

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<sup>106</sup> United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, Comments on Article IX, UN doc. E/447, in *ibid.*, p. 245; Historical Survey of International Criminal Jurisdiction, *supra* note 75.

<sup>107</sup> Ad Hoc Committee on Genocide, Seventh Meeting, in Abtahi and Webb, 2008, pp. 786 ff., see *supra* note 104.

<sup>108</sup> Ad Hoc Committee on Genocide, Summary Record of the Ninety-seventh Meeting, 9 November 1948, UN doc. A/C.6/SR.97, *ibid.*, pp. 1669 ff. Uruguay: Amendments to the Draft Convention on Genocide (E/794), UN doc. A/C.6/209, *ibid.*, pp. 1963 ff.

<sup>109</sup> United Nations General Assembly resolution 177 (II), Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 21 November 1947, which led to the Nuremberg Principles being adopted by the ILC at its second session, 5 June–29 July 1950; International Law Commission ('ILC'), Report, A/1316 (A/5/12), 1950, part III, paras. 95–127, *Yearbook of the International Law Commission*, vol. II, 1950, pp. 374–78 (<https://www.legal-tools.org/doc/5164a6/>).

<sup>110</sup> ILC, Draft Code of Offences against the Peace and Security of Mankind, in *Yearbook of the International Law Commission*, vol. II, 1951, pp. 134–37.

<sup>111</sup> United Nations General Assembly resolution 489 (V), International Criminal Jurisdiction, 12 December 1950.

the Committee published its report.<sup>112</sup> Arising out of the Draft Statute was again a system based on the voluntary activation of the court's jurisdiction; yet no safety net was accorded to cases where perpetrators were intentionally shielded from justice.<sup>113</sup> The establishment of an international criminal court was again reviewed by the 1953 Committee on International Criminal Jurisdiction.<sup>114</sup> The system that emerged was very similar to the one suggested in 1951, underlining the residual competence of the international judicial body, always dependent on the voluntary submission of cases. Again, the project of an international criminal court was curtailed.<sup>115</sup>

The matter was seriously explored again in the early 1980s when the ILC recognised the problem of having a code on the most serious crimes under international law without the necessary machinery to enforce it.<sup>116</sup> Therefore, discussing the implementation of the future Code of Offences against the Peace and Security of Mankind, the ILC was necessarily driven to the creation of an international criminal court. It was proposed that national and international jurisdictions should coexist "side by side", based on the *aut dedere aut judicare* principle.<sup>117</sup> Some states con-

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<sup>112</sup> Report of the Committee on International Criminal Jurisdiction on its Session held from 1 to 31 August 1951, UN General Assembly Official Records, 7th sess., suppl. no. 11, UN doc. A/2136.

<sup>113</sup> Article 26 and 27 barred the jurisdiction of the court in all cases where both the state of nationality and territory had not given their consent, by convention or specific agreement or declaration. As clarified by the Secretary-General, the jurisdiction of the court would be in principle "optional" and states were under "no obligation" to refer cases to the international court. Summary Record of the Third Meeting, 1st sess., UN doc. A/AC.48/SR.3; Summary Record of the Seventh Meeting, 1st sess., UN doc. A/AC.48/SR.7. See also Memorandum of the Secretary-General submitted on 2 July 1951, UN doc. A/AC.48/1.

<sup>114</sup> In 1952 the General Assembly appointed a different Committee mandated to study the creation and impact of an international criminal court, its relationship with the UN and its organs, and to explore the draft submitted by the 1951 Committee on International Criminal Jurisdiction. See UN doc. A/2186, para. 3(a) and (b), 63.

<sup>115</sup> The General Assembly, recognising the close relationship between an international judicial body and crimes against the peace and security of mankind decided to postpone the consideration of the Draft Statute until the report was seen by the Special Committee working on the definition of the crime of aggression. United Nations General Assembly resolution 898 (IX), International Criminal Jurisdiction, 14 December 1954.

<sup>116</sup> ILC, Report of the International Law Commission on the Work of its Thirty-Fourth Session, 3 May–23 July 1982, UN General Assembly Official Records, 37th Session, suppl. no. 10, 1982, UN doc. A/37/10 (<https://www.legal-tools.org/doc/499f5d/>).

<sup>117</sup> *Ibid.*, p. 275.

sidered that the proper system should be based on the duty to prosecute or extradite which would function exclusively between states. This, however, did not seem the most plausible response, particularly in view of the reluctance of states to extradite nationals and the problems arising out of revolutionary governments which could condemn former adversaries with the support of the law.<sup>118</sup> Recognising the political sensitivity of the issue, a provision was included asserting the duty to extradite or prosecute while clarifying that the system thereby determined did not jeopardise the future establishment of an international criminal court.<sup>119</sup> It is worth noting the statement of the Special Rapporteur Doudou Thiam affirming that the most

logical solution of the problem would be an international criminal jurisdiction, but in the absence of such an institution, and pending a decision on the advisability of establishing it [...] the best solution in the present circumstances was still reliance on the principle of universal jurisdiction.<sup>120</sup>

This statement acknowledges the potential of universal jurisdiction and the *aut dedere aut judicare* principle to work in concert so as to decrease impunity of international crimes. However, the proposal of the Rapporteur did not manage to gather sound support. States were unwilling to try perpetrators for such politically sensitive crimes and much less to extradite their nationals and submit them to foreign jurisdictions.<sup>121</sup> Again, some insisted on compulsory international jurisdiction capable of guaranteeing equality and impartiality.<sup>122</sup> Others continued defending the role of national courts at least for a transitional period.<sup>123</sup> It was against this back-

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<sup>118</sup> ILC, Summary Records of the Meetings of the Thirty-Seventh Session, 6 May–26 July 1985, *Yearbook of the International Law Commission*, vol. 2, p. 11, 1985 (<https://www.legal-tools.org/doc/26eb9b/>).

<sup>119</sup> ILC, Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, Art. 4(1) and (2), *Yearbook of the International Law Commission*, vol. 2, part 1, 1986, p. 82, UN doc. A/CN.4/398.

<sup>120</sup> ILC, Summary Records of the Meeting of the Thirty-Ninth Session, 4 May–17 July 1987, *Yearbook of the International Law Commission*, vol. 1, 1987, p. 6.

<sup>121</sup> ILC, Summary Records of the Meetings of the Fortieth Session, 9 May–29 July 1988, *Yearbook of the International Law Commission*, vol. 1, 1988, pp. 67, 100, 275.

<sup>122</sup> *Ibid.*, p. 68.

<sup>123</sup> *Ibid.*, pp. 114, 281–82.

drop of constant division<sup>124</sup> that the General Assembly decided to invite the ILC to study the matter further.<sup>125</sup>

In the 1990s the ILC, directly mandated by the General Assembly,<sup>126</sup> continued its work on the establishment of an international criminal court. The 1993 Draft Statute of an International Criminal Code merely stated that the tribunal should be able to prosecute a person for acts constituting crimes referred to in the Statute “if the previous criminal proceedings against the same person for the same acts was really a ‘sham’ proceedings, possibly even designed to shield the person from being tried by the Court”.<sup>127</sup> In respect of the precise extent of the court’s jurisdiction, opinions continued to be divided.<sup>128</sup> The 1994 Draft Statute refers for the first time to *complementarity*. The concept developed into the model established in the ICC Statute.<sup>129</sup>

Out of the context of the establishment of a permanent international criminal court, in the early 1990s the United Nations Security Council established the *ad hoc* Tribunals specific to the former Yugoslavia and Rwanda with precise geographic and chronological mandates. The corresponding Statutes determined the concurrent jurisdiction of the Tribunals and domestic jurisdiction with primacy to the former in case of conflict.<sup>130</sup>

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<sup>124</sup> ILC, Summary Records of the Meetings of the Thirty-Fifth Session, 3 May–22 July 1983, *Yearbook of the International Law Commission*, vol. 1, 1982, pp. 15–39, 151.

<sup>125</sup> United Nations General Assembly resolution 44/39, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes, 4 December 1989, UN doc. A/Res/44/39.

<sup>126</sup> See United Nations General Assembly 44/32, Draft Code of Crimes against the Peace and Security of Mankind, 5 December 1989, UN doc. A/Res/44/32; Resolution 44/39, see *supra* note 125.

<sup>127</sup> ILC, Report of the International Law Commission on the Work of its Forty-fifth Session, 3 May–23 July 1993, UN General Assembly Official Records, 48th supp. no. 10, Art. 45, Commentary, p. 121, UN doc. A/48/10 (<https://www.legal-tools.org/doc/f3681f/>).

<sup>128</sup> *Ibid.*, commentary 3.

<sup>129</sup> ILC Draft Statute for an International Criminal Court with commentaries, Text Adopted by the ILC at its Forty-sixth Session, 2 May–22 July 1994 (<https://www.legal-tools.org/doc/390052/>). See also *supra* section 5.2.

<sup>130</sup> Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Art. 9 (‘ICTY Statute’) (<https://www.legal-tools.org/doc/b4f63b/>); Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by resolution 955, Art. 8 (‘ICTR Statute’) (<http://www.legal-tools.org/doc/8732d6/>).

Later, a new form of co-ordination between national and international jurisdictions emerged (much as a response to criticism related to the *ad hoc* Tribunals) with the establishment of the so-called hybrid tribunals, such as for Special Panel for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) and the Special Court for Sierra Leone. While they are characterised by having national and international staff, and applying both international and domestic law, they enjoy primacy over the courts of the relevant country in respect of crimes falling under their mandate.<sup>131</sup>

### 5.3.2. Reconceptualising Complementarity

After a detailed examination of complementarity in international criminal law, El Zeidy originally proposed four main complementarity models. The first is what he calls “optional complementarity”,<sup>132</sup> according to which a state party to the convention establishing an international court *could* refer the case if it concluded, for whatever reason, it was unable or unwilling to administer justice. Resorting to international jurisdiction would be strictly optional. States’ inactivity did not immediately trigger the jurisdiction of the international court.<sup>133</sup>

The second model – “friendly or amicable complementarity” – would be that emerging from the IMT Charter of the Nuremberg Tribunal, reflecting

a complementary relation between the Nuremberg International Military Tribunal and national courts. Yet, each jurisdiction focused on different types of offenders. The international Military Tribunal dealt with the major war criminals while the mid-to lower rank criminals were dealt with by national courts.<sup>134</sup>

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<sup>131</sup> See *infra* section 5.3.3.

<sup>132</sup> El Zeidy, 2008, p. 133, see *supra* note 59. El Zeidy includes in this model the regimes proposed by the 1990 and 1992/1993 Working Groups, and the ninth and eleventh reports of the Special Rapporteur as they also proposed an “optional concurrent and complementary regime inspired by the 1953 model”.

<sup>133</sup> Material examples of this model could be found in the 1937 League of Nations Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937. El Zeidy includes in this model the 1951 and 1953 Drafts elaborated by the two Committees on International Criminal Jurisdiction (appointed by the UN) as they submitted a very similar regime with slightly different technical modalities (*opting in* clauses).

<sup>134</sup> El Zeidy, 2008, pp. 133–34, see *supra* note 59.



The main feature is that the applicability of international jurisdiction is not dependent on the failure of domestic jurisdiction but is instead based on a division of labour.

As the third model, El Zeidy refers to the regime proposed by the 1994 ILC Working Group for the establishment of an international criminal court, which is based on the optional system determined in the first model but added an admissibility test to be carried out by the international court at the time of the referral.<sup>135</sup> This system did not include any safety net for cases of unwillingness of the state to investigate and prosecute. Finally, the fourth model corresponds to the one presently set out in the ICC Statute. El Zeidy points out that such a system derives, with different technicalities, from the first and second models to the extent that when faced with state unwillingness or inability the court is entitled to step in. In the words of El Zeidy the jurisdiction of the court is simultaneously compulsory and optional: compulsory because if the admissibility conditions are satisfied there is no need for states' referral; optional because the state may prefer to resort directly to the court through a self-referral.

Notably, El Zeidy highlights how complementarity is not a novelty of the ICC Statute, rather being the result of several previous and lengthy developments undergone by international criminal law. However, it is herein contended that not all the systems he considers as complementarity models actually integrate complementarity.

El Zeidy defines complementarity in the following terms:

Complementarity is perceived in international criminal law as a principle that defines and organizes the relationship between domestic courts and the permanent International Criminal Court (ICC). The principle of complementarity provides national courts with primacy to exercise jurisdiction over the core crimes defined under the ICC Statute. Only when national courts manifest 'unwillingness' or 'inability' to adjudicate on an alleged crime may the International Criminal Court step in to remedy the deficiencies resulting from the failure of one or more States to fulfil their duties.<sup>136</sup>

After engaging in a scrupulous scrutiny of the origin and development of complementarity, El Zeidy restricts its notion to the terms of the

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<sup>135</sup> *Ibid.*, p. 134.

<sup>136</sup> *Ibid.*, p. 4.

Statute. He then starts from the definition provided for in the ICC Statute to pursue his analysis. Accordingly, it seems he only acknowledges traits or antecedents of complementarity inasmuch as there is a strong similarity with the principle of complementarity as framed in the ICC Statute; that is, where international jurisdiction is called to complete, top to bottom, domestic jurisdiction. In this chapter, a different methodology is adopted. The analysis starts with no axiomatic references. The core of the principle of complementarity as mirrored in the ICC Statute is that it intertwines domestic and ICC jurisdiction in an efficient manner in order to optimise efforts, thus ensuring that core crimes perpetrators will not find safe havens. The history of core crimes law demonstrates, however, that the primacy of domestic courts is not the only solution concerning the effective co-ordination of national and international judiciaries in the fight against impunity. As a result, the primacy of national courts is not herein considered as the core feature of complementarity broadly understood even though it is essential to the principle of complementarity as defined in the ICC Statute.

On the basis of the evolution of core crimes law since the First World War,<sup>137</sup> one realises that in critical times where the international community was struck in its fundamental values, there was (though not always) a common response to somehow rebuild the basis of civilisation, preserve its confidence on essential values and guarantee its safety. To that effect, the international community has furthered efforts to prevent serious crimes from going unpunished. The solutions presented repeatedly insisted on the establishment of an international criminal court.<sup>138</sup> The question at stake was how to best co-ordinate the relationship between both sets of jurisdiction, with sovereignty concerns repeatedly preventing the creation of an international court.

After the First World War the proposals for the establishment of a high court were not included in the Versailles Treaty. However, the penalty clauses determined that criminals would be tried by military tribunals

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<sup>137</sup> Focusing primarily on the emergence of complementarity with the framework of the ICC Statute, see also Kleffner, 2008, pp. 70–98, *supra* note 24.

<sup>138</sup> In spite of the fact that an international judicial body was repeatedly called for when massive atrocities were at stake, history is riven with episodes where such a solution was not popular. For example, Winston Churchill, the then British Prime Minister, was of the view that Nazi leaders should be executed without a trial. It was mostly due to the efforts of the United States and its commitment to moral principles that the IMT was established.

of the power most affected by the criminal conduct. With the refusal of Germany to abide by Articles 228–230 of the Versailles Treaty, the Allied powers determined that where Germany did not provide for satisfactory trials, their military tribunals would adjudicate cases. The compensatory, *rectior* complementary, mechanism was determined by the principles of territoriality, passive personality or protective interest. Clearly, there was a complementary rationale underpinning this solution: though safeguarding German sovereignty *ab initio*, other domestic jurisdictions would, in case of Germany's failure to act, complete its work thus forming a "balanced whole" capable of ensuring accountability for perpetrators of such serious crimes. The jurisdictional relationship is placed at a strict horizontal level.

In the aftermath of the Second World War, the IMT represented the joint exercise of Allies' jurisdictional prerogatives.<sup>139</sup> The model was based on the *a priori* conclusion that trials by the defeated powers would not genuinely respond to the demands of the international community. The lack of impartiality emerging out of strong public feelings of dissatisfaction and repugnance in Germany for the Allied powers led to an aprioristic finding of unwillingness of the Axis to carry out genuine proceedings. The IMT had exclusive jurisdiction over the gravest crimes committed by the highest-ranking officials responsible for ordering the criminal acts. The IMT was not complementary to national jurisdiction in the sense of the ICC Statute. Yet, albeit with different contours, a complementary interplay between the IMT and domestic courts is evident: both were doing their share in a common project intended to apply justice to the gravest crimes. To complete the action of the IMT, the zonal tribunals were engaged in prosecutions of war criminals as were domestic courts. They heard cases on grounds of well-established principles of international law, in particular territoriality. Accordingly, there was a top-to-bottom complementary relationship between the IMT and domestic courts where the former was called upon to act where national jurisdiction could not, on the one hand, and a complementary horizontal interplay between national orders which, on the basis of territoriality or passive personality, were bringing perpetrators to justice beyond the jurisdiction of the IMT, on the other. Moreover, the jurisdiction of domestic courts is conceivable as a form of bottom-up complementarity vis-à-vis the Nuremberg Tribunal.

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<sup>139</sup> These considerations are applicable to the International Military Tribunal for the Far East.

The Statutes of the *ad hoc* Tribunals established the primacy of the latter vis-à-vis national courts because, as in the IMT context, an aprioristic determination of inability, in the case of Rwanda, and unwillingness, in respect of the former Yugoslavia, to administer justice was made.<sup>140</sup> The RPE as well as the practice of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') reveal that such priority worked as safety device to ensure that sham trials and other mechanisms of deceit would not defeat the mandate of the tribunals, the efficiency of proceedings and the good administration of justice in respect of other cases.<sup>141</sup> In keeping with this view, states continued, where appropriate, to exercise criminal jurisdiction over crimes committed during the conflict in the former Yugoslavia and the genocide in Rwanda.<sup>142</sup> The primacy regime defined in the Statutes of

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<sup>140</sup> The distinction between *a priori* and *a posteriori* determined unwillingness and inability is assessed in reference to the establishment of the international tribunal. That is, when the Tribunals were established there was already clear evidence of Rwanda's incapacity and the former Yugoslavia's unwillingness to undertake genuine criminal proceedings. Once established the Tribunals did not give states, particularly those of the former Yugoslavia, a "second chance" to prosecute, intervening only whereas the state had failed to do so.

<sup>141</sup> ICTY Statute, Art. 9, see *supra* note 130, determines that:

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.

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted 11 February 1994, IT/32 ('ICTY, Rules of Procedure and Evidence'). Rules 8 to 13 expound on the primacy of the ICTY. Rule 9 determines three circumstances upon which the prosecutor is allowed to ask the Trial Chamber to issue a formal request of deferral: 1) the act investigated by the domestic jurisdiction is being classified as an ordinary crime; 2) the national proceedings are a sham; and 3) the matter is closely related – factually or legally – to investigations or prosecutions before the international tribunal.

<sup>142</sup> This was the case, for example, of Belgium, Switzerland and Germany. See, for example, Switzerland, Tribunal Militaire, *Prosecutor v. Fulgence Niyonteze*, Trial Judgment, Division 2, Lausanne, 30 April 1990; followed by Tribunal Militaire d'Appel 1A, *Prosecutor v. Fulgence Niyonteze*, Appeals Judgment, Geneva, 26 May 2000; followed by Tribunal Militaire de Cassation, Cassation Judgment, 27 April 2001. For an analysis of this case, see Luc Reydam, *Universal Jurisdiction, International and Municipal Legal Perspectives*, Oxford University Press, Oxford, 2003, pp. 196–200. See, for example, Belgium, *Public*

the *ad hoc* Tribunals was the result of a very specific set of circumstances and the immediate need to neutralise considerable threats to international peace and security. While the primary responsibility and prerogative of states in exercising the *jus puniendi* were always acknowledged, the international community stepped in through the *ad hoc* Tribunals so as to supplement the role of states when they failed to take action. The ICTY was aware of its temporary character and that it would not maintain the support of states for a long period. Accordingly, in 2000 Judge Claude Jorda, then President of the ICTY, and his colleagues designed what is known as the Completion Strategy, a plan of action which aimed to transfer proceedings to national judiciaries as soon as possible. The Security Council, through resolution 1503 (2003), called upon both the ICTY and ICTR “to take all possible measures to complete investigations by the end of 2004, to complete all trials activities at first instance by the end of 2008, and to complete all work in 2010”.<sup>143</sup> Obviously, the implementation of the Completion Strategy cannot amount to allowing for impunity of core crimes or overlooking fundamental rights, namely those of due process, which the Tribunals are bound to respect. The ICTY has developed, particularly through amendments to the RPE, a framework of co-operation with the judiciary of Bosnia and Herzegovina in order to allow proceedings to be transferred. However, the Tribunal continues to supervise the development of such cases in order to ensure fairness and due process.<sup>144</sup> Rule 11*bis* establishes the power of the prosecutor to request the Referral Bench to revoke its referral order if evidence exists which reveals that the case is not being handled in accordance with human rights and standards

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*Prosecutor v. Higaniro et al.*, 2001. For an account of this case see Reydam, *id.*, 109–12; for other relevant Belgian case law, pp. 112–18. See also Germany, *Prosecutor v. Nikola Jorgić*, 3 StR 215/98, 1999. For an analysis of this case see Reydam, *id.*, pp. 152–55. In the words of Fausto Pocar, former President of the ICTY: “the Tribunal, from its inception, was established to exercise primary jurisdiction only for a short period and because of the inability of local judiciaries to deliver justice or ensure a future of peace to the region”; Fausto Pocar, “Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 655.

<sup>143</sup> United Nations Security Council resolution 1503, 28 August 2003, UN doc. S/Res/1503. Later, United Nations Security Council resolution 1534, 26 March 2004, UN doc. S/Res/1534 (2004) urged the *ad hoc* Tribunals to implement the Completion Strategy by the dates established in resolution 1503, but did not create an obligation to that effect.

<sup>144</sup> The Office of the Prosecutor monitors the proceedings transferred through the Organization for Security and Co-operation in Europe.

of due process. In these circumstances the ICTY will take on proceedings again. The ICTY has also been proactive in enhancing co-operation efforts with domestic jurisdictions in order to put its expertise at the latter's disposal.<sup>145</sup> This framework discloses the logic underpinning core crimes law in general, and the complementary models of co-ordinating national and international jurisdictions, in particular. The key standard is the *genuineness* of criminal proceedings: perpetrators of core crimes should face justice at the same time that internationally recognised human rights are respected. Accordingly, the *ad hoc* Tribunals cannot defer cases to national systems without guarantees of their willingness and ability to investigate and prosecute. For those situations where the genuineness of proceedings is doubtful, the *ad hoc* Tribunals maintain (even if it leads to extending the time-frames determined in Security Council resolutions) the role of correcting failings and closing lacunae in national legal orders.<sup>146</sup> These considerations are fully applicable to the ICTR.

The so-called hybrid tribunals can be conceived of as a derivation of the *ad hoc* Tribunals. Their legitimacy is far less controversial as they include national and international personnel and jointly apply national and international law. However, as with the *ad hoc* Tribunals, they are established in respect of a specific situation to which their jurisdiction is limited. They are emergency institutions, either determined directly by the Security Council or under a request to that effect addressed to the Security Council by interested states.<sup>147</sup> Their role is again to step in where states

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<sup>145</sup> Pocar calls this strategy one of “continued legacy building” rather than a “completion strategy” as it “effectively means returning cases back to where they belong, but only after ensuring that local institutions once again have become ready, willing and able to manage them”; Pocar, 2008, p. 661, see *supra* note 142.

<sup>146</sup> For an overview of the completion strategy, see, Erik Møse, “The ICTR’s Completion Strategy – Challenges and Possible Solutions”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 667.

<sup>147</sup> See United Nations, 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 (<https://www.legal-tools.org/doc/3a33d3/>). The third introductory paragraph states that following a request to that effect presented by the Government of Cambodia to the United Nations the latter would assist and co-operate with Cambodia by the establishment of the Extraordinary Chambers of the Courts of Cambodia. See also Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (<https://www.legal-tools.org/doc/797850/>). The second introductory paragraph states that the Security Council requested the Secretary General to negotiate

are incapable or reluctant to ensure genuine investigations and prosecutions.

Alternative forms of justice, like truth and reconciliation commissions and other similar institutions are also relevant for the ongoing analysis. These mechanisms are fundamental components of the transitional justice discourse and, hence, crucial in societies' effort to recover from post-conflict scenarios. Such alternative mechanisms of justice intend to promote the determination of the truth to facilitate national reconciliation, enforce the right to historical memory and provide some form of vindication to victims. Inextricably related to this is the debate peace versus justice. It would be far too ambitious to thoroughly address this matter here. Still, it is submitted that some of these mechanisms crystallise an accommodation of competences that intends to prevent impunity for those most responsible for crimes under international law. Adopting a micro (rather than macro) systemic perspective, one may find, in some of their models, the same intent to establish safeguards to ensure that the most serious crimes of international concern will not go unpunished. In East Timor, for instance, the Community Reconciliation Panels were required to refer important evidence in respect of serious crimes to the Office of the Prosecutor.<sup>148</sup> The strength of this commitment is not always the same. For example, the Truth and Reconciliation Commission for Sierra Leone had the power to make all recommendations as deemed appropriate – notably of a legal nature – to achieve its purpose, including “preventing the repetition of the violations or abuses suffered [and] addressing impunity”.<sup>149</sup> In any event, one realises that truth and reconciliation commissions aim to provide some form of justice when the judicial apparatus of the state is unable or unwilling to genuinely administer justice. In situations of widespread and systematic violence, the number of perpetrators is often so high that it is nearly impossible to bring all to justice. Importantly, however, it should be borne in mind that this chapter relates exclusively to the most serious crimes of concern to the international community as a whole. There is a consolidated trend in international law contending that the duty

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with Sierra Leone the establishment of a special court to prosecute those responsible for serious violations of international law.

<sup>148</sup> United Nations Transitional Administration in East Timor, Regulation No. 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001, Section 27.5 (<http://www.legal-tools.org/doc/afd3d9/>).

<sup>149</sup> Sierra Leone, The Truth and Reconciliation Commission Act 2000.

of states to prosecute is binding only in respect of those most responsible for international crimes.<sup>150</sup> This is to say that truth and reconciliation commissions may play an important role in gathering evidence against the perpetrators of core crimes, pass the information to the investigative and prosecuting authorities, thus assisting – in their complementary role that henceforth arises – in the administration of justice and implementation of the principle of complementarity (as long as the domestic judiciary is willing and able to carry out proceedings). This notwithstanding, these considerations may only be taken as a starting point for further scrutiny since – the argument could be made (and it is indeed often so argued) – the urgency in pacifying the country and halting atrocities may justify general amnesties. If the latter were to represent the honest and informed agreement of the majority of the people affected, it would seem difficult to argue that the interests of justice could overrun a democratic decision. Another issue, however, is whether while being a legitimate and valid option in certain circumstances, alternative forms of justice that do not provide for the possibility of prosecution may be integrated within the scope of complementarity broadly understood. As better explained below, this is not the case whenever the administration of criminal justice is not foreseen or is merely an option.

Outside of the context of (quasi-)judicial bodies, states have since the Second World War taken on proceedings to ensure criminal accountability for perpetrators of core crimes when the crime was committed

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<sup>150</sup> See Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, in *Yale Law Journal*, 1991, vol. 100, no. 8, p. 2599, arguing that states may discharge their international obligations by prosecuting

those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations [...] provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.

See also United Nations Security Council resolution 1329, 30 November 2000, UN doc. S/Res/1329 (2000) in which the Security Council acknowledges “the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors”. The Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 1(1) conversely limits the jurisdiction of the Court to “persons who bear the greatest responsibility for serious violations” (<http://www.legal-tools.org/doc/aa0e20/>).



abroad, on the basis of either more traditional jurisdictional grounds (for example, passive personality) or universal jurisdiction.<sup>151</sup>

The most relevant treaties on core crimes law set forth, implicitly or explicitly, a jurisdictional network aimed at filling in legal and institutional gaps capable of leading to *de facto* impunity. Certainly, the solutions enshrined therein must be assessed in light of the social and political context that preceded their coming into force. While the 1948 Genocide Convention referred to a possible international tribunal, it did not go further on the issue because of states' rigid understanding of sovereignty. Nevertheless, the Genocide Convention commits states to adopt the necessary measures to prevent genocide from going unpunished. In borderline cases, these measures might include the adoption of universal jurisdiction, whose final goal is to make up for the failure of states connected to the crimes in assuring prosecution and punishment. The 1984 Convention against Torture requires states to provide for universal jurisdiction.<sup>152</sup> The Geneva Conventions codify the duty to extradite or prosecute in respect of grave breaches.

Once examined the solutions set up to prevent impunity, and recalling the analysis carried out in the previous sub-section which drew attention to different proposals of interplay between national and international jurisdictions (as opposed to focusing on the models actually implemented by the international community), the question which arises is whether all these models and proposals fall under the umbrella of complementarity.

The *New Oxford Dictionary of English* defines complementarity as “a relationship or situation in which two or more different things enhance or emphasize each other's qualities or form a balanced whole”.<sup>153</sup> According to the *Oxford American Dictionary & Thesaurus*, “complementary” is an adjective referring to two or more parts that combined form “a whole

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<sup>151</sup> For a comprehensive account of case law on universal jurisdiction, see Reydams, 2003, pp. 86–219, *supra* note 142.

<sup>152</sup> United Nations General Assembly resolution 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, 10 December 1984, UN doc. A/Res/39/46 (‘Convention against Torture’) (<https://www.legal-tools.org/doc/326294/>).

<sup>153</sup> *New Oxford Dictionary of English*, Oxford University Press, Oxford, 1999, p. 375 (‘NOED’).

or [...] improve each other”.<sup>154</sup> The *New Oxford Thesaurus of English* clarifies that in order for one thing to complement another it needs to “add” something to it in a way that “completes it”<sup>155</sup> and makes it “perfect”.<sup>156</sup> It is submitted that complementarity refers to the combination of national and international jurisdictions in such a manner that they form a “balanced whole”, completing each other and making the system established – at least potentially – “perfect”. Abstractly, complementarity corresponds to the optimal point where the interests of sovereignty and those of international criminal justice reconcile themselves in an operative way able to ensure satisfying levels of guarantee to legitimate claims of states, on the one hand, and the international community, on the other. Technically, complementarity grasps the interplay between national and international jurisdictions in such a manner that, while paying deference to the principle of sovereignty, guarantees safety devices which will allow for the criminal accountability of perpetrators of core crimes when states reveal themselves to be unwilling or unable to undertake genuine criminal proceedings. This is the vector common to the actual solutions the international community gradually came to adopt and enforce with regard to core crimes accountability. “Unwillingness” and “inability” have been, as in the ICC Statute, the criteria that operate and implement complementarity, and “genuineness” has been the standard upon which to evaluate states’ willingness and ability. This study contends that unwillingness and inability are not only defined *ex post facto* as emerging from the Statute. The ICTY was established because of the unwillingness of national authorities to ensure criminal accountability. The ICTR was created as response to the collapse of the Rwandan judicial apparatus. The ECCC were set up as a result of the inability (or arguably the unwillingness) of the Cambodian government to pursue genuine criminal accountability of former Khmer Rouge leaders. Also, in Nuremberg, cases were excluded from the jurisdiction of national courts when their extreme gravity or delicate political sensitivity gave rise to an aprioristic presumption that states were neither willing nor able to carry out proceedings. The jurisdiction of

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<sup>154</sup> *Oxford American Dictionary & Thesaurus*, 2nd ed., Oxford University Press, New York, 2009, p. 250 (‘OADT’).

<sup>155</sup> *New Oxford Thesaurus of English*, Oxford University Press, Oxford 2000, p. 170.

<sup>156</sup> Webster’s Third New International Dictionary of the English Language, Unabridged, Merriam-Webster, Springfield, MA, 1993, p. 464.

the IMT was thus based on an *ex ante* ruling on unwillingness and inability.

Further, within the scope of complementarity it is to be combined not only vertical jurisdictional networks (domestic courts in relation to international tribunals and vice versa) but also horizontal jurisdictional relationships, that is, between different states, such as those arising from the Geneva Conventions and the *aut dedere aut judicare* principle as determined therein.

Certainly, one can maintain that, within the available possibilities, recognising primacy to national courts is the one which truly corresponds to complementarity. However, this conclusion is based on a methodology that takes as its starting point an axiomatic view of the principle of complementarity as presented in the ICC Statute. Here, in order to identify the rationale underpinning complementarity, an inductive analysis was followed. It departed from the comprehensive study of the evolution of core crimes law, concrete responses of the international community to the perpetration of core crimes that were actually enforced (or at least adopted as law) and the interplay between domestic and international jurisdictions seeking to reconcile sovereignty and criminal justice.

### **5.3.3. The Principle of Substantive Complementarity**

Against this background, it is important to distinguish between the principle of complementarity as enshrined in the ICC Statute and complementarity as the overreaching concept that covers all models of interaction between national and international criminal jurisdictions, which, while protecting the core of sovereignty, provides for safety valves that aim to prevent impunity for perpetrators of core crimes. The term complementarity appears as the most adequate to express this comprehensive interplay as it grasps the essence of this relationship: national and international criminal jurisdictions interact so as to “complete each other” and give rise to the most “perfect” international criminal law order possible. This perfection is embodied by the concept that core crimes perpetrators will not go unpunished. In other words, perfection is equated to the absence of the denial of justice; that is,

a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper admin-

istration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice.<sup>157</sup>

Importantly, this perfection is only potential as it will depend on states enforcing the existing legal framework.

As revealed by the historical survey regarding the origins and development of complementarity,<sup>158</sup> the relationship between national and international jurisdictions was not always vertical. Nor was it always directed from top to bottom. The evolution of core crimes law since the First World War mirrors a reciprocal interplay between the national and international systems, whereby one can distinguish a multidirectional relationship intertwining different domestic and international jurisdictions, mutually filling in each other's gaps and guiding their efforts with a view to decreasing impunity. I refer to this relationship as *substantive complementarity* and further propose it as a structural principle of core crimes law.<sup>159</sup> The *Collins English Dictionary* defines substantive as “relating to, containing, or being the essential element of a thing”, “having independent function, resources, or existence”, that which is “solid in foundation and basis”.<sup>160</sup> The *Cassell Concise English Dictionary* defines substantive as what has or pertains “to the essence or substance of anything; inde-

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<sup>157</sup> “The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners”, Supplement: Codification of International Law, in *American Journal of International Law*, 1929, vol. 23, no. 2, p. 134, cited in Francesco Francioni, “The Rights of Access to Justice under Customary International Law”, in Francesco Francioni (ed.), *Access to Justice as a Human Right*, Oxford University Press, Oxford, 2007, p. 11.

<sup>158</sup> See *supra* section 5.3.1.

<sup>159</sup> I have chosen the term complementarity rather than subsidiarity to describe this principle for it better expresses the relationship intertwining national and international jurisdictions. First, subsidiarity operates only in one direction (from the higher authority to the lowest) while complementarity operates in different ways (from the international level to complete domestic systems, from national systems to fill in gaps of the international judicial apparatus, and between different states so as to prevent the establishment of safe havens where international jurisdiction cannot be triggered). Second, subsidiarity is usually used in respect of systems where the intervention of the higher authority is dependent on state consent or a complaint presented by another state. Complementarity is a more structured manner of implementing subsidiarity. That is, the latter presupposes that cases will be heard at the lowest level of authority able of efficaciously administering justice. Yet, whereas states are unwilling or unable to do so, the ICC is competent to step in independently of the consent of states or a complaint presented by any other subject of law.

<sup>160</sup> *Collins English Dictionary*, Collins, London, 1980, p. 1449 (‘Collins Dictionary’).

pendently existing, not merely implied, inferential or subsidiary”; it is the adjective of the noun “substance”, which in turn means “the essence, the essential part, [...] main purpose, [...] solid foundation”; “the permanent substratum in which qualities and accidents are conceived to inhere”.<sup>161</sup> Substance is the “most important or essential part or meaning”.<sup>162</sup>

Complementarity as proposed here has a “firm basis in reality and [thus it is] important [and] meaningful”.<sup>163</sup> It is not taken from isolated sources; rather it is the essence of core crimes law. It embodies the very purpose of the latter. It exists independent of actions or omissions. To reject it is to reject the whole system of core crimes law.<sup>164</sup> It is important to distinguish that the methodology used here – that is, analysing the development, sources and mechanisms of core crimes law and from these inferring the principle of substantive complementarity – does not mean that substantive complementarity exists because it was determined or created by those factors. The inductive exercise allows it to be revealed, but its existence is derived from – it is part of – the fundamental nature of core crimes law. It represents the common theme interlacing the system, bestowing upon it logic, coherence and consistency and therefore the tools necessary to pursue its goals. Without such an operation, core crimes law becomes an obsolete system for there are no guarantees of enforcement and systems lacking mechanisms to react to derogations of primary norms present an insurmountable flaw.<sup>165</sup> It is fair to argue that enforcement is the permanent challenge of international law. While this is true, core crimes law deals with peremptory prohibitions for which international law already provides mechanisms capable of ensuring prosecution.<sup>166</sup> The

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<sup>161</sup> *Cassell Concise English Dictionary*, Cassell, London, 1989, pp. 1322–23 (‘Cassell Dictionary’).

<sup>162</sup> OADT, p. 1304, see *supra* note 154.

<sup>163</sup> *Concise Oxford English Dictionary*, Oxford University Press, Oxford, 2002, p. 1430.

<sup>164</sup> In the view of Thirlway, no state can derogate from a principle which is so “bound up with the essential nature of international law that it would be impossible to exclude it without denying the existence of international law”. H.W.A. Thirlway, *International Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law*, Brill, Leiden, 1972, p. 110.

<sup>165</sup> It is important to bear in mind that the actual application of punitive sanctions is one thing and the potential for punishment is quite another. The efficacy of a legal system is dependent on both the potential for enforcement and effective application of sanctions in due cases.

<sup>166</sup> This is the case of the *aut dedere aut judicare* principle, the ICC, the *ad hoc* Tribunals and treaty law requiring prosecution of international crimes.

principle of substantive complementarity expresses and gives a material form to the articulation of those mechanisms. It determines on states an obligation of result – to exhaust all legal resources in order to guarantee criminal accountability – but it does not establish any prescribed means of doing so. Therefore, states are entitled to adopt different strategies in order to achieve the result determined.

Substantive complementarity thus defines a duty “as opposed to giving the rules by which such things are established”.<sup>167</sup> Accordingly, the ICC Statute established the primacy of national courts vis-à-vis the ICC while the *ad hoc* Tribunals enjoy primacy in circumstances of conflict with domestic jurisdictions. Conversely, some of the states parties to the ICC Statute opted for relinquishing jurisdiction, under some circumstances, in favour of the ICC, and recovering it only where the Court does not step in and proceed. Others established universal jurisdiction at an early stage. In all these cases the difference in the approaches adopted is the level of compromise but the intrinsic principle is the same: substantive and multidirectional complementarity between domestic and international jurisdictions in order to prevent impunity. In keeping with this view, the principle of complementarity enshrined in the ICC Statute does not constitute a new concept; the innovation concerns the codification of a new version (level or stage) of complementarity in respect of a certain system. Nor should the Statute-based principle of complementarity be seen as the final and perfect model of the relationship between domestic and international jurisdictions. Evidence of this fact is the model adopted by states such as Germany, Spain or Belgium, which, when implementing the ICC Statute, elected (via different means) that the domestic courts be the last resorts instead of the ICC. That is, while the ICC Statute states it is the ICC that should complement national jurisdictions, these countries determined bottom-up complementary models where, independent of the shortcomings analysed in section 5.3.5, domestic courts are called upon to cover the gaps in the functioning of the permanent Court. Substantive complementarity is a principle that developed spontaneously as a response to the demands of core crimes law and the international community. It progressively flourished among opposing views, claims and legal principles. The ICC Statute shed light on the importance of co-ordinating municipal and international jurisdictions so as to prevent impunity. For dec-

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<sup>167</sup> Definition of “substantive” in OADT, p. 1304, see *supra* note 154.

ades, despite the scourge of two world wars, there was not a consolidated conscience of core crimes, both in the sense of awareness of their devastating implications and the sense that such acts are contrary to elementary considerations of humanity. In time, courts with a more internationalist approach started, as that conscience strengthened, to undertake the role of *longa manus* of the international community. The more this international conscience consolidates, the more complementary jurisdictional models will develop.

The evolution of core crimes law shows a progressive effort from the international community to set forth safety nets to compensate for the failure of domestic legal orders. The safety valve envisaged was always intended to overcome the unwillingness or inability of states. The historical survey provided above is illustrative of this intention. That is to say, like complementarity, unwillingness and inability are not a brand-new creation of the ICC Statute. Different terms have been used over the course of years. Yet they always referred to the same problem: the technical incapacity or perversity of states which caused fair and impartial proceedings to be impeded.<sup>168</sup> Unwillingness and inability can be determined *ex post facto* as in the ICC Statute, that is after the failure of states to administer justice *in concreto: stricto sensu* unwillingness and inability. They can likewise be determined *ex ante*, presumed from a range of relevant facts which evidence the probable or factual reluctance to act: *latu sensu* unwillingness and inability. Unwillingness and inability *latu sensu* underpinned the jurisdiction of the IMT and *ad hoc* Tribunals. They would be the rationale for the establishment in the future of an international criminal court with exclusive jurisdiction over specific core crimes the gravity and aggressive nature of which gives rise to concerns regarding states' diligence.

Against the previous analysis, substantive complementarity is not equated to all forms of allocation of jurisdiction. The former is included within the latter; yet they are essentially different. El Zeidy includes within the principle of complementarity models of co-ordination between do-

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<sup>168</sup> During the 1922–1924 meetings of the International Law Association to discuss the establishment of an international criminal court, Charles Henry Butler argued that the Court should function as seat of appeal and determine “whether the national Court had properly executed justice in such a way as to satisfy the nation which claimed that the offence had been committed against its national”. ILA Report, p. 103, see *supra* note 77, cited in El Zeidy, 2008, p. 32, *supra* note 59.

mestic courts and an international criminal tribunal where submission of cases to the latter would be strictly optional. In other words, in the case of clear unwillingness there is no safety net capable of ensuring that perpetrators will not escape justice. This inclusion – it is submitted – cannot be accepted if one follows the analytical approach reflected in this chapter. It takes as starting point of the theoretical construction the top-to-bottom vertical model posited in the ICC Statute configuring it as static, rigid and absolute without evaluating it in light of the entire framework of core crimes law. Furthermore, the core of complementarity is fixed within that vertical interplay without any evaluation of the purpose underpinning the principle of complementarity as framed in the ICC Statute. Importantly El Zeidy acknowledges early in his study that:

These are misconceptions [to consider the principle of complementarity exclusively in reference to the ICC Statute and its negotiations], and this work aims to correct such assertions. [...] [T]he notion of complementarity is manifestly not the product of the 1994 International Law Commission's work. Nor is it the sole outcome of any recent work on the subject during the 21st century. It is an idea that developed over a long period of time until it was inserted into the 1998 Rome Statute. [...] [T]he concept of complementarity has been re-shaped and has emerged in different guises.

Yet, the system laid down in the ICC Statute integrates complementarity precisely because it raises the ICC into the realm of being able to prevent impunity in respect of the specific system established by the Statute. Certainly, given the limited resources of the Court and its lack of universal acceptance, it will not be able to fill in all the gaps. This notwithstanding, the ICC moves core crimes law towards that result. In a world where states fully complied with their obligations, the ICC would close crucial loopholes. It is submitted that no system without a safety net can be subsumed into complementarity because they do not fulfil its axiological and logical foundations. Such systems determine particular forms of allocation of jurisdiction between national and international judicial bodies. They *might* compose a regime of *de facto* complementarity (if states investigate and prosecute or voluntarily refer the case to the competent international court) but technically they do not. The same considerations are valid in respect of “opting in” regimes. The international community is not yet prepared to trust in the voluntary submission of cases to an international court. Such a scheme would be selective and unequal depend-



ing on the suspects, states involved and political and economic repercussions of undertaking criminal proceedings or triggering international jurisdiction. Furthermore, it is doubtful in terms of law because as an approach it reveals a double standard. On the one hand, states would recognise and accept the legitimacy and jurisdiction of the Court and, on the other, they would later decide on a case by case basis whether the jurisdiction previously accepted was legitimate *in concreto* in spite of unwillingness *and* inability conditions being fulfilled. This regime may have politically reasonable explanations but under the scrutiny of law it is inconsistent and illogical.

The principle of substantive complementarity mirrors a more sophisticated version of the traditional *aut dedere aut judicare* principle. In final instance, it determines that the state holding custody over the perpetrator, whenever international jurisdiction cannot be triggered, must either prosecute or extradite to a country willing and able of *genuinely* administering justice. Where extradition is not possible and the state of custody does not have any closer link to the crime, it shall prosecute on the basis of universal jurisdiction. It is the combined action of the duty to extradite or prosecute and universal jurisdiction that provides the ultimate safety net able to ensure criminal accountability and thus respect for the rationale which underpins complementarity.<sup>169</sup> In practice, there is consid-

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<sup>169</sup> The relationship between the *aut dedere aut judicare* principle and universal jurisdiction has been advocated in different historical moments and codified as such by law. The terms of their interplay have yet varied throughout the years. For a detailed account see Reydams, 2003, pp. 28–42, *supra* note 142. The medieval city-states in Italy, while recognising the primary competence to punish to both the territorial and domicile state, defined the jurisdiction of the custodial state to prosecute and punish in respect of *vagabondi*, a power later extended over murderers, robbers and exiles. The Spanish scholar Covarruvias considered it unfair to subject only these criminals to the reach of the custodial state. Based on natural law, he contended that the custodial state should either extradite or prosecute all dangerous criminals. This appears to be the origin of the maxim *aut dedere aut judicare*. Reydams, *id.*, p. 29. In 1883 the Institute of International Law passed a resolution with important impact on universal jurisdiction; Institute of International Law, Munich Session, 1883, reprinted in *Annuaire de l'Institut de Droit International*, vol. 7, 1883–1885. It proposed that whenever the territorial state could not be identified and extradition was not possible the custodial state should administer justice. Clearly, the jurisdiction of the forum *defensionis* was complementary to that of states closer related to the crime. As for the rationale underpinning the solution adopted, the members of the Institute of International Law were divided. While some argued that the right to punish derives from the duty of states to maintain internal public order, others found the justification in natural law and the idea of universal justice. See the commentary on Article 10 by von Bar and Brusa, cited in Maurice Travers, *Le droit pénal international et sa mise en oeuvre en temps de paix et en*

*temps de guerre*, vol. 1: *Principes. Règles générales de compétence des lois répressives*, Librairie du Recueil Sirey, Paris, 1920, p. 130. In the nineteenth century several countries included universal jurisdiction in their codes with the contours proposed by the Institute of International Law; that is, universal jurisdiction in respect of all extraditable crimes whenever states with a narrower link to the crime did not wish (for example, because they did not request extradition or denied an invitation to that effect made by the custodial state) or could not (for example, because extradition could not be granted) undertake proceedings. See Article 10 of the Resolution, as translated in Reydams, 2003, p. 30, fn. 12, *supra* note 142, which reads as follows:

Every Christian State (or recognizing the legal principles of Christian States), which has custody over an offender may try and punish him when notwithstanding prima facie evidence of a serious crime and culpability, the locus delicti cannot be determined, or when the extradition of the culprit, even to his home State, is not granted [...] or is considered dangerous. In this case, the court will apply the most favourable law to the accused, taking into account the probable place of the crime, the nationality of the accused, and the law of the forum State.

This idea of complementary intervention of the custodial state was made clear by Henri Donnedieu de Vabres's work, where he established a rigid hierarchy of jurisdictional grounds: firstly competent was the territorial state, followed by the state where the criminal resided when he committed the crime and, finally, the custodial state. Universal jurisdiction was a last resort:

A State, which in these circumstances prosecutes a foreigner, does not vindicate a foreign right of its own. [...] It steps in, in default of any other State, to prevent in the interest of humanity an outrageous impunity. [...] Therefore, its intervention has a very subsidiary character and cannot take place unless the state has physical custody over the offender. The exercise of universal jurisdiction is, just like the practice of extradition, the negation of the right of asylum.

Henri Donnedieu de Vabres, *Les principes modernes du droit pénal international*, Librairie du Recueil Sirey, Paris, 1928, p. 135. A similar understanding is seen in resolutions adopted by authoritative bodies, such as the 1927 Warsaw Conference for the Unification of Penal Law, the resolution of the 1932 Hague International Congress of Comparative Law; the 1935 Draft Convention on Jurisdiction by Harvard Research in International Law. By contrast, Travers categorically rejected universal jurisdiction as a device through which states would represent the international community, yet accepted the subsidiary jurisdiction of the custodial state based on sovereignty arguments:

The example of an offender peacefully enjoying the benefits of his misdeeds encourages criminality and the possibility of an offender taking refuge in a state with the certainty that its penal law will not be applied would attract riffraff to hospitable countries, necessarily impacting their social order. [...] Extradition and expulsion are inadequate remedies for this double danger because the first is not always feasible and the latter does not produce a sufficiently moralizing effect

Travers, *id.*, pp. 77–76, in Reydams, *id.*, pp. 32–33. Kopeck Mikliszanki further developed the *aut dedere aut judicare* principle and better articulated it with universal jurisdiction. As

erable evidence sustaining this substantive conception of complementarity. States such as Holland, Spain, Belgium and Germany provided, in different ways, for the jurisdiction of their courts on the basis of universality whenever States with a closer link to the crime are unwilling or unable to prosecute and the ICC is not in the condition to step in and undertake proceedings.<sup>170</sup> There is also important domestic jurisprudence in this regard. The *Scilingo* case is an extremely illustrative example of the combined action of the duty to prosecute or extradite and universal jurisdiction.<sup>171</sup> Spanish courts applied universal jurisdiction to the prosecution of crimes

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opposed to Travers, Mikliszanski maintained universal jurisdiction as a primary right of every state, at least as far as *delicta juris gentium* were concerned:

An offence should always never remain unpunished; the possibility to cross borders should not shield the common criminal from punishment. He has to know that wherever he goes he will be held responsible. It is thus the duty of the custodial State to supply an inadequacy of the territorial State and the State of nationality of the offender. [...] What then is the principle of universality of the right to punish? It is the principle according to which every penal norm, far from being limited to a certain territory, is eminently international (*interétatique*), or rather supranational (*supraétatique*). In the administration of justice, the administration of the perpetrator or the victim and the place of commission are irrelevant... Extension of the validity of the penal norm to all countries and individuals is the basic idea behind the universalist repressive system. [...] It follows that jurisdiction based on the universal principle is not subsidiary at all, does not supply an inadequacy of another more competent jurisdiction to avoid impunity, but is an independent and primary right... Indeed, in the system of universal repression [...] the perpetration of the offence triggers the equal competence of all criminal courts, but only the judge of the place of arrest may actually exercise jurisdiction.

Kopek Mikliszanski, “Le système de l’universalité du droit de punir et le droit pénal subsidiaire”, in *Revue de science criminelle et de droit pénal comparé*, 1936, vol 1, pp. 331–33.

<sup>170</sup> Even the United States has been adapting its internal law in a manner consistent with the principle of substantive complementarity. To be exact, since the coming into force of the ICC Statute the United States adopted a series of statutes on serious crimes under international law whereby it provides for universal jurisdiction *in presentia*. This is the case, for example, with the 2008 Child Soldiers Act, the 2007 Genocide Accountability Act and the 2009 Human Rights Enforcement Act. The statutes do not elaborate on the interplay between American and foreign jurisdiction but it would not be unreasonable to admit that courts adopted some criteria to undertake cases, namely on the basis of Section 402 and 403(a) of the Restatement (third) of US Foreign Relations Law.

<sup>171</sup> Spain, Audiencia Nacional, Sala de lo Penal, *Adolfo Francisco Scilingo Manzorro*, Judgement, 16/2005, 19 April 2005 (<https://www.legal-tools.org/doc/d042b3/>).

against humanity even though it was not provided for by a domestic norm in respect of this type of crime. The notion of “subsidiary necessity of Spanish jurisdiction” was applied as to suppress gaps in accountability in respect of the most serious international crimes. The Constitutional Court endorsed this view,<sup>172</sup> and, on the basis of this jurisprudence, proceedings were initiated against the former President of the People’s Republic of China JIANG Zemin for the genocide of the Tibetan people.<sup>173</sup>

The most relevant treaties on core crimes also pay tribute to substantive complementarity as the tool to ensure criminal accountability by the link it establishes between different domestic and international jurisdictions. The Geneva Conventions explicitly enshrine the duty to prosecute or extradite,<sup>174</sup> and they permit the exercise of universal jurisdiction and urge states to adopt all necessary measures to prevent and repress the crime, here foreseen the establishment of a competent international judicial body.<sup>175</sup> The Convention against Torture establishes the *aut dedere aut judicare* principle,<sup>176</sup> and the Apartheid Convention promotes universal jurisdiction.<sup>177</sup> Against this background, the following three models of complementarity are proposed.

First, there is vertical complementarity, which is divided into “ascending complementarity”, “descending complementarity” and primacy. It is vertical because it presupposes an international judicial body, which rulings are binding on states. Descending complementarity includes models of co-ordination between domestic and international jurisdictions

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<sup>172</sup> Spain, Tribunal Constitucional, *Rios Montt et al.*, Guatemala Generals Case, Decision (*Sentencia*), STC 237/2005, 26 September 2005 (<https://www.legal-tools.org/doc/381d6a/>).

<sup>173</sup> Spain, Audiencia Nacional, Sala de lo Penal, *Jiang Zemin et al.* (Tibet case), 196/05, 10 January 2006, para. 1.

<sup>174</sup> See the Common Articles of the Geneva Conventions, 1949. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, Art. 50; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 146.

<sup>175</sup> Genocide Convention, Arts. 1, 5 and 6, see *supra* note 24.

<sup>176</sup> Convention against Torture, Art. 5, see *supra* note 152.

<sup>177</sup> United Nations General Assembly resolution 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, Art. V (<https://www.legal-tools.org/doc/d9644f/>).

where the international body is called to fill in from top to bottom the gaps caused by the imperfect functioning of national systems. This is the case with the system put in place by the ICC Statute. The regimes determined by the Spanish implementing law of the Statute provides an example of ascending complementarity, where domestic courts gain competence to fill in from the bottom up gaps which have emerged from the functioning of the ICC. Primacy is portrayed in the Statutes of the *ad hoc* Tribunals, the latter having priority over domestic courts. The difference between primacy and descending complementarity lies in the authoritative power of the international tribunal to assert its jurisdiction independent of any evidence *in concreto* of the unwillingness or inability of states to undertake genuine proceedings. Clearly, the rules determined in the corresponding Statutes need to be respected. The decision falls within the discretionary power of the international body but it is not an arbitrary one.<sup>178</sup>

The second model is horizontal complementarity, which consists of the interplay between different domestic jurisdictions. The pre-eminent example is given by the functioning of the *aut dedere aut judicare* principle as established, for example, in the Geneva Conventions.

Finally, there is multidirectional complementarity which involves the combined action of horizontal complementarity and vertical complementarity in either of its forms. This model emerges, for example, from the Belgian and German implementing laws of the ICC Statute, determining that domestic courts will be competent to prosecute where states with closer links to the crime have not undertaken proceedings and the ICC is not taking on the case. It was further seen in the post-Second World War period when domestic and zonal tribunals engaged in proceedings in parallel to the IMT. In addition, it can be identified by the fact that national courts decided cases relating to the conflict in the former Yugoslavia and the genocide in Rwanda at the same time that the corresponding *ad hoc* Tribunals were handling other criminal files.

The different versions or levels of complementarity referred to in respect of each model can be subdivided in active and negative complementarity. In the first case, the state or institution with a complementary function ought to step in to close impunity gaps when the bodies immediately competent failed to do so. In the second case, the judicial body is

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<sup>178</sup> In this sense, decisions by the *ad hoc* Tribunals need to comply with the conditions set forth in, for example, ICTY, Rules of Procedure and Evidence, Rule 9, see *supra* note 141.

required to refrain from any action inasmuch as the judicial body immediately competent or more closely related to the crime is already genuinely investigating or prosecuting or is in a better position to do so.

#### **5.3.4. The Nature of the Principle of Substantive Complementarity**

The principle of substantive complementarity is not only important from a theoretical viewpoint that permits the evolution and purpose of the system of core crimes law to be understood. Rather, its principal importance lies in the practical impact it may have in the administration of criminal justice, particularly by solving positive and negative conflicts of jurisdiction that strongly influence investigation and prosecution of the most serious crimes of international concern. Inevitably, the consequences of the principle of complementarity will much depend on its legal nature.

The principle of substantive complementarity is here proposed with a two-fold nature. First, it is a general principle of international law in the sense of Article 38(1)(c) of the ICJ Statute. Second, it is a structural principle of core crimes law. While a principle of law may simultaneously appertain to both categories, the main difference between a principle of law in the terms of Article 38(1)(c) and a structural principle of law is that the latter is intrinsic to the very idea and logic of the system being appraised while the former derives from specific material sources.<sup>179</sup>

General principles of law are abstract constructions formulated – namely – by induction from a set of legal concepts, rules or norms sharing the same axiological core. General principles of law in the sense of Article 38(1)(c) should be submitted to a contemporary approach concerning their formation. The practice of international judicial bodies plays a crucial role in the development of principles of core crimes law. International and hybrid tribunals have been established in order to fill in gaps arising from the functioning of domestic jurisdictions, whether being considered individually or in relation to the jurisdiction of other states. At the same time, states have continued to operate side-by-side with international tribunals by handling cases that did not fall under the competence of international bodies or that could not be pursued at the international level be-

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<sup>179</sup> Statute of the International Justice, annexed to the Charter of the United Nations, 24 October 1945, Art. 38(1)(c) (<http://www.legal-tools.org/doc/a0bb78/>). Formal sources consist of authoritative procedures of law-making determined by the international legal system. Material sources address the foundations of the binding authority of international norms.

cause of a lack of resources or due to the limitations of the tribunals' mandate.

The foundation of core crimes law today reveals a network of jurisdictional interplay that mirrors the principle of complementarity as proposed here. While some of the most significant treaties regulating responses to core crimes determine, as a minimum standard, the obligation of the territorial state to prosecute, they further require states to adopt the necessary measures to prevent perpetrators from going unpunished.<sup>180</sup> This, in line with a logical reading of the law, requires, and has in practice resulted in, the duty to prosecute or extradite and the exercise of universal jurisdiction. Other relevant conventions specifically determine the *aut dedere aut judicare* principle thus causing universal jurisdiction to be exercised by the custodial state when extradition is unfeasible.<sup>181</sup> With the establishment of international tribunals, the jurisdictional interplay between states was combined with international jurisdiction thus elaborating what can be seen as refined versions or developments of the duty to extradite or prosecute. Against this background, substantive complementarity as general principle of international law is inferred from 1) the *aut dedere aut judicare* principle, 2) the exercise or admissibility of universal jurisdiction as *ultima ratio* (as it nowadays generally exists in domestic laws), 3) the terms of the principle of primacy of the *ad hoc* and hybrid tribunals over domestic courts, and 4) the complementary nature of the ICC. This view is supported by the fact that some states party to the Statute have defined their jurisdiction in a manner that faithfully adheres to the principle of substantive complementarity. While a few states have specifically codi-

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<sup>180</sup> See, for example, Genocide Convention, Art. 6, *supra* note 24, determining the obligation of the territorial state to administer justice, while Art. 5 determines the obligation of the contracting parties to adopt “necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3”.

<sup>181</sup> See, for example, Convention against Torture, Art. 5(2), *supra* note 152. Certainly, there are crimes for which no such specific obligation is defined. Crimes against humanity, for instance, are not the subject of a comprehensive convention determining the applicable regime. However, they have been generally characterised as part of *the most serious crimes of concern to the international community as a whole*. The integration of this typology of crimes in the Statutes of the *ad hoc* tribunals, hybrid tribunals and the ICC Statute further endorses the extension of the regime applicable to core crimes. Importantly, crimes against humanity are generally accepted as violations of peremptory norms from which derives to the custodial state the obligation to act in order not to assist and condone the breach, becoming itself an accomplice of the derogation of fundamental values.

fied the terms of the relationship between national courts and the ICC by electing the former, instead of the Court, as courts of last resort, the majority of the parties to the Statute have not regulated that relationship in the same way. Rather they have determined their courts to have universal competence in the case of core crimes committed abroad, by foreigners against foreign victims when states with a closer link to the crime are unwilling or unable to undertake proceedings. In so doing, they acknowledged the ICC as the last resort while restating their commitment to prosecute core crimes, usually if the accused is present in their territory. Even though the latter group of states does not establish the primacy of the ICC, in practice it is likely to be inevitable, as states with no direct link to the crime will not, in principle, oppose to a request of the ICC to undertake the case.

In addition to the understanding of substantive complementarity as general principle of international law, it is contended that it constitutes one of the most central principles of core crimes law; technically, it is a structural principle of this branch of international law. Structure is “the supporting or essential framework; the manner in which a complex whole is constructed, put together, or organically formed”.<sup>182</sup> The *New Oxford Dictionary* defines structural as that “relating to, or forming part of the structure of a building or other item”. Structure is the “arrangement of and relations between the parts or elements of something complex”. Structural is thus what relates to the “arrangement of and relations between the parts or elements of a complex whole”.<sup>183</sup> From a chemical perspective, a *structural* formula shows “the composition and structure of a molecule [...] the structure is indicated by showing the relative positions of the atoms in space and the bonds between them”.<sup>184</sup> Substantive complementarity indicates the co-ordination and relationship between different and essential components of the international criminal system.

Accordingly, as the legal principle it is, substantive complementarity has the potential of providing powerful guidance in the resolution of positive and negative conflicts of jurisdictions, especially in filling in lacunae, integrating legal/statutory uncertainties, and eventually bestowing upon courts a legal tool that permits for some corrective interpretation of

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<sup>182</sup> Cassell Dictionary, p. 1316, see *supra* note 161.

<sup>183</sup> NOED, p. 1844, see *supra* note 153.

<sup>184</sup> Collins Dictionary, p. 1442, see *supra* note 160.



*lege ferenda* without which – in borderline situations – one may be confronted with situations of ultimate denial of justice.

#### 5.4. Conclusion

The evolution of core crimes law since the Versailles Treaty unveils, on the one hand, the effort of the international community towards the prosecution and punishment of core crimes' perpetrators and, on the other, a growing multidirectional complementarity between national and international jurisdictions which, while respecting states' prime prerogative in the exercise of the *jus puniendi*, assures safety valves able to guarantee that in case of states' failure to act perpetrators, will be brought to justice.

The combined analysis of different legal sources and mechanisms permits one to discern the principle of 'substantive complementarity' as a main pillar of core crimes law. The principle of substantive complementarity imposes on the state of custody the duty to investigate with a view to prosecution perpetrators of core crimes – if necessary on grounds of universal jurisdiction – when extradition is not feasible and international judicial bodies cannot step in. This obligation is peremptory inasmuch as by allowing the perpetrator to live free in its territory, the custodial state would be condoning, assisting and perpetuating a breach of *jus cogens*. Therefore, the obligation to stop such a breach (owed to the international community of states) is binding upon the state of custody as a derivation of the principle of territoriality because only it is in the position to exercise coercive powers over the perpetrator. The principle of substantive complementarity is a binding principle of substantive law, which assists law enforcers in the resolution of positive and negative conflicts of jurisdiction.

Substantive complementarity takes the nature of a structural principle of core crimes law, deriving its existence from the *ratio existenti* of this system. It is a principle which has developed and keeps on developing within the sphere of a rather recent and intricate branch of law. Although its main foundations have been set forth it is now required that law enforcers apply it in practice, thus promoting its widespread recognition and hopefully contributing to its progressive customary consolidation.



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## International Criminal Law in Peace Processes: The Case of the International Criminal Court and the Lord's Resistance Army

Mareike Schomerus\*

### 6.1. Introduction

The year 2005 was momentous for international criminal justice. The newly established International Criminal Court ('ICC') issued its first arrest warrants for five commanders of the Ugandan rebel group, the Lord's Resistance Army ('LRA'). One of the five names listed was that of Vincent Otti, second in command to the LRA leader, Joseph Kony. When Otti found out about the arrest warrant issued against him, he had very clear expectations of what that meant: "I know that they take me to the ICC and then they will hang me", he said.<sup>1</sup> Having spent 20 years in the bush to fight as a rebel, he was now facing what he believed was certain execution in Europe. He added that he did not want to be executed far away from his home, the town of Atiak in northern Uganda. This would not be a fitting end to the LRA's fight against President Yoweri Museveni and the Government of Uganda, which had started in 1986. A fitting end would be to either defeat the government militarily or to successfully negotiate peace with it.

In July 2006, a few months after Otti said this, the LRA did indeed enter peace negotiations with the Government of Uganda. These came to be known as the Juba peace talks, named after South Sudan's capital in which they were held. In December 2008 the talks came to an abrupt end when the Ugandan army dropped bombs on the LRA camp after their re-

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<sup>1</sup> Author telephone interview, 7 November 2005.

peated refusals to finalise an agreement.<sup>2</sup> Otti did not live to see these developments. He was executed – but not, as he had expected, by the ICC in The Hague. Otti was shot dead on the orders of his commander-in-chief, Kony.

Just as Otti's understanding of what to expect from international criminal justice had been a bit murky, the twists and turns of the peace talks between the Government of Uganda and the LRA had become a lot more complicated than anyone had expected, creating internal confusion within the LRA and sparking heated debate – with equal amounts of confusion – elsewhere. The ICC's first-ever arrest warrants against five LRA commanders, coupled with the fact that the Ugandan case was also the ICC's first-ever state referral, had added a new and unexpected dimension to an already complex conflict. It had also marked the beginning of a new era in both contemporary peacemaking and international criminal justice.

Peacemaking and international criminal justice procedures have had a rocky co-existence since the International Conference for the former Yugoslavia and the launching of the International Criminal Tribunal for the former Yugoslavia ('ICTY') through a United Nations Security Council vote in May 1993. What at the time was an *ad hoc* merging of visions for ending war in the former Yugoslavia and for finding ways of dealing with atrocities committed marked the start of a new debate on the tension between peacemaking and justice procedures. Simultaneously, peace and justice practitioners started to grapple with the realities of the tension that was to become a permanent fixture in conflict resolution over the coming years and to this day. Only with the emergence of the ICC did a justice-based approach to war and violence become permanently entrenched in the international landscape, with the tension between peace and justice particularly prominent, as it had become clear since the ICTY and subsequent *ad hoc* courts that even if cases were brought in front of the court, this did not necessarily mean that tension and conflict came to an end.

The case of the LRA highlights the tension between peace and justice in several prominent ways. As the first case of the new ICC, it became somewhat of a test for the now permanently entrenched co-existence of peace and justice. Due to the nature of the conflict involving the LRA, the question of the impact of the Court's engagement in an on-

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<sup>2</sup> Ronald Raymond Atkinson, *From Uganda to the Congo and Beyond: Pursuing the Lord's Resistance Army*, International Peace Institute, New York, 2009.

going conflict sparked a heated debate among victims and rebels as well as scholars, policymakers and practitioners. It also might highlight a disconnection between the imagined nature of international criminal law and the reality of contemporary conflicts, which are multilayered, often low-level, long-term and involve a multitude of actors who play different roles at different times.<sup>3</sup>

The LRA is notorious, widely known for its brutality, tenacity and also its seeming – and much disputed – irrationality in fighting a war without a clear political agenda. In the history of the ICC, the LRA case will remain hugely important – not because it can be considered the ICC's successful debut, but because it became the catalyst for a much broader debate on the role of international criminal justice in conflict situations, usually simplistically depicted as the tension between peace and justice.

This chapter first gives a brief overview of the conflict situation at the heart of the ICC's first arrest warrants, including the broader debate that was launched by the ICC's engagement in Uganda. It then examines what the ICC looked like to the conflict actors who became its first case and who were faced with the tension between peace and justice.<sup>4</sup> The final section links some of the insights to the broader debate on peace versus justice.

### 6.1.1. Methods

This chapter draws on several years of fieldwork during the Juba talks, as well as leading up to them and long after they had failed.<sup>5</sup> During this time, I regularly communicated and debated with members of the LRA as well as representatives of its political wing, the Lord's Resistance Movement ('LRM'). During the Juba talks, this meant having countless conversations with the LRA/M delegates in Juba or while visiting the various sites of LRA presence. I spoke to many senior LRA commanders, including Joseph Kony and Vincent Otti. This ethnographic approach to under-

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<sup>3</sup> See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 1999.

<sup>4</sup> A more detailed analysis of how the LRA articulated its expectations of justice procedures is presented in Mareike Schomerus, "'Where are we going to meet?' The LRA's Articulations of Justice and the Proceduralization of Armed Conflict", forthcoming.

<sup>5</sup> See Mareike Schomerus, "Even Eating You Can Bite Your Tongue: Challenges and Dynamics at the Juba Peace Talks with the Lord's Resistance Army", Ph.D. Thesis, London School of Economics and Political Science, 2012.

standing the LRA/M's experience while going through peace talks has obvious caveats, the most important one being that I gathered my information during an extremely tense time in which manipulation of information was common by all conflict actors and the stakes were high for the LRA/M.

## 6.2. Background: Uganda and the ICC – Seeking Justice for What?

Most writing about Uganda's state referral to the ICC starts with a brief history of the war in northern Uganda, and so will this chapter eventually. It seems the most useful and straightforward way also for a discussion on the role of the LRA case in the development of international criminal law as a discipline. And yet, such brief histories of the war in northern Uganda are often misleading, as they tend to gloss over the very intricacies that make dealing with a violent situation through international justice procedures so challenging. In the list of wars jointly published in 2003 by the Centre for Systemic Peace and the Uppsala Conflict Data Project, the LRA's activities do not make the cut as a "war" at all. The list puts the combined deaths of conflict between the Government of Uganda and the LRA, West Nile Bank Front and Allied Democratic Forces at less than 1,000 conflict-related deaths since 1994.<sup>6</sup> One of the most respected databases on contemporary wars thus contradicts the notion that anyone involved in the violence in northern Uganda could be credibly charged with war crimes.

Jill Lepore has pointed out that within establishing the most prominent name for a war lies "a contest for meaning".<sup>7</sup> While international criminal law seemingly operates with clear definitions of what constitutes a war crime, broader scholarship does not offer clarification on how to name a specific war or the general activity of war. Rather, write Oliver Ramsbotham *et al.*, "current conflict typology is in a state of confusion [...] and the criteria employed not only vary, but are often mutually incompatible".<sup>8</sup> This labelling issue is important as naming of a particular crime in the shape of a criminal charge is at the heart of individualised

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<sup>6</sup> Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution*, 2nd ed., Polity Press, Cambridge, 2005, p. 58.

<sup>7</sup> Jill Lepore, *The Name of War: King Philip's War and the Origins of American Identity*, Vintage, New York, 1998, p. xvi.

<sup>8</sup> Ramsbotham *et al.*, 2005, p. 63, see *supra* note 6.

responsibility for war crimes and crimes against humanity. During the Juba talks, which form the backdrop of this chapter, the LRA/M contested the title “LRA war” primarily on the grounds that issues of marginalisation and abuse were relevant to a larger group of people than just the LRA.<sup>9</sup> Having realised the accountability problems that come with emphasising their own fight against such marginalisation, the LRA/M delegation in late 2009 urged “a return to the negotiating table, to save all the peoples affected by the ‘Northern Uganda’ conflict from further senseless, destructive and unnecessary military adventures”.<sup>10</sup>

Yet, without the title “LRA war”, we have few names left to use. The “war in northern Uganda” hardly captures that a much larger territory in Sudan, the Democratic Republic of Congo and the Central African Republic was affected and that the LRA has been active in the Sudans for as long as it was active in northern Uganda. “Kony’s war”, as it is sometimes called, reduces our understanding of the conflict to the deeds of one person. Sverker Finnstroem and Chris Dolan, two of the most influential scholars on northern Uganda, avoid using the term “war” altogether, offering more socially inclusive terminology: Finnstroem describes the continuous war-like activities as “living with bad surroundings”, while Dolan uses the term “social torture” to describe how rebel and government activity destroy the social fabric of the north.<sup>11</sup> In sum, it seems as if we lack a descriptive term that credibly catches the far-reaching impact of structural violence against a population, the existence of an armed rebellion that turned against its own population to battle said structural violence, and the many narratives of communal and personal suffering that make up the collective experience and memory of what has happened in northern Uganda and other affected areas.

Generally speaking, scholars now tend to agree that the Government of Uganda had successfully established a narrative in which the northern population posed a threat to Uganda’s general prosperity, which

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<sup>9</sup> At other moments, however, they emphasise the meaning of the “LRA” war in order to stress their role as Museveni’s adversary.

<sup>10</sup> Justin Labeja, “Open Letter: LRA/M Private Bag, Re: L.R.A. Document on Juba Peace Talks”, Nairobi, 2009.

<sup>11</sup> Sverker Finnstroem, *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda*, Duke University Press, Durham, NC, 2008; Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986–2006*, Berghahn Books, Oxford, 2009.

allowed broad dismissal of Acholi grievances,<sup>12</sup> implementation of oppressive measures against a whole population,<sup>13</sup> and allowed fundraising among donors for defence spending.<sup>14</sup> Thus a discussion about justice procedures as a means to end the conflict will need to take as its starting point a much more sophisticated understanding of issues of accountability and context than a criminal charge usually provides.

### 6.2.1. A Brief History

The history of Uganda's northern war is contested. In 1986 the rebellious forces of today's President Yoweri Museveni, the National Resistance Army ('NRA'), overthrew the government of Tito Okello. This particularly violent year had continued a long history of violence and violent power struggles.<sup>15</sup> In late 1985 Museveni's NRA and Okello's military regime had signed a peace agreement in Nairobi, agreeing on power sharing, a peaceful settlement of the civil war, and on keeping the status quo of the Ugandan political landscape in the hands of Okello, who stemmed from the Acholi region of Uganda.<sup>16</sup> Nonetheless, Museveni marched his NRA forces to Kampala to overthrow Okello. Violence continued after the coup, with the new government under Museveni focusing its counter-insurgency tactics in the northern part of the country where they suspected strong support for Okello. Acholi who had been working with Okello's government were dismissed from positions of power. Many of his supporters fled the country. They would later form the prominent and influ-

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<sup>12</sup> Dylan Hendrickson with Kennedy Tumutegyeize, *Dealing with Complexity in Peace Negotiations: Reflections on the Lord's Resistance Army and the Juba Peace Talks*, Conciliation Resources, London, 2012, p. 18.

<sup>13</sup> Dolan, 2009, see *supra* note 11.

<sup>14</sup> Andrew Mwenda, "Uganda's Politics of Foreign Aid and Violent Conflict: The Political Uses of the LRA Rebellion", in Tim Allen and Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality*, Zed Books, London, 2010, pp. 45–58; Roger Tangri and Andrew M. Mwenda, *The Politics of Elite Corruption in Africa: Uganda in Comparative African Perspective*, Routledge, London, 2013.

<sup>15</sup> Dirk Berg-Schlosser and Rainer Sieglar, *Political Stability and Development: A Comparative Analysis of Kenya, Tanzania and Uganda*, Lynne Rienner, Boulder, CO, 1990.

<sup>16</sup> Catherine Barnes and Okello Lucima, "Introduction", in Okello Lucima (ed.), *Protracted Conflict, Elusive Peace: Initiatives to End the Violence in Northern Uganda*, Conciliation Resources, London, 2002, pp. 4–8.



ential diaspora opposition to Museveni's governing National Resistance Movement ('NRM').

Armed resistance widened in northern Uganda, and in Lango and Teso districts. Lango's and Teso's armed rebellions were largely over by the early 1990s; resistance in the north was to remain active for the next decades.<sup>17</sup> The first prominent armed group in northern Uganda was Alice Lakwena's Holy Spirit Mobile Forces, which was defeated by the NRA in 1987.<sup>18</sup> When Kony named himself and his fellow fighters the United Holy Salvation Army in 1988 (later renaming themselves the United Democratic Christian Army in 1992 and then the Lord's Resistance Army) the NRA seemed generally unconcerned, having just defeated Lakwena's forces. Yet Kony, having been asked by the Acholi elders to resist Museveni with force, proved a lot more resilient than expected.<sup>19</sup> Africa's most enduring armed rebel group and one of the world's most compelling rebel leaders was born.

Initially, the LRA's military successes against the oppressive government forces garnered support amongst the northern Ugandan civilian population – particularly so after the government's military offensive Operation North in 1991 was meant to end the LRA insurgency, but instead brought arbitrary arrests and harassment of civilians. Following Operation North, the LRA also increasingly turned against civilians, instilling fear through attacks and abductions and forcefully recruiting most of its fighting force. The LRA's reputation as a fearless rebel group, strengthened by their reported adherence to spiritual rules, was soon established. The LRA justified its violence as a protest against the oppressive Government of Uganda, although public statements by the LRA with a clear political agenda were rarely heard – and, if so, actively discredited by the government.<sup>20</sup>

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<sup>17</sup> Frank van Acker, "Uganda and the Lord's Resistance Army: The New Order No One Ordered", in *African Affairs*, 2004, vol. 103, no. 412, pp. 335–57. Ruddy Doom and Koen Vlassenroot, "Kony's Message: A New *Koine*? The Lord's Resistance Army in Northern Uganda", in *African Affairs*, 1999, vol. 98, no. 390, pp. 5–36.

<sup>18</sup> Tim Allen, "Understanding Alice: Uganda's Holy Spirit Movement in Context", in *Africa*, 1991, vol. 61, no. 3, pp. 370–99. Heike Behrend, *Alice und die Geister: Krieg im norden Ugandas*, Trickster, Munich, 1993.

<sup>19</sup> Billie O'Kadameri, "LRA/Government Negotiations 1993–94", in Lucima, 2002, pp. 34–41, see *supra* note 16; Matthew Green, *The Wizard of the Nile: The Hunt for Africa's Most Wanted*, Portobello Books, London, 2008.

<sup>20</sup> Finnstroem, 2008, see *supra* note 11.

While Uganda's south and west gradually became more peaceful and prosperous, other parts, particularly the north, northeast and northwest, fell behind. For a period of intense fighting in the late 1990s and early 2000s, the war garnered hardly any international attention, yet in northern Uganda millions of people were affected by the violence committed by the rebels, the army and the government policy of forcing people into so-called "protected villages".<sup>21</sup> The villages were repositories of forcefully displaced people who were to live and die in these internally displaced persons' camps.<sup>22</sup>

The atrocious conditions in the camps finally attracted the wider attention of the international community. In 2003 the United Nations Under-Secretary-General for Humanitarian Affairs, Jan Egeland, made a highly publicised visit to the region, focusing in his subsequent press appearances on the plight of displaced civilians. Egeland described the situation at the time in an interview in 2007:

It was very much a forgotten conflict, neglected conflict. I was myself shocked to my bones coming in the autumn of 2003 and I could not believe how bad it was in northern Uganda. And also checking, even in the couple of days, the international community why so little had been done, really, to alleviate the suffering. But also to try to bring the conflict to an end. Everybody had failed. I then went very dramatically public on BBC [...] the whole BBC system and later CNN and said we have all failed, the international community, the Uganda government in northern Uganda. So why had it not been brought on the international agenda or on the Security Council agenda? I think because everybody wanted Uganda to remain a success story.<sup>23</sup>

Egeland's visit refocused attention on alleviating civilian suffering in the camps. With civilians' plight moving centre stage, more attention

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<sup>21</sup> Paul Omach, "Civil War and Internal Displacement in Northern Uganda: 1986–1998", Poverty Policy Working Paper no. 26, Network of Ugandan Researchers and Research Users (NURRU), 2002; Adam Branch, "Gulu Town in War ... and Peace? Displacement, Humanitarianism and Post-War Crisis", Crisis States Working Paper no. 36, 2008; Caroline Lamwaka, *The Raging Storm: Civil War and Failed Peace Processes in Northern Uganda, 1986–2005*, Fountain, Kampala, 2011.

<sup>22</sup> World Health Organization/Ministry of Health, *Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda*, Republic of Uganda, Ministry of Health, Kampala, 2005.

<sup>23</sup> Author interview with Jan Egeland, by phone, 2007.

was given to the experience of the Acholi population at the hands of the government. Some have argued that the government has systematically attempted to destroy the population of northern Uganda,<sup>24</sup> particularly by forcing the entire population into displacement camps. Ruddy Doom and Koen Vlassenroot describe the “fear of extinction held by many Acholi people. In the eyes of Alice [Lakwena], the eve of total destruction was near, and resistance along modern political-military lines had led to defeat”.<sup>25</sup> Paul Jackson reiterates how both Alice Lakwena and Kony “believed that the Acholi were about to be wiped out in massacres and reprisals”.<sup>26</sup> The narrative of extinction and enslavement comes through in much earlier writing by the LRA, for example in this pamphlet from 1996:

We took up arms only to defend our very lives, which was threatened by Museveni's marauding soldiers of fortune (1987). [...] We also witnessed many atrocities, murder of our relatives, torching of our homes and the looting of our produce and livestock.<sup>27</sup>

Mahmood Mamdani has made the point that “few Acholi saw the government in Kampala as the source of protection. This single fact is testimony to the political failure of this government's northern policy”.<sup>28</sup> Few academics would go as far as Ugandan-born Olara Otunnu who, having finished his tenure as UN Under-Secretary-General and Special Representative for Children and Armed Conflict, in his acceptance speech for the Sydney Peace Prize launched a scathing criticism on the international response to the crisis in northern Uganda.<sup>29</sup>

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<sup>24</sup> Todd David Whitmore, “Genocide or Just Another ‘Casualty of War’? The Implications of the Memo Attributed to President Yoweri K. Museveni of Uganda”, in *Practical Matters*, 2010, vol. 3, pp. 1–49.

<sup>25</sup> Doom and Vlassenroot, 1999, p. 17, see *supra* note 17.

<sup>26</sup> Paul Jackson, “‘Negotiating with Ghosts’: Religion, Conflict and Peace in Northern Uganda”, in *The Round Table*, 2009, vol. 98, no. 402, p. 324.

<sup>27</sup> Lord's Resistance Army. “LRA Policy Definitions and Explanations”, unpublished document, 1996.

<sup>28</sup> Mahmood Mamdani, “Kony Not the Real Issue in Peace Talks”, in *The New Vision*, 10 July 2006.

<sup>29</sup> When Otunnu went public with his criticism in 2006, concerns about his own political interests in Uganda (he became the leader of the opposition party Uganda People's Congress [‘UPC’] and ran for president in 2011) and his well-publicised antagonism towards Museveni did not dampen the impact of his speech.

I must draw your attention to the worst place on earth, by far, to be a child today. That place is the northern part of Uganda. What is going on in northern Uganda is not a routine humanitarian crisis, for which an appropriate response might be the mobilization of humanitarian relief. The human rights catastrophe unfolding in northern Uganda is a methodical and comprehensive genocide. An entire society is being systematically destroyed – physically, culturally, socially, and economically – in full view of the international community.<sup>30</sup>

Repeating his argument in an article in *Foreign Policy* magazine, Otunnu challenged the common portrayal of the situation in northern Uganda as a consequence of a one-sided cruel campaign of senseless killing conducted by insane rebels.<sup>31</sup> While Otunnu offered the most radical interpretation regarding the intent behind northern Uganda's neglect, most scholars of the conflict agree that northern Uganda's marginalisation was deliberate government policy and that the government's commitment to finding a negotiated solution to the conflict has been and remains questionable.<sup>32</sup> Otunnu's suggestion that the international community was complicit in what was happening in northern Uganda was not new – among scholars, the most detailed work arguing international complicity is that of Adam Branch, Dolan and Finnstroem.<sup>33</sup> As early as 1990 the former President, Milton Obote, had concluded that a better future for Uganda was possible despite the international complicity: "I am convinced that however long it may take and whatever protection the world affords to the oppressors, freedom shall be won and that the Pearl of Africa shall rise and shine

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<sup>30</sup> Olara Otunnu, "Saving Our Children from the Scourge of War", 2005 Sydney Peace Prize Lecture, Centre for Peace and Conflict Studies Occasional Paper no. 05/3, 2005.

<sup>31</sup> Olara Otunnu, "The Secret Genocide", in *Foreign Policy*, 2006, no. 155, pp. 44–46.

<sup>32</sup> Joanna R. Quinn, for example, points out that in the 2004–2005 budget, the Government of Uganda only allocated 0.01 per cent of the national budget to conflict resolution attempts in northern Uganda; Joanna R. Quinn, "Getting to Peace? Negotiating with the LRA in Northern Uganda", in *Human Rights Review*, 2009, vol. 10, no. 1, pp. 55–71. Dolan, 2009, see *supra* note 11, outlines the government system at the heart of the conflict which he calls "social torture". Egeland states in his book that he felt Museveni did not want a negotiated solution; Jan Egeland, *A Billion Lives: An Eyewitness Report from the Frontlines of Humanity*, Simon and Schuster, New York, 2008.

<sup>33</sup> Christopher Dolan, "Understanding War and Its Continuation: The Case of Northern Uganda", Ph.D. Thesis, London School of Economics and Political Science, 2005; Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, New York, 2011; Finnstroem, 2008, see *supra* note 11.

again”.<sup>34</sup> Over the years, elements within the NRM and NRA (later re-named the Ugandan People's Defence Force ['UPDF']) have stood to gain from the continuation of the war in the north.<sup>35</sup>

During this time, there had been many attempts to bring this conflict to an end,<sup>36</sup> with peace talks having failed in 1988<sup>37</sup> and again in 1994.<sup>38</sup> Particularly 1994 was considered a crucial opportunity which was unsuccessful, argues Dolan, because parity between the government's endeavour to dismiss the LRA and the LRA's quest to seek recognition for what they considered a legitimate struggle could not be established.<sup>39</sup> Others saw in the failure of the talks a confirmation of the LRA's irrationality.<sup>40</sup>

Military campaigns against the LRA have been numerous, yet none was successful in ending either the rebellion or capturing the LRA leadership.<sup>41</sup> Although generally speaking, the Government of Uganda has tended to make public its opinion that a military solution would be needed to bring an end to this rebellion, other paths have been tried. In 2000 Uganda passed a law granting amnesty to those engaged in armed rebellion

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<sup>34</sup> A. Milton Obote, *Notes on Concealment of Genocide in Uganda*, A.M. Obote, Lusaka, 1990.

<sup>35</sup> Adam Branch, "Political Violence and the Peasantry in Northern Uganda, 1986–1998", in *African Studies Quarterly*, 2005, vol. 8, no. 2; Mareike Schomerus, "They Forget What They Came For': Uganda's Army in Sudan", in *Journal of Eastern African Studies*, 2012, vol. 6, no. 1, pp. 124–53.

<sup>36</sup> Lucima, 2002, see *supra* note 16. Elizabeth Drew (ed.), *Initiatives to End the Violence in Northern Uganda*, Conciliation Resources, London, 2010.

<sup>37</sup> O'Kadameri, 2002, see *supra* note 19.

<sup>38</sup> Government of Uganda and the Lord's Resistance Army, "Agreement: The Gulu Ceasefire", 2 February 1994. David Westbrook, "The Torment of Northern Uganda: A Legacy of Missed Opportunities", in *Online Journal for Peace and Conflict Resolution*, 2000, vol. 3, no. 2; Peter J. Quaranto, "Ending the Real Nightmares of Northern Uganda", in *Peace Review*, 2006, vol. 18, no. 1, pp. 137–44; Anthony Vinci, "Existential Motivations in the Lord's Resistance Army's Continuing Conflict", in *Studies in Conflict & Terrorism*, 2007, vol. 30, no. 4, pp. 337–52.

<sup>39</sup> Dolan, 2005, p. 109, see *supra* note 33.

<sup>40</sup> Dennis Pain, *"The Bending of Spears": Producing Consensus for Peace & Development in Northern Uganda*, International Alert/ Kacoke Madit, London, 1997.

<sup>41</sup> Andre Le Sage, "Countering the Lord's Resistance Army in Central Africa", in *Strategic Forum*, 2011, no. 270, pp. 1–16. Ronald R. Atkinson, Phil Lancaster, Ledio Cakaj and Guillaume Lacaille, "Do No Harm: Assessing a Military Approach to the Lord's Resistance Army", in *Journal of Eastern African Studies*, 2012, vol. 6, no. 2, pp. 371–82.

against the government.<sup>42</sup> In 2004 we saw another failed attempt at peace talks, in which the exact demarcation of an assembly zone for the rebels proved the major stumbling block, and a bombing attack on the area spelled the end of this attempt.<sup>43</sup> When, in early 2005, rebels and the government in neighbouring Sudan signed a peace agreement, the LRA also lost easy access to the area to which they had successfully withdrawn in the early 1990s.<sup>44</sup>

The northern Ugandan situation has attracted much attention in the mainstream press, in social media and in scholarship. International audiences became engaged, thanks to a series of films and documentaries produced on the plight of the children of northern Uganda.<sup>45</sup> Scholarship on the LRA conflict has covered a range of issues, such as the role and ineffectiveness of aid agencies in complex situations,<sup>46</sup> health in the displacement camps,<sup>47</sup> living conditions in the war zone,<sup>48</sup> and later on the role of international advocacy.<sup>49</sup> Much has been written about northern Uganda's and the Acholi's marginalisation, deprivation and how both ver-

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<sup>42</sup> Barney Afako, *Promoting Reconciliation: A Brief Review of the Amnesty Process in Uganda*, CSOPNU, Kampala, 2002. Lucy Hovil and Zachary Lomo, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation", Refugee Law Project Working Paper no. 15, February 2005.

<sup>43</sup> "Traditional Leader meets LRA", in *Sudan Mirror*, 13–26 December 2004.

<sup>44</sup> Gerard Prunier, "Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986–99)", in *African Affairs*, 2004, vol. 103, no. 412, pp. 359–83; Mareike Schomerus, *The Lord's Resistance Army in Sudan: A History and Overview*, Small Arms Survey, Geneva, 2007.

<sup>45</sup> Jason Russell (dir.), *Kony 2012*, Invisible Children, USA, 2003 (film); Ali Samadi Ahadi and Oliver Stoltz (dirs.), *Lost Children*, Arte, Dreamer Joint Venture Filmproduction and Westdeutscher Rundfunk, Germany/France, 2004 (film); Sean Fine and Andrea Nix Fine (dirs.), *War/Dance*, THINKFilm, USA/Japan, 2007 (film).

<sup>46</sup> Branch, 2011, see *supra* note 33.

<sup>47</sup> S. Accorsi, M. Fabiani, B. Nattabi, B. Corrado, R. Iriso, E.O. Ayella, B. Pido, P.A. Onek, M. Ogwang and S. Declich, "The Disease Profile of Poverty: Morbidity and Mortality in Northern Uganda in the Context of War, Population Displacement and HIV/AIDS", in *Transactions of the Royal Society of Tropical Medicine and Hygiene* 2005, vol. 99, no. 3, pp. 226–33.

<sup>48</sup> Finnstroem, 2008, see *supra* note 11.

<sup>49</sup> Amanda Taub (ed.), *Beyond Kony 2012: Atrocity, Awareness and Activism in the Internet Age*, Leanpub (e-book), 2012; Mareike Schomerus, "'Make Him Famous': The Single Conflict Narrative of Kony and Kony2012", in Alex de Waal (ed.), *Advocacy in Conflict: Critical Perspectives on Transnational Activism*, London, Zed Books, 2015.

tical and horizontal inequalities have contributed to the long conflict.<sup>50</sup> The literature dealing with political and social developments in Uganda, including Uganda's path dependency due its history of violence, political culture, identity and marginalisation all connected to the LRA conflict, is vast.<sup>51</sup> In 2012 the LRA and its leader Joseph Kony became an internet sensation, when the US-based advocacy group Invisible Children launched the hugely successful video campaign *Kony 2012*, calling for the arrest of Kony and for US military support in the matter.<sup>52</sup>

The focus on LRA commander-in-chief Joseph Kony as a solely responsible actor means there is little mainstream analysis of group behaviour or of the finer points of individual choices made by LRA actors. As a fascinating figure for popular culture, easily depicted as the root of all evil, the focus on Kony has blurred understanding of the broader context. This is a crucial point in the debate regarding the applicability of international criminal law in complex conflict situations. The most poignant moment of this personalisation came in 2005, when the newly established ICC concluded a contentious two-year investigation that led to the issuing and later the unsealing of arrest warrants for five LRA commanders, including Kony and Otti.

When the ICC announced in 2003 Uganda's state referral to investigate the war in northern Uganda, critics argued that Uganda's government had received ICC support in portraying the war as a one-sided LRA

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<sup>50</sup> Frances Stewart, "Horizontal Inequalities: A Neglected Dimension of Development", CRISE Working Paper no. 81, Queen Elizabeth House, Oxford, February 2002.

<sup>51</sup> Edward A. Brett, "Neutralising the Use of Force in Uganda: The Rôle of the Military in Politics", in *Journal of Modern African Studies*, 1995, vol. 33, no. 1, pp. 129–52; Holger Bernt Hansen and Michael Twaddle, *Uganda Now: Between Decay and Development*, James Currey, Oxford, 1988; Holger Bernt Hansen and Michael Twaddle, *Changing Uganda: The Dilemmas of Structural Adjustment & Revolutionary Change*, James Currey, Oxford, 1991; Holger Bernt Hansen and Michael Twaddle, *Developing Uganda*, Ohio University Press, Athens, 1998; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, Princeton, NJ, 1996; Frank Knowles Girling, *The Acholi of Uganda*, Her Majesty's Stationery Office, London, 1960; Ronald R. Atkinson, *The Roots of Ethnicity: The Origins of the Acholi in Uganda before 1800*, Fountain Publishers, Kampala, 1994.

<sup>52</sup> Mareike Schomerus, Tim Allen and Koen Vlassenroot, "Obama Takes on the Lra: Why Washington Sent Troops to Central Africa", in *Foreign Affairs*, 15 November 2011; Taub, 2012, see *supra* note 49; Schomerus, forthcoming, see *supra* note 4.

problem only.<sup>53</sup> At the time, Uganda's contact with the ICC had seemed a straightforward state referral to the ICC – albeit the first of its kind – yet the sequence of events and political interests at play have become contested. The ICC narrative has always been that once Uganda requested an investigation, the Court had to follow up with activities in Uganda.<sup>54</sup> But there are accounts from within Uganda that suggest that the ICC had approached Uganda to ask for a state referral.<sup>55</sup>

On 9 July 2005 the ICC issued five sealed warrants for the LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen.<sup>56</sup> The warrants were unsealed on 13 October the same year. The reception was mixed. The move was called a historic step towards ending impunity for the worst of crimes.<sup>57</sup> Yet the ICC's engagement sparked a lively scholarly debate on the Court's role in conflict situations and the politics of justice and accountability.<sup>58</sup> The broader debates on the merits of ICC involvement in an ongoing conflict tended at first to fall into several categories. However, debates and commentary continue. Due to the recent history of how international criminal justice had emerged, international justice interventions are viewed by its supporters as a matter of principle. Some more finely tuned analysis highlighted

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<sup>53</sup> Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention", in *Ethics & International Affairs*, 2007, vol. 21, no. 2, pp. 179–98; Louise Parrott, "The Role of the International Criminal Court in Uganda: Ensuring That the Pursuit of Justice Does Not Come at the Price of Peace", in *Australian Journal of Peace Studies*, 2006, vol. 1, no. 1, pp. 8–29.

<sup>54</sup> Matthew Brubacher, "The ICC Investigation of the Lord's Resistance Army: An Insider's View", in Allen and Vlassenroot, 2010, pp. 262–77, see *supra* note 14.

<sup>55</sup> Barney Afako, "Experiencing Justice in Fragile and Conflict-Affected Contexts", Alastair Berkeley Memorial Lecture, London School of Economics and Political Science, 7 November 2012.

<sup>56</sup> As of mid-2015, only Kony and Ongwen are still alive, with Kony still at large. Ongwen in early 2015 was taken into custody in the Central African Republic and was later extradited to stand trial at the ICC.

<sup>57</sup> "Annan hails International Criminal Courts' Arrest Warrants for Five Ugandan Rebels", in UN News Service, 14 October 2005.

<sup>58</sup> Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, London, 2008; Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, Zed Books, London, 2006; Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, Cambridge, 2013.



the political uses of the ICC by the Ugandan government,<sup>59</sup> which had acted externally as if concerned about atrocities against civilians, but had a poor human rights record.<sup>60</sup>

Others saw justice procedures as a necessary step towards peace, but thought that justice could only serve peace if a careful consideration of the impact of punitive measures was made. Most argued that retributive justice was a more promising path to peace and that such procedures could only be accommodated through locally relevant approaches,<sup>61</sup> which would be admissible under the ICC's rule of complementarity and focus on victims.<sup>62</sup> A vast range of scholarship focused on specific Acholi justice procedures, some of it optimistic about the abilities to heal communities,<sup>63</sup> some of it scathing of such interpretations.<sup>64</sup> A prominent point that was made regularly was the limited extent to which the affected population had been consulted on their experience of the conflict by the ICC.<sup>65</sup> A most striking manifestation of the disregard for local sentiments was when local leaders in northern Uganda voiced their concerns about the impact of potential ICC warrants on the peace process.

On 15 March 2005 Acholi leaders from northern Uganda travelled to The Hague to ask the ICC to refrain from issuing arrest warrants

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<sup>59</sup> Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo", in Waddell and Clarke, 2008, pp. 37–45; Phil Clark, "Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda", in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, vol. 2, Cambridge, Cambridge University Press, 2011, 1180–1203; Branch, 2007, see *supra* note 53.

<sup>60</sup> Kenneth A. Rodman and Petie Booth, "Manipulated Commitments: The International Criminal Court in Uganda", in *Human Rights Quarterly*, 2013, vol. 35, no. 2, pp. 271–303.

<sup>61</sup> Issaka K. Souaré, "The International Criminal Court and African Conflicts: The Case of Uganda", in *Review of African Political Economy*, 2009, vol. 36, no. 121, pp 369–88; Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC", in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development: The Nuremberg Declaration on Peace and Justice*, 2009, pp. 19–103.

<sup>62</sup> Nouwen, 2013, see *supra* note 58.

<sup>63</sup> Terry Beitzel and Tammy Castle, "Achieving Justice through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach?", in *International Criminal Justice Review*, 2013, vol. 23, no. 1.

<sup>64</sup> Tim Allen, "Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda", in Waddell and Clark, 2008, pp. 47–54, see *supra* note 58.

<sup>65</sup> Christian Noll, "The Betrayed: An Exploration of the Acholi Opinion of the International Criminal Court", in *Journal of Third World Studies*, 2009, vol. 26, no. 1, 99–119.

against LRA leaders. Their voices and actions would fall in line with another broad category of voices on the ICC intervention that saw justice as an obstacle to a negotiated, non-military end to the violent conflict – replaced with a difficult-to-execute arrest warrant.<sup>66</sup> Because an arrest warrant is a drastic and at first a zero-sum solution, some saw the warrants as naturally pushing military attempts to end the conflict.<sup>67</sup> Many commentators, however, argued for a more holistic approach that would help abandon the dichotomies of international and local justice<sup>68</sup> or peace and justice.<sup>69</sup> One quickly emerging claim – although unsubstantiated and contradictory – was that the ICC warrants had pushed the LRA towards the negotiating table.<sup>70</sup>

### 6.3. The LRA/M's View on the ICC during Peace Talks

In July 2006 the Government of Uganda and the LRA/M entered into peace talks in South Sudan's capital Juba; justice and accountability were one of the agenda items to be negotiated and the international context determined that the ICC warrants would somehow – if implicitly – need to be addressed. In the end, a justice agreement was formulated and signed that established justice procedures within Uganda.<sup>71</sup> However, the Juba talks did not end with a fully endorsed peace agreement and after repeated refusals by Kony to sign such an agreement, the Ugandan army put an end to this peace effort.

For some of the international observers or parties of interest, the tension between the ICC warrants and the approach to negotiating peace in Juba posed a difficult challenge to navigate and interpret. In a parliamentary discussion in the United Kingdom, one participant outlined that

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<sup>66</sup> Kasaija Phillip Apuuli, "The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 1, pp. 179–187.

<sup>67</sup> Rodman and Booth, 2013, see *supra* note 60.

<sup>68</sup> Jackson, 2009, see *supra* note 26.

<sup>69</sup> Janine Natalya Clark, "The ICC, Uganda and the LRA: Re-Framing the Debate", in *African Studies*, 2010, vol. 69, no. 1, pp. 141–60.

<sup>70</sup> Nick Grono and Adam O'Brien, "Justice in Conflict? The International Criminal Court and Peace Processes in Africa", Paper presented to the Royal African Society, 11 October 2007.

<sup>71</sup> Barney Afako, "Negotiating in the Shadow of Justice", in Drew, 2010, pp. 21–23, see *supra* note 36.

the UK's position was not as clear-cut as its official support for the ICC might have suggested:

One of the most difficult issues is the ICC indictments [*sic*] because the ICC has to be supported and the credibility of talks competes with international justice efforts to end violence in the region. I sense that the ICC does not regard itself as a blunt instrument. Is this the best thing for northern Uganda? The ICC position is very sophisticated.<sup>72</sup>

During the Juba talks, the justice issue had at various points threatened to overpower broader political debates – particularly in the international perspective portrayed in the bulk of the press coverage. Much of the debate continued to focus on whether or not the Court should have intervened in the conflict in the first place, with critics including Ugandan leaders and some international organisations. The supporters of the ICC, however, were a powerful lobby, leading, as Kimberley Armstrong argues, to a situation in which the approach taken towards conflict resolution was heavily driven by justice considerations.<sup>73</sup>

The LRA/M's position on the ICC ricocheted as much as Museveni's approach to the amnesty law. Vincent Otti had gone from expecting his immediate hanging to saying that he was convinced that the ICC was not to be taken seriously. He then started to express doubts as to whether his security could be assured by the Sudan People's Liberation Army if he were to go to Juba. He followed this statement with an announcement that the ICC's lifting of the arrest warrant would be a precondition for disarmament: "Not even a single LRA soldier will go home before it is lifted [...] the ICC is the first condition, without that I cannot go home because it might be a trap".<sup>74</sup> Museveni countered that a peace deal was a prerequisite for a removal of the warrants (which is not technically possible), otherwise he said that the LRA "will die on our hands or the hands of the ICC".<sup>75</sup>

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<sup>72</sup> Author notes, Parliamentary Discussion, Westminster Adjournment Debate on the Juba Talks, 2007.

<sup>73</sup> Kimberley Armstrong, "Justice without Peace? International Justice and Conflict Resolution in Northern Uganda", in *Development and Change*, 2014, vol. 45, no. 3, pp. 589–607.

<sup>74</sup> "Uganda Rebel Deputy Admits Child Abductions", in *Agence France-Presse*, 3 September 2006.

<sup>75</sup> "ICC Indictments against Rebels Should Stay, Says President", in *IRIN News*, 21 September 2006.

For the LRA/M, encountering the ICC posed a number of contradictory challenges. On the one hand, they expressed anger and frustration about being singled out as one conflict actor. Yet members also argued that they could use the momentum of attention that the ICC had created to expose more effectively government atrocities. At times they suggested that they were going to alert the ICC to the government's crimes, unaware of the procedures of state party referral. The second possibility was to use the growing opposition against the ICC to establish a uniquely home-grown system of dealing with the past, which by definition had to be quite shielded from the influence of international frameworks and actors. Dealing with the past in either way was not just a way out of an entrenched conflict situation. Individual actors also clearly recognised that they needed a mechanism that either involved an international powerhouse such as the ICC to act as an umpire or a new actor that had to be created in opposition to such powerhouse and the strings that the Government of Uganda had been able to pull to get the justice issue framed in terms that served its purpose. Without such mechanisms it was clear to the individuals in the LRA that their return to a state of not being at war and living a peaceful life was an illusion.

For the LRA/M, the justice issue was at first framed in an entirely different manner. It is important to note that in 2006 the Court was still a very young institution; the LRA/M was not entirely clear on the mandate of the Court or how it worked. An international community still trying to figure out the same did not provide much clarity. Otti's suspicion that a public hanging in The Hague was the fate that awaited him should he get caught was as real to him as the interpretation by various actors that the ICC had arresting powers, extradition treaties or all other kinds of collaborations with intelligence agencies or further powers which the Court does not in reality have.

With the exact role of the Court unclear, it is perhaps not surprising that the LRA/M's early approach to the ICC issue was of a very different kind than what is widely remembered or assumed. They were convinced that for a prosecution upholding international standards to be fair, the ICC investigators and the prosecutor would need to come and talk to them. Kony set out his views on the ICC's lack of engagement with, as he saw it, both sides of the story, as follows. He expressed his bewilderment that an international procedure was started on one-sided information: "They only hear from Museveni side. From my side they did not hear anything.

They did not question me, they did not ask me, they did not interview me about that ICC". For him, the arrest warrant stood in direct contrast to the pursuit of a peaceful solution:

And we did not know that reason why we are accused in The Hague. We don't know. They [the ICC] just hear from what Museveni stated to them only. So if they want peace, they will take that case from us. But if they do not want peace, then they will continue with it. Or if they want peace, they take a proper way to convince Kony or to talk with Kony [and] Museveni. And going to talk, so that they will prove that who did those things. Who did the thing, which people say that we are being accused. Who did that things [that] the international body want to know. If they want peace to be, they will call all of us together then we talk about it. But [it is not enough to say] that I am guilty or I am wanted with the ICC. Then come here to arrest me without knowing [my side of the story].<sup>76</sup>

Kony said that he had found out via the news that he was wanted in The Hague:

That one, I hear. I read in the paper like that. LRA leadership, Joseph Kony is wanted by International Criminal Case. That one, as I see, I am not bad or I am not guilty. I did not. I have not done what Museveni is accusing me of.

His main point of contention – or confusion, depending on one's opinion about the nature of the self-referral – was that Museveni was allowed an international forum to accuse Kony and the LRA of crimes without a possibility of them giving their side of the story.

It is not true. Because what they are saying that I have done, this is not true. And that accusation was sent by Museveni to [The Hague] [...] we know very well that Museveni is the one who did that to block us or to spoil our name.

In the eyes of the commander of the LRA, a just approach on the international level could not prejudge even during an investigation. While presumably lack of clarity about the exact procedures is also at the heart of this sentiment, the point that an international institution needs to be per-

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<sup>76</sup> Author interview with Joseph Kony, 12 June 2006. A full transcript of the interview can be found in Mareike Schomerus, "A Terrorist Is Not a Person Like Me": An Interview with Joseph Kony", in Allen and Vlassenroot, 2010, pp. 113–31, see *supra* note 14.

ceived as just if it is not to interfere negatively in a peace process is important.<sup>77</sup> Otti made a similar point in a newspaper interview:

We were indicted without being questioned. We were not even investigated. That is why we decided to at least first of all send some of our delegates to go and find it properly from The Hague and from the court prosecutor to explain to them or we would like the prosecutor to send his staff to come here and hear from us whether we have really committed crime.<sup>78</sup>

The crucial grievance that runs through some of these comments on the ICC's perceived one-sidedness is the seeming lack of attention given to the crimes of the Ugandan government. In the eyes of the LRA/M, this had followed a long tradition of international positive bias about Museveni. Former President Obote had written at length about what he perceived to be an inappropriate international liking of Museveni;<sup>79</sup> Egeland's analysis that "everyone wanted Uganda to remain a success story" might go some way towards explaining why attention remained scatty for a considerable time.

The issue of fairness of institutions that got involved in resolving Uganda's conflict was a recurring theme for the LRA/M. A September 2006 press release by the LRA/M delegation stated what had been said on and away from the tables in Juba in many different guises. It summed up the LRA/M's feelings that they had not been accepted as a fair negotiation partner by the Government of Uganda, or the mediating government of southern Sudan, for that matter. The press release expressed the outrage the LRA/M felt about what they perceived to be the Government of Uganda's approach: to make very clear that negotiating with the LRA was not what the Government of Uganda had in mind. The LRA criticised "the repeated statements by the regime in Kampala", which the LRA interpreted as the government's stance, that they had only accepted to enter the talks "to give the LRA/M a safe landing". Further they criticised that Kampala had said that

some of the demands being made by LRA/M are unrealistic; the LRA combatants should lay down their arms and benefit from the Amnesty Act; the talks should be quick and expedi-

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<sup>77</sup> See also Schomerus, forthcoming, see *supra* note 4.

<sup>78</sup> "LRA Rebels to Send Delegates to the ICC", in *Voice of America*, 24 January 2007.

<sup>79</sup> Obote, 1990, see *supra* note 34.

tious; but in any case; should be completed within a time frame determined by the regime in Kampala; most of the demands are already addressed by the laws of Uganda and other Government programmes.<sup>80</sup>

The public response by the LRA summed up how the LRA/M battled for its honour in the peace talks. This honour was both a personal as well as an institutional issue; it was important that individuals were treated fairly and that the UPDF was evaluated to the same standard as the LRA.

Kony himself argued that the LRA was being mistreated in the justice debate since their views on the actual charges they had received, the fairness of the international justice system and the lack of disregard for crimes committed by the government amounted to a major stumbling block in the peace talks.

Criminal justice in general does not work with the premise that its processes and procedures need to make sense to those who are being targeted. Yet international criminal justice as a force intervening in an active conflict with many different types of perpetrators and crimes committed ought not to have such luxury – after all what is at stake in establishing what accountability means might be peace for a larger population, rather than just prosecution of an individual.

Northern Ugandans' experience of being herded into internally displaced persons' camps for the better part of two decades featured prominently in the LRA/M's argument for more accountability of the government.<sup>81</sup> One LRA/M statement read:

Due to the brutality of the armed conflict, the region has literally been made into a wasteland. Tens if not hundreds of thousands of people in the region have died, and over 2 million people were displaced and encamped under genocidal conditions – mainly as a result of the government army's counter-insurgency measures.<sup>82</sup>

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<sup>80</sup> LRA/M Delegation in Juba, Press Release, Juba, 2006.

<sup>81</sup> The internally displaced persons' situation has been widely documented, from Egeland's description to the World Health Organisation's assessment of deadly conditions in the camps, Allen's assessment of the camps as a crime against humanity, Branch's argument that the camps were a government crime propped up by the international community, to Finnstrom's anthropological treatise on the meaning of displacement.

<sup>82</sup> LRA/M Peace Team, "Juba Peace Talks: The Record of Sabotage by the Government of Uganda; the Reasons General Joseph Kony Wants the Peace Agreement Revisited; and, the Way Forward", Nairobi, 2009.

Even narratives of displacement, seemingly easy to confirm factually, differ vastly in the conflict. Established wisdom is that the first camps were established around 1996 and this is certainly the beginning of the official policy to establish “protected villages” when the war had already been firmly entrenched and, indeed, many peace efforts seemed to have gone nowhere. The LRA narrative about internal displacement was quite different. Several LRA officers, including Vincent Otti, reiterated that the first time Acholi were herded into camps was only about a year after Museveni took power, which would have been 1987. Some said that it took only a few months for the first Acholi to be forced out of their homes into camps. One younger LRA officer, who says he was born in 1980, described how he remembered people being taken into camps when he was a young child.<sup>83</sup> It has been established that the Government of Uganda did force some people into camps as early as 1987. Caroline Lamwaka, a Ugandan journalist working in Gulu at the time, seems to at least partially confirm the LRA version. She estimated that between December 1986 and June 1988, of the 400,000 residents of Gulu district, 28,000 were displaced in Gulu town and more than 25,000 were “residing near the various NRA detachments in the rural areas, showing signs of malnutrition and living under appalling hygiene conditions”.<sup>84</sup> She describes the early displacement camps:

The ‘Caribbean camp’ was a grotesque structure with open doors and windows without frames and fittings. A few hundred people were residing there, brought in by the army from Atiak, 42 miles northwest of Gulu, in January 1987 after a fierce battle there. [...] The displaced people relied mainly on meagre food from the Ministry of Rehabilitation and from relatives and friends in town. It was a humanitarian crisis of the first order.<sup>85</sup>

Putting the date of mass displacement of Acholi through government forces as early as 1987 also explains the extent to which the LRA presented itself as a legitimate reactive force, acting upon the injustice imposed upon their people by others. This stance continued to be strengthened through the years, with probably the highest rates of displacement happening between 2002 and 2005, when displacement in-

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<sup>83</sup> Author notes, Conversation with the LRA/M delegation in Juba, 2006.

<sup>84</sup> Lamwaka, 2011, p. 96, see *supra* note 21.

<sup>85</sup> *Ibid.*



creased again as a reaction to the UPDF's military campaign. In September 2002, for example, the army ordered the whole of Pader district to move to displacement camps within 48 hours.

Pader district, which up to that time had almost no displaced camps and where people used to stay in their villages, became 100% displaced. People in few remaining villages in Kitgum, where people had resisted leaving their homes all these years, were forced out by the Army during the last months of 2003 and beginning of 2004.<sup>86</sup>

For the LRA/M, the narrative of crimes committed is thus strongly shaped by their understanding that what has happened to the Acholi people was a genocide. In the first LRA/M position paper, Obonyo Olweny as the signatory of the paper picks up on this: "The creation of the IDP Camps had all hallmarks of achieving [a genocide], because it would, at the same time rapture the cultural fabrics, which made them; especially the Acholi; so proud and confident".<sup>87</sup>

"Genocide is the most serious crime that any one can commit under International Law", a set of unpublished notes of the LRA/M delegation read.<sup>88</sup> The note-gatherer refers to Otunnu's article in *Foreign Affairs*, in which he declared: "the Human Rights catastrophe unfolding in Northern Uganda is a methodical and comprehensive genocide. An entire society is systematically being destroyed physically, culturally, socially and economically in the full view of the international community".<sup>89</sup>

In July 2006, when the Juba talks began, the international debate on justice for crimes against humanity and genocide had taken a decisive turn for various reasons. Certainly the LRA's own steps towards peace talks, often seen as a mere reaction to the threat of international prosecution, were playing their part in stimulating a more detailed debate on issues of justice and peace. But in the broader context, the way that such crimes against humanity were being talked about was radically changing. The Save Darfur campaign, spearheaded by celebrities such as George

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<sup>86</sup> Fr. Carlos Rodriguez, "The Northern Uganda War: The 'Small Conflict' that Became the World's Worst Humanitarian Crisis", in *Health Policy and Development Journal*, 2004, vol. 2, no. 2, pp. 81–84.

<sup>87</sup> Obonyo Olweny, First Position Paper of the Lra Peace Delegation During Negotiations, 2006.

<sup>88</sup> Unpublished notes of the LRA/M Delegation in Juba, 2006.

<sup>89</sup> Otunnu, 2006, see *supra* note 31.

Clooney, had firmly put the genocide label on the table for the war in Darfur. While Otunnu, and as a consequence the LRA/M, argued on the basis of the UN Genocide Convention that the government of Uganda's treatment of Acholi was a genocide, the Save Darfur campaign initiated a different kind of debate in which genocide became equivalent to the most terrible crime, the crime of choice if a label had to be put on something brutal, far-reaching and incomprehensible.

The LRA/M went into the debate using the term genocide, yet also outlining that genocide through neglect or genocide through unfair treatment was what they saw at the heart of this conflict.<sup>90</sup> The position paper states:

It is the inescapable duty of the state to not only give, but also to be seen to give fair and equal treatment to all different people in the country. The perception of injustice and unfairness in the treatment it receives from the Government by any section of people in the country is usually the immediate cause of any war or conflict between the Government in power and that section.

In calling on the perception of injustice and unfairness, the LRA/M confirms the importance of narratives: it is not only a problem if a government is unjust, it is also a problem if it is perceived to be unjust, thus if the narrative on the government is one of unjust behaviour.

If justice, as we understand it, is the fair and equal treatment of people or it is the perception by the people of the quality of the Government being fair and reasonable then we would implore the NRM/A government to search its soul to see

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<sup>90</sup> Daniel Chirot and Clark McCauley identify the Irish potato famine as a similarly disputed example, asking whether this was a neglect by the British government – or neglect with the intent to kill more than one million people by simply not helping them. Daniel Chirot and Clark McCauley, *Why Not Kill Them All? The Logic and Prevention of Political Mass Murder*, Princeton University Press, Princeton, NJ, 2006. Similar lines of argument have been used in either proving or disproving the Acholi genocide theory. This is clear in the LRA/M's argument that "numerous other genocidal techniques have been employed by dictator Museveni including starvation, malnutrition, disease and insanitation infecting the civilian population with HIV/AIDS by HIV/AIDS positive soldiers inflicting serious bodily and mental harm on the people, impoverishing substantially and immiserising the victims of genocide". LRA/M Delegation in Juba, Unpublished notes, 2006.

whether it has been fair and reasonable in its treatment of the northern and eastern regions of the country.<sup>91</sup>

Olweny further recounted the testimony of Benon Ogwal, at the time the Anglican Bishop of Northern Uganda:

By Devine [*sic*] providence the Bishop happened to be on his way from Kampala to Gulu through the Karuma Bridge and had the rare opportunity of witnessing the movement of the population and their livestock. According to him he had to wait for close to five hours for the population to cross the bridge with over 1,000,000 animals – cattle, goats and sheep. On arrival at Bweyale the people were shown where to put up camps but were not allowed to keep their animals, which were taken away by the UPDF soldiers. Fervent reports to Government authorities only attracted retributions.<sup>92</sup>

The LRA/M, in its criticism of one-sided international attention to issues of conflict in northern Uganda, also drew heavily on descriptions noted by the former President, Milton Obote. Written in 1990, Obote lists clearly what to the LRA/M became the main narratives of the conflict. Obote wrote:

3. [...] The International Media and Human Rights Organizations such as Amnesty International, Minority Rights Group and International Alert have painted and continue to paint Museveni and his regime in glowing colors that to them there is no myth. According to them, Uganda, under Museveni, is rapidly recovering from the agonies of the past and there is much improvement.
4. These Notes present the opposite view that Uganda, under Museveni's regime, is a Police State where:
5. Genocide has been and still reigns even as I write;
6. Entire villages have been and continue to be destroyed by soldiers of the regime as legitimate and proper action against "rebels";
7. Foodstuffs in the fields and in granaries in the so-called "war-zones" have been and continue to be uprooted, burnt or destroyed allegedly to deny succor to "rebels";

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<sup>91</sup> Obonyo Olweny, LRA/M Opening Speech at First Juba Peace Talks Opening Ceremony, 2006.

<sup>92</sup> Olweny, First Position Paper of the LRA Peace Delegation During Negotiations.

8. Water wells and boreholes in the "war-zones" have been either poisoned or dismantled;
9. The entire livestock in several Districts have been looted by the National Resistance Army (NRA), the soldiery of the Museveni regime;
10. In the Districts of Gulu, Kitgum, Lira, Soroti, Kumi, a large part of Tororo and now Kasese – (population 2.8 million 1979 census) – where the NRA soldiers have wrought their greatest havoc, those not massacred, arrested or detained are forced by the soldiers to go to Concentration Camps where many die on various accounts of torture, and from lack of food, water, medication and protection against inclement weather;
11. Women in the Concentration camps and in the "war-zones" are at the mercy of the NRA soldiery to abuse as they fancy;
12. Soldiers known to be infected with contagious diseases including the deadly HIV are posted to these Concentration camps where they are free to mix and abuse the female inmates. The Concentration camps are in fact cauldrons of genocide where the vulnerable groups (the children, pregnant women and the elderly) are taken to die. The list is not exhaustive.<sup>93</sup>

In a speech to a group of people who had come to see him in the bush at a critical juncture for the peace talks, Kony talked at length about what he considered the problem with how accountability had been handled in the peace talks so far. Among his audience were representatives of the United Nations, the Government of Uganda, various non-governmental organisations and members of northern Ugandan civil society. By this time (December 2006) the issue of the ICC had been around the table a few times in a range of different interpretations and the LRA's stance on whether or not they considered the ICC the crucial obstacle to finding a peaceful solution to the conflict in northern Uganda had become increasingly instrumentalised. The purpose of the meeting in the bush had been, among other things, to allow Kony and his senior commanders to receive some legal advice on the exact jurisdiction of the ICC. Kony had listened to some of it and then launched into his own interpretation of the

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<sup>93</sup> Obote, 1990, see *supra* note 34.

matter at hand. He argued that if the problems in northern Uganda were to be finally solved, it was necessary that “in respect to ICC we must act with honesty and truthfulness so that matter of ICC brought to a logical conclusion”. He was talking in Acholi, with a translator with legal background translating on the spot:

I want to emphasise that in our view the fairest way to go about this matter, the ICC should avail themselves to come and talk to us so that at least they know our view about this matter. [...] What we keep on hearing from mass media, we hear arrest warrant has been served on us, giving for execution to UNMIS, MONUC [the UN missions in Sudan and the Democratic Republic of Congo at the time], Sudan without giving an opportunity to talk to us. This is what is so worrying to us.

A further aspect that he considered unfair was that in 2006 matters of war and peace in Uganda were now too focused on the ICC's cut-off date for investigations. With crimes prior to 2002 not being part of the Court's jurisdiction, the issue of war in northern Uganda was now strangely concentrated on a limited time frame. Kony argued:

I want to challenge my brothers [the lawyers present] who are more knowledgeable than me. I want to put it to you in our view that members of ICC have to have an opportunity to come and talk to us so that we can understand the nature of indictment and the problem we are now landed with.

Kony continued (speaking of himself in the third person):

The international justice system is insincere. If UN really wants the world at peace, UN should not turn to be justice for strong. If they see Kony as a weak man, they pursue him. If that is the rule of the game, the only option is to fight so that international community sees you are strong and let you walk free [...]. Charles Taylor tried to help Sanku who did not succeed. Taylor was taken to justice because he was now vulnerable. If that is the rule of the game, it means that getting powerful is enough. If UN wants that to be the rule of the game, let it be clear [...].<sup>94</sup>

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<sup>94</sup> Author notes on Joseph Kony's speech to UN staff, mediation team, Acholi representatives and legal advisers, Ri-Kwang-ba, 2006.

Countering Government of Uganda's propaganda with a version of their own, the LRA sought to reset the public's opinion about what had happened in Uganda and the role the LRA had played. In doing so, they focused on establishing why their actions had been justified. The public manifestation of the new LRA/M narrative, however, hardly moved beyond a crude whitewashing with a focus on denying atrocities and deflecting guilt for attacks to the UPDF. The set-up of the talks, the LRA/M argued privately, had made a more nuanced public presentation impossible. I observed several moments during the talks when delegation members and the high command were cornered about atrocities. Their visible reaction seemed to be embarrassment, as if atrocities and the past should not be discussed in public – an interesting counterpoint to the request to go deeper into the past when dealing with government actions. An LRA member confirmed that this impression was correct – from the LRA point of view, he said, the LRA could not talk openly about crimes they had committed because of the threat of ICC prosecution and because “talking about it like that makes it hard to reconcile”.<sup>95</sup> In less public situations, members freely admitted that the LRA had committed violent crimes.<sup>96</sup> In the early days of the Juba talks, delegates even argued that it would be beneficial for the LRA to go to the ICC in The Hague to be tried as it would give them an opportunity to present their evidence of government of Uganda atrocities.

#### **6.4. Peace versus Justice?**

The relationship between international criminal law and justice, on the one hand, and peace processes, on the other, has been mistakenly narrowed down to a dichotomous framing of peace versus justice. From the perspective of international criminal law as a discipline, the extent to which states are allowing international criminal law to play a role is indicative of their commitment to the framework. From the perspective of bringing peace among conflict parties who are not necessarily states, the focus on international criminal law is disturbingly narrow. First, because it does not necessarily take into account power dynamics between conflict actors, and second, because its focus on individuals overlooks systemic

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<sup>95</sup> Author notes on departure day first field mission of the Cessation of Hostilities Monitoring Team, 2006.

<sup>96</sup> *Ibid.*

and structural issues that are often the expression of one kind of violence, or cause of another.

Defying the increased understanding of the complexity of events and networks that make up this now regional conflict, conflict resolution approaches as well as the broader debate on justice and peace have stayed surprisingly linear. The main approach seems to still be an understanding that this conflict is made up of dichotomies, such as “war” versus “peace” or “peace” versus “justice” or, indeed, “peace negotiations” versus “military solution”. However, the common dichotomies might also point towards a different issue that actors in contemporary peacemaking face. If the straightforward dichotomies are no longer applicable, it is a valuable exercise to look at the LRA conflict to ask if this is a conflict that is at all negotiable. Those in opposition to the LRA peace negotiations have often referred to the LRA as rebels without a cause, puzzled as to what exactly perpetuates the rebel situation. Such opposites are commonly used to describe what is essentially a permanently shifting and fluid situation involving many different actors. Moving away from these dichotomies and their often-harmful effect becomes essential when state-sponsored violence becomes the tool of choice to transform the situation from one extreme – war – to the other – peace.

What might be a more constructive way of thinking about the issue of justice and peace, moving away from the dichotomous framing, is a renewed debate on what accountability might mean in a complex, long-term and convoluted conflict in which international actors have also played a part and in which boundaries between victim and perpetrator are often blurred.<sup>97</sup> The dichotomous framing overlooks crucial structural points that individualised justice procedures fail to grasp. Joanna Quinn argues that

civil war leaves in its path a series of communities in need of many things, all of which stretch budgets that have been depleted by years of significant military expenditure. These include roads, hospitals, education, and security, among others, and each of these must be carefully weighed against the country's need for justice.<sup>98</sup>

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<sup>97</sup> Erin K. Baines, “Complex Political Perpetrators: Reflections on Dominic Ongwen”, in *Journal of Modern African Studies*, 2009, vol. 47, no. 2, pp. 163–91.

<sup>98</sup> Joanna R. Quinn, “Constraints: The Un-Doing of the Ugandan Truth Commission”, in *Human Rights Quarterly*, 2004, vol. 26, no. 2, p. 403.

This is a crucial consideration, since it makes clear that bringing justice does not bring peace to many of the victims of broader structural violence. Phil Clark argues that the framing of the war in northern Uganda is based on false dichotomies between peace and justice or, on a more refined level, between international and traditional justice. Instead of opposing the concepts, however, the question must be what form justice can take so that it can work alongside peace.<sup>99</sup> Why the notion of justice procedures is so complex is made clear by Bruce Baker, who argues that for victims of sexual violence committed by the LRA the lack of justice procedures from the government contributes to the same sense of marginalisation that created and fuelled the LRA rebellion in the first place.<sup>100</sup>

The notion of an international criminal justice framework as being in opposition to peace is not helpful. Rather than simply opposing peace and justice, it might be more appropriate to see the two seemingly opposite ends of the debate as an indication of individual accountability in a complex, contextualised structure. One suggestion of thawing the dichotomy of justice and peace is the inclusion of a more refined truth and reconciliation element that takes less of a template approach to the issue, but acts as a repository of memories and understandings of accountability.

The notion of creating memories and allowing official access to them that is as authoritative as, for example, arrest warrants of the ICC, is an intriguing one. It does not solve the tension between peace and justice, but opens another, possibly more fruitful avenue of dealing with what has happened. During the Juba talks the LRA/M wanted to change perceptions of the war, presenting themselves as truth-tellers about the conflict. They expected that a more complete picture of the war, including recognition of government atrocities, would mean that the LRA's actions would be exonerated. In an LRA/M communiqué this was phrased in the following way:

For a long time LRA/M did not make its case to the international community, including the United Nations, regarding its political Agenda. This gave the repressive regime of NRM in Uganda a leeway to use its massive international propaganda machinery to vilify the LRA to make it appear like the most murderous, atrocious evil and terrorist Organi-

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<sup>99</sup> Clark, 2010, see *supra* note 69.

<sup>100</sup> Bruce Baker, "Justice for Survivors of Sexual Violence in Kitgum, Uganda", in *Journal of Contemporary African Studies*, 2011, vol. 29, no. 3, pp. 245–62.



sation in the world. No wonder the regime in Kampala has managed to convince some members of the international community to buy into this ploy and list the LRA/M as a terrorist organisation. It may be noteworthy that Uganda, notwithstanding the fact that its economy is 52% Donor funded, is one of the few African countries that has hired an international U.K. Public Relations firm at phenomenal costs to, not only cleanse its image, but also to fight her political opponents, both at home and abroad. In the same vein, it has relentlessly tried to enlist the support of the international community, including the UN and its agencies, to assist him to fight a civil war he has failed to win because of the inherent justifications underpinning those civil wars.<sup>101</sup>

Yet research has shown that truth-telling as a peacebuilding measure presupposes a significant shift in power to create an environment in which truth, or what people presume it to be, can be told without repercussions. Renée Jeffery highlights that there is still a disjuncture between the practice of political forgiveness and how it is understood in theory.<sup>102</sup> This has implications for how truth-telling might be experienced.

Further, telling the truth might also highlight what Ketty Anyeko *et al.* call the “complexity of the victim-perpetrator identity at the community level”.<sup>103</sup> An emerging record of the full truth could also turn out to be threatening to peace. Such a record might highlight the disregard the LRA often showed for the very same population that they sought to free from oppression.<sup>104</sup>

## 6.5. Conclusion

Providing insight into how the ICC was understood by members of the LRA/M, this chapter has argued that the LRA perceived the ICC as perpetuating patterns of disenfranchisement and marginalisation that had brought about the armed conflict in the first place. The tension between

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<sup>101</sup> LRA/M Delegation in Juba, “The Political Case of the LRA/M to the Department of Political Affairs, United Nations”, Juba, 2006.

<sup>102</sup> Renée Jeffery, “Forgiveness, Amnesty and Justice: The Case of the Lord’s Resistance Army in Northern Uganda”, in *Cooperation and Conflict*, 2011, vol. 46, no. 1, 78–95.

<sup>103</sup> Ketty Anyeko, Erin Baines, Emon Komakech, Boniface Ojok, Lino Owor Ogora and Letha Victor, “‘The Cooling of Hearts’: Community Truth-Telling in Northern Uganda”, in *Human Rights Review*, 2012, vol. 13, no. 1, pp. 107–24.

<sup>104</sup> Author notes first trip of LRA delegation to Juba, 2006

peace and justice is thus not necessarily found in the sequencing of the two, but in the negative perception of the way in which justice procedures are administered. This makes committing to peace so challenging.

Purists might argue that these considerations are meaningless as the ICC's mandate is clear and was not violated. However, as much writing on the ICC has shown, the ICC does act politically – pretending this not to be the case has detrimental effects, as the LRA case has shown. A broader lesson that can be drawn from the experience of LRA actors under ICC arrest warrants is that procedures need to be seen as just and fair by everyone affected. This has implications for communication strategies that international institutions might want to pursue, as well as for the framing in which international institutions, namely the ICC, present their activities.

Within the broader debates on peace and justice, the historic case of the LRA and the ICC highlights the tensions between presumed long-term and short-term effects of different approaches to peace and justice. It is unlikely that this broader tension can be resolved either through *ad hoc* or permanent international criminal justice institutions – or indeed through abandoning both justice approaches. Instead the tension highlights that the main characteristic of both peace and justice is that they require permanent processes that cannot be captured or their goals achieved through a signed agreement or a verdict. This is increasingly the case as conflicts continue to be ongoing – without clear beginnings or ends and even in many cases without clear warring parties, victims and perpetrators. The establishment of a permanent court to deal with situations of violent conflict might have misleadingly shrouded this characteristic of contemporary conflict, suggesting instead a clarity of procedure for peacemaking that does not exist.

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## Expanding the Scope of Universal Jurisdiction through Municipal Law: From Piracy to the Crime of Aggression via the Eichmann Trial

Seta Makoto\*

### 7.1. Introduction

Under contemporary international law, the concept of universal jurisdiction has been established and used extensively in the manner defined by the Princeton Principles. According to Principle 1.1,

universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.<sup>1</sup>

Although universal jurisdiction is sometimes defined so as to include the jurisdiction exercised by international criminal tribunals,<sup>2</sup> in this chapter universal jurisdiction means exclusively the competence of states. Therefore, international bodies such as the post-Second World War Nuremberg Military Tribunals cannot exercise universal jurisdiction in the sense used

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<sup>1</sup> Stephen Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, NJ, 2001, p. 28.

<sup>2</sup> For example, Leila Nadya Sadat divides universal jurisdiction into two categories. One is “universal inter-state jurisdiction”, the competence of states; and the other is “universal international jurisdiction” which is exercised by the international community. Leila Nadya Sadat, “Redefining Universal Jurisdiction”, in *New England Law Review*, 2001, vol. 35, no. 2, p. 246.

in this chapter.<sup>3</sup> Although some commentators describe the Nuremberg Military Tribunals as American tribunals,<sup>4</sup> this is legally incorrect given the fact that their jurisdiction stemmed from the Allied Control Council.<sup>5</sup> As a result, the judgments of the Nuremberg Military Tribunals are not regarded as a precedent to exercise universal jurisdiction.

While there has not been any dispute over the origins of universal jurisdiction, that is, piracy, the current scope of the jurisdiction, specifically which crimes are subject to universal jurisdiction, is controversial. For example, in the *Arrest Warrant* case heard before the International Court of Justice ('ICJ'), the Democratic Republic of Congo contested the legality of the exercise of universal jurisdiction by Belgium. It argued that the arrest warrant against its incumbent Minister of Foreign Affairs, which alleged gross human rights offences, was issued without any grounds. Because the Democratic Republic of Congo changed its strategy and did not argue the above point in the final submission, the ICJ did not answer this question.<sup>6</sup> However, some judges in their separate opinions criticised the decision of the majority for failing to examine whether Belgium could exercise universal jurisdiction over crimes against humanity.<sup>7</sup> Moreover, as a result of the Review Conference on the Rome Statute of the International Criminal Court ('Kampala Review Conference') in 2010, universal jurisdiction over the crime of aggression has become highly controversial.

Against this background, this chapter does not aim to clarify which concrete crimes are subject to universal jurisdiction, because this question may rely on practice and not theory. Rather, it proposes to analyse how

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<sup>3</sup> Although Michael P. Scharf examines whether the Nuremberg Tribunals exercised universal jurisdiction, his definition of universal jurisdiction is different from the one used in this chapter. Michael P. Scharf, "Universal Jurisdiction and the Crime of Aggression", in *Harvard International Law Journal*, 2012, vol. 53, pp. 374–79.

<sup>4</sup> August von Knieriem, *The Nuremberg Trials*, trans. by Elizabeth D. Schmitt, Henry Regnery, Chicago, 1959, p. 100.

<sup>5</sup> See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, pp. 109–18.

<sup>6</sup> International Criminal Court ('ICJ'), *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Judgment, 14 February 2002, paras. 45–46 (<https://www.legal-tools.org/doc/c6bb20/>).

<sup>7</sup> ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, para. 16 ('Arrest Warrant case') (<https://www.legal-tools.org/doc/23d1ec/>).

municipal law works as the origins of universal jurisdiction. More specifically, the chapter delineates how municipal law can contribute to enlarging the scope of targeted crimes of universal jurisdiction under international law. To answer this question, the discussion addresses the Eichmann Trial, which is arguably the most important municipal trial and regarded as the historical origin of universal jurisdiction over gross human rights offences. Sections 7.3. and 7.4. examine the enlargement of the scope of universal jurisdiction in and after the Eichmann Trial, from both the substantive and procedural perspectives.

## 7.2. The Eichmann Trial

Adolf Eichmann was a member of German Nazi *Schutzstaffel* (SS) and played a role in the Holocaust and the Final Solution to systematically eliminate the Jewish population of Europe during the Second World War. After the war, Eichmann lived in Argentina under a false name, Ricardo Klement. However, on 11 May 1961 he was arrested and taken by Israel's intelligence service, Mossad, to Israel where eventually he faced execution.<sup>8</sup> During his criminal proceedings, Eichmann was prosecuted for offences under the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950 ('1950 Law'), including genocide, crimes against humanity and war crimes.<sup>9</sup> Before this trial, some courts of other states exercised jurisdiction over gross human rights offences on the basis of the universality principle. For example, British courts exercised universal jurisdiction over war crimes. That the Eichmann Trial was so unprecedented is due to the fact that the tribunal pursued criminal responsibility for all three crimes – genocide, crimes against humanity and war crimes – that are currently provided for in Articles 6, 7 and 8 of the ICC Statute, respectively.<sup>10</sup> Furthermore, due to this fact, the Israel's courts had to elaborate the "piracy analogy". The Jerusalem District Court sentenced Eichmann to death on 12 December 1961, and the Supreme Court of Israel denied his appeal and upheld the death sentence on 29 May 1962. In both

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<sup>8</sup> For the chronology of the trial process, see Deborah E. Lipstadt, *The Eichmann Trial*, Schocken, New York, 2011, pp. 223–33.

<sup>9</sup> Israel, Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, 4 LSI 154. See "The Zyklon B Case", in United Nations War Crimes Commission (ed.), *Law Reports of Trials of War Criminals*, vol. 1, His Majesty's Stationery Office, London 1947, p. 103.

<sup>10</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Arts. 6, 7 and 8 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

judgments, Eichmann challenged the criminal jurisdiction of Israel's courts from the perspective of international law.

### 7.2.1. Protective Principle

While the District Court of Jerusalem relied on the protective principle,<sup>11</sup> the Supreme Court merely referred to the reasoning of the District Court and did not elaborate on it.<sup>12</sup> When confirming its jurisdiction based on the protective principle, the District Court postulated that states may exercise their jurisdiction when there is a connection or link between states and the offences in question. The District Court found the connection between the offences committed by Eichmann and Israel, because the offences were directed at the Jewish people, and there was a special relationship between the Jewish people and Israel. The District Court further stressed the fact that Israel was more concerned with the offences under the 1950 Law than other states, with reference to Georg Dahm's theory that the most concerned states may exercise jurisdiction if they do not violate international law.<sup>13</sup>

Moreover, the District Court carefully responded to the argument that only an existing state may exercise jurisdiction based on the protective principle; in other words, Israel, which did not exist when Eichmann committed the offences, could not rely on the protective principle. The District Court raised two counterarguments. First, it argued that the non-existence of Israel at the time Eichmann committed the offences would be problematic if the retroactive application of the 1950 Law were prohibited. However, according to the District Court, under international law there was no rule that prohibited retroactive application at that time. Isra-

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<sup>11</sup> For the basic understanding of the protective principle, see Iain Cameron, *The Protective Principle of International Criminal Jurisdiction*, Dartmouth, Aldershot, 1994, pp. 2–3.

<sup>12</sup> Supreme Court of Israel, *Adolf Eichmann v. Attorney General*, Judgment, Criminal Appeal No. 336/61, 29 May 1962, para. 12 ('Supreme Court, Eichmann case'). In its judgment, the Supreme Court emphasised the passive personality principle as much as the protective principle. However, as far as the judgment of the District Court is literally analysed, this understanding is not correct. Dominic Lasok adopts similar view. According to him, "The Court concluded that [...] the right of the State of Israel to punish the offenders is clearly derived from the protective principle"; Dominic Lasok, "The Eichmann Trial", in *International and Comparative Law Quarterly*, 1962, vol. 11, no. 2, p. 868.

<sup>13</sup> District Court of Jerusalem, *Attorney General of the Government of Israel v. Adolf Eichmann*, Judgment, Criminal Case No. 40/61, 12 December 1961, paras. 32–35 ('District Court, Eichmann case') (<https://www.legal-tools.org/doc/aceae7/>).

el's non-existence therefore did not prevent it from applying the 1950 Law. Second, the District Court stressed the continuity of the Jewish community. Since the United Kingdom exercised its jurisdiction over Palestine on the basis of a League of Nations Mandate, Jewish people continued to constitute a Jewish community, which was then in Israel. Considering this continuity, the District Court concluded that Israel was eligible to exercise its jurisdiction over offences under the 1950 Law.<sup>14</sup>

Certainly, it might be difficult to assert that the principle of *nullum crimen sine lege, nulla poena sine lege* (the legality principle) was a part of customary international law that restricted sovereign states at that time. Moreover, some commentators, including Hans W. Baade, assert that the 1950 Law may be retroactive in procedure but not in substance; therefore, it did not violate the legality principle.<sup>15</sup> However, apart from its legality, to enhance the legitimacy of the criminal proceedings, this principle should have clearly been observed. Further, the argument on the continuity of the Jewish community is dubitable. As James Fawcett indicates, an internal legal continuity may be confirmed.<sup>16</sup> However, considering the legal personality of British Mandate for Palestine under international law and the discontinuity between the Mandate and Israel, the reasoning of the District Court is unclear. Whether the Supreme Court recognised this lack of clarity is not obvious; it basically elaborated the universality principle and did not rely heavily on the protective principle.

### 7.2.2. Universality Principle

Concerning the universality principle, the District Court merely referred to the authority of the *forum deprehensionis* and historical exercise of jurisdiction over piracy. However, it did not delineate the rationale for this principle.<sup>17</sup> On the other hand, the Supreme Court analysed this principle deeply. According to the Supreme Court, while the existence of universal jurisdiction over piracy *jus gentium* is widely agreed, the scope of this jurisdiction is in dispute. Moreover, the Supreme Court surveyed the dif-

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<sup>14</sup> *Ibid.*, paras. 36–38.

<sup>15</sup> Hans W. Baade, “The Eichmann Trial: Some Legal Aspects”, in *Duke Law Journal*, 1961, vol. 10, no. 3, pp. 412–13.

<sup>16</sup> James E.S. Fawcett, “The Eichmann Case”, in *British Year Book of International Law*, 1962, vol. 38, pp. 190–92.

<sup>17</sup> District Court, Eichmann case, paras. 12–13, see *supra* note 13.

ference among four distinct theories on the universality principle, and concluded that this principle is applied to the offences committed by Eichmann irrespective of the theory adopted.<sup>18</sup>

To support its conclusion, the Supreme Court identified the rationale for universal jurisdiction over piracy in the following way: “the interest to prevent bodily and material harm to those who sail the seas and to persons engaged in trade between nations, is a vital interest common to all civilized States”.<sup>19</sup> Therefore, if there is a vital interest of the international community, universal jurisdiction can be justified not only in the context of piracy but also in that of other crimes. Consequently, in the Supreme Court’s words:

It was not the capacity of universal jurisdiction to try and punish the person who committed “piracy” that from a practical point of view justified bestowing upon this act the character of an international crime *sui generis*, it was the agreed vital interest of the international community that made the exercise of such jurisdiction justifiable.<sup>20</sup>

In this way, the Supreme Court relied on the so-called piracy analogy when making gross human rights offences subject to universal jurisdiction. In fact, Eugene Kontorovich asserts that “the Court justified its exercise of universal jurisdiction almost exclusively on the basis of the piracy analogy”.<sup>21</sup> Thomas Mertens also indicates that the decision on the jurisdiction of Israel’s courts stressed the similarity “between ‘crimes against humanity’ and the well-known ‘crime of piracy’”.<sup>22</sup> As the piracy analogy – as reasoned by the Supreme Court – is theoretically elaborated, it prevails and is quoted in a variety of contexts. For example, Miriam Cohen argues that human trafficking should be subject to universal jurisdiction, because this crime is analogous to piracy.<sup>23</sup>

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<sup>18</sup> Supreme Court, Eichmann case, para. 12, see *supra* note 12.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Eugene Kontorovich, “The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation”, in *Harvard International Law Journal*, 2004, vol. 45, no. 1, p. 196.

<sup>22</sup> Thomas Mertens, “Memory, Politics and Law – The Eichmann Trial: Hannah Arendt’s View on the Jerusalem Court’s Competence”, in *German Law Journal*, 2005, vol. 6, p. 419.

<sup>23</sup> Miriam Cohen, “The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction”, in *Buffalo Human Rights Law Review*, 2010, vol. 16, pp. 201–35.



### **7.3. Substantive Aspect of Development of Universal Jurisdiction**

#### **7.3.1. From Piracy to Gross Human Rights Offences**

##### **7.3.1.1. Expansion of the Interest of the International Community: Advantages of the Piracy Analogy**

The piracy analogy has a theoretical defect that derives from the difference between piracy and gross human rights offences. To rely on the piracy analogy, the Supreme Court extracted the character of both piracy and gross human rights offences, and concluded that they are similar in that they violate the common interest of the international community. Currently, it is true that both are supposed to violate the interest of the international community. However, the content of interest violated by piracy and by gross human rights offences cannot be equated.

On the one hand, piracy violates the interest of free navigation on the high seas which is essential for contemporary maritime transportation. Considering the nature of this interest, it can be characterised as a pragmatic interest of the international community. It is true that some academics view piracy as so heinous that they believe it to be subject to universal jurisdiction.<sup>24</sup> However, going back to the definition of piracy currently stipulated in Article 101 of the United Nations Convention on the Law of the Sea ('UNCLOS'),<sup>25</sup> piracy is not always heinous. In the recent *Gua-*

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<sup>24</sup> For example, see Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, Leiden, 1991, p. 270.

<sup>25</sup> United Nations Convention on the Law of the Sea, 10 December 1982, Art. 101 provides:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - 1. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - 2. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

*nabara* case, Japan's first case on piracy under its Anti-Piracy Act, nobody was killed or injured. Therefore, it is difficult to regard the case as being heinous, though the Japanese courts characterised the illegal activities in the case as piracy.<sup>26</sup> Furthermore, various states have not punished pirates severely, which demonstrates that they have not regarded their crimes as grave and heinous.<sup>27</sup>

On the other hand, gross human rights offences shock the conscience of the international community; they violate the moral not pragmatic interests of the international community.<sup>28</sup> Therefore, it can be said that, irrespective of whether intentionally or unintentionally, the Eichmann Trial enlarged the scope of the interest of the international community from a pragmatic interest to a moral one, for the purpose of justifying universal jurisdiction over gross human rights offences.

### **7.3.1.2. Generating a Misunderstanding about Piracy: Disadvantages of the Piracy Analogy**

Due to the piracy analogy described above, the Supreme Court of Israel succeeded in justifying to some extent its jurisdiction over the crimes committed by Eichmann. However, this judgment led to a misunderstanding about the nature of piracy, namely that piracy is grave and heinous, because the judgment put piracy into the same category as gross human rights offences which are clearly grave and heinous. More precisely, in its judgment, the Supreme Court did not characterise piracy as grave and

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<sup>26</sup> On the *Guanabara* case, see Kentaro Furuya and Jun Tsuruta, "The *Guanabara* Case: The First Prosecution of Somali Pirates under the Japanese Piracy Act", in *International Journal of Marine and Coastal Law*, 2013, vol. 28, no. 4, pp. 719–28. See also Shuichi Furuya, Makoto Seta and Kenta Hiram, "Case Concerning a Violation of the Japanese Act on the Punishment of and Measures against Piracy", in *Waseda Bulletin of Comparative Law*, 2015, vol. 33, pp. 84–88.

<sup>27</sup> In terms of municipal law of the United States and Russia, Joshua Goodwin points out: "The United States punishes piracy under the law of nations with life in prison. [...] In Russia, piracy is punished with a prison sentence of five to ten years if there are no weapons involved"; Joshua Michael Goodwin, "Universal Jurisdiction and the Pirate: Time for an Old Couple to Part", in *Vanderbilt Journal of Transnational Law*, 2006, vol. 39, pp. 996–97.

<sup>28</sup> Similarly, Nahal Kazemi provides two characterisations for universal jurisdiction: pragmatic and moralistic; Nahal Kazemi, "Justifications for Universal Jurisdiction: Shocking the Conscience is Not Enough", in *Tulsa Law Review*, 2013, vol. 49, p. 31; see also Makoto Seta, "Book Review: Criminal Jurisdiction over Perpetrators of Ship-Source Pollution", in *Yearbook of International Environmental Law*, 2014, vol. 24, pp. 648–50.

heinous, but only referred to the heinous character of international crimes, including piracy.<sup>29</sup> In the meantime, piracy had been denounced as *hostis humani generis* since the Roman era, and sometimes it had been regarded as being heinous even before the Eichmann Trial.<sup>30</sup> That being said, heinousness in this context had the meaning of atrociousness in a general sense and did not have any special meaning of atrociousness as it relates to the character of crimes violating the moral interest of the international community. Nevertheless, due to the fact that the Eichmann Trial put piracy into the same category as gross human rights offences, this description of heinousness in both a general and a specific sense became equated.<sup>31</sup> As a result, the misunderstanding that piracy is a grave and heinous crime became established.<sup>32</sup>

If the Eichmann Trial were not highly valued as a precedent for the exercise of universal jurisdiction this misunderstanding might not have been accepted.<sup>33</sup> But the Eichmann Trial is esteemed, probably because other states and international organisations did not officially object to it for two primary reasons. First, it is politically difficult to make an objection against Israel – whose citizens comprise Jewish people who are Holocaust victims – in terms of its exercise of jurisdiction over the perpetrator of atrocities. It is especially difficult for the most interested state, Germany, where Eichmann, a German national, contributed to the Holocaust, to oppose the trial’s findings. In fact, Germany assisted Israel when

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<sup>29</sup> Supreme Court, Eichmann case, para. 11, see *supra* note 12.

<sup>30</sup> Edwin D. Dickinson, “Is the Crime of Piracy Obsolete?”, in *Harvard Law Review*, 1925, vol. 38, p. 338.

<sup>31</sup> For example, Kenneth C. Randall describes both piracy and other crimes including torture as heinous; Kenneth C. Randall, “Universal Jurisdiction under International Law”, in *Texas Law Review*, 1988, vol. 66, no. 4, pp. 791, 794, 826.

<sup>32</sup> From the perspective that “grounds of jurisdiction” are nothing but a topic of academic discussion and “do not correspond with any positive rule of international law”, as Jean d’Aspremont says, this misunderstanding is not serious at all. However, considering the fact that grounds of jurisdiction currently become a point of contention in criminal proceedings against pirates, these grounds must be rooted in the positive rules of international law; see Jean d’Aspremont, “Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction”, in *Israel Law Review*, 2010, vol. 43, no. 2, p. 311.

<sup>33</sup> Actually, some authors argue that the Eichmann Trial cannot be a precedent because it is too unique. See Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed., Columbia University Press, New York, 1979, p. 276.

it examined the witnesses on German territory.<sup>34</sup> Second, as shown above, since bases of jurisdiction other than the universality principle, such as the protective principle, are invoked, the objection against the universality principle itself is not vital even if those objections were made against this trial. Besides, in academic theory, the Eichmann Trial is introduced as a precedent to exercise universal jurisdiction over gross human rights offences. For instance, as Mitsue Inazumi notes: “The Eichmann Trial is considered to be the most prominent precedent for universal jurisdiction over genocide”.<sup>35</sup>

This misunderstanding about the character of piracy was strengthened in the drafting history of Vienna Convention on the Law of Treaties by the International Law Commission (‘ILC’). In this history, Mustafa Kamil Yasseen, a member of the ILC, argued that no two states can legally make a bilateral treaty to permit piracy in order to demonstrate the existence of *jus cogens*.<sup>36</sup> Accepting this argument, some members of the ILC argued that “a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide” is against the rules of *jus cogens*.<sup>37</sup> It may be true that a treaty that authorises piracy cannot be in conformity with contemporary international law, as Yasseen indicated. In this regard, the conclusion that the authorisation of piracy is inconsistent with *jus cogens* seems appropriate. On the other hand, the ILC did not clarify the reason for the authorisation of piracy being regarded as such at all. In the case of genocide, since its rationale that universal jurisdiction stems from gravity and heinousness, there is no doubt that this rationale is linked to the norm of *jus cogens*.<sup>38</sup> However, considering the

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<sup>34</sup> Georg Schwarzenberger, *International Law and Order*, Stevens, London, 1971, p. 242; Schwarzenberger also indicates that “by acquiescence or approbation, Germany waived claim in tort she might have had against Israel”.

<sup>35</sup> Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, Antwerp, 2005, p. 63.

<sup>36</sup> International Law Commission, *Yearbook of the International Law Commission 1966*, vol. I, part I: *Summary Records of the Eighteenth Session, 4 May–19 July 1966*, United Nations, New York, 1967, p. 38.

<sup>37</sup> International Law Commission, *Yearbook of the International Law Commission 1966*, vol. II: *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly*, United Nations, New York, 1967, p. 248.

<sup>38</sup> Christopher Joyner elaborates the relationship between *jus cogens* and the universality principle; Christopher C. Joyner, “Arresting Impunity: The Case of Universal Jurisdiction

nature of piracy, its character is not different from ordinary crimes such as murder or armed robbery. Hence, the reason for piracy being connected to *jus cogens* is unclear.

Since the rationale for *jus cogens* does not fall within the scope of this chapter, it is not fully considered here.<sup>39</sup> However, based on its definition, piracy is only a form of murder or armed robbery on the high seas and does not have a grave or heinous character at all. Given this fact, the rationale behind the authorisation of piracy being considered contrary to *jus cogens* should be explained in a different manner to the case of genocide. In fact, the ICL, some members of which put piracy into the same category as genocide in the context of *jus cogens*, excludes the authorisation of piracy from the category of *jus cogens* when drafting articles on responsibility of states for internationally wrongful acts, while putting genocide or slavery into this category.<sup>40</sup> Furthermore, M. Cherif Bassiouni lists two requirements for a norm to be *jus cogens*: first, threatening the peace and security of humankind, and second, shocking the conscience of humanity. According to him, although at one time piracy might have satisfied these two requirements, currently it does neither of them.<sup>41</sup>

Despite the fact that piracy is not different from ordinary crimes with regard to its character, piracy has been misidentified as a grave or heinous crime because such misidentification is essential to justify the

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in Bringing War Criminals to Accountability”, in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 169. See also Michel Cosnard, “La compétence universelle en matière pénale” [Universal Jurisdiction in Criminal Matters], in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff, Leiden, 2006, p. 358; Antonio Cassese, “Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?” [Is There an Insurmountable Conflict between Sovereignty and International Criminal Justice?], in Antonio Cassese and Mireille Delmas-Marty (eds.), *Crimes internationaux et juridictions internationales* [International Crimes and International Jurisdictions], Presse Universitaires de France, Paris, 2002, p. 20.

<sup>39</sup> Alexander Orakhelashvili researched and published a monograph wholly on *jus cogens* under international law. According to him, a peremptory norm must have “a moral or humanitarian connotation”. Based on this understanding, he excludes piracy from examples of *jus cogens*; Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2006, pp. 50–66.

<sup>40</sup> International Law Commission, *Yearbook of the International Law Commission 2001*, vol. II, part II: *Report of the Commission to the General Assembly on the Work of its Fifty-third Session*, United Nations, New York, 2007, p. 85.

<sup>41</sup> M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligation Erga Omnes*”, in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, pp. 69–70.

universal jurisdiction over gross human rights offences, as in the Eichmann Trial. At the time of the trial, when there were no state practices and *opinio juris* supporting such universal jurisdiction, it was difficult to confirm the establishment of customary international law that allowed states to exercise that jurisdiction. Hence, the piracy analogy was essential and played a vital role to justify the Israeli exercise of universal jurisdiction. As a result of that analogy, piracy had to be put into the same category as genocide.<sup>42</sup> Therefore, if this misidentification of piracy is still essential to support the exercise of universal jurisdiction over gross human rights offences, that misidentification still has a *raison d'être*.

However, from the perspective of both state practices and the theoretical aspect, universal jurisdiction over gross human rights offences is currently explained and justified without relying on the piracy analogy. In fact, in its Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, the International Law Association argues that universal jurisdiction over gross human rights offences is widely accepted under customary international law.<sup>43</sup> Moreover, in some reports, such as the AU-EU Expert Report on the Principle of Universal Jurisdiction<sup>44</sup> and the Report of the UN Secretary-General on the Scope and Application of the Principle of Universal Jurisdiction,<sup>45</sup> it is confirmed that most states accept universal jurisdiction over gross human rights offences.

If the piracy analogy is not needed to justify universal jurisdiction over gross human rights offences, there is no reason to maintain this analogy, which mislabels the character of piracy as being grave or heinous. Rather, considering the fact that recently piracy has been widely prosecut-

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<sup>42</sup> Kelley A. Gable evaluates this piracy analogy to support universal jurisdiction over gross human rights offences; Kelley A. Gable, "Cyber-Apocalypse Now: Securing the Internet against Cyberterrorism and Using Universal Jurisdiction as a Deterrent", in *Vanderbilt Journal of Transnational Law*, 2010, vol. 43, no. 1, pp. 109–10.

<sup>43</sup> See International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, London, 2000, pp. 5–7.

<sup>44</sup> Council of Europe, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Brussels, 16 April 2009, 8672/1/09 REV.1, para. 9.

<sup>45</sup> United Nations General Assembly, The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments, 29 July 2010, UN doc. A/65/181, para. 28 ('Secretary General's Report').

ed and punished based on the universality principle,<sup>46</sup> and that jurisdiction is a point of contention in most criminal proceedings,<sup>47</sup> piracy and universal jurisdiction over it should be evaluated as objectively as possible. Furthermore, if piracy is objectively evaluated, it is just an ordinary crime and neither grave nor heinous.

### 7.3.2. From Gross Human Rights Offences to the Crime of Aggression

After the Kampala Review Conference of the Rome Statute, held in 2010, controversy arose about whether the crime of aggression is subject to universal jurisdiction. This is because at that conference, the Kampala Amendment, which defines the crime of aggression and provides individual responsibility over this crime, was adopted.<sup>48</sup> Against this back-

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<sup>46</sup> The report submitted by the Secretary-General summarised the criminal proceedings over piracy in UN member states. See United Nations Security Council, Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region, 20 January 2012, UN doc. S/2012/50, p. 5.

<sup>47</sup> Furuya *et al.*, 2015, pp. 85–86, see *supra* note 26. Furthermore, universal jurisdiction over suspects who facilitate piracy from land is currently controversial. See Jon Bellish, “Breaking News from 1932: Pirate Facilitators Must Be Physically Present on the High Seas”, in *EJIL:Talk!* 19 September 2012.

<sup>48</sup> See International Criminal Court, *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010: Official Records*, Secretariat, Assembly of States Parties, International Criminal Court, The Hague, 2010. Concerning the details of the Kampala Conference, see Claus Kreß and Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1179–1217. According to ICC Statute, Art. 8bis, see *supra* note 10, the crime of aggression is defined as follows:

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however tem-

ground, some ambitious states have tried to prosecute and punish the perpetrators of the crime of aggression based on the universality principle.

In terms of state jurisdiction, two paragraphs of the Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression (‘Understandings’) were adopted at the Kampala Review Conference. According to paragraph 4 of the Understandings:

It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.<sup>49</sup>

Moreover, paragraph 5 states: “It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic

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- porary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
  - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
  - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
  - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
  - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
  - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

<sup>49</sup> ICC, Review Conference of the Rome Statute, Conference Room Paper on the Crime of Aggression. Annex III: Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 10 June 2010, RC/8 (‘Understandings’) (<https://www.legal-tools.org/doc/100228/>).



jurisdiction with respect to an act of aggression committed by another State”.<sup>50</sup>

Interpreting these two sentences together, it can be concluded that whether the crime of aggression can be subject to universal jurisdiction is not regulated by those Understandings. Moreover, considering the lack of a treaty that provides universal jurisdiction over the crime of aggression, states must rely on rules of customary international law while exercising such universal jurisdiction.<sup>51</sup> At this point, most commentators are not of the view that universal jurisdiction over the crime of aggression is accepted under customary international law. For example, Dapo Akande notes: “There is no rule (and indeed no precedent) which permits universal domestic jurisdiction for aggression”.<sup>52</sup> Similarly, Beth Van Schaack argues: “current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression, *a fortiori* pursuant to universal jurisdiction”.<sup>53</sup> In a more modest expression, Carrie McDougall suggests: “at this state it can only be concluded that an exercise of universal jurisdiction over the crime of aggression would be controversial”.<sup>54</sup>

States stipulate universal jurisdiction over the crime of aggression. According to a survey of the UN General Assembly, Azerbaijan, Belarus and Bulgaria have established universal jurisdiction over the crimes against peace,<sup>55</sup> and moreover, Estonia and Lithuania do so over the crime of aggression.<sup>56</sup> Furthermore, though Moldova does not use the term “aggression”, it stipulates universal jurisdiction over the crime to plan, pre-

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<sup>50</sup> *Ibid.*

<sup>51</sup> Meagan Wong argues in a similar manner; Meagan Wong, “Germany and Botswana Ratify the Kampala Amendments on the Crime of Aggression: 7 ratifications, 23 more ratifications to go!”, *EJIL:Talk!*, 10 June 2013.

<sup>52</sup> Dapo Akande, “Prosecuting Aggression, the Consent Problem and the Role of the Security Council”, Working Paper, Oxford Institute for Ethics, Law and Armed Conflict, May 2010.

<sup>53</sup> Beth Van Schaack, “*Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 1, p. 144.

<sup>54</sup> Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2013, p. 320.

<sup>55</sup> Secretary General’s Report, p. 29. see *supra* note 45.

<sup>56</sup> United Nations General Assembly, The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments, 20 June 2011, UN doc. A/66/93, p. 33.

pare, unleash or wage war, if the criminal proceeding against the perpetrator in question has not been convicted in a foreign state.<sup>57</sup>

As previously noted, it is not the aim here to examine whether the crime of aggression is subject to universal jurisdiction. However, that legislation is expected to compose state practices with *opinio juris* sufficient to establish the rules of customary international law that allow states to exercise universal jurisdiction over the crime of aggression in the future. This is because the number of states ratifying the Kampala Amendment is increasing, and some of them legislate and will legislate universal jurisdiction over the crime of aggression. Hence, it is important to deliberate in advance on the rationale for such jurisdiction.

Generally speaking, the rationale for universal jurisdiction is a violation of the interest of the international community which is divided into two categories: pragmatic interest and moral interest. The crime of aggression would probably violate the latter type of interest. Crimes such as genocide and crimes against humanity that are regarded as violating moral interest are strongly related to the violation of human rights, including the right to life. Therefore, if the crime of aggression always accompanies human rights violations, it is likely to violate the moral interest of the international community. From this perspective, the right to peace, which is intensely debated, deserves detailed consideration, because the crime of aggression would necessarily violate this right.<sup>58</sup> Unlike some human rights, such as the right to life, the concept of the right to peace has not been established, and its nature is still vague.<sup>59</sup> Although this right is provided for in the Draft Declaration on the Right to Peace which was written by the United Nations Human Rights Council Advisory Committee, most states are not content with the Declaration. For example, the United States criticises the declaration as covering “many issues that are, at best, unre-

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<sup>57</sup> Criminal Code of the Republic of Moldova, Law No. 985-XV, 18 April 2002, Arts. 11(3) and 139 (<https://www.legal-tools.org/doc/4dbae0/>).

<sup>58</sup> According to William A. Schabas, the right to peace and the crime of aggression can work together for the sake of *jus ad bellum* which has not been traditionally articulated in the context of international human rights law as well as international criminal law. William A. Schabas, “Freedom from Fear and the Human Right to Peace”, in David Keane and Yvonne McDermott (eds.), *The Challenge of Human Rights: Past, Present and Future*, Edward Elgar, Cheltenham, 2012, pp. 36–51.

<sup>59</sup> Regarding the historical evolution of the right to peace, see Cecilia M. Bailliet, “Untraditional Approaches to Law: Teaching the International Law of Peace”, in *Santa Clara Journal of International Law*, 2014, vol. 12, no. 2, pp. 5–18.

lated to the cause of peace and, at worst, divisive and detrimental to efforts to achieve peace”.<sup>60</sup> In addition, some commentators argue that the draft provides not only *lex lata* but also *lex ferenda*.<sup>61</sup>

Nevertheless, based on this declaration, the Human Rights Council adopted a resolution on Promotion of the Right to Peace and decided “to establish an open-ended intergovernmental working group with the mandate of progressively negotiating a draft United Nations declaration on the right to peace”.<sup>62</sup> Therefore, as Cecilia M. Bailliet correctly indicates, it can be said that the declaration “is still subject to evaluation at present”.<sup>63</sup> Given the current enigmatic status of the right to peace, it is difficult to argue that the crime of aggression always violates moral interest by violating the right to peace. Yet, in future this argument may be tenable.

In theory, it is true that the crime of aggression itself does not necessarily infringe on any other human rights other than the right to peace, or cause harm to the life or body of human beings.<sup>64</sup> To illustrate, if a president of state A plans the bombardment of the territory of state B, even if the bombardment is never realised, this president can be regarded as committing the crime of aggression, in accordance with the definition provided by Article 8*bis* of the ICC Statute.<sup>65</sup> In this sense, it can be said that the character of the crime of aggression is different from gross human rights offences. However, considering the reason for emergence of the concept of aggression, the crime of aggression can be linked to a violation of the moral interest, and, in other words, it infringes on human rights and causes harm to a human life or body. This is because the aggression was originally prohibited for the purpose of eliminating war and armed con-

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<sup>60</sup> United States Mission to the United Nations, U.S. Explanation of Vote: Resolution on Promotion of the Right to Peace Sponsored by Cuba, Human Rights Council, 20th Session, 29 June 2012, Geneva.

<sup>61</sup> See Cecilia M. Bailliet and Kjetil Mujezinović Larsen, “Nordic Expert Consultation on the Right to Peace: Summary and Recommendations”, in *Nordic Journal of Human Rights*, 2013, vol. 31, no. 2, p. 163.

<sup>62</sup> United Nations General Assembly, Promotion of the Right to Peace, resolution adopted by the Human Rights Council, 17 July 2012, A/HRC/RES/20/15, para. 1.

<sup>63</sup> Bailliet, 2014, p. 18, see *supra* note 59.

<sup>64</sup> Understandings, see *supra* note 49.

<sup>65</sup> In terms of the individual responsibility for planning and preparation of aggression, see Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, London, 2013, pp. 201–2.

flict, which inevitably infringe human rights and cause damage to human beings.<sup>66</sup>

Moreover, apart from the interest of the international community under international law, the legal interest of municipal criminal law (*Rechtsgut*) must be considered, especially if a state tries to criminalise and punish the perpetrator of the crime of aggression by its own municipal criminal system. Of course, each municipal law should have its own justification consistent with its whole legal system. Therefore, each justification can vary from state to state. However, if a state exercises its jurisdiction over the crime based on the universality principle, some kind of harmonisation would likely be expected.

#### **7.4. Procedural Aspect of Development of Universal Jurisdiction**

##### **7.4.1. *Ex injuria jus non oritur* under International Law**

Although the Eichmann Trial is theoretically elaborated and no other states oppose it, this trial could not have become a precedent if the principle *ex injuria jus non oritur* were strictly applied.<sup>67</sup> Unlike the laws in other fields, under international law whether the principle *ex injuria jus non oritur* is established is controversial. According to Hans Kelsen, this principle is applied only partially or exceptionally under international law.<sup>68</sup> For example, it is well known that under traditional international law, war started against *jus ad bellum* sometimes created new rights and obligations.<sup>69</sup> Moreover, it is often said that unilateral measures would create new law. Michael Byers describes the way in which municipal legislation that is not firmly based on the existing international law develops,

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<sup>66</sup> On the emergence of the concept of aggression and its prohibition, see Kirsten Sellars, *Crimes against Peace and International Law*, Cambridge University Press, Cambridge, 2013, pp. 1–112.

<sup>67</sup> *Ex injuria jus non oritur* is translated as “a right does not arise from wrongdoing”; Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, Oxford University Press, Oxford, 2008, p. 94.

<sup>68</sup> For example, Hans Kelsen states: “There are, however, serious restrictions to the operation of the principle *ex injuria jus non oritur* in international law”; Hans Kelsen, *Principles of International Law*, 2nd ed., ed. by Robert W. Tucker, Holt, Rinehart and Winston, New York, 1967, p. 88.

<sup>69</sup> See Robert Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, Manchester, 1961, pp. 52–55.

maintains or changes customary rules.<sup>70</sup> Capturing these aspects of international law, Rosalyn Higgins notes: “One of the special characteristics of international law is that violations of law can lead to the formation of new law”.<sup>71</sup>

Meanwhile, in his report on the law of treaties made in 1953 for the International Law Commission, Hersch Lauterpacht argues: “That principle – *ex injuria jus non oritur* – recognised by the doctrine of international law and by international tribunal, including the highest international tribunal, is in itself a general principle of law”.<sup>72</sup> Further, G.J.H. van Hoof criticises the idea that customary international law is changed by practices which deviate from this law. He is of the view that “[i]t must be quite an extraordinary system of law which incorporates as its main, if not the only, vehicle for change the violation of its own provisions”.<sup>73</sup> According to van Hoof, accepting such a position would support John Austin’s conclusion that international law is not really law.<sup>74</sup>

Moreover, the ICJ seems to regard *ex injuria jus non oritur* as a principle of international law. In its judgment on the *Gabčíkovo-Nagymaros Project* case, the ICJ explained that its finding does not contradict with this principle.<sup>75</sup> Furthermore, in its advisory opinion on the *Palestinian Wall* case, the ICJ denied the traditional argument as shown above that the war against *jus ad bellum* would create new rights as a result of prohibiting the threat or use of force by Article 2(4) of the UN Charter.<sup>76</sup> Although the ICJ itself does not clarify the reason for its denial,

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<sup>70</sup> Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, Cambridge, 1999, pp. 90–101.

<sup>71</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, Oxford University Press, Oxford, 1994, p. 19.

<sup>72</sup> International Law Commission, *Yearbook of the International Law Commission 1953*, vol. II: *Summary Records of the Fifth Session, including the report of the Commission to the General Assembly*, United Nations, New York, 1959, p. 148.

<sup>73</sup> G.J.H. van Hoof, *Rethinking the Sources of International Law*, Kluwer, Deventer, 1983, p. 99.

<sup>74</sup> *Ibid.*

<sup>75</sup> The ICJ stated: “The principle *ex injuria jus non oritur* is sustained by the Court’s finding”; ICJ, *Hungary v. Slovakia (Case concerning the Gabčíkovo–Nagymaros Project)*, Judgment, 25 September 1997, p. 7, para. 133 (<https://www.legal-tools.org/doc/5c99a1/>).

<sup>76</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, p. 136, para. 87 (<https://www.legal-tools.org/doc/e5231b/>).

according to Judge Elaraby, this conclusion derives from the principle *ex injuria jus non oritur*, which is “well recognized in international law”.<sup>77</sup>

Even given the ICJ’s position on this, considering the actual circumstances of international law, it is still not clear whether *ex injuria jus non oritur* is firmly established and entirely applied under international law. However, for the purpose of making international law more legal, the principle should be established or, at the very least, be on its way to being established. Meanwhile, customary international law is already required to change rapidly enough to keep up with a changing society. Therefore, international law scholars are currently expected to create the methodology to allow customary international law to develop and change in harmony with the principle *ex injuria jus non oritur*. To put it differently, from the perspective of international relations, it can be said that international lawyers are required to take a balance between stability and change.<sup>78</sup>

Here the distinction of the types of jurisdiction is worth noting. Basically, under international law, jurisdiction is categorised into three types according to its function: legislative jurisdiction, executive jurisdiction and judicial jurisdiction.<sup>79</sup> The latter two types of jurisdiction are collectively referred to as enforcement jurisdiction.<sup>80</sup> In the Eichmann Trial, Israel exercised not only legislative jurisdiction but also both executive and judicial jurisdiction. Therefore, a legal dispute arose and Argentina as well as Eichmann himself argued against this exercise of jurisdiction. However, it must be noted that the lawfulness of the exercise of jurisdiction by Israel was not reviewed by any international judicial organ such as the ICJ. A determination by the ICJ that Israel illegally exercised its jurisdiction would greatly change the import and impact of the Eichmann Trial.

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<sup>77</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Elaraby, 9 July 2004, para. 3.1 (<https://www.legal-tools.org/doc/912eff/>).

<sup>78</sup> See Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, in *International Organization*, 1998, vol. 52, no. 4, p. 894.

<sup>79</sup> Michael Akehurst, “Jurisdiction in International Law”, in *British Year Book of International Law*, 1972, vol. 46, p. 145.

<sup>80</sup> Frederick Alexander Mann, “The Doctrine of Jurisdiction in International Law”, in *Recueils des cours*, 1964, vol. 111, pp. 127–29.

#### 7.4.2. The Role of International Courts: Making Law or Stunting its Development?

So far the contribution of international courts to the making and development of international law has been emphasised and favourably accepted. The authors of *The Making of International Law*, Alan Boyle and Christine Chinkin, allocate one chapter to “Law-Making by International Courts and Tribunals”. There, they conclude that international courts and tribunals “are also part of the process for making” the law.<sup>81</sup> Some judges of the ICJ also point out that the clarification of international law by the ICJ has developed international law.<sup>82</sup>

In the meantime, the development of international law would be stunted by international courts and tribunals because of the impact of their judgments. For example, the judgment of *Jurisdictional Immunities of the State* rendered by the ICJ might halt the development of the law of state immunities. In this case, the ICJ concludes that under contemporary international law, the violation of *jus cogens* does not affect the jurisdictional immunities enjoyed by Germany, from both perspectives of theory and state practice.<sup>83</sup> This conclusion is generally supported by commentators.<sup>84</sup> However, aside from whether this conclusion of the judgment is legally correct, it leads to a situation in which individuals are deprived of the opportunities to obtain judicial relief before national courts. In this vein, Judge Cançado Trindade states:

As to national legislations, pieces of sparse legislation in a handful of States, in my view, cannot withhold the lifting of

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<sup>81</sup> Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press, Oxford, 2007, p. 310.

<sup>82</sup> For example, Hersch Lauterpacht says “the Court has made a tangible contribution to the development and clarification of the rules and principles of international law”. See Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens, London, 1958, p. 5; Higgins, 1994, p. 202, see *supra* note 71.

<sup>83</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, p. 99, para. 97 (‘Jurisdictional Immunities case’) (<https://www.legal-tools.org/doc/674187/>).

<sup>84</sup> For examples, see Markus Krajewski and Christopher Singer, “Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights”, in *Max Planck Yearbook of United Nations Law*, 2012, vol. 16, p. 24; François Boudreault, “Identifying Conflicts of Norms: The ICJ Approach in the Case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 4, pp. 1011–12.

State immunity in cases of grave violations of human rights and of international humanitarian law. Such positivist exercises are leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of the kind so widespread in the legal profession, such as, *inter alia*, the counterpositions of “primary” to “secondary” rules, or of “procedural” to “substantive” rules, or of obligations of “conduct” to those of “result”.<sup>85</sup>

Actually, the dispute between Italy and Germany, which has now become a conflict between Italy and the ICJ, has not yet been settled. Placing emphasis on the aspect of human rights, especially the right to judicial protection that Article 24 of the Italian Constitution provides, the Italian Constitutional Court denies accepting what the ICJ ruled.<sup>86</sup> Moreover, the Constitutional Court stresses the role of domestic courts to evolve the norm of immunity under customary international law and asserts that the present judgment “may also contribute to a desirable – and desired by many – evolution of international law itself”.<sup>87</sup> However, it is now difficult for most states to lift the immunity of other states with a view to pursuing the responsibility for violating *jus cogens*, mainly because of the judgment delivered by the ICJ.<sup>88</sup> In addition, the judgment also makes it difficult for the ICJ itself to make a different conclusion in similar cases.<sup>89</sup>

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<sup>85</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Dissenting Opinion of Judge Cançado Trindade, 6 July 2010, para. 294 (<https://www.legal-tools.org/doc/502924/>).

<sup>86</sup> Italy, Constitutional Court, Judgment No. 238/2014, 22 October 2014.

<sup>87</sup> *Ibid.*, para. 3.3. Roger O’Keefe argues: “The role of domestic courts as agents of development of the international law of jurisdiction is by no means negligible”. Roger O’Keefe, “Domestic Courts as Agents of Development of the International Law of Jurisdiction”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, p. 558.

<sup>88</sup> Regarding an example of the disadvantages for states that violate the immunity of other states, Robert Kolb raises the possibility that “Italy would have to compensate Germany for all the sums of money to which Germany would be condemned as against the war crimes-claimants, and also for all expenditure”. Robert Kolb, “The Relationship between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court”, in *Questions of International Law*, 2014, p. 14.

<sup>89</sup> See Pasquale De Sena, “The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative



Canada also recognised the negative impact of the judgment of the international courts. For instance, Canada legislates and operates both the Arctic Waters Pollution Prevention Act ('AWPPA') and the Coastal Fisheries Protection Act ('CFPA'), which led to the adoption of Article 234 of the UNCLOS and the conclusion of the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks respectively.<sup>90</sup> When legislating the AWPPA, in order to avoid being reviewed by the ICJ Canada modified its reservations in its declaration to accept the compulsory jurisdiction of the ICJ. For the purpose of justifying that modification, Prime Minister Pierre Trudeau indicated that there was a "very grave risk that the world court would find itself obliged to find that coastal states cannot take steps to prevent pollution".<sup>91</sup> The strategy to modify its reservations in declaration to accept the compulsory jurisdiction of the ICJ was also taken when legislating CFPA.<sup>92</sup>

From this point of view, the judicial strategy of the Democratic Republic of Congo and the decision of the ICJ in the *Arrest Warrant* case should be highly valued not only for the states involved but also from the perspective of the development of international law. As previously explained, in the course of the proceeding, the Democratic Republic of Congo changed its strategy and did not challenge the legality of Belgium's exercise of universal jurisdiction. As some judges observed, the question of whether Belgium had the authority to issue an arrest warrant must be answered before answering whether the arrest warrant in question breached the immunity enjoyed by the Democratic Republic of Congo.<sup>93</sup> Therefore, the Court might and could have answered the question of the legality of the exercise of universal jurisdiction. As shown above, the customary international law that allows a state to exercise universal jurisdiction over gross human rights offences is now strongly supported. Howev-

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Analysis under International Law", in *Questions of International Law*, 16 December 2014, p. 28.

<sup>90</sup> Byers, 1999, pp. 90–101, see *supra* note 70.

<sup>91</sup> Pierre E. Trudeau, "Canadian Prime Minister's Remarks on the Proposed Legislation", in *International Legal Materials*, 1970, vol. 9, pp. 600–4; Richard B. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea", in *Michigan Law Review*, 1970, vol. 69, no. 1, p. 18.

<sup>92</sup> International Court of Justice, *Yearbook 1994–1995*, No. 49, International Court of Justice, The Hague, 1995, p. 85.

<sup>93</sup> Arrest Warrant case, see *supra* note 7.

er, it is not clear whether this customary international law existed in 2002 when the ICJ made its judgment in the *Arrest Warrant* case. If the ICJ had said there was no such law, the current situation might be different.

### 7.4.3. Municipal Legislation as a Practice to Change Customary International Law

If a state applies its law to the concrete case based on the universality principle, as Israel did in the Eichmann Trial and Belgium did in the *Arrest Warrant* case, an interstate conflict would occur. Recently, the exercise of universal jurisdiction, especially so-called exercise *in absentia*, is one reason for interstate conflicts. For example, when Spain issued an arrest warrant based on the universality principle, alleging that former Chinese leaders committed human rights abuses in Tibet, China naturally contested it. Partly because of this contestation, Spain is considering changing its policy to exercise universal jurisdiction.<sup>94</sup>

In this context, it must be noted that recently the number of judgments delivered by international courts and tribunals has been increasing. For instance, as frequently pointed out, the ICJ deals with many more cases than it usually dealt with in the past. As Mariko Kawano says: “It is the indisputable phenomenon that the Court has become much busier since the 1980s and, in particular, since the turn of the century”.<sup>95</sup> Considering the fact that international courts and tribunals can stunt the development of international law, states are required to refrain from exercising universal jurisdiction. Of course, there may be some powerful states that do not mind what international courts and tribunals say. However, recently, major powers such as the United States and Russia have shown a tendency to follow what courts or tribunals say even when they do not fully comply with the findings of those courts.<sup>96</sup> A situation could arise in

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<sup>94</sup> For the current discussion on universal jurisdiction in Spain, see Soeren Kern, “Spain Re-thinks Universal Jurisdiction”, Gatestone Institute, 31 January 2014 (<http://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction>).

<sup>95</sup> Mariko Kawano, “The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes”, in *Recueils des cours*, 2011, vol. 346, p. 35.

<sup>96</sup> As for the violation of the Vienna Convention on Consular Relations, the United States tried to comply with the judgment rendered by the ICJ especially after the *Avena* case. See A. Peyro Llopis, “Après *Avena*: l’exécution par les États-Unis de l’arrêt de la Cour internationale de Justice” [After *Avena*: Execution by the United States of the Judgment of the International Court of Justice], in *Annuaire français de droit international*, 2005, vol. 51, no. 1, pp. 140–61. Also Russia does not fully comply with the order of the International Tri-

which no states ever exercise universal jurisdiction, which might be contrary to the existing rules of customary international law, for fear of being labelled a violator of international law.

If so, then, how will customary international law on universal jurisdiction evolve? If the customary international law *status quo* is the ideal and does not need reform, this situation might be fine. However, such law does not appear to exist anywhere in the world. From one side of the argument, customary international law is expected to allow states to exercise universal jurisdiction over some new crimes, such as the crime of aggression or human trafficking.<sup>97</sup>

One proposed method to develop customary international law on universal jurisdiction is in a manner that mainly relies on legislative jurisdiction and not enforcement jurisdiction. In other words, states are expected to make a new law on universal jurisdiction on some specific crimes and never enforce this new law. Only after state practices of similar legislation accumulate sufficiently to persuade international courts and tribunals to recognise the emergence of new rules of customary international law that authorise states to exercise universal jurisdiction over those crimes, then states ought to fully enforce that legislation. Some commentators might challenge the qualification of legislation itself as state practices that lead to the creation of customary international law.<sup>98</sup> However, as confirmed in the *State Immunity* case before the ICJ, under contemporary international law the legislating practices are a part of state practices that establish customary international law.<sup>99</sup>

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bunal for the Law of the Sea, but released all seafarers of MV *Arctic Sunrise*, who allegedly violated the Russian Criminal Code. See “Updates from the Arctic Sunrise Activists”, Greenpeace International, 1 August 2014 (<http://www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/>).

<sup>97</sup> From the other side of the argument, customary international law should not allow states to broadly exercise universal jurisdiction which would infringe other states’ sovereignty.

<sup>98</sup> Van Hoof, 1983, p. 110, see *supra* note 73. See also Michael Akehurst, “Custom as a Source of International Law”, in *British Year Book of International Law*, 1974, vol. 47, no. 1, pp. 1–11.

<sup>99</sup> *Jurisdictional Immunities* case, p. 28, para. 56, see *supra* note 83. O’Keefe indicates: “For expression or reflections of a state’s belief as to the content of international jurisdictional rules, it is by and large to that state’s legislature that one should look”; O’Keefe, 2013, p. 541, see *supra* note 87.

Furthermore, under municipal laws the legality of that policy might be doubted, because generally prosecutors have to prosecute conduct as defined as crimes by the legislation and have little discretion to refrain from exercising this prosecuting power. Therefore, even if no problems arise in the context of international law, this policy might be problematic in the sphere of municipal law. On this point, the recent French legislation on the Law on the Fight against Piracy and the Exercise the Police Powers of the State at Sea deserves attention.<sup>100</sup> This new law was adopted to prosecute piracy which does not have any nexus to France.<sup>101</sup> According to Article 1 of the new legislation, “*lorsque le droit international l’autorise*” (when international law authorises) some provisions of the French Criminal Codes are applied to piracy which is committed on the territorial waters of other states. As a matter of principle, states cannot prosecute the crimes that occur within the territorial waters of the other states. However, where the Security Council authorises or coastal states give their consent, non-coastal states also may prosecute these crimes. This new legislation is designed to respond to these circumstances.

Unlike authorisation by the Security Council and consent of coastal states, it is not clearly confirmed when the new rules of customary international law on universal jurisdiction have been established. However, by embedding the condition of “when international law authorises” into its municipal law, states can legislate universal jurisdiction but not exercise it in accordance with municipal law, unless that exercise would be consistent with international law. In this context, not only legislators and judges but also prosecutors are expected to contribute significantly to the development of international law.

It might be doubted that the ICJ would allow the states that do not have any damage from an internationally wrongful act to bring the case before it. Furthermore, in such cases, the policy as delineated above would not work. Certainly, the ICJ seems to change the precedent of the *South West Africa* case which denied *locus standi* of non-injured states, and to accept this standing. In the case relating to the *Obligation to Pros-*

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<sup>100</sup> Republic of France, Loi no. 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l’exercice des pouvoirs de police de l’État en mer [Law No. 2011-13 of 5 January 2011 on the Fight against Piracy and the Exercise the Police Powers of the State at Sea].

<sup>101</sup> United Nations Security Council, Note verbale dated 15 October 2009 from the Permanent Mission of France to the United Nations addressed to the President of the Security Council, 22 October 2009, UN doc. S/2009/549, p. 6.

*ecute or Extradite*, the ICJ manifestly recognised the concept of “obligations *erga omnes partes*” and accepted the *locus standi* of Belgium without referring to whether it was injured.<sup>102</sup> Moreover, in the *Antarctic Whaling* case, the ICJ allowed Australia, which had not proved to have suffered from the violation of individual interest, to bring the case before the Court.<sup>103</sup> However, as elaborated in the *Obligation to Prosecute or Extradite*, the *locus standi* of non-injured states seems to be limited to the case concerning the violation of multilateral treaties that they ratify. Therefore, without any relevant multilateral treaties, it is unrealistic that the ICJ will deal with the case of legislation based on the universality principle and judge that legislation as illegal.

### 7.5. Conclusion

At present, international criminal tribunals do not have any police power. In this regard, Antonio Cassese describes the International Criminal Tribunal for the former Yugoslavia as “a giant without arms and legs”.<sup>104</sup> Moreover, it has become well known that generally international criminal tribunals are not cost effective.<sup>105</sup> Against this background, with a view to enforcing international criminal law more effectively, municipal courts are expected to share a burden and exercise their jurisdiction. When doing so, most courts are required to delineate the reason why they can exercise jurisdiction, especially if they rely on the universality principle.<sup>106</sup> As this

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<sup>102</sup> ICJ, *Belgium v. Senegal (Questions relating to the Obligation to Prosecute or Extradite)*, Judgment, 20 July 2012, paras. 68–70 (<https://www.legal-tools.org/doc/18972d/>).

<sup>103</sup> On this point, see Hironobu Sakai, “After the *Whaling* Case: Its Lessons from a Japanese Perspective”, in Malgosia Fitzmaurice (ed.), *Whaling in the Antarctic: The Judgement and Its Implications*, Brill, Leiden, 2015 (forthcoming), pp. 2–3.

<sup>104</sup> Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, in *European Journal of International Law*, 1998, vol. 9, no. 1, p. 13.

<sup>105</sup> See David Wippman, “The Costs of International Justice”, in *American Journal of International Law*, 2006, vol. 100, no. 4, p. 880.

<sup>106</sup> Fausto Pocar and Magali Maystre note: “Universal jurisdiction provides for the possibility of decentralized prosecution of international crimes by states, creating a comprehensive framework of jurisdictional claims for core international crimes. This markedly improves the chances of ending, or at least reducing, impunity for such crimes”. Fausto Pocar and Magali Maystre, “The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?”, in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 302.

chapter has shown, municipal legislation and its enforcement can become a source for the further development of universal jurisdiction under international law. In order to realise this development, states are required not only to aggressively exercise it but also to refrain from exercising it in accordance with the existing law. To put it generally, *lex ferenda* as well as *lex lata* must be taken into consideration when trying to change and develop the rules of customary international law.

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## A Historical Approach to International Criminal Law through the Lenses of Domestic Prosecutions: Judging Massive Human Rights Violations in Argentina

Natalia M. Luterstein\*

### 8.1. Introduction

Recent developments in international criminal law, in particular the creation of *ad hoc* tribunals and the establishment of a permanent international criminal court, seem to lead to the conclusion that the international branch of international criminal law has become central to this discipline. In the wake of both internal and internationalised conflicts, the international community demonstrates a preference for the prosecution of international crimes by international or mixed tribunals, with an emphasis on international prosecutions. Nevertheless, it is submitted here that this preference for the international branch is simply a misleading impression, at least in the case of post-transitional societies.<sup>1</sup>

This chapter traces the evolution of international criminal law through the lenses of domestic tribunals, using as a case study the ongoing domestic trials of the human rights violations that occurred during

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<sup>1</sup> By “post-transitional societies” I refer to those countries that have returned to democracy at least 15 years ago. In the case of Argentina, I do not use the more usual term “transitional societies” because I believe that after 30 years of democratic government the situation there cannot be compared to that of the first decade after the end of the dictatorship, and the applicable principles and rules are different now.

the dictatorship in the late 1970s in Argentina.<sup>2</sup> It will be argued that in spite of the trend towards international prosecution of past human rights abuses that dominated legal doctrine in the 1990s, the new millennium has ushered in a new twist. While in the so-called Trial of the Juntas (*El Juicio a las Juntas*)<sup>3</sup> international legal terms such as “crimes against humanity” were not mentioned and the tribunal applied almost exclusively domestic norms, the current decisions of the Argentinian judiciary are mainly based on international law. Indeed, the decision to reopen the trials closed in the 1980s was grounded on international instruments and case law and the developments that had taken place in that realm since that decade.<sup>4</sup>

Given that the main paradigm shift took place during the 1990s at the time of the greatest development of the international branch of international criminal law, it is possible to assert that all its enforcement mechanisms (both international and domestic) are linked together and the transformations that occurred in one branch of the discipline affect the other.

This chapter commences with a brief overview of the Argentinian case followed by three main parts. In section 8.3. I will provide an outline of the content of international criminal law. In section 8.4. I will analyse the ways in which the national courts enforce international criminal law. I will do so by looking into the institution of amnesty and the exercise of universal and territorial jurisdiction. I will concisely examine the amnesty laws in the context of the international obligations undertaken by states. With regard to universal jurisdiction, even if its exercise has played

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<sup>2</sup> I will use the terms “dictatorship” and “state terrorism” interchangeably. The latter refers specifically to a new form of a state of exception. The state acquired clandestine structures and permanently institutionalised the most abhorrent forms of illegal and repressive activities. Terror became a permanent method and practice in order to achieve the physical annihilation of the opposition and the destruction of all traces of democratic organisation. See Eduardo Luis Duhalde, *El estado terrorista argentino: quince años después, una mirada crítica* [The Terrorist State: Fifteen Years Later, a Critical Look], Eudeba, Buenos Aires, 1999, pp. 217–19.

<sup>3</sup> The Federal Criminal Court of Appeals tried the leaders of the three military juntas that ruled the country during the dictatorship (1976–1983) and issued its Judgment on 9 December 1985. Argentina, Federal Criminal Court of Appeals, *Videla, Jorge R. y otros (Juicio a las Juntas Militares)*, Judgment, Causa 13/84, 9 December 1986 (‘Videla case’).

<sup>4</sup> See, for example, Argentina, National Supreme Court of Justice, *Recurso de Hecho Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, Judgment, Causa 17.768C, 14 June 2005 (‘Simón case’) (<https://www.legal-tools.org/doc/6321f1/>).



a very important role in the developments regarding the prosecution of the crimes committed by the last dictatorship, I will include a brief account of the most important events, in order to concentrate on the developments that took place after 2003 in Argentina, which will be analysed in section 8.5. Finally, in section 8.6. I will examine the outcome of this process, particularly the effects of the application of international criminal law by national courts.

## 8.2. Overview of the Argentine Case: A Circular Story

The relationship between international criminal law and domestic law in post-dictatorship Argentina can be explained as resembling the shape of a circle.<sup>5</sup> The starting point of the circle is 1985, the year of the Trial of the Juntas. A domestic court heard the cases against the heads of the military who were accused of being responsible for offences, which by virtue of their nature could be labelled international crimes.

The first turn of the circle took place in 1986 and 1987, when the Full Stop<sup>6</sup> and the Due Obedience<sup>7</sup> laws were enacted, respectively. These amnesty laws precluded any legal action from being pursued against the military for the alleged commission of international crimes. The Full Stop law established a 60-day time limit to bring claims against military officers, while the Due Obedience law determined that certain categories of officers had acted under superior orders, hence exempting them from criminal liability.

The following turn moved the circle to Europe. During the 1990s several European countries asserted their jurisdiction over the crimes committed in Argentina. As a result, the trials were moved from Argentina's fora to foreign jurisdictions. While the amnesty laws precluded any prosecution in Argentina, foreign countries were not limited by such laws and were able to pursue criminal trials.

The next significant turn occurred in 2001. A federal Argentinian judge, Gabriel Cavallo, in a leading case usually referred to as the *Poblete*

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<sup>5</sup> The last dictatorship government remained in power from 1976 to 1983.

<sup>6</sup> Argentina, Ley 23.492 Punto Final [Law 23.492 Full Stop], 24 December 1986 ('Full Stop Law') (<https://www.legal-tools.org/doc/d464a5/>).

<sup>7</sup> Argentina, Ley 23.521 Obediencia Debida [Law 23.521 Due Obedience], 8 June 1987 ('Due Obedience Law') (<https://www.legal-tools.org/doc/a4be3b/>). See Full Stop Law, p. 507, *supra* note 6.

or *Simón* case,<sup>8</sup> declared the Full Stop and Due Obedience laws unconstitutional on the grounds that they violated the international obligations the country had undertaken when ratifying various human rights treaties, which had been incorporated in the National Constitution in 1994.<sup>9</sup> Just one week later, the Inter-American Court of Human Rights held in the so-called *Barrios Altos* case that amnesty laws breached the American Convention on Human Rights ('ACHR').<sup>10</sup> In line with this trend, the Argentinian Federal Court of Appeals<sup>11</sup> and the National Supreme Court of Justice eventually upheld the *Simón* judgment.<sup>12</sup>

The final turn of the circle came about in August 2003. The National Congress passed Law 25.779,<sup>13</sup> which declared the Full Stop and Due Obedience laws null and void. As a consequence, the Argentinian courts have reopened the cases closed in 1987 due to the previously invalidated laws, thus bringing the trials back to Argentina's domestic jurisdiction and to the starting point of the circle.

All the turns of this circle are related to each other and demonstrate the way international criminal law interacts with the national law.

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<sup>8</sup> Federal Criminal Tribunal, no. 4, *Simón, Julio y Del Cerro, Antonio s/sustracción de menores de 10 años*, Judgment, Causa 8686/2000, 6 March 2001 (<https://www.legal-tools.org/doc/7d7b10/>).

<sup>9</sup> Art. 75(22) of the National Constitution of Argentina establishes that certain international human rights instruments possess constitutional hierarchy, including, *inter alia*, the American Convention of Human Rights ('National Constitution') (<https://www.legal-tools.org/doc/cee560/>).

<sup>10</sup> Inter-American Court of Human Rights, *Chumbipuma Aguirre and others v. Peru*, Judgment, Serie C No. 75, 14 March 2001 ('Barrios Altos case') (<https://www.legal-tools.org/doc/fl439e/>).

<sup>11</sup> Argentina, Federal Criminal Court of Appeals, Sala II, *Simón, Julio y Del Cerro, Antonio s/sustracción de menores de 10 años*, Causa 8686/2000, Judgment, 9 November 2001.

<sup>12</sup> *Simón* case, Judgment, see *supra* note 4.

<sup>13</sup> Argentina, Ley 25.779 Nulidad de las Leyes de Obediencia Debida y Punto Final [Law 25.779 Annulment of Laws on Due Obedience and Full Stop], 2 September 2003 (<https://www.legal-tools.org/doc/94ffd6/>). At this stage, I should mention that I do not intend to examine the legal validity of the annulment law. Nevertheless, it is worth noting that this norm has been questioned by the defence of the military on a constitutional basis relating to the capacity of the National Congress to annul a law passed by a democratic legislature. It has also been challenged on the basis of violation of the acquired rights during the time in which the Full Stop and Due Obedience laws were in force. In any event, the National Supreme Court of Justice upheld the law in June 2005 on the grounds that the norm purports to comply with Argentina's international obligations with regard to the prosecution of gross human rights violations, as in the *Simón* case, see *supra* note 4.

### 8.3. International Criminal Law: Some Definitions

International criminal law has often been defined as a hybrid between international law and domestic criminal law, as being formed by the internationalised elements of criminal law and by the criminal elements of international law.<sup>14</sup> Antonio Cassese<sup>15</sup> has stated that international criminal law is a branch of public international law because both areas of the law share the same sources.<sup>16</sup> Some commentators have argued that international criminal law encompasses interstate co-operation in the administration of justice, that is, extradition treaties, conventions that suppress certain crimes such as hijacking or hostage-taking, and transnational crimes such as money laundering and drug trafficking.<sup>17</sup> Nonetheless, with respect to the substantial part of this discipline, I will focus on a narrower definition of international criminal law, one that entails individual criminal responsibility for international crimes, essentially war crimes, crimes against humanity and genocide, the so-called *jus cogens* or core crimes.

On the other hand, I will adopt a wide notion of international criminal law with respect to its enforcement methods. I include not only international tribunals, but also domestic courts asserting universal jurisdiction and domestic courts prosecuting acts that amount to international crimes committed in their territories. Further, I make a distinction between the various enforcement mechanisms and I divide them into an international branch and a national branch. The former includes the international tribunals, such as the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo, the *ad hoc* tribunals created by the UN Security Council for the former Yugoslavia and Rwanda and the International Criminal Court ('ICC'). The national branch includes national courts asserting some form of jurisdiction over international crimes, from territorial to universal jurisdiction. The Special

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<sup>14</sup> M. Cherif Bassiouni, *International Criminal Law*, vol. 1, Transnational Publishers, Ardsley, NY, 1998, p. 4; Ilias Bantekas, *International Criminal Law*, 2nd ed., Cavendish, London, 2003, p. 1.

<sup>15</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 16.

<sup>16</sup> Statute of the International Court of Justice, 26 June 1945, Art. 38 (<http://www.legal-tools.org/doc/fdd2d2/>).

<sup>17</sup> Bassiouni, 1998, see *supra* note 14; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, Oxford, 2003.

Court for Sierra Leone and other mixed tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon or the East Timor Special Panels for Serious Crimes, stand in the middle of these two branches as a kind of transitional or compromise arrangement.

International criminal law provides several means of enforcement. Admittedly, as a branch of international law, it shares the same characteristics, that is, a decentralised system of implementation. Nevertheless, it also presents its own particular features. The application of international criminal law has two aspects: state responsibility and individual criminal responsibility.<sup>18</sup> In this chapter, I concentrate on the latter. Therefore, it is possible to identify four ways of enforcing international criminal law: 1) international tribunals; 2) mixed tribunals; 3) domestic courts asserting universal jurisdiction as agents of the international community; and 4) domestic courts asserting territorial or national jurisdiction over international crimes. It is thus submitted that international tribunals are not the only enforcement mechanism, and that domestic courts play a vital role in this process, as it will be shown in the Argentinian case. Moreover, the original means of enforcement of international criminal law were domestic courts that used to suppress acts of piracy and war crimes.<sup>19</sup>

Nonetheless, not all authors consider every one of these instances as part of international criminal law, and some have expressed their preference for enforcement through international tribunals.<sup>20</sup> Along these lines, M. Cherif Bassiouni has referred to the period from 1955 to 1992 as “the years of silence”<sup>21</sup> due to the lack of progress with regard to the creation

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<sup>18</sup> In this sense, see, for example, International Court of Justice (‘ICJ’), *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Judgment, Case No. 91, 26 February 2007 (<https://www.legal-tools.org/doc/5fcd00/>).

<sup>19</sup> Julio Barboza, “International Criminal Law”, in *Collected Courses of the Hague Academy of International Law*, vol. 278, Brill/Nijhoff, Leiden, 1999, p. 28.

<sup>20</sup> Antonio Cassese, “Reflections on International Criminal Justice”, in *Modern Law Review*, 1998, vol. 61, no. 1, p. 1; Ben Chigara, “Pinochet and the Administration of International Criminal Justice”, in Diana Woodhouse (ed.), *The Pinochet Case: A Legal and Constitutional Analysis*, Hart Publishing, Oxford, 2000, p. 127; Carlos Nino, “The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina”, in *Yale Law Journal*, 1991, vol. 100, no. 8, p. 2638.

<sup>21</sup> M. Cherif Bassiouni, “From Versailles to Rwanda in Seventy-five Years: The Need to Establish a Permanent International Criminal Court”, in *Harvard Human Rights Law Journal*, 1997, vol. 10, p. 4.

of international tribunals and the failure to adopt a code of international crimes.

Moreover, international criminal law has gained importance in recent decades as a means of enforcing international law and human rights law, particularly in transitional and post-transitional societies. Therefore, in defining international criminal law, it is necessary to analyse the influence of human rights law, especially in Argentina where the human rights movement and the developments of this regime have played a fundamental role in the application of international criminal law.

The Inter-American system of protection of human rights has been instrumental in enforcing human rights in Argentina, as in many Latin American countries that suffered dictatorships and human rights abuses. The jurisprudence of the monitoring bodies of this system has been a key factor in the ongoing trials for human rights abuses in Argentina. The accountability processes – or lack thereof – that took place in Latin America after the return to democracy has played an important part in the transition from a human rights protection system to a system of individual criminal responsibility. The strategies adopted by the newly elected governments to deal with past gross human rights abuses have had an impact in the sphere of international criminal law.<sup>22</sup>

The Inter-American system presents a wide and comprehensive jurisprudence regarding states' obligations under the ACHR. In the leading case decided by the Inter-American Court of Human Rights, known as the *Velasquez Rodriguez* case,<sup>23</sup> the Court analysed the content of the obligation under Article 1 to “ensure and guarantee” the rights under the ACHR. It held that such an obligation entailed the duty to organise the governmental apparatus so that it is capable of juridically ensuring the free and full enjoyment of human rights, and it also affirmed that the duties to prevent, investigate and punish violations of human rights were necessary consequences of the obligation to guarantee set forth in the ACHR.<sup>24</sup> Nevertheless, as Michael Scharf has noted, the Court did not require Hon-

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<sup>22</sup> Steven R. Ratner, “The Schizophrenias of International Criminal Law”, in *Texas International Law Journal*, 1998, vol. 33, no. 2, p. 248.

<sup>23</sup> Inter-American Court of Human Rights, *Manfredo Velasquez Rodriguez v. Honduras*, Judgment, Serie C No. 4, 29 July 1988 (<https://www.legal-tools.org/doc/b6abdc/>).

<sup>24</sup> *Ibid.*, para. 166.

duras to institute criminal proceedings.<sup>25</sup> Even so, it is worth noting that *Velasquez Rodriguez* was the first contentious case and thus the Court might have been reluctant to invade states' jurisdictions.<sup>26</sup> In fact, since then, the Inter-American Court of Human Rights has gradually moved on to impose more concrete obligations on states regarding the obligation to investigate, prosecute and impose sanction on those responsible for grave violations of human rights.<sup>27</sup>

It is therefore possible to assert that states party to the ACHR, such as Argentina, are bound by the obligations to investigate, prosecute and punish acts of genocide, grave breaches, acts of torture and the most serious violations of human rights, among which it is possible to include forced disappearances.

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<sup>25</sup> Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 50.

<sup>26</sup> Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, p. 31.

<sup>27</sup> See, for example, Inter-American Court of Human Rights, *Almonacid Arellano and others v. Chile*, Judgment, Serie C No. 154, 26 September 2006 (<https://www.legal-tools.org/doc/3543c4/>); Inter-American Court of Human Rights, *Gelman et al. v. Uruguay*, Judgment, Serie C No. 221, 24 February 2011 (<https://www.legal-tools.org/doc/a8c7db/>); and Inter-American Court of Human Rights, *Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil*, Judgment, Series C No. 219, 24 November 2012 (<https://www.legal-tools.org/doc/a66e9e/>). In these cases, starting in *Almonacid Arellano*, the Inter-American Court of Human Rights has imposed such obligations by applying a doctrine called "control of conventionality" (*control de convencionalidad*) that deals with the responsibility of national authorities to ensure that the application of national legislation does not adversely affect the rights under the ACHR, para. 124, "the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention". For more information see, for example, Walter Carnota, "The Inter-American Court of Human Rights and Conventionality Control", 2000 ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2116599](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116599)); Oswaldo Ruiz Chiriboga "The Conventionality Control: Examples of (Un)successful Experiences in Latin America", *Inter-American and European Human Rights Journal*, 2010, vol. 3, p. 200.

## **8.4. International Obligations to Investigate, Prosecute and Punish: The Argentinian Amnesty Laws and the Exercise of Universal Jurisdiction**

### **8.4.1. Full Stop Law and Due Obedience Law**

The Argentinian National Congress passed the Full Stop law in December 1986. The government of President Raul Alfonsín (1983–89) had been subject to military pressure in the face of the trials of the mid- and low-ranking officers that began after the end of the Trial of the Juntas. Those officers who had been summoned were refusing to appear before the courts and others were refusing to give testimony.<sup>28</sup> The law aimed at bringing some degree of certainty among the restless military by establishing a 60-day time limit for the filing of claims against the armed forces officers, after which all rights to bring a claim would be extinguished.<sup>29</sup> However, it had a boomerang effect, and within that period the number of defendants rose to 400, some 20 times the number up to then.<sup>30</sup>

The military's resistance to the trials continued, and by Easter of 1987 a group of military rebels took over a garrison in the outskirts of Buenos Aires and made a number demands. Alfonsín finally reached an agreement with the group that later submitted itself to a trial before a military court. In June the Due Obedience law was passed. It created an irrefutable presumption that chief officers, subordinate officers, sub-officers and troops of the armed forces, together with security and prison forces, had acted under orders without the possibility of opposition to such orders.<sup>31</sup>

Finally, in 1989 and 1990 President Carlos Menem (1989–1999) granted presidential pardons to members of the armed forces, including the members of the juntas, and to members of guerrilla groups.<sup>32</sup> The list

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<sup>28</sup> For a full – and first-hand – account of the events of the 1983–87 period, see Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, New Haven, 1996.

<sup>29</sup> Full Stop Law, Art. 1, see *supra* note 6.

<sup>30</sup> Nino, 1996, p. 94, see *supra* note 28.

<sup>31</sup> Due Obedience Law, Art. 1, see *supra* note 7.

<sup>32</sup> Decrees 1.003/89, 1.004/89, 1.005/89, 2.742/90 and 2.743/90.

included individuals who had been convicted and individuals who were still on trial.<sup>33</sup>

Even if at the time of the commission of the alleged crimes Argentina was not a party to the International Covenant on Civil and Political Rights ('ICCPR'), the ACHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention'), by the time the amnesty laws were passed, Argentina had already ratified those three treaties and thus violated the obligations undertaken in those instruments, and, at least, Article 18 of the 1969 Vienna Convention on the Law of Treaties in the case of the Torture Convention.<sup>34</sup> In fact, the validity of such laws was discussed at the time of their adoption by the National Supreme Court of Justice, which upheld them on the grounds that the National Congress possessed the authority to enact such a law and that by virtue of separation of powers, the judiciary should not interfere with political decisions.<sup>35</sup> Nonetheless, it is worth noting that

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<sup>33</sup> The latter aspect clearly clashes with the rationale of the presidential pardon insofar as they can only be granted after a conviction, and on 19 March 2004 decrees 1.002/89 and 2.846/90 were declared unconstitutional within the case of Federal Criminal Court of Appeals, *Suárez Mason, Guillermo y otros s/homicidio agravado, privación ilegal de la libertad agravada*, Judgment, Causa 450 (<http://www.legal-tools.org/doc/67496a/>). Moreover, in 2007, the National Supreme Court declared that the presidential pardons violated international peremptory norms recognised in the ACHR and in the International Covenant on Civil and Political Rights ('ICCPR'), and specifically, the international obligations to investigate, prosecute and sanction the perpetrators and the victims' right to a judicial remedy. See National Supreme Court of Justice, *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad – Riveros*, Judgment, M. 2333. XLII, 13 July 2007, paras. 29, 32 ('Mazzeo case') (<http://www.legal-tools.org/doc/7ed416/>).

<sup>34</sup> For example, the Inter-American Commission on Human Rights in 1992 issued its Report 28/92 whereby it asserted that the laws violated Article 1, Article 8(1) (right to fair trial) and Article 25 (right to judicial protection) of the ACHR. In spite of acknowledging that Argentina had taken exemplary measures vis-à-vis the human rights violations – such as the National Commission on the Disappearances of Persons ('CONADEP'), a commission created in 1983 mandated to gather information and receive testimonies about the crimes allegedly committed by the military, issued a report *Nunca Más* [Never Again] where it documented over 9,000 cases of torture, abductions, disappearances and executions and the existence of many clandestine detention centres, the Trial of the Juntas, and the economic compensation set up for victims – it nonetheless recommended that Argentina adopted measures necessary to clarify the facts and identify those responsible.

<sup>35</sup> National Supreme Court of Justice, Causa No. 547 incoada en virtud del Decreto No. 280/84 del Poder Ejecutivo Nacional, 1987-D Revista La Ley 194-266 [Case No. 547 filed by Decree No. 280/84 of the Executive Branch, 1987 – Law 194-266], Judgment, 22 June 1987 in Fallos de la Corte Suprema de Justicia de la Nación, 1987-310:1162.



only one member of the high tribunal, Justice Petracchi in his concurring vote, acknowledged the existence of international norms governing this issue, and in particular the Torture Convention. He remarked that even though the instrument had not yet entered into force,<sup>36</sup> Argentina was already a state party to it – having ratified on 24 September 1986 – making Article 18 of the 1969 Vienna Convention applicable.<sup>37</sup> Yet he did not elaborate further on this point and joined the majority’s decision.

This shows that in transitional societies the role of international law is limited and there is a preference for the domestic law,<sup>38</sup> as a means of asserting the power of the new regime. However, international criminal law, in the shape of human rights treaties imposes duties on the states to conduct domestic trials. By invalidating certain amnesty laws, such as the Argentinian ones, international law requires states to prosecute those accused of committing international crimes, thus highlighting their role in the enforcement of international criminal law.

The incompatibility of the amnesty laws with Argentina’s international obligations was recognised at the national level at the end of the 1990s. In March 1998 the National Congress decided to repeal the amnesty laws.<sup>39</sup> Since the repeal did not have retroactive effect, it did not bring about any practical results; only an annulment would produce such consequences.

It was in the judicial branch of the state that the main development took place. In the *Simón* case already noted,<sup>40</sup> the National Supreme Court of Justice declared the laws unconstitutional and confirmed the constitutionality of Law 25.779. The Supreme Court explicitly based its decision on international human rights law and international instruments that enjoy the highest level of constitutional hierarchy in relation to Argentinian do-

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<sup>36</sup> The Torture Convention entered into force only days after the Supreme Court’s decision, on 26 June 1987.

<sup>37</sup> This provision establishes the obligation of signatory states or states party to “refrain from defeating the object and purpose of a treaty prior to its entry into force”.

<sup>38</sup> John Dugard, “Retrospective Justice: International Law and the South African Model”, in A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, IN, 1997, p. 269.

<sup>39</sup> Argentina, Ley 24.952 Derogación de las leyes de Obediencia Debida y Punto Final [Law 24.952 Derogating Laws Due Obedience and Full Stop], 15 April 1998 (<https://www.legal-tools.org/doc/0fd487/>).

<sup>40</sup> *Simón* case, see *supra* note 4.

mestic law.<sup>41</sup> The Supreme Court asserted that to the extent that every amnesty is orientated towards “oblivion” of grave violations of human rights, they oppose the norms of the ACHR and the ICCPR, and are thus constitutionally intolerable.<sup>42</sup> The Court went on to state that even if the Peruvian *Barrios Altos* case, decided by the Inter-American Court of Human Rights, presented a different set of characteristics, the decisive factor was that the Full Stop and Due Obedience laws possessed the same vices that led the Inter-American Court to reject the Peruvian self-amnesty laws, because all of them had resulted in the impossibility of prosecuting grave breaches of human rights.<sup>43</sup> Moreover, the parliamentary debate that took place prior to the approval of Law 25.779 shows that the intention of the legislators was to abide by international human rights standards by eliminating the obstructions to the investigation of such violations and facilitating the fulfilment of the obligation to repair harm committed in the broadest form possible.<sup>44</sup>

In this sense, it is interesting to note that the Congress debated the annulment together with a bill that proposed to grant constitutional hierarchy to the 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (‘Convention on the Non-Applicability of Statutory Limitations’). This reveals that the parliamentarians identified a link between the amnesty laws and international criminal law. Indeed, during the Congressional debate,<sup>45</sup> many representatives advanced arguments related to international law and the duties undertaken by Argentina under this legal order. They referred to the *jus gentium*, to the Inter-American Commission on Human Rights (‘IACHR’) Report 28/92, to the trials taking place in Spain and even to the Rome Statute of the International Criminal Court (‘ICC Statute’).

While both the national and international orders regulate the same conduct, they do so in different ways and with different consequences. Whereas in the domestic order amnesty laws could be said to be in ac-

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<sup>41</sup> National Constitution, see *supra* note 9.

<sup>42</sup> *Simón* case, Judgment, para. 18, see *supra* note 4.

<sup>43</sup> *Ibid.*, para. 24.

<sup>44</sup> *Ibid.*, para. 32.

<sup>45</sup> Cámara de Diputados de la Nación [National Congress], meeting 12, sess. 4, Anulación De Las Leyes 23.492 Y 23.521 De Punto Final Y De Obediencia Debida [Annulment of Laws 23.492 and 23.521 Full Stop and Due Obedience, 12 August 2003 (<https://www.legal-tools.org/doc/c41b1d/>)].

cordance with the law, they violate norms of the international order. By nullifying national norms using international law, the Supreme Court re-asserted the role of national courts in applying international criminal law and blurred the distinction between the domestic and the international, which will be addressed in the final part of this chapter. It is also worth noting that those norms had come into force vis-à-vis Argentina at least nine years before this decision took place. However, during that time, international criminal law manifested itself in the form of another institution: universal jurisdiction, that is, the possibility of prosecuting conduct that amounts to international crimes that take place without any link, neither territorial nor national, with the prosecuting state.

#### **8.4.2. Universal Jurisdiction and the Argentinian Case: A Brief Account**

Although a number of countries that have asserted their jurisdiction over the events that occurred during the last Argentinian dictatorship,<sup>46</sup> I will succinctly examine the trials set up in Spain, because it was the only state to base prosecution on the grounds, *inter alia*, of universal jurisdiction.

Before asserting their jurisdiction over crimes committed in Argentina, the courts in Spain had to address the issue of the amnesty laws because many of the defendants had benefited from them. Both Baltasar Garzón, acting as the investigator judge, and the Audiencia Nacional (Spain's Appeals Court) found that those laws had no extraterritorial validity, mainly because they were not legal under international law. Indeed, Garzón referred, *inter alia*, to Report 28/92 of the IACHR to justify such invalidity.<sup>47</sup> This demonstrates that international criminal law's enforcement mechanisms create a backup system, whereby if the front line, that is, the national courts, fails to enforce its norms, foreign courts asserting universal jurisdiction will step in and "do the job". In the case of Argentina, not only did the Spanish trials help prevent those crimes committed during the dictatorship remaining unpunished but they also triggered a number of consequences that culminated in the annulment of the amnesty laws.

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<sup>46</sup> For example, Italy and Germany.

<sup>47</sup> Spain, Audiencia Nacional, Central Investigative Tribunal no. 5, Decision, 25 March 1998 para. 15(e) (<https://www.legal-tools.org/doc/d9c132/>).

The Spanish trials played an important part in the events taking place in Argentina, but they mainly served the function of reopening the debate, socially and legally, on Argentina's recent tragic past.<sup>48</sup>

In fact, the decision of Judge Gabriel Cavallo in the *Poblete* case, the first judicial decision to determine the invalidity of the amnesty laws, can be framed within the "collateral effects" of the Spanish trials, and, indeed, the judgment refers to them and to trials in other states such as Italy and Germany. He asserted that the judicial activity vis-à-vis the events that occurred in Argentina crossed all frontiers because of their heinous nature. This assertion is in line with the wide conception of the enforcement mechanisms of international criminal law. In 2005 the Supreme Court finally followed Judge Cavallo's cue and declared the amnesty laws contrary to the National Constitution.<sup>49</sup> All these judgments have in common the fact that the judges relied heavily on international law norms to justify their decisions.

Therefore, as Naomi Roht-Arriaza affirms, one of the main lessons to learn from the universal jurisdiction trials in Europe is that transnational prosecutions can trigger domestic prosecutions.<sup>50</sup> This is clear in the case of Argentina, despite the fact that in the beginning the trials encountered a certain degree of resistance, manifested mainly in the shape of rejecting the extradition requests made by the Spanish judiciary.<sup>51</sup>

Generally, states asserting universal jurisdiction act in a subsidiary manner. Only when the territorial state does not prosecute those accused of international crimes does a foreign state assert universal jurisdiction over those acts. This can be illustrated with the case of the Spanish trials. In August 2003 the Council of Ministers of Spain decided to suspend the

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<sup>48</sup> For example, in 1995 Captain Adolfo Scilingo publicly confessed to the crimes he committed as a member of the armed forces during the dictatorship, which included the throwing of drugged prisoners from planes into a river, and said that these "death flights" were routine in the military activities. See Horacio Verbitsky, *The Flight: Confessions of an Argentine Dirty Warrior*, New Press, New York, 1996. Scilingo flew to Spain to testify where he was arrested by Judge Garzón, and was later convicted. Audiencia Nacional, Judgment, Chamber, 4 November 1998 ('Scilingo case') (<https://www.legal-tools.org/doc/edf133/>).

<sup>49</sup> Simón case, see *supra* note 4.

<sup>50</sup> Naomi Roht-Arriaza, "The Pinochet Precedent and Universal Jurisdiction", in *New England Law Review*, 2001, vol. 35, no. 2, p. 315.

<sup>51</sup> Decree 1581/01 established a general rejection of extradition requests for offences committed on Argentine territory. This decree was derogated by Decree 420/03, which in its preamble mentions Art. 118 of the National Constitution, see *infra* note 54.

extradition procedure against 40 Argentinian military officers after the annulment of the Full Stop and Due Obedience laws by the Argentinian Congress.<sup>52</sup> The Council of Ministers recognised Argentina's priority to prosecute the alleged crimes committed by the military government during the period of state terrorism.<sup>53</sup> Today, as will be explained below, the cases have been reopened and the military are being tried in Argentina. This therefore shows how the story of the trials for past human rights violations in Argentina has come full circle.

### 8.5. The Application of International Law by the Argentinian Judiciary

Article 118 of the Argentinian Constitution recognises in the existence of crimes against *jus gentium*.<sup>54</sup> This provision, although having been part of the National Constitution since its inception in 1853, has only come into the limelight in the last decade.<sup>55</sup> Courts describing the events that occurred during the state terrorism as crimes against humanity have justified the applicability of international law through a reference to Article 118 by saying that the Argentinian legal system has always recognised international criminal law and the existence of certain offences that breach the

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<sup>52</sup> Spain, Audiencia Nacional, Auto ordenando la remisión al juez argentino de la decisión del Consejo de Ministros de no tramitar las extradiciones y solicitando comunique si enjuiciará los hechos [Order on Argentinian Judge's Referral to the Decision of the Council of Ministers on the Extradition Process and Requesting Information on Whether It Will Prosecute the Facts], 30 August 2003 (<http://www.derechos.org/nizkor/arg/espana/autoago03.html>).

<sup>53</sup> Federal Court of Appeals, Order, 16 March 2004. Except for Scilingo and Cavallo who remain in Spain.

<sup>54</sup> National Constitution, Art. 118, see *supra* note 9, reads:

The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against public international law, the trial shall be held at such place as Congress may determine by a special law.

It is worth noting that the Spanish version reads "*derecho de gentes*" (*jus gentium*) in lieu of public international law. Constitución de la Nación Argentina, 22 August 1994 (in Spanish) (<https://www.legal-tools.org/doc/b07ac0/>).

<sup>55</sup> It is possible to make a comparison with the US Alien Torts Claim Act and the fact that although they both date from earlier centuries, they have gained importance through the trials relating to human rights abuses. In this sense, it is interesting to note how old tools are being used for new purposes.

international order as a part of it.<sup>56</sup> The Argentinian courts have contended that Article 118 is an open or progressive clause that should be dynamically construed in order to allow the developments of international criminal law to be included.<sup>57</sup> In the same vein, some judges of the International Court of Justice have recognised that the content of the crimes under international law, particularly that of crimes against humanity, are undergoing change.<sup>58</sup>

Thus, it is possible to assert that since 1853 the Argentinian legal system has been constituted by both domestic and international rules. At this point it is important to mention that Argentina is a monist country that considers that international law and domestic law form part of one system.<sup>59</sup> Further, since the constitutional amendment in 1994 there is no doubt that international law has a priority over national legislation, in accordance with Article 27 of the 1969 Vienna Convention on the Law of Treaties.<sup>60</sup>

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<sup>56</sup> See for example, National Supreme Court of Justice, *Recurso de hecho deducido por el Estado y el Gobierno de Chile en la causa Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, para decidir sobre su procedencia*, Judgment, Causa 259, 24 August 2004, para. 16 ('Arancibia Clavel case') (<http://www.legal-tools.org/doc/610f30/>); and Mazzeo case, paras. 14–15, see *supra* note 33.

<sup>57</sup> See Federal Criminal Court of Appeals, Sala II, *Contreras Sepúlveda, Juan M.C.*, Judgment, 4 October 2000, in *Doctrina Judicial 2001–I* ('Contreras Sepúlveda case'). However, it has been pointed out that Art. 118 refers to *jus gentium* to establish Argentinian jurisdiction over crimes committed outside its territory (universal jurisdiction) and thus, it could not be used to establish jurisdiction of domestic tribunals over crimes committed in Argentina. See Ezequiel Malarino, "La cara represiva de la reciente jurisprudencia argentina sobre graves violaciones de los derechos humanos. Una crítica de la sentencia de la Corte Suprema de Justicia de la Nación de 14 de junio de 2005 en el caso *Simón*" [The Repressive Face of Recent Argentinian Case Law on Gross Violations of Human Rights: A Critique of the Supreme Court of Justice's Decision of 14 June 2005 in the *Simón* case], in *Jura Gentium: Rivista di filosofia del diritto internazionale e della politica globale*, 2009 (<http://www.juragentium.org/topics/latina/es/malarino.htm>).

<sup>58</sup> ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Joint Separate Opinion of Judges Higgins, Kooijman and Buergenthal, 14 February 2002, para. 62 (<https://www.legal-tools.org/doc/23d1ec/>).

<sup>59</sup> National Constitution, Art. 31, see *supra* note 9.

<sup>60</sup> However, pursuant to Art. 27 of the National Constitution, the international rules have to be in accordance with the principles of public law of the Magna Carta. This has been, in fact, the basis of the position of the dissenting judges of the National Supreme Court, in particular Justice Fayt. See, for example, Arancibia Clavel case, paras. 15, 16 and 18, *supra* note 56; Simón case, para. 43, see *supra* note 4; and Mazzeo case, paras. 11, 14 and 17, see *supra* note 33. Until 1992 the Supreme Court had contended that both international

### 8.5.1. The Characterisation of the Crimes in 1985 and in the Late 1990s Cases

In the Trial of the Juntas the term “crimes against humanity” was not mentioned.<sup>61</sup> The members of the military juntas that ruled Argentina from 1976 to 1983 were convicted for homicide aggravated by cruelty, unlawful deprivation of freedom aggravated by violent threats, and acts of torture followed by death and robbery, all of them domestic offences under the Criminal Code.<sup>62</sup> Nonetheless, the Federal Criminal Court of Appeals considered that the prosecution had proved the existence of a systematic plan, a pattern that included all such acts, and which was carried out against a part of the civilian population. There is no doubt that this description fits within the definition of crimes against humanity, as it is understood today.<sup>63</sup> The Federal Criminal Court of Appeals only made a reference to international law to consider the argument presented by the defence that the acts committed by the military government were justified on the grounds that there existed a state of war. Regardless of the characterisation of the conflict (or whether there was an armed conflict at all), the Court of Appeals made clear that international law, especially the 1949 Geneva Conventions, did not permit the commission of such acts.

Notwithstanding, the term “crimes against humanity” was not mentioned vis-à-vis those acts until the late 1990s. A possible explanation can be found in the fact that crimes against humanity did not exist as an offence within the domestic law in Argentina. Article 18 of the National Constitution recognises the *nullum crimen, nulla poena sine lege* principle (or principle of legality) with the consequence that one can only be prosecuted and punished for acts that were considered as offences by law prior to the commission of such acts. Since the Argentinian law did not foresee

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treaties and national legislation had the same hierarchy (see *Martin & Cia Ltda. S.A. c Nación* in Fallos de la Corte Suprema de Justicia de la Nación 257:99). In that year, the Supreme Court modified its jurisprudence and asserted that international treaties had priority over national law (see *Ekmekdjian, Miguel Angel c. Sofovich. Gerardo y otros* in Fallos de la Corte Suprema de Justicia de la Nación 315:1492), a doctrine that was later expressly recognised by the constitutional amendment.

<sup>61</sup> See Videla case, Judgment, *supra* note 3.

<sup>62</sup> See extracts of the decision of the Federal Criminal Court of Appeals in 26 I.L.M. 316. Not every member of the juntas was convicted, in fact three of them – Graffigna, Galtieri and Lami Dozo – were acquitted.

<sup>63</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Art. 7 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

the crimes against humanity as a domestic offence, this might have been the reason why the Federal Criminal Court of Appeals did not characterise the acts committed during the dictatorship as such.

It is true that Article 15 of the ICCPR states that the principle of legality 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 recognized by the community of nations*” (emphasis added). Yet, it is also true that Argentina made a reservation to the extent that the application of Article 15 will be limited by Article 18 of the National Constitution.<sup>64</sup> Argentinian courts have solved this obstacle by affirming that by virtue of Article 118 of the National Constitution, the rule established in Article 18 does not apply in the sphere of international criminal law. Thus, the reservation would not take away the effects of Article 15(2) because such provision recognises a rule of *jus cogens*.<sup>65</sup> Therefore, it is possible to assert that the domestic principle of legality does not have the same content at the international level because there are certain peremptory norms that qualify such content. Along these lines, the Supreme Court held that since customary international law recognises crimes against humanity as an offence against the international order, so does the national order by virtue of Article 118.<sup>66</sup>

This change in the doctrine, which began in the 1990s, can be linked to two fundamental developments in both the national and international levels. On the one hand, Argentinian courts began to address the crimes committed by the Nazi regime during the Second World War, which allowed them to introduce certain norms of international law. In 1995,<sup>67</sup> in a case involving the extradition of an alleged Nazi criminal, the

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<sup>64</sup> Argentina, Ley 23.313 Pacto Internacional de derechos económicos, sociales y culturales Pacto Internacional de derechos civiles y políticos y Protocolo facultativo [Law 23.313 International Covenant on Economic, Social and Cultural Rights International Covenant on Civil and Political Rights and Facilitating Protocol], 16 April 1986, Art. 4.

<sup>65</sup> Which can only be derogated by a rule of the same nature. Contreras Sepúlveda case, see *supra* note 57. Furthermore, in her concurring opinion in the Simón case, Justice Argibay stated that the efficiency of such reservation had weakened after the ratification of the Convention on non-statutory limitations, para. 16, see *supra* note 4.

<sup>66</sup> Arancibia Clavel case, para. 16, see *supra* note 56.

<sup>67</sup> However, it is worth noting that in a pioneer case a Federal Criminal Court of Appeals of the city of La Plata, Province of Buenos Aires, had applied international norms in a case concerning the extradition of another Nazi official, F.L. Schwammburger, and asserted the non-applicability of statutory limitations to the crimes charged against him. Judgment, 30 August 1989 in *El Derecho* 135–326.



Supreme Court relied on Article 118 to determine that the requirement of double criminality set up in the extradition treaty between Argentina and Italy was satisfied since the national legal order recognised the existence of international crimes without the need of an internal act by the National Congress to “define and punish” such conduct. Thus the Supreme Court granted the extradition on the basis of the crime of genocide.<sup>68</sup> It should be noted, however, that this was a case involving an extradition process, which did not require a determination of criminal guilt from the Court. Nevertheless, it was an important recognition of the role of international law within the national system. On the other hand, the developments that took place in the sphere of the international law of human rights also brought about a more frequent application of international norms and standards. Today, national courts apply human rights law not only to cases concerning international crimes but also to cases of non-widespread or systematic violations of human rights, including economic, social and cultural rights.<sup>69</sup>

Furthermore, it is worth noting that international law provides a tool for national courts and victims’ group to fight impunity. Once an act is characterised as an international crime, a menu of international criminal law rules becomes available,<sup>70</sup> including, for example, the concept of non-

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<sup>68</sup> Unlike the US Constitution, by which this provision is inspired. See Supreme Court of Justice, *Priebke, Erich s/solicitud de extradición*, Judgment, 2 November 1995 in Fallos de la Corte Suprema de Justicia de la Nación 318:2148, concurring votes of Justice E. Moliné O’Connor and Justice J. Nazareno, para. 39, and Justice G. Bossert, para. 51 (‘Priebke case’) (<https://www.legal-tools.org/doc/be180b/>). However, it is worth noting that Justices A. Belluscio, R. Levene and E. Petracchi in their dissenting opinions remarked the importance of the *nulla poena sine lege* principle and rejected the request on those grounds.

<sup>69</sup> As an example, see Supreme Court of Justice, *Asociación Benghalensis y otros V. Ministerio de Salud y Acción Social -Estado Nacional s/amparo 16.688*, Judgment, 1 June 2000, and *Campodónico Beviacqua, Ana Carina*, Judgment, 24 October 2000, on right to health; Supreme Court of Justice, *S. nchez, María del Carmen c/ aNses s/reajustes varios*, Judgment, 17 May 2005, on right to retirement pensions; Supreme Court of Justice, *Reyes Aguilera, Daniela c. Estado Nacional*, Judgment, 4 September 2007, on rights of persons with disabilities, among many others. For a general overview, see Christian Curtis and Sebastián Tedeschi “Derechos sociales” [Social Rights], in V.ctor Abramovich, Alberto Bovino and Christian Curtis (comps.), *La aplicación de los tratados sobre derechos humanos en el ámbito local: La experiencia de una década* [The Application of Human Rights Treaties at the Local Level: The Experience of a Decade], Editores del Puerto/CELS, Buenos Aires, 2007.

<sup>70</sup> Mart.n Abregú, “Apostillas a un fallo histórico” [Notes on a Historic Decision], in *Cuadernos de Doctrina y Jurisprudencia Penal*, 2003, vol. 9, no. 16, p. 26.

applicability of the statute of limitations or the possibility to exercise universal jurisdiction.

The amnesty laws represented the chief obstacle to the investigation and prosecution of the events that occurred during the dictatorship, and international criminal law provided the tools to get around them. International law has also been useful in circumventing arguments that such crimes were statute barred. This was particularly so in the case of the crimes committed by the Nazis, but it also arose during the trials of conduct that occurred in the 1970s in Argentina. Because international criminal law recognises that the statutory limitations are not applicable to international crimes, labelling the conduct as such helps avoid such an obstacle.

As the Advocate General said in the *Simón* case, the development of public international law and the need to work with new tools that serve to prevent horrific and tragic events cannot be ignored. He acknowledged the fact that such developments at the international level, together with domestic developments such as the constitutional amendment in 1994,<sup>71</sup> have produced a new paradigm.

#### **8.5.2. New Developments since 2004**

The trend that started in the 1990s with regard to Nazi crimes was strengthened and confirmed after 2004, when the National Supreme Court of Justice issued its seminal decision in the *Arancibia Clavel* case. Since then, the domestic tribunals have been reopening the cases for crimes committed during the last dictatorship and have, at the same time, applied and contributed to the development of international criminal law. Up to December 2014, 1,131 people had been put on trial, 554 persons have been convicted and 59 were acquitted.<sup>72</sup> The cases represent domestic instances of the application of international criminal law and present interesting features. In the context of this chapter, I refer only to three main issues: the non-applicability of statutory limitations, the qualification of

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<sup>71</sup> He referred specifically to the constitutional hierarchy of certain human rights international instruments.

<sup>72</sup> Procuración General de la Nación [National Prosecution Office], Prosecution of Crimes Against Humanity: Informe sobre el estado de las causas por violaciones a los derechos humanos cometidas durante el terrorismo de Estado [Report on the State of Cases on Human Rights Violations Committed during State Terrorism] (<https://www.legal-tools.org/doc/4e5833/>).

the conduct as crimes against humanity and/or genocide, and sexual violence as part of the systematic attack against a civilian population.<sup>73</sup>

#### **8.5.2.1. Non-Applicability of Statutory Limitations to the Crimes Committed by the Dictatorship**

One of the main obstacles faced by the prosecution of the crimes committed by the dictatorship was the passing of time. After almost 30 years, the Argentinian tribunals had to deal with the defensive arguments regarding the application of statutory limitations, which, in accordance with domestic law,<sup>74</sup> prevent the trials from taking place. Therefore, the tribunals turned to international law which, in the words of the National Supreme Court, bans the commission of crimes against humanity and must be applied by domestic tribunals, regardless of the express consent of the states, that is, *jus cogens*.<sup>75</sup> As this section shows, the notion of *jus cogens* – vague as it may be<sup>76</sup> – has been instrumental in the case law of the Argentinian tribunals regarding the crimes committed during the dictatorship, both in relation to the characterisation of such crimes and in relation to the consequences thereof.

The case that led to the reopening of the trials, the so-called *Arancibia Clavel* case,<sup>77</sup> was in fact not specifically related to the Argentinian dictatorship, but to its Chilean counterpart, albeit, of course, a part of the so-called *Plan Cóndor*.<sup>78</sup> Indeed, Enrique Arancibia Clavel, a former agent of the Chilean Dirección de Inteligencia Nacional (National Intelligence Directorate) was sentenced to life imprisonment as perpetrator of the murders of Carlos José Santiago Prats, a former Chilean General

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<sup>73</sup> There are a number of other interesting issues such as the responsibility of civilians for crimes committed during state terrorism and the crime of abduction of children and the suppression of their identity.

<sup>74</sup> Criminal Code, Art. 62.

<sup>75</sup> Mazzeo case, para. 15, see *supra* note 33.

<sup>76</sup> Stefan Kadelbach, “Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms”, in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Martinus Nijhoff, Leiden, 2006, pp. 27–29.

<sup>77</sup> Arancibia Clavel case, see *supra* note 56.

<sup>78</sup> The so-called *Plan Cóndor* was a co-ordination structure among the military dictatorships in the Southern Cone of Latin American to persecute and murder (mainly also by the commission of the crime of forced disappearance) all those considered enemies of the regimes.

opposed to the Pinochet regime, and his wife, Sofia Esther Cuthbert Chiarleoni, committed in Buenos Aires. The case was brought to the National Supreme Court of Justice to decide on the application of statutory limitations because the events had taken place in 1974.

The majority of the Tribunal decided that the conduct could be characterised as a crime against humanity because the group to which Arancibia Clavel belonged had the goal of persecuting political opponents of the Pinochet regime by way of murder, forced disappearance and torture with the acquiescence of state agents. In order to justify the application of this legal qualification, the Supreme Court stated that the recent ratification of the Inter-American Convention on Forced Disappearance only meant a conventional affirmation of the label that state practice already bestowed upon such conduct at the time of the events, in light of the developments that had taken place since the end of the Second World War.<sup>79</sup>

This definition, which the Supreme Court and other domestic tribunals later deepened – always on the basis of international law – proved critical for the developments that followed. In fact, the totality of the cases regarding crimes committed during the last dictatorship were opened by virtue of them being considered crimes against humanity and not ordinary domestic crimes. Moreover, the Supreme Court, by quoting the ICC Statute, stated that responsibility does not only stem from traditional forms of perpetration but also from the contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose (cf. Article 25 of the ICC Statute), which fitted the situation of Arancibia Clavel.<sup>80</sup>

Therefore, the Court decided that the applicable law to the case was the Convention on the Non-Applicability of Statutory Limitations,<sup>81</sup> which, as mentioned above, has constitutional precedence. The Court explained that the crimes against humanity are an exception to the application of statutory limitations because, regardless of the passing of time, they constitute acts that have not ceased to impact the society and the international community as a whole, given their magnitude and meaning.<sup>82</sup>

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<sup>79</sup> Arancibia Clavel case, para. 13, see *supra* note 56.

<sup>80</sup> *Ibid.*, para. 11.

<sup>81</sup> *Ibid.*, para. 12.

<sup>82</sup> *Ibid.*, para. 21.

Nevertheless, the Supreme Court had to address the fact that the ratification of the Convention on the Non-Applicability of Statutory Limitations took place after the facts of the case, which gave rise to arguments regarding the legality principle and the *ex post facto* applicability of the law. In this sense, the Court affirmed that the underpinning of the non-applicability of statutory limitations to crimes against humanity relates to the fact that such crimes are generally committed by the agencies that possess punitive power, such as the security forces, acting outside the control of the law.<sup>83</sup> Therefore, the doctrine of the passing of time as a barrier to prosecution does not apply to crimes against international law.<sup>84</sup> Moreover, the Court held that the Convention merely acknowledges the existence of a *jus cogens* customary international law in force at the time of the events – Argentina having contributed to its formation<sup>85</sup> – thus avoiding a violation of the prohibition of non-retroactivity of the criminal norm.<sup>86</sup> Additionally, the Supreme Court invoked the case law of the Inter-American Court of Human Rights – specifically the *Barrios Altos* case – which states that the ACHR bans all obstacles to the prosecution of such crimes, such as the amnesty laws and the application of statutory limitations.<sup>87</sup>

This short section clearly shows that the Supreme Court applied international law – international human rights law and international criminal law – in order to overcome the barriers faced by the prosecution of the crimes committed in Argentina during the military dictatorship, thus opening the door for new developments. Based on the Inter-American Court of Human Rights’ doctrine of the removal of obstacles to the prosecution of those responsible for gross violations of human rights, which include both amnesty laws and the application of statutory limitations, the Supreme Court led the way for new trials.

The decision of the Supreme Court was not unanimous; in fact, it was highly divided, being adopted by four votes to three. In particular, Justice Fayt stated that Article 27 of the National Constitution, which requires that treaties must be in accordance with public constitutional prin-

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<sup>83</sup> *Ibid.*, para. 23.

<sup>84</sup> *Ibid.*, para. 25.

<sup>85</sup> *Ibid.*, para. 31.

<sup>86</sup> *Ibid.*, para. 28.

<sup>87</sup> *Ibid.*, para. 35.

ciples, forbids the retroactive application of the Convention on the Non-Applicability of Statutory Limitations because it would violate the *nullum crimen, nulla poena sine lege praevia* principle, recognised in Article 18 of the Constitution.<sup>88</sup> Fayt's arguments are thus mainly based on domestic law rather than on international law. Nonetheless, it should be noted that in her concurring opinion, Justice Argibay stated that, in fact the legality principle does not cover issues related to procedural rules such as the application of statutory limitations, but only rules related to the definition of the crimes – the conduct must be defined *ex ante* – and therefore this principle is not affected by an alleged retroactive application of Convention on the Non-Applicability of Statutory Limitations.<sup>89</sup>

However, even from the international perspective, it should be noted that the Supreme Court's conclusions on the qualification of the conduct as crimes against humanity and the resulting application of the Convention on the Non-Applicability of Statutory Limitations could also be criticised. The Court based its conclusions on the existence of a customary international law in force at the time of the facts. Nonetheless, the Court fell short of properly identifying the elements of such customary norm (state practice and *opinio juris*).<sup>90</sup> It merely stated – in a rather dogmatic way<sup>91</sup> – that a *jus cogens* norm existed in 1968,<sup>92</sup> and that its existence stemmed from a tacit acceptance of a particular practice,<sup>93</sup> to which Argentina had contributed.<sup>94</sup>

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<sup>88</sup> Arancibia Clavel case, Dissenting Opinion of Justice Fayt, para. 19, see *supra* note 56.

<sup>89</sup> Simón case, Concurring Opinion of Justice Argibay, para. 16, see *supra* note 4. Justice Petracchi rejected this argument in his concurring opinion in the *Arancibia Clavel* case, para. 19, see *supra* note 56. This doctrine, which limits the scope of the legality principle by excluding rules relating to statutes of limitations was previously developed by the German Constitutional Tribunal in 1969, in the case BVerfG, 26 February 1969, 2 BvL 15, 23/68. Available in BVerfGE 25, 269, cited in Jürgen Schwabe (comp.), *Jurisprudencia del Tribunal Constitucional Federal Alemán. Extractos de las sentencias más relevantes compiladas* [Case Law of the German Constitutional Tribunal: Extracts of the Most Relevant Decisions], Konrad Adenauer Stiftung, Mexico City, 2009, p. 534.

<sup>90</sup> Statute of the International Court of Justice, 26 June 1945, Art. 38.

<sup>91</sup> Malarino, 2009, see *supra* note 57.

<sup>92</sup> Arancibia Clavel case, para. 29, see *supra* note 56.

<sup>93</sup> *Ibid.*, para. 30.

<sup>94</sup> *Ibid.*, para. 31.

### 8.5.2.2. Labelling the Conduct: Is It a Crime against Humanity or a Crime of Genocide?

One of the most contentious and polemical developments has been the assertion by some tribunals that the crimes committed by state terrorism could be labelled as genocide. The first time this concept was used was in the judgment of the Federal Criminal Oral Tribunal No. 1 of the city of La Plata in the case known as *Etchecolatz*.<sup>95</sup> In its decision, the Tribunal affirmed that the events that took place during state terrorism could be labelled as crimes against humanity committed in the context of a genocide, because the accused actions showed a complete disregard for his fellow human beings, and formed part of an apparatus of destruction, death and terror.

In order to reach its conclusion, the Tribunal conducted a historical analysis of the crime of genocide that included the UN General Assembly resolution 96(I), which, it noted, mentioned political groups in the definition of the crime. Further, even though it recognised that such group was later excluded from the 1948 Genocide Convention, it still affirmed that the crimes committed during the dictatorship could be labelled as such. To support its argument, the Tribunal referred to the decision of the Audiencia Nacional of Spain in the *Scilingo* case,<sup>96</sup> which stated that the persecuted group was composed of citizens that did not correspond to the requirements of the dictatorship for the establishment of the new order in the country. They were citizens opposed to the regime, but also indifferent thereto. The military did not try to change the group's attitude but to destroy it by means of detention, death, forced disappearance, abduction of children and terror. The Tribunal also referred to Judge Baltasar Garzón's judgment of 2 November 1999, where he stated that the military sought to

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<sup>95</sup> Federal Criminal Oral Tribunal no. 1 de La Plata, *Etchecolatz, Miguel Osvaldo*, Judgment, Causa 2251/06, 28 September 2006 (<http://www.legal-tools.org/doc/38be2a/>). The Tribunal reached the same conclusion in Federal Criminal Oral Tribunal no. 1 de La Plata, *Von Wernich, Christian Federico s/ Inf. Arts. 144bis, 144ter, 80.7, 54 of the Criminal Code*, Judgment, Causa 2506/07, 2 November 2007 (<http://www.legal-tools.org/doc/99f075/>), among others. For more information, see Elizabeth Gómez Alcorta "Genocidio: Los juicios: calificaciones, narrativas y nuevas interpretaciones" [Genocide: The Trials: Qualifications, Narratives and New Interpretations], in Gabriel Ignacio Anitua, Alexis Álvarez Nakagawa and Mariano Gaitán, Mariano (comp.), *Los juicios por crímenes de lesa humanidad: Enseñanzas jurídico penales* [Trials for Crimes against Humanity: Legal-Criminal Teachings], Ediciones Didot, Buenos Aires, 2014, pp. 291–314.

<sup>96</sup> Scilingo case, see *supra* note 48.

impose a model of Western and Christian morality, exterminating those who did not conform thereto. Consequently, because political groups had been excluded from the legal definition, the Tribunal considered that the victim group was a national group, which had been eliminated in part. The eliminated portion was substantial enough to modify social relations within the country.

Aside from the legality-related issues involved in this decision, one of the questions raised therein pertains to the reasons advanced by the Tribunal to choose such *nomen juris*. They chiefly related to the right to truth, developed by human rights bodies. The Tribunal asserted that because its decision entailed the first conviction after the reopening of the trials in 2004, it was necessary – nearly mandatory – for it to paint a complete picture of the events of state terrorism. After so many years of waiting, the Tribunal stated, victims deserved an adequate response by the state.

Nevertheless, it should be noted that the accused was not convicted of genocide (which is not included in the Criminal Code as an offence)<sup>97</sup> but of multiple murders, torture and illegal deprivation of liberty. In this sense, the reference to international criminal law was not enough to modify or substitute the domestic legislation without violating the *nullum crimen sine lege* principle. Therefore, the reference to the crime of genocide does not have practical legal consequences, but symbolic ones. Indeed, case law seems to show that, unlike other international crimes, the notion of genocide carries specific symbolic weight, which translates victims' expectations of the judicial system.

### **8.5.2.3. Sexual Violence as Part of the Systematic and Widespread Attack Against a Civilian Population**

One key development is the inclusion of charges of sexual violence against the military being tried at the Argentinian domestic tribunals. Even if at the time of the Comisión Nacional sobre la Desaparición de Personas ('CONADEP', National Commission on the Disappearances of

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<sup>97</sup> Ley 26.200 Ley de implementación del Estatuto de Roma de la Corte Penal Internacional [Law 26.2000 Law for the Implementation of the Rome Statute of the International Criminal Court] (<https://www.legal-tools.org/doc/43268e/>) was adopted on 13 December 2006. It refers to the definition of genocide contained in the ICC Statute, without defining it itself, but only establishing the penalty to be imposed on a person convicted for genocide.



Persons) and the Trial of the Juntas there already were testimonies regarding sexual abuses committed by state terrorism, the first case in which this was discussed and a conviction secured took place in June 2010.<sup>98</sup> Afterwards, in one of the most important decisions, the so-called *ESMA* case,<sup>99</sup> the Federal Criminal Oral Tribunal No. 5 ordered that certain testimonies be severed from the file of the case and send to the investigative judge (*juez de instrucción*) to commence an investigation of possible charges of sexual abuse and rape committed at the clandestine detention centre.<sup>100</sup>

The prosecution of these crimes raised a number of questions that needed to be resolved.<sup>101</sup> In the first place, it had to be established that acts of sexual violence had been part of the systematic and widespread attack against the civilian population in order to avoid the application of statutory limitations. In the second place, because in previous decisions the tribunals had included acts of sexual violence within the definition of the crime of torture and ill treatment, the independent existence of the former had to be established. In the third place, there is a tendency at the Argentinian judiciary to consider acts of sexual abuse as *delicta propria*, and therefore this raised questions about the responsibility of those who had not themselves committed the material elements of the crime. Finally, there were some questions regarding the evidential burden required to prove such crimes.

With regard to the inclusion of sexual violence within a systematic and widespread attack against the civilian population, in the *Molina* case, the Tribunal observed that already in the judgment of the Trial of the Juntas, the Chamber had identified an illegal state structure, run by the armed forces, that developed a clandestine repression plan looking to eliminate certain groups considered enemies of the country due to their political

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<sup>98</sup> Federal Criminal Oral Tribunal, Mar del Plata, *Molina, Gregorio Rafael s/privación ilegal de la libertad, etc.*, Judgment, Case 2086, 16 June 2010 ('Molina case').

<sup>99</sup> Escuela Superior de Mecánica de la Armada ('ESMA', Navy Mechanics School) was the location of the largest clandestine detention centre, where it is estimated that approximately 5,000 people were illegally detained, the majority of whom were later killed and to this day remained disappeared.

<sup>100</sup> Federal Criminal Oral Tribunal no. 5, *Donda, Adolfo Miguel s/ infracción al art. 144 ter, párrafo 1° del Código Penal – ley 14.616 – y sus acumuladas*, Judgment, 28 December 2011.

<sup>101</sup> See Legal Opinion of the National Prosecution Office, Unit for the Coordination and Follow-up of Cases on Human Rights Violations Committed during State Terrorism, 7 October 2011 ('Legal Opinion of the National Prosecution Office').

ideology. This clandestine plan included a massive and systematic violation of human rights, such as torture, ill treatment and humiliation of those illegally detained. In this context, women were usually subjected to heinous sexual practices that resulted in impunity because of victims' forced silence.<sup>102</sup> Taking into account the testimonies collected by CONADEP and the IACHR, the Tribunal considered that there was enough evidence to consider that rapes suffered by women at the clandestine detention centres were not isolated or random events, but were, in fact, part of the repressive clandestine plan of the armed forces.<sup>103</sup>

To support its findings, the Tribunal made a general reference to the case law of international criminal tribunals, such as the tribunals for the former Yugoslavia and Rwanda (albeit it did not cite any specific case), and also mentioned the ICC Statute.<sup>104</sup> It also referred to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights.<sup>105</sup> The decision of the Tribunal was appealed before the Federal Court of Cassation. In its decision, it mentioned the ICC Statute and stated that in order to be considered as a part of a crime against humanity, the sexual abuses should have constituted a habitual practice and not isolated facts.<sup>106</sup>

At this point, it should be noted that it seems that the tribunals do not clearly separate the contextual elements or the *chapeau* of crimes against humanity (widespread or systematic attack against the civilian population) from the underlying offences. Indeed, they require that sexual abuses be committed in a widespread or systematic manner, while, in fact, those characteristics should be found in the attack itself, which consists of a “course of conduct involving the multiple commission of acts referred to in paragraph 1 [underlying offences] against any civilian population”.<sup>107</sup>

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<sup>102</sup> Molina case, p. 18, see *supra* note 98.

<sup>103</sup> *Ibid.*, p. 19.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, pp. 19–20. The Tribunal mentioned the case of European Court of Human Rights, *Aydin v. Turkey*, Judgment, 25 September 1997 (<https://www.legal-tools.org/doc/d5db6e/>) and the case Inter-American Court of Human Rights, *Caso del Penal Miguel Castro Castro v. Perú*, Judgment, 25 November 2006 (<https://www.legal-tools.org/doc/7d2681/>).

<sup>106</sup> Federal Court of Cassation, Chamber IV, *A Molina, Gregorio Rafael s/ recurso de cassación*, Judgment, Causa. 12821, 17 February 2012, pp. 21–22.

<sup>107</sup> ICC Statute, Art. 7.2(a), see *supra* note 63.

Regarding the second question, whether sexual violence should be distinguished from the crime of torture, in a second leading case, the Federal Court of Cassation affirmed that because rape and other forms of sexual violence are considered by international law both as crimes of war and as crimes against humanity, they have to be singled out from other similar heinous crimes, such as murder, torture and so on.<sup>108</sup> The Court stated that the ways used to inflict pain at the clandestine detention centres – forced nudity, forced pregnancy and forced abortion – were different in the case of women.<sup>109</sup> Furthermore, even if sexual violence could be equated with torture as a crime against humanity, this does not mean that the former conduct should be subsumed in the latter because sexual violence possesses its own specific elements and its prosecution seek to protect different values, such as sexual integrity and freedom.<sup>110</sup>

Moreover, the Federal Court of Cassation also mentioned resolutions of human rights bodies, such as the Committee of the Convention to Eliminate All Forms of Discrimination against Women, which, in its report of July 2010, regretted that Argentina's tribunals had not imposed sanctions on perpetrators of sexual violence at the clandestine detention centres, and recommended that the state adopt proactive measures to prosecute sexual violence in the context of crimes against humanity. Therefore, the Court asserted that it had to make this conduct visible as autonomous crimes violating human rights because sexual violence in the context of state terrorism expresses a form of sexual terror that exceeds the crime of torture, going beyond its sociological and legal meaning.<sup>111</sup> It was, in fact, an international obligation stemming from human rights treaties, in particular those relating to women's rights.<sup>112</sup>

As regards the issue of sexual violence as *delicta propria*, in the *Menéndez et al.* case, the Federal Court of Cassation affirmed that it was possible to apply the doctrine of commission through another person or

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<sup>108</sup> Federal Court of Cassation, *Compulsa en Autos 86-F*, “F. c/ Menéndez Luciano y Otros s/ Av. Inf. art. 144 ter C.P. por apelación”, venido a esta Sala “B”, Judgment, 23 November 2011, p. 37 (‘Menéndez et al. case’).

<sup>109</sup> *Ibid.*, p. 38.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, p. 50.

<sup>112</sup> *Ibid.*, p. 51.

indirect perpetration (*autoría mediata*)<sup>113</sup> because the perpetrator is the person who dominates the execution of the act in an organised power apparatus, such as state terrorism.<sup>114</sup> Therefore, in the context of sexual violence, the perpetrator is not only the person who penetrates the victim's body but it is also the person exercising strength over her, issuing the order, the one responsible for the functioning of the clandestine detention centre and, in general, the person with decisive influence over the final act.<sup>115</sup>

In this sense, the Court also asserted that cases of macro-criminality require special rules of responsibility such as the ones developed by international law.<sup>116</sup> Nevertheless, it also observed that the theory of will-domination through a state apparatus of power has been mainly applied by European courts, especially German, and Latin American tribunals, and that the *ad hoc* tribunals, such as the International Criminal Tribunal for the former Yugoslavia ('ICTY'), have concluded that it is not part of customary international law and thus they could not apply it,<sup>117</sup> preferring, instead, the joint criminal enterprise and the responsibility of commanders and other superiors theories. At the same time, the Federal Court of Cassation mentioned that the ICC did accept the theory of will-domination through a state apparatus of power.<sup>118</sup>

Finally, regarding evidentiary issues, due to the characteristics of sexual violence offences and the clandestine nature of the state terrorism plan, the need for special rules have been asserted. Indeed, the National Prosecution Office has made reference to the rules developed by the IC-

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<sup>113</sup> Since the Judgment of the Trial of the Juntas, the Argentinian tribunals have applied Claus Roxin's theory of an organised structure (state apparatus) of power where the perpetrator possesses will-domination, is the man from behind (*Hintermänner*) who actually controls the acts. This theory requires: 1) domination of a hierarchical organisation; 2) fungibility of the executor – who can also be responsible; and 3) illegal organisation.

<sup>114</sup> Menéndez *et al* case, pp. 56–57, see *supra* note 108.

<sup>115</sup> *Ibid.*, p. 58.

<sup>116</sup> *Ibid.*, p. 59.

<sup>117</sup> *Ibid.*, p. 63. The Court referred to International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Milomir Stakić*, Appeals Chamber, Judgment, IT-97-24, 22 March 2006 (<https://www.legal-tools.org/doc/09f75f/>).

<sup>118</sup> The Court of Cassation mentioned the case at the ICC, Situation in the Democratic Republic of Congo, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-4, 28 September 2008 (<https://www.legal-tools.org/doc/67a9ec/>).

TY and the ICC in order to avoid the revictimisation of those who suffered sexual abuses, especially at the time of interrogation and assessment of the evidence.<sup>119</sup> For example, the National Prosecution Office cited Rule 96(1) of the ICTY's Rules of Procedure and Evidence ('RPE'), which established that no corroboration of the victim's testimony shall be required, and Rule 63(4) of the ICC's RPE which also declares that "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence". In the same vein, the National Prosecution Office referred to Rules 70 and 71 of the ICC's RPE, and to the case law of the ICTY, in particular, the decisions in the *Foča*,<sup>120</sup> *Aleksovski*<sup>121</sup> and *Tadić*<sup>122</sup> cases.

Some of the National Prosecution Office's arguments have been taken into account by the Argentinian Tribunals. For example, in the *Molina* case, the Oral Tribunal considered that the testimonies of two victims proved the sexual violence acts, though it also noted that statements of other persons who had been detained at the same clandestine detention centre supported those testimonies.<sup>123</sup> In the *Menéndez et al.* case, the Federal Court of Cassation asserted that to demand evidence of a secret order would be tantamount to requiring diabolic proof to the detriment of victims of sexual violence, placing them in a defenceless situation and causing revictimisation.<sup>124</sup>

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<sup>119</sup> See Legal Opinion of the National Prosecution Office, pp. 24–26, *supra* note 101.

<sup>120</sup> ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgment, IT-96-23, 22 February 2001, para. 566 ('Foča case') (<https://www.legal-tools.org/doc/fd881d/>).

<sup>121</sup> ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgment, IT-95-14/1, 24 March 2000, para. 62 (<https://www.legal-tools.org/doc/176f05/>).

<sup>122</sup> ICTY, *Prosecutor v. Duško Tadić*, Trial Chamber, Judgment, IT-94-1, 7 May 1997, para. 536 (<https://www.legal-tools.org/doc/0a90ae/>).

<sup>123</sup> *Molina* case, p. 108, see *supra* note 97. It is worth noting that a Federal Court of Cassation, *Acordada* [General Decision], 1/12, *Reglas prácticas en causas de lesa humanidad* [Practical Rules in Cases of Crimes against Humanity], 28 February 2012, stated that tribunals should refer to international law criteria when dealing with witnesses who suffered sexual violence to avoid revictimisation.

<sup>124</sup> *Menéndez et al.* case, p. 59, see *supra* note 108. At the same time, this argument can be considered as asserting an inversion of the legal burden of proof (*onus probandi*) in detriment of the accused, by demanding that he or she did not give the order.

The Argentine case law<sup>125</sup> on this subject, though not very extensive, shows that the developments in the international criminal law field have been instrumental for the advancement of the prosecution of sexual offences.

### **8.6. Blurring the Distinction between International Criminal Law and Domestic Law**

In Argentina, courts are applying international criminal law, even though some of the international provisions have not been implemented in the national order,<sup>126</sup> using international law to fill in a vacuum of the domestic system.<sup>127</sup> Those supporting the characterisation of the events that occurred in Argentina as crimes against humanity assert the double nature of this conduct. They regard them as being both domestic and international crimes. The meaning of this double nature is not clear.<sup>128</sup> Does it mean that judges have a choice on the applicable law when faced with conduct that can be labelled as both a domestic crime and an international crime? Certainly the consequences of only applying domestic law would be different from resorting to international law. Nonetheless, it is submitted here that in such a case, the judges apply neither domestic law nor international law, but a kind of hybrid constituted by both orders. Judges have used international law to overcome domestic legal obstacles; however, they have not convicted the accused for international crimes, but for domestic figures. These convictions would not have been possible without the recourse to international law. In those cases, we can no longer speak of domestic or international law, as they are blurred.

Along these lines, Bassiouni asserts that the interaction caused by the exercise of universal jurisdiction is “breaking down the traditional

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<sup>125</sup> For more information on the subject, see Paula Mallimaci Barral, “Violencia de género en los centros clandestinos de detención: Testimonios, respuestas y silencios de Poder Judicial” [Gender Violence at Clandestine Detention Centres: Testimonies, Answers and Silences of the Judiciary], in Ignacio Anitua *et al.*, 2014, pp. 231–62, see *supra* note 95.

<sup>126</sup> As an example, Argentina has never implemented the Genocide Convention.

<sup>127</sup> Sévane Gariban, “El recurso al derecho internacional para la represión del pasado: Una mirada cruzada sobre los casos *Touvier* (Francia) y *Simón* (Argentina)” [The Recourse to International Law for the Repression of the Past: A Crossed Overview of the *Touvier* (France) and *Simón* (Argentina) cases], in *Revista Jurídica de la Universidad de Palermo*, 2012, vol. 13, no. 1, pp. 53–74.

<sup>128</sup> Malarino, 2009, see *supra* note 57.

compartmentalization between international and national law”.<sup>129</sup> This affirmation can also be applied to the case of national courts exercising territorial jurisdiction and applying international law. Moreover, the ways in which the Argentinian courts are gradually more willing to employ international rules demonstrates that international law is leaving its traditional place in the shade. In a similar vein, Frédérique Mégret<sup>130</sup> advances a view that the distinction between international and national law has become less pertinent because the “domestic has become more like the international and the international has become more like the domestic”. He argues that the internationalisation of domestic criminal law does not change this discipline as much as the criminalisation of international law changes the latter. Nevertheless, as the Argentinian case shows, the fact that criminal courts are applying international law does have a bearing upon the content of that discipline. Indeed, this situation is not without difficulties.

As mentioned earlier, the principle of *nullum crimen, nulla poena sine lege*, a cornerstone of national criminal law, is being applied with a certain degree of flexibility and not every member of the judiciary regards this as a positive consequence. In fact, five former and current Supreme Court justices asserted in their dissenting opinions that this was a principle that could not be trampled on in order to apply international law with the aim of prosecuting international crimes.<sup>131</sup> Yet, it seems that the notion explained above, that this principle when applied in the realm of international criminal law differs in content from the one applicable in prosecutions of domestic crimes,<sup>132</sup> prevails in the jurisprudence analysed in this chapter. Indeed, the critiques do not seem to include customary norms in their analysis, which constitute one of the sources of international law, and thus, of international criminal law as well.

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<sup>129</sup> Bassiouni, 1998, p. 154, see *supra* note 14.

<sup>130</sup> Frédéric Mégret, “Three Dangers for the International Criminal Court: A Critical Look at the Consensual Project” in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 196.

<sup>131</sup> Priebke case, Decisions of Justices Belluscio, Levene and Petracchi, see *supra* note 68. In the same line, decisions of Justices Belluscio, Fayt and Vasquez in the Contreras Sepúlveda case, see *supra* note 57; Dissenting Opinions of Justice Fayt in the Arancibia Clavel case, see *supra* note 56; Simon case, see *supra* note 12, and Mazzeo case, see *supra* note 33.

<sup>132</sup> However, it is worth noting that the ICC Statute recognises the legality principle in Art. 22.

It may be argued that blurring the distinction between international criminal law and domestic law could result in the disappearance of the former as a discipline in itself. On the contrary, the better view seems to be that the trend described here is actually reinforcing this area of international law. Not only do national courts contribute to its development but states are also becoming more receptive to international provisions. The fact that their courts can apply those provisions makes them less wary about the discipline as a whole, including its international branch, which still needs state co-operation to work properly.<sup>133</sup>

### **8.7. Some Conclusions**

International criminal law is an inclusive concept with respect to its enforcement mechanisms. This chapter has suggested that the national branch of international criminal law is actually growing stronger and is playing a paramount role in the development of this subject. Through the exercise of territorial and universal jurisdiction, states are reinforcing the existence of international criminal law as a discipline and are also contributing to the development of its norms.

The prosecution of international crimes by national courts seems to encounter less resistance in post-transitional societies. The case of Argentina shows that courts and government have become more open to the application of international norms. The main change in their attitude took place during the 1990s at the time of the greatest development of the international branch of international criminal law. Thus, it is possible to assert that all its enforcement mechanisms are linked together and the transformations that occurred in one aspect of the discipline affect the other.

This dialectical relationship is mirrored in the interaction between international criminal law and domestic law. For example, on the one hand, states have enacted internal amnesty laws that in turn have shaped the way in which international law deals with this subject. On the other hand, international law has conditioned the kind of amnesties states are allowed to adopt. Moreover, the influence of domestic law on international criminal law has been beneficial because the developments that took place in this realm have spurred the latter onwards, even when its international branch was on pause.

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<sup>133</sup> As an example, see ICC Statute, Part IX, *supra* note 63.



Furthermore, post-transitional societies, such as Argentina, demonstrate that amnesty laws for international crimes that are in violation of international norms cannot retain their validity, either at the international or national levels. This indicates that international criminal law has been strengthened since the 1980s. In this sense, while at the end of that decade it was possible to assert that an international duty to prosecute could have had a detrimental effect on a transitional society because it could have destabilised fledgling democracies,<sup>134</sup> this is no longer true in the case of post-transitional societies. In these societies, such an international duty has had the effect of promoting human rights and thwarting impunity, thus contributing to the fortification of democracy.

Therefore, this chapter shows that international criminal law plays a fundamental role in combating serious human rights abuses and complements the international system of protection of human rights, which only focuses on state responsibility. Consequently, the blurring of international criminal law and domestic law has produced positive results. It has enhanced the role of the former so that it would influence the latter into promoting human rights and combating impunity for the most serious international crimes.

The fact that states are incorporating substantive rules of international criminal law seems to have had a favourable effect on the prosecution of international crimes. In this sense, it has been advanced that domestic courts should engage in an “international judicial dialogue” with international tribunals and foreign courts when deciding on a case relating to the commission of an international crime.<sup>135</sup> In this manner, all courts, both national and international, would benefit from each other’s findings and contribute to make international criminal law a more integrated and consistent discipline. As a result, it is submitted here that national courts should play an even more important role in the application of international criminal law because this exercise is beneficial for the discipline as a whole. Therefore, in order to tell a complete story, the history of international criminal law must take into account the developments in the domestic realm.

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<sup>134</sup> Nino, 1991, p. 2638, see *supra* note 20.

<sup>135</sup> In fact, the existence of hybrid tribunals shows that the future of international criminal law depends on its interaction with domestic law and national experiences.



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## Peace and Security and the State's Use of Criminal Law and Justice: The Case of West Germany

Hilde Farthofer \*

### 9.1. Introduction

The struggle for peace and security in the world was not born at the end of the nineteenth century, but it was never so glaringly obvious as after the onset of the First World War. This development was influenced by the new methods of warfare and the unprecedented scale of related harm and destruction during that conflict. Historical experience shows that the desire for peace and security in international relations is usually based on the impression that emanates from the effects of war, particularly in the face of mass atrocities committed during conflicts. This impression influences the decisions of states when delegating some of their sovereign rights to an international body and urging legally binding measures to prevent a reoccurrence of violence.

The discussion in this chapter is structured chronologically. Section 9.2. provides a historical overview of the steps taken towards peace and security in the world at the international level and highlights the intention behind the remarkable treaties which, in a certain way, were dedicated to the renunciation of war. Section 9.3. considers the international military tribunals and crimes against peace. In addition to the implementation of the new offence of crimes against peace, this moment marked the transition from the state responsibility to individual responsibility for crimes committed in course of wars.

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The chapter does not want to show the historical development of the crime of aggression from the international perspective, as it is now stipulated in Article 8*bis* of the Rome Statute of the International Criminal Court ('ICC Statute'). Rather it considers the difficulties national law-makers are faced with by implementing such offences in domestic penal codes. This concerns not only the implementation of international law into national law but also the fact that states have to react to the threats imposed on it by both endogenous and exogenous factors. Section 9.4. offers a case study of the Federal Republic of Germany ('West Germany') as an example of the difficult steps that national legislation had to make towards the criminalisation of crimes regarding acts and wars of aggression. In the conclusion, the main issues are summarised and the problems which are caused by combating war and acts of aggression are highlighted.

## **9.2. The First International Steps towards Peace and Security in the World**

The need for peace and security in the world did not emerge for the first time at the outset of the First World War. The eighteenth and nineteenth centuries were characterised by global wars, including, for example, the War of the Spanish Succession (1701–1714), the Napoleonic Wars (1792–1815) and the Crimean War (1853–1856). During these wars, the civilian population suffered as a result of the hostilities, but the governments involved were not ready to take part in combined efforts to restrict the right to wage war.<sup>1</sup> The only concession made by states towards the regulation and confinement of war was limited to an acceptance of rules regarding *jus in bello*.<sup>2</sup> The different Hague Conventions, in particular the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907), aimed exclusively to delimit how to conduct fighting and not to regulate the legitimate grounds to resort to force.<sup>3</sup> Prior to this, at the con-

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<sup>1</sup> Jost Dülffer, *Im Zeichen der Gewalt: Frieden und Krieg im 19. und 20. Jahrhundert*, Böhlau, Cologne, 2003, pp. 1 ff.

<sup>2</sup> For an overview of humanitarian law and its aims see, for example, Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014; and Robert Kolb and Richard Hyde, *Introduction to the International Law of Armed Conflicts*, Hart, Oxford, 2008.

<sup>3</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (<https://www.legal-tools.org/doc/fa0161/>).

clusion of the first Hague Peace Conference in 1899, states at least agreed for the first time to provisions that should govern arbitration proceedings before waging war with, for example, the Convention for Pacific Settlement of International Disputes.<sup>4</sup> The intention behind the Convention was similar to the principle included in Article 29 of the Lieber Code: "Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace".<sup>5</sup> The establishment of the Permanent Court of Arbitration in 1899 in The Hague also was not a complete prohibition against the waging of war but aimed to provide other means to solving disputes between states.<sup>6</sup>

Shortly after the outbreak of the First World War, the British government spoke up for a federation of states, which was from their point of view the only option to prevent further wars.<sup>7</sup> Their main argument was based on the idea that the unrestricted right to resort to force as part of state sovereignty could only be controlled by the community of states as a whole. The first step towards building an international community was the Covenant of the League of Nations.<sup>8</sup> Its founding document constitutes the first chapter of the Versailles Peace Treaty.<sup>9</sup> The obligation for a state not to resort to war is stipulated in its Preamble. This could convey the impression that it was designed as a complete ban on waging war. That is

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<sup>4</sup> Convention (I) for the Pacific Settlement of International Disputes, The Hague, 29 July 1899 ('Pacific Settlement Convention') (<https://www.legal-tools.org/doc/b1e51f/>).

<sup>5</sup> General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 24 April 1863, Art. 29 (Lieber Code) (<http://www.legal-tools.org/doc/842054/>). See also Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity", in *American Journal of International Law*, 1998, vol. 92, no. 2, pp. 213–31.

<sup>6</sup> Pacific Settlement Convention, Art. 20, see *supra* note 4. For a deep examination of arbitration, see Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration*, Kluwer Law International, London, 2013.

<sup>7</sup> Hermann Raschhofer, *Völkerbund und Münchener Abkommen*, Olzog, Munich, 1976, pp. 53 ff.

<sup>8</sup> See, for example, Fred H. Aldrich, *The Rights, as a Belligerent, of a Member of the League of Nations which Resorts to War in Disregard of Its Obligations under Articles 12, 13 or 15 of the Covenant*, n.p., 1925.

<sup>9</sup> Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919, ('Versailles Treaty') (<http://www.legal-tools.org/doc/a64206/>). See, for example, Sebastian Haffner, *Der Vertrag von Versailles*, Matthes und Seitz, Munich, 1978; and Alan Sharp, *Consequences of Peace: The Versailles Settlement: Aftermath and Legacy, 1919–2010*, Haus, London, 2010.

not entirely correct because it was merely intended to restrict the right of a state to resort to force under any circumstances.<sup>10</sup>

Ten years after the Versailles Treaty, the next step towards the condemnation of war was stipulated by the Kellogg-Briand Pact.<sup>11</sup> It was signed in 1928 and was originally sought as a bilateral treaty between France and the United States. Negotiations had started in 1920. In 1927 the contracting parties came to an agreement which formed the basis for discussions with other states to establish an international anti-war treaty.<sup>12</sup> The Kellogg-Briand Pact does not include a definition of aggression because the US Secretary of State, Frank B. Kellogg, recognised the risk that if included it would not gain the consent of the contracting parties.<sup>13</sup> Nevertheless, for the first time it was determined that war should not serve as method to resolve disputes between states. The right of self-defence, deriving from state sovereignty, was not infringed because it was seen as a legitimate justification. Unfortunately, these international obligations and commitments could not achieve the desired result, as the German attack on Poland on 1 September 1939 showed. A significant gap was the lack of an enforcement mechanism in the case of a breach of the treaty by a state and therefore it could not prevent the outbreak of the Second World War.

### 9.3. Crime against Peace and Individual Responsibility

The outbreak of the Second World War hindered further activities to ban war as method of political discourse and international controversies. The establishment of an International Military Tribunal ('IMT') at Nuremberg

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<sup>10</sup> League of Nations, Declaration Concerning Wars of Aggression, Eighth Ordinary Session of the Assembly of the League of Nations, adopted 24 September 1927, League of Nations Official Journal, Special Supplement No. 53, p. 22.

<sup>11</sup> Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928 ('Kellogg-Briand Pact'). Unfortunately the Pact did not provide any sanction in case of a breach and therefore the signatory states could not agree upon measures against Japan after the Japanese invasion of Manchuria in 1931. See, on the conflict and the role of the League of Nations, Christopher G. Thorne, *The Limits of Foreign Policy: The West, the League, and the Far Eastern Crisis of 1931–1933*, Putnam, New York, 1972.

<sup>12</sup> Robert H. Ferrell, *Peace in Their Time: The Origins of the Kellogg-Briand Pact*, W.W. Norton, New York, 1968, pp. 170 ff.

<sup>13</sup> Eva Buchheit, *Der Briand-Kellogg-Pakt von 1928: Machtpolitik oder Friedensstreben?*, Lit, Münster, 1998.

to prosecute the major war criminals of the European Axis was an issue discussed during various conferences of the Allies. The Moscow Declaration in 1943 clearly indicated that the United States, the United Kingdom, China and the Soviet Union intended to prosecute the main perpetrators through their own institutions instead of repeating the mistake made in the aftermath of the First World War.<sup>14</sup>

During the First World War, the idea emerged among the Allies to bring to justice those responsible for war crimes. Articles 228 and 229 of the Versailles Treaty indicated that persons who were accused of committing war crimes could be brought before a court martial of the Allies. By signing the Versailles Treaty, Germany agreed to extradite German nationals who were suspected to have breached the laws and customs of war. It was provided that in the main proceedings the perpetrators should face accusations in the territory and according to the laws of the country where they had perpetrated crimes. This concept should not be applied concerning offences without regional links. In these cases the composition of the courts martial should comprise judges of each state of the Allied powers.<sup>15</sup> The Allies handed over to the German authorities a memorandum that listed the names of 900 German nationals, but Germany refused the extradition of the accused and informed the Allied powers that the perpetrators would be charged before the German *Reichsgericht* (Court of Justice). The attempt failed and only 17 proceedings took place. Most trials resulted in acquittal.<sup>16</sup> It was quite obvious that the charges against individuals based on breaches of the customs and laws of war would not be in violation of the principle of *nullum crimen, nulla poena sine lege*.

The case of Wilhelm II, the former German Kaiser, was exceptional. He should have been tried on the charges of a supreme offence against international morality and the sanctity of treaties. Wilhelm II was not accused of having breached international customary law and, therefore, an

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<sup>14</sup> Declaration of the Four Nations on General Security, Moscow, 30 October 1943 ('Moscow Declaration'). See also Kochavi, 'The Moscow Declaration, the Kharkov Trial and the Question of a Policy on Major War Criminals in the Second World War', *History*, 1991, vol. 76, no. 248, pp. 401–17.

<sup>15</sup> For an in-depth analysis of the reasons for the failure of the criminal prosecution by the Allies after the First World War, see Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg*, Hamburger Edition, Hamburg, 2003.

<sup>16</sup> Claud Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of German Mentality*, H.F. & G. Witherby, London, 1921.

objection was raised that the accusation would violate international law, that is, the concept of state immunity which outlaws the conviction of head of states by other states.<sup>17</sup> In 1920 the Netherlands rejected the extradition of the Kaiser and the desire to establish justice after international crimes had been committed remained unsuccessful.<sup>18</sup>

In the aftermath of the Second World War, the Charter annexed to the London Agreement of 8 August 1945 ('IMT Charter') stipulated in Article 6 that the IMT should have jurisdiction over crimes against peace, war crimes and crimes against humanity. Crimes against peace were defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".<sup>19</sup> The new concept of individual responsibility was combined with the idea of an unjust war, as mentioned indirectly in the Kellogg-Briand Pact, which then was used as justification against criticism that the criminal offence would breach one of the main principles in law, the principle of *nullum crimen, nulla poena sine lege*.<sup>20</sup>

Of 24 indicted individuals<sup>21</sup> only six were not accused of having committed crimes against peace, either for count two<sup>22</sup> of the Indictment as a perpetrator or for count one,<sup>23</sup> that is, taking part in a common plan or conspiracy to commit the crime. Only a person in position of authority could have committed the offence, that is, he had to have at least the opportunity to participate in and influence political decisions. In the subse-

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<sup>17</sup> See, for example, Ramona Pedretti, *Immunity of Heads of States and State Officials for International Crimes*, Brill, Leiden, 2014.

<sup>18</sup> Robert K. Woetzel, *The Nuremberg Trials in International Law*, Stevens, London, 1960, p. 31.

<sup>19</sup> Charter of the International Military Tribunal, annexed to the London Agreement, 8 August 1945, Art. 6, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. I: *Official Documents*, Nuremberg, Germany, 1947, p. 11 ('IMT Charter') (<https://www.legal-tools.org/doc/64ffdd/>).

<sup>20</sup> Woetzel, 1960, pp. 163 ff, see *supra* note 18.

<sup>21</sup> Robert Ley committed suicide before the trial started; Martin Bormann was tried *in absentia*; and the case of Gustav Krupp von Bohlen und Halbach was separated owing to his serious illness. Therefore 21 accused appeared before Court.

<sup>22</sup> Karl Dönitz, Walter Funk, Wilhelm Frick and Arthur Seyss-Inquart.

<sup>23</sup> Hermann Göring, Wilhelm Keitel, Joachim von Ribbentrop, Erich Raeder, Alfred Rosenberg, Alfred Jodl, Constantin von Neurath and Rudolf Hess, the only person convicted solely for a crime against peace.



quent Nuremberg trials against the elite of Nazi Germany, it was very difficult or impossible to establish the prerequisite of the “head of state” capacity of the majority of the defendants.<sup>24</sup> That is the reason why, in the subsequent Nuremberg trials held under the jurisdiction of the United States, the leadership requirement of crimes against peace could only be reached in the *Ministries* case,<sup>25</sup> but not in the other trials against the German military and economic elite, for example, not in the *High Command* case,<sup>26</sup> the *Krupp* case<sup>27</sup> or the *Farben* case.<sup>28</sup> The charges according to count one, the participation in a common plan or conspiracy to commit crimes against peace, failed either due to a lack of knowledge of the plan or to the missing steps carried out by the individual defendant to put the plan into action.

The Judgment of the IMT against the major war criminals compartmentalised actions between a war of aggression and acts of aggres-

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<sup>24</sup> As Robert H. Jackson, the chief US prosecutor at the IMT, made clear regarding the charge of crimes against peace:

It never occurred to me, and I am sure it occurred to no one else at the conference table, to speak of anyone as “waging” a war except topmost leaders who had some degree of control over its precipitation and policy.

Robert H. Jackson, “The United Nations Organization and War Crimes”, Address delivered at the American Society of International Law, 26 April 1952, cited in Witney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945–1946*, Southern Methodist University Press, Dallas, 1999, p. 533.

<sup>25</sup> United States Military Tribunal, *United States of America v. Ernst von Weizsäcker et al.*, Judgment, 11–13 April, 1949 (‘Ministries Case’) (<https://www.legal-tools.org/doc/eb20f6/>) in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949*, vol. XIV, Washington, DC: US Government Printing Office, 1949, p. 865 (‘Trials of War Criminals’). The defendants von Weizäcker, Lammers, Woermann, Körner and Keppler were convicted for participation in the planning of an aggressive war in the Trial Court but the decision was only confirmed in the case of von Weizäcker by the Court of Appeal.

<sup>26</sup> United States Military Tribunal, *United States of America v. Wilhelm von Leeb et al.*, Judgment, 27 October 1948, in *Trials of War Criminals*, vol. XII, pp. 65 ff. (‘High Command case’) (<https://www.legal-tools.org/doc/c340d7/>), see *supra* note 25.

<sup>27</sup> United States Military Tribunal, *United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach et al.*, Judgment, 31 July 1948, in *Trials of War Criminals*, vol. X, p. 103 (‘Krupp case’) (<https://www.legal-tools.org/doc/ad5c2b/>), see *supra* note 25.

<sup>28</sup> United States Military Tribunal, *United States of America v. Carl Krauch et al.*, Decision and Judgment of the Tribunal, 30 July 1948, in *Trials of War Criminals*, vol. X, p. 40 (‘Farben case’) (<https://www.legal-tools.org/doc/38b077/>), see *supra* note 25.

sion. The latter referred to the invasion of a country without the use of a large number of military troops to overthrow resistance, such as the invasion of Austria and Czechoslovakia, while the attack against Poland was classified as the first war of aggression in the context of the Second World War.<sup>29</sup> This division was carried over into Article 2 of Control Council Law No. 10, which differs from the wording of Article 6(a) of the IMT Charter.<sup>30</sup> The first part of Article 2 makes clear that there is a difference between the invasion of a country and the war of aggression. A determination of war of aggression was not developed but rather it was noted that the resort to force was in violation of international law and international treaties, for example the Kellogg-Briand Pact.

Both the IMT Charter and Control Council Law No. 10 provided for the *actus reus* of crimes against peace that the perpetrator planned, prepared and initiated an aggressive attack against other nations. The defendants had to have knowledge that the planned, prepared or initiated war would be illegal and that he had the political power to influence the decision. The Tribunal clearly pointed out in the *Ministries* case that an individual had not to object at any cost, that is, that there was no obligation to jeopardise the lives of their own soldiers by committing treason, and that some of the defendants had protested against waging war but that the protest was not successful.<sup>31</sup> The term waging war was interpreted by the IMT in a broader way – that it was sufficient to fulfil the prerequisites for liability if the individual took part in the establishment of a new government in occupied territory.<sup>32</sup>

In relation to the war fought in the Pacific region, crimes against peace stipulated in Article 5(a) of the Charter of the International Military Tribunal for the Far East was the most important charge at the Tokyo Trials.<sup>33</sup> More than half of the counts were based on crimes against peace.<sup>34</sup>

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<sup>29</sup> International Military Tribunal ('IMT'), *Prosecutor v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946, p. 186 (<https://www.legal-tools.org/doc/f41e8b/>).

<sup>30</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, in *Trials of War Criminals*, vol. XV, pp. 23–28 (<https://www.legal-tools.org/doc/ffda62/>).

<sup>31</sup> *Ministries* case, pp. 341 ff., see *supra* note 25; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, p. 188.

<sup>32</sup> Heller, 2011, p. 192, see *supra* note 31.

<sup>33</sup> Charter of the International Military Tribunal for the Far East, 19 January 1946 (<https://www.legal-tools.org/doc/a3c41c/>).

Interestingly, the concept of conspiracy was only applied during proceedings regarding crimes against peace. This discrepancy was probably based on the lack of explanation of the concept of conspiracy. This was strongly criticised because the precondition of effective connections between the Japanese leadership could not be proven.<sup>35</sup>

In the aftermath of the Second World War the United Nations ('UN') was established. Article 2(4) of the UN Charter stipulates the prohibition of the use of force.<sup>36</sup> The ban on waging war is restricted by Article 51, that is, the inherent right of a sovereign state to act in self-defence against offenders is not infringed by Article 2(4).<sup>37</sup> The Nuremberg Trials, with the shift from state responsibility to individual liability, and the establishment of the UN were followed by a number of international documents, including the Nuremberg Principles<sup>38</sup> and the Declaration on Friendly Relations.<sup>39</sup>

Unfortunately, the Cold War blocked further development until resolution 3314 (1974), including a definition of aggression, was adopted by

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<sup>34</sup> Neil Boister, "The Tokyo Trial", in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, p. 24. The attack on Pearl Harbor was the reason for the political decision to focus on crime against peace at the Tokyo Trials. See Bert V.A. Röling, "The Nuremberg and the Tokyo Trials in Retrospect", in Guénaél Mettraux, *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, pp. 461 ff.

<sup>35</sup> For more details, see Fujita Hisakazu, "The Tokyo Trial: Humanity's Justice v Victors' Justice", in Yuki Tanaka, Timothy L.H. McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 10.

<sup>36</sup> Charter of the United Nations, San Francisco, 26 June 1945, Art. 2(4) ('UN Charter'). See for the different arguments regarding the interpretation of the term "force", Ademola Abass, *International Law: Texts, Cases, and Materials*, 2nd ed., Oxford University Press, Oxford, 2014, pp. 337 ff.

<sup>37</sup> UN Charter, Art. 51, see *supra* note 36. See also Thomas K. Plofchan, "Article 51: Limits on Self-Defense?", in *Michigan Journal of International Law*, 1992, vol. 13, pp. 336–73.

<sup>38</sup> International Law Commission ('ILC'), Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Report of the ILC on its Second Session, 5 June –29 July 1950, Official Records of the General Assembly, 5th sess., suppl. no. 12, UN doc. A/CN.4/34, in Yearbook of the International Law Commission, vol. II, 1950, Principle VI(a) (<https://www.legal-tools.org/doc/5164a6/>).

<sup>39</sup> United Nations General Assembly, resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 25th sess., 24 October 1970 (<https://www.legal-tools.org/doc/9ce2af/>).

the UN General Assembly.<sup>40</sup> The crime of aggression was never listed in any of the Statutes of the *ad hoc* or hybrid tribunals nor applied in national cases involving international crimes.<sup>41</sup> The concept of aggression could only be found regarding state responsibility trials at the International Court of Justice, for example in the *Congo v. Uganda* case. The Court concluded in its Judgement “that Uganda has violated the sovereignty and also the territorial integrity of the DRC”.<sup>42</sup> Now the definition of aggression had been implemented in the ICC Statute, but it remains to be seen if and how it will be applied by the Court after 2017.

#### **9.4. National Security Law: The Case of West Germany**

After the Second World War the newly established government of West Germany was faced with various problems. Several of them were caused by the growing tensions between its Western allies and the Soviet Union. The first open crisis between the opposing parties was marked by the blockade of Berlin in 1948 where the friendly relations experienced during the Second World War turned hostile. The consequence was the division into West and East Germany (German Democratic Republic, ‘GDR’).

The fear of an aggressive attack by the Soviet Army was not the only problem the government in Bonn faced. For instance, it had to deal with large-scale humanitarian difficulties caused by refugees from the eastern parts of the German Empire, the lack of habitation because of the widespread destruction of housing infrastructure during the war and a high rate of unemployment.

##### **9.4.1. *Tabula Rasa* Concept of the Allied Powers**

Long before the end of the war the Allied powers discussed the opportunities to cleanse German law of all elements which were clearly affected by the National Socialist ideology. The United Kingdom tended to circum-

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<sup>40</sup> United Nations General Assembly, resolution 3314 (XXIX), Definition of Aggression, 31st sess., 14 December 1974 (<http://www.legal-tools.org/doc/90261a/>).

<sup>41</sup> Yoram Dinstein, *War, Aggression and Self-Defence*, 5th ed., Cambridge University Press, Cambridge, 2011, pp. 130 ff.

<sup>42</sup> International Court of Justice, *Democratic Republic of the Congo v. Uganda (Case Concerning Armed Activities on the Territory of the Congo)*, Judgment, 19 December 2015, para. 165 (<https://www.legal-tools.org/doc/e31ae7/>).

vent the international law obligation to respect the national legislation in the occupied zone by including the elimination of various laws in the peace treaty. The United States, in contrast, took the view that the suspension of the affected law was obligatory for the occupation force in order to establish public safety and order in the occupied territory.<sup>43</sup> The main intention behind these considerations was to preclude an opportunity for the German government to implement law that reverted to the National Socialist era after the end of the occupation.

After the end of the war, the question of whether National Socialist law should be suspended was no longer on the agenda; rather, the issue was how to apply the suspension. The remaining substantive issue was the effective timing of suspension, that is, *ex tunc* (from the outset) or *ex nunc* (from that moment onwards). Even if the Allies preferred the first option they opted for the latter because of the immense ramifications the *ex tunc* suspension would have had on the daily life of the German population. The Allied Control Council decided to establish within each zone a catalogue of preconditions to identify Nazi-based law. For example, the American list provided that the regulations used to discriminate individuals on racial, religious and political grounds or because of their citizenship were inadmissible.<sup>44</sup>

On 20 September 1945 Control Council Law No. 1 came into force, repealing National Socialist laws. In its Article 1(1)(c), the Law for the Amendment of the Provisions of Criminal Law and Procedure of 24 April 1934 was explicitly suspended and as a consequence the previously applicable law was reactivated.<sup>45</sup> The intervention did not go far enough for the Allies, and for this reason they passed Control Council Law No. 11, which provided for the complete annulment of the state protection law, that is, of Paragraphs 80–94 of the German Criminal Code.<sup>46</sup> The Allied powers were motivated by the need to protect their German collaborators

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<sup>43</sup> Both states referred to Art. 43 of the Hague Conventions to justify the intervention in national law but were using different arguments. Matthias Etzel, *Die Aufhebung der nationalsozialistischen Gesetze durch den Alliierten Kontrollrat (1945–1948)*, J.C.B. Mohr (Paul Sieback), Tübingen, 1992.

<sup>44</sup> For a detailed list of preconditions to identify national socialist influenced law, see *ibid.*, pp. 56 ff.

<sup>45</sup> Control Council Law No. 1, Repealing of Nazi Laws, 20 September 1945.

<sup>46</sup> Control Council Law No. 11, Repealing of Certain Provisions of the German Criminal Law, 30 January 1946.

against German criminal prosecution.<sup>47</sup> This approach was strongly criticised from the German side, with the argument that the state would be made defenceless against any kind of attack from outside as well as from within.<sup>48</sup>

#### **9.4.2. Shifting of the Character of War and the Legal Countermeasures**

Both West Germany as well as the GDR claimed the right to be the legal successor of the German Reich and therefore to have jurisdiction over the whole territory of Germany. These circumstances led to a state of fear of an attack from the side of the Soviet occupied zone and had a massive impact on the legislative decisions taken by West German governments in subsequent years.<sup>49</sup>

The first legal attempt to at least partly close the resulting lacunae can be found in the West German Basic Law or Constitution (*Grundgesetz*) in 1949.<sup>50</sup> In February 1950, as a further reaction, the opposition Sozialdemokratische Partei Deutschlands (SPD, Social Democratic Party of Germany) proposed a draft Law against the Enemies of Democracy,<sup>51</sup> based on the Hessian state protection law, which was not passed by the state parliament of Hesse. Some months later the government put their own proposal on the table which was significantly more comprehensive than the SPD draft.<sup>52</sup> In its explanation of the draft, the government emphasised that the offences should be integrated into the Criminal Code and not, as proposed by the SPD, formulated as a special act. The government argued that a special act would first, be reminiscent of the inefficient legal measures taken during the Weimar Republic, and second, could lead to

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<sup>47</sup> On the controversies between the interests of the Allies and German law, see Hans Mittelbach, “Strafrechtlicher Schutz der Besatzungsinteressen”, in *Deutsche Richterzeitung*, 1950, vol. 5, pp. 51–55.

<sup>48</sup> For example, the criticisms of the Hessian Minister of Justice Georg-August Zinn; see Etzel, 1992, p. 84, *supra* note 43.

<sup>49</sup> The statement of Otto John, the then Federal Intelligence Agency, Legal Committee of the German Parliament, 112th sess., 13 June 1951.

<sup>50</sup> Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], 23 May 1949, BGBI 1949, 1 (<https://www.legal-tools.org/doc/7a9b34/>).

<sup>51</sup> German Parliament, doc. no. 563, 15 February 1950.

<sup>52</sup> German Parliament Doc. No. 1307, 4 September 1950.

the wrong impression that it would be a reversion to the special acts of the National Socialist period.<sup>53</sup>

In the course of the negotiations in the German Parliament on the proposed first Criminal Code Amendment Act (*Strafrechtsänderungsgesetz*), it became obvious that the fear that West Germany could be a victim of direct aggressive attacks shifted to the threat of indirect aggressive actions which were aimed at undermining the new government and which could finally lead to the failure of the new democratic system.<sup>54</sup> The government as well as the opposition parties obviously had in mind the collapse of the Weimar Republic in the 1920s and the subsequent seizure of power by the National Socialist German Workers' Party when deciding on the elaboration of the state protection law. This event had not been caused by an aggressive attack but was rather driven by aggressive actions against the government, for example, by the assassination of Walther Rathenau, the foreign minister of the Weimar Republic.

The post-war government's draft of the first Criminal Code Amendment Act was guided by the draft of 1927,<sup>55</sup> but did not take into account the objections raised from academics or the alternative concept of Wilhelm Kahl.<sup>56</sup> The second model for the State Security Act was the amended Swiss Criminal Code, a law based on the state security regulations of the National Socialist regime. Hence, the German legislators imported precisely the law that was suspended by the Allied Control Council. The government draft not only adopted these sources but also extended their ambit. Besides the conventional offences of high treason and treason, the draft provided articles on crimes against peace, sedition and acts of subversion. The criticism was based on the implementation of extensive government powers to intervene in the fundamental rights of individ-

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<sup>53</sup> Explanation to the first Law amending Criminal Law, Annex to the German Parliament doc. No. 1307, 4 September 1950, p. 29.

<sup>54</sup> *Strafrechtsänderungsgesetz* [Criminal Code Amendment Act], 30 August 1951, Federal Law Gazette of Germany (Bundesgesetzblatt), part I 1951, no. 43; Legal Committee of the German Parliament, 111th sess., 7 June 1950, p. 1.

<sup>55</sup> Reichstagsdrucksache no. 3390, 19 May 1927.

<sup>56</sup> Materials to the Criminal Legislation Reform, Criminal Law Draft 1930 (Draft Kahl), reprinted Heger, Bonn, 1954, Reichstagsdrucksache no. 395, 6 December 1930 and see Friedrich-Christian Schröder, *Der Schutz von Staat und Verfassung im Strafrecht: Eine systematische Darstellung, entwickelt aus Rechtsgeschichte und Rechtsvergleichung*, Keip, 1970, pp. 176 ff.

uals. In subsequent years this anticipated fear was fulfilled, in particular through the decisions of the German Federal Supreme Court.<sup>57</sup>

The first Criminal Code Amendment Act was not only heavily criticised by lawyers and academics in Germany but also by the Allies. The government deliberately refrained from informing the Control Council before presenting it to Parliament. As a consequence, the Allied High Commission adopted the Law No. 62 which overruled the application of the law on issues regarding the Allies.<sup>58</sup>

### **9.4.3. Criminal Law as a Method to Protect the State: The End Justifies the Means?**

The revival of extreme right-wing groups in Germany led to the urgent implementation of parts of the first Criminal Code Amendment Act. Despite all the criticism, a state protection law was urgently needed, but regrettably the regulations were not based on a systematic approach and gave the judges of the Federal Supreme Court too much discretionary power to determine standards. The latter point was the reason for heated discussions. One Member of Parliament ('MP'), Hermann Brill, expressed his doubts that German judges would be qualified to apply the law<sup>59</sup> and the State Secretary, Walter Strauss, argued that the German judges would not be able to deal with such a high responsibility.<sup>60</sup>

The first regulation which was taken out of the draft during the negotiations in Parliament was the offence "betrayal of peace".<sup>61</sup> Paragraph 12 of the Law against the Enemies of Democracy, the proposed draft of the political opposition contained punishments of all forms of armed violence against other countries and all conduct that could serve in the preparation for war, but it did not mention war of aggression at all.<sup>62</sup> In the government draft of the state protection law the offence "crime against

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<sup>57</sup> Some of the decisions of the Federal Supreme Court were published by the Attorney General Walter Wagner, *Hochverrat und Staatsgefährdung: Urteile des Bundesgerichtshofes*, vol. 1, Müller, 1957 and vol. 2, Müller, 1958.

<sup>58</sup> Allied High Commission Law no. 62, Relations with the occupying powers, Official Journal of the Allied High Commission, 30 August 1951, p. 1106.

<sup>59</sup> Legal Committee of the German Parliament, 111th sess., 7 June 1951, p. 15.

<sup>60</sup> Legal Committee of the German Parliament, 118th sess., 28 June 1951, p. 16.

<sup>61</sup> Legal Committee of the German Parliament, 87th sess., 14 February 1950.

<sup>62</sup> See *supra* note 51.



peace” was placed at the very beginning to demonstrate a rejection of nationalism and a commitment to the international community. Paragraph 80, entitled “Betrayal of Peace”, was undoubtedly aimed at penalising the conduct of extreme right- and left-wing groups. The field of application was extended and war of aggression was directly mentioned in its first section.<sup>63</sup>

The former Minister of Justice wanted to launch a universal jurisdiction in the case of an aggressive war but could not convince Parliament to pass the law. One point of criticism concerned the concept of universal jurisdiction which, according to most parliamentarians regardless of party affiliation, would not have been possible to apply.<sup>64</sup> The Legal Commission of Parliament debated options to exclude the punishability of the government in the case of its decision to resort to force.<sup>65</sup> Until today a definition of the term “war of aggression” is not found and this lack of determination is the reason for disputes inside the academic world. Finally, after nearly 18 years Paragraph 80 on the preparation of a war of aggression was passed by Parliament in a modified form, without a determination of the term war of aggression but fulfilling the obligation posed by Article 26 of the German Grundgesetz.

Regulations regarding high treason can be found in every country in the world in order to protect the state. However, in the case of West Germany the law was widely extended, for example, by an offence named “disturbance of the constitution” which should have served as a general clause because of the undefined legally protected good “constitutional order”. A determination of the expression could have been founded by a political decision but should not have been open to the discretionary power of judges.

In the final version “disturbance of the constitution” was replaced by a chapter named Acts of Subversion which was not without controversy either.<sup>66</sup> Contrary to what was stated by the Ministry of Justice, the

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<sup>63</sup> See *supra* note 52.

<sup>64</sup> Legal Committee of the German Parliament, 87th sess., 14 February 1951.

<sup>65</sup> The debate was initiated by a member of the Ministry of Justice, who later became a judge at the Federal Supreme Court; Legal Committee of the German Parliament, 89th sess., 21 February 1951.

<sup>66</sup> Reinhard Schiffers, *Zwischen Bürgerfreiheit und Staatsschutz: Wiederherstellung und Neufassung des politischen Strafrechts in der Bundesrepublik Deutschland 1949–1951*, Droste Verlag, Düsseldorf, 1989, p. 249.

term “subversive” was already used in the Preamble of the Decree of the Reich President for the Protection of People and State (*Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*, 1933), the so-called Reichstag Fire Decree and was not a product of the Ministry of Justice.<sup>67</sup> The legally protected interest of the offence was shifted from the “constitutional order” to the “existence of the Federal Republic of Germany”. The existence of West Germany was frequently contested by the GDR as well as by other states. The provision aimed to confirm the sovereignty and independence of the state.<sup>68</sup> The Kommunistische Partei Deutschlands (‘KPD’, German Communist Party) MP, Walter Fisch, argued that the regulation would result in the punishability of the efforts of communists to unify the western and eastern parts of Germany.

Another criminal offence provided for the protection of state organs, that is, the protection of individuals and institutions should have gone well beyond the protected group of persons in the Criminal Code Amendment Act of 1934. Not only should this have comprised the protection of the Federal President but also of all members of the Federal government and of the members and heads of the *Länder* governments. Ultimately, only the protection of the Federal President was passed by Parliament because during the negotiations further extensions to the group of protected persons were proposed, such as the judges of the Federal Constitutional Court.<sup>69</sup>

Another critical regulation in the chapter on high treason was Paragraph 89 which had a massive impact on the freedom of press. The wording of this regulation derived from Paragraph 6(1) of the notorious Decree against Betrayal of German People of 1933<sup>70</sup> and was combined with the extensions of the Law for the Amendment of the Provisions of Criminal Law and Procedure of 1934.<sup>71</sup>

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<sup>67</sup> Verordnung des Reichspräsidenten zum Schutz von Volk und Staat [Decree of the Reich President for the Protection of People and State], 28 February 1933, Reich Law Gazette (Reichsgesetzblatt), part 1 1933, no. 17, p. 83.

<sup>68</sup> Schröder, 1970, pp. 188 ff., see *supra* note 56.

<sup>69</sup> Legal Committee of the German Parliament, 117. Session, 27 June 1951.

<sup>70</sup> Verordnung des Reichspräsidenten gegen Verrat am Deutschen Volke und hochverräterische Umtriebe [Decree of the Reich President against Betrayal of the German People and Traitorous Activities], 28 February 1933, Reich Law Gazette (Reichsgesetzblatt), part 1 1933, no. 18, pp. 85–87.

<sup>71</sup> Explanation to the first Criminal Code Amendment Act, Annex to the German Parliament doc. no. 1307, 4 September 1950, p. 34.

An offence was committed by producing, distributing or storing of all kind of means which could be used to influence masses of people, such as radio and television transmissions or newspaper articles. The problem arose due to the mental element requirements. The commission by negligence was proposed by the government and was unfortunately passed by Parliament. These conditions created a system of self-censorship because of the imminent threat placed on journalists, editors and publishers to commit a crime even if they had carefully considered the content of an article.

Another critical issue was Paragraph 95 on the “defamation of the state”. It penalised any public allegation which could be seen as defamation of the state, its organs or the constitutional order, a broad term which could cover nearly everything. The wording of the provision evoked the notorious law against acts of subversion and therefore the National Socialist criminal law which aimed to penalise the attitude and not the deeds of a person was brought back into the Criminal Code.<sup>72</sup>

The offence of treason according to Paragraph 100 was the legal source of one of the most strongly debated decisions of the Federal Supreme Court. In 1954 the head of the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz), Otto John, disappeared and some days later appeared in East Berlin. He gave two interviews during his stay in the GDR without revealing any state secrets. Approximately 18 month later John organised his escape but on arriving in West Berlin he was arrested and later convicted and sentenced to four years' imprisonment. The charge was treason and treacherous falsification. It could not be proved that he voluntarily left West Berlin or that he had given any secret information to the Soviet intelligence service, the KGB.<sup>73</sup> Interestingly in 1951 John had participated in the negotiations of

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<sup>72</sup> The KPD MP, Walter Fisch, gave rise to this argument on various occasions during the negotiations, for example, Legal Committee of the German Parliament, 117th sess., 27 June 1951. Also the conservative politician Hans-Joachim von Merkatz, who argued that the provisions were the spiritual children of the law against acts of subversion of the National Socialist regime, Legal Committee of the German Parliament, 102nd sess., 7 May 1951. For an academic study, see Schröder, 1970, p. 181, *supra* note 56.

<sup>73</sup> For comprehensive overview regarding the case of Otto John, see Klaus Schaefer, *Der Prozess gegen Otto John: zugleich ein Beitrag zur Justizgeschichte der frühen Bundesrepublik Deutschland*, Tectum-Verlag, Marburg, 2009. Otto John was one of the inner circle of the “men of 20 July”, a military resistance group which tried to kill Adolf Hitler on the

the Legal Commission of Parliament and had argued that MPs had to be tougher by adopting legislation against acts that placed the new democratic system under threat.<sup>74</sup> It was a statement he certainly regretted.

In the period after the state protection act came into force two political parties were outlawed. One proceeding was against the extreme right-wing Sozialistische Reichspartei Deutschlands ('SRP', Socialist Reich Party of Germany) and the other against the KPD, which was involved in the negotiations of the Legal Commission of Parliament. The members of the KPD had already been under pressure since 1950 when Chancellor Konrad Adenauer issued a decree to uphold loyalty to the constitution which allowed for their dismissal from public office solely on the basis of their party membership. The Federal Constitution Court stated in 1956 that the KPD was an anti-constitutional party and therefore declared its prohibition.<sup>75</sup> In the aftermath, thousands of party members were convicted for high treason, treason or acts of subversion.<sup>76</sup>

It was not only the substantive criminal law implemented by the first Criminal Code Amendment Act that was strongly criticised. The Courts Constitution Act also was modified in a controversial manner. Two regulations, Paragraphs 74a and 134(1) were of particular importance for the further practical implementation of the political criminal law. In spite of all the criticism of Paragraph 134(1), the modification was passed by Parliament and the Federal Supreme Court became the trial court in cases of high treason and treason, and consequently the court of last resort. The government had insisted that the responsibility could not be burdened on the shoulders of a normal judge and the matters pending before the court would be highly sensitive and of state interest, and therefore the trials should not be open before a jury.<sup>77</sup> The subsequent absence of a Court of Appeal was incompatible with the rule of law and led to a criminal law designed for enemies of the state, whatever that was supposed to mean.

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20 July 1944. John survived because he succeeded in escaping; his brother was executed together with most members of the group.

<sup>74</sup> Legal Committee of the German Parliament, 112th sess., 13 June 1951.

<sup>75</sup> For detailed information regarding the proceedings see *Das KPD-Verbot, Urteil des Bundesverfassungsgerichts*, 17 August 1956.

<sup>76</sup> A selection of decisions against former member of the KPD can be found in Wagner, 1957 and 1958, see *supra* note 57.

<sup>77</sup> Ministry of Justice, *Denkschrift*, 30 October 1951.

The second critical point was the concentration of the proceedings in special criminal chambers in the German regional courts for offences that were not assigned to the Federal Supreme Court, such as acts of subversion. It should be guaranteed that the judges involved were qualified to decide over such sensitive matters, in particular regarding the determination of the mental element of the defendant. During the negotiations in Parliament, not only members of the KDP but also those of the SPD and the Freie Demokratische Partei ('FDP', Free Democratic Party) drew an analogy between the special chambers for state protection matters and the notorious special courts of the National Socialist jurisdiction. Nevertheless, the special chambers were established.<sup>78</sup>

From a historic perspective some of the fears of the government and the people were legitimate. But the way the government chose to deal with the indirect aggressive attacks from Eastern Europe and in particular from the GDR did not solve the problems but created new ones. The establishment of the terrorist organisation Rote Armee Fraktion (Red Army Faction), an extreme left-wing terrorist association, was not the only negative symptom of a restrictive political criminal law. Nowadays the same political mistakes are being made all over the world by restricting the freedom and civil rights in the name of the war against terror.

## 9.5. Conclusion

To find a definition of aggression should be kept in mind not only in the international context but also when implementing such offences in national legal systems. The determination of a war crime or of a crime against humanity seems rather easier because of the lack of the political element that is included in the term war of aggression. If the aggressor wins the battle there will be no possibility to bring them to justice, in particular the major players in global politics. At the same time, the international community as a whole should be aware of the shifting character of war which probably needs new measures to prevent attacks against the sovereignty of states. All acts of aggression against other states are prepared by intelligence agencies, and therefore the intervention of agents, acts of sabotage

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<sup>78</sup> Schiffers, 1989, pp. 273 ff., see *supra* note 66. In favour of the special chambers, see Attorney General Walter Wagner, "Rechtsfragen zu § 74 a GVG von Bundesanwalt", in Heinrich Grützner (ed.), *Goltdammer's Archiv für Strafrecht*, R. v. Decker's Verlag, Hamburg, 1957, pp. 161–70.

and other little incidents should already be regulated in a systematic manner in national law and to a certain degree also at the international level. The development of a restrictive state protection law does not have the desired effect as we can see in many of the conflicts today, for example, the restrictive politics of the government of Syria was one of the reasons for the establishment of Islamic State.

The determination as to whether an armed conflict is a war of aggression will always be a political decision, and will therefore be hard to define under international or national law. Hence, states have to develop countermeasures against acts of aggression which prevent the outbreak of an aggressive war. But they should not forget that the ends do not justify the means. The argument that torture should be allowed to save the lives of thousands of people, articulated by various heads of state, such as General Augusto Pinochet, the former president of Chile, should not be used as a justification.

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## Civil Litigation and International Criminal Law – the Historical Discourse: Do the Two Go Together Even If Not Intended?

Itai Apter\*

### 10.1. Introduction

Study of the history of international criminal law can be utilised for a wide variety of purposes, whether to study its development or to understand its application today to prosecution of war criminals. However, and interestingly, the history of international criminal law is relevant today to other spheres of international litigation, in particular international civil litigation concerning allegations of breaches of human rights both by governments and corporations, where the main cause for action is based on alleged war crimes, as in the example of banks allegedly to have co-operating with the apartheid regime.<sup>1</sup>

The conjuncture of international criminal law and civil law can be seen in the light of the approach that universal criminal jurisdiction

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<sup>1</sup> In these cases, the New York Circuit Court analysed the history of international criminal law and interpreted its conjunction with civil law concepts in order to establish corporate liability for aiding and abetting human rights violations. See Andrei Takhteyev, "Note: Who Is to Blame? (and What Is to Be Done?): Liability of Secondary Actors Under Federal Securities Laws and the Alien Tort Claims Act", in *Brooklyn Law Review*, 2010, vol. 74, no. 4, p. 1561; US Court of Appeals for the Second Circuit, *Khulumani v. Barclay Nat'l Bank Ltd*, 504 F.3d 254, 12 October 2007, pp. 270–77.

is no different than universal civil jurisdiction.<sup>2</sup> But, and as this chapter argues, this does not necessarily mean that the historical discourse of the different concepts of both has proven to be beneficial or legally sound.

In order to illustrate this point, the chapter explores how the interpretation of international criminal law in civil actions corresponds with early international criminal law developments, in particular to questions of foreign government officials' immunity and corporate liability and complicity in alleged human rights violations as cases studies. It is important to note that in both fields there is constant development. Moreover, case law is always changing, as evidenced by the fact that in the last five years the US Supreme Court dramatically transformed the landscape under American law,<sup>3</sup> and European courts handed down conflicting judgments on civil litigation concerning Second World War cases, an issue which was eventually resolved by the International Court of Justice ('ICJ') in the *Jurisdictional Immunities* case (*Germany v. Italy*).<sup>4</sup> While this makes formulating conclusions for the future difficult, the importance of the chapter lies in looking at the historical discourse and cross-effects, and so the dynamic state affairs only highlights the need to better understand it, especially with regard to international criminal law which is much less susceptible to domestic law interpretation.

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<sup>2</sup> JIA Bing Bing, "The Immunity of State Officials for International Crimes Revisited", in *Journal of International Criminal Justice*, vol. 10, no. 5, pp. 1304–6.

<sup>3</sup> The cases, which will be elaborated upon further, are the *Kiobel* decision (holding that there must be minimum contacts to the United States for a corporate liability case) and the *Samantar* decision, holding that the Foreign Sovereign Immunity Act does not apply to foreign officials. See US Supreme Court, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 17 April 2013; US Supreme Court, *Samantar v. Yousuf*, 560 US 305, 1 June 2010 ('*Kiobel* case').

<sup>4</sup> International Court of Justice ('ICJ'), *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, General List No 143, 3 February 2012 ('*Jurisdictional Immunities* case') (<https://www.legal-tools.org/doc/674187/>) discussing, *inter alia*, the following European cases as quoted in the ICJ decision: Italy, Supreme Court, *Ferrini v. Federal Republic of Germany*, decision no. 5044/2004, 11 March 2004, *Rivista di diritto internazionale*, vol. 87, 2004, p. 539, *International Law Reports* ('ILR'), vol. 128, p. 658 ('*Ferrini* case'); Greece, Supreme Court, *Prefecture of Voiotia v. Federal Republic of Germany*, case no. 11/2000, ILR, vol. 129, p. 513, ('*Distomo* case'); Greece, Special Supreme Court, *Margellos v. Federal Republic of Germany*, case no. 6/2002, ILR, vol. 129, p. 525. While these cases, and the ICJ case, do not refer directly to foreign official immunity or corporate liability for war crimes, the decision by the ICJ to hold that there is no war crimes exception to foreign sovereign immunity is significant to the analysis of the international criminal law–civil litigation discourse.



The chapter focuses on how the discourse between international criminal law and the civil sphere has affected international criminal law and vice versa. This discourse is important to understand and evaluate as the potential implications are not only of a legal nature but also involve political and historical elements, as both are a prominent feature of international criminal law.<sup>5</sup>

As noted, there is significant scholarship and case law pointing out that there is no true difference or distinction between international criminal and civil jurisdiction and case law for alleged human rights violations.<sup>6</sup> Those arguing this position would no doubt claim that if there is any importance to such implications or historical discourse then it is only of minor value as it is internal and in the same “field”, and that in any case it could not affect the outcomes or definitions of international criminal law. However valid such arguments can be, the chapter will not follow this presumption. Rather, it builds upon the proposition, arguably affirmed by some of the ICJ justices in the *Arrest Warrant* case, that expresses scepticism as to whether states view civil and criminal proceedings in the context of alleged human rights violations abroad as similar in rationale and application.<sup>7</sup> Such a distinction compels not only exploring whether, even if distinct, we can or should combine them (that is, do they go together?), but also examining the results, and effects on international criminal law, of the historical discourse which placed them almost as one.

Within this framework, and the latter proposition, the chapter will begin in section 10.2. with how related concepts and ideas have been dis-

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<sup>5</sup> David Luban, for example, argues that to believe that international criminal law can “leap-frog” politics is messianic thinking. See David Luban, “After the Honeymoon: Reflections on the Current State of International Criminal Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 2.

<sup>6</sup> See, for example, American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, American Law Institute, St. Paul, MN, 1967, § 404, comment b states:

In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.

<sup>7</sup> ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002 (‘Arrest Warrant case’) (<https://www.legal-tools.org/doc/23d1ec/>); Donald Francis Donovan and Anthea Roberts, “The Emerging Recognition of Universal Civil Jurisdiction”, in *American Journal of International Law*, 2010, vol. 100, no. 1, p. 146.

cussed, in the past and today, in various jurisdictions, namely, the immunity of state officials for acts performed on duty from civil proceedings and corporate liability for alleged violation of human rights. The focus of the next two sections (10.3. referring to immunity and 10.4 to corporate liability)<sup>8</sup> will be on how the different legal frameworks relate to international criminal law core elements, as they form what is widely recognised as *jus cogens* (violations of peremptory international law norms) and a main component of states' obligations.<sup>9</sup> The discussion helps facilitate a better understanding of the question as to whether application of international criminal law to tort litigation was envisioned in the early days. Complementing this, we will also look at early modern era international criminal law applications such as the First World War-related international instruments,<sup>10</sup> the Nuremberg International Military Tribunal and the Eichmann Trial.

While immunity and corporate liability seem distinct at first view, especially in the legal sense, the way these issues have been discussed from a political perspective reveals a point of convergence. Some key elements are the interplay between the state of the official, or the corporation, and the forum state (where litigation takes place), the role of civil society, possible abuse of international criminal law and victor's justice.

Completing the circle, section 10.5. builds upon the previous analysis to present some preliminary legal and political conclusions to the case studies discussed. However, this will not be the only goal, as we seek to also understand how similar discourses with other legal and non-legal fields have affected international criminal law and its contemporary practice.

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<sup>8</sup> As there are many aspects to corporate liability and the main purpose of the chapter is to look at the issue from a case study perspective, with a focused debate, the relevant section will mostly focus on the aiding and abetting elements as they are reflected in international criminal law and the civil litigation.

<sup>9</sup> While the *jus cogens* concept has not been the focus of international criminal law in earlier times, its elements, and obligations arising from a definition of a crime as a violation of *jus cogens*, are now considered as the basic components of states' obligations under international criminal law. M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, pp. 65-66.

<sup>10</sup> M. Cherif Bassiouni, "International Criminal Justice in Historical Perspective: The Tension between States' Interests and the Pursuit of International Justice", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 132.

The recurring thread throughout the analysis is the need to consider how the historical discourse between international criminal law and civil litigation has influenced each other, the benefits and drawbacks of this, and of viewing civil litigation as an alternative to international criminal law, in particular to the functioning of international criminal law in the current and future international legal and political climate. In going through the different stages of the debate, this idea is always in the background of the analysis as we attempt to reach some initial conclusions on the consequences of this seemingly unintended dialogue and discourse which at times appears to be more of a monologue. This outcome is hardly surprising, as not only are international criminal courts required to interpret international criminal law but also domestic civil courts.<sup>11</sup> As will be evident throughout the chapter, by referring to historical discourse we mean two things: first, the discourse between present and the past; and second, discourse in a more general sense, that is, not only case law but also academic legal scholarship which plays an inherent leading role in international criminal law development.

## **10.2. Setting the Context: International Civil Litigation and Foreign Official Immunity and Corporate Liability**

Before proceeding with the case studies, it is important to provide the setting, referring to early as well as more contemporary developments, including some end results. Admittedly, it could be that if we took a traditional route this discussion would have been better placed at a later stage, but in this instance understating the ultimate outcomes facilitates a better understanding of the details.

We first consider the question of the immunity of foreign officials. In some civil cases, US courts still follow the principals set by the 1897 US Supreme Court holding in the *Underhill v. Hernandez* case,<sup>12</sup> providing that litigation against a foreign official puts in question the conduct of the state, making it harder to remove immunity (although this is not always the case). *Underhill*, often cited in US case law and legal scholarship pertaining to immunity, set out what was later defined as the act of

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<sup>11</sup> David Baragwanath, “The Interpretative Challenges of International Adjudication across the Common Law/Civil Law Divide”, in *Cambridge Journal of International and Comparative Law*, 2014, vol. 3, no. 2, p. 454.

<sup>12</sup> US Supreme Court, *Underhill v. Hernandez*, 168 US 250, 29 November 1897.

state principle, and adopted by other courts such as the United Kingdom Court of Appeals in 1921.<sup>13</sup> According to this principle, courts in one state cannot adjudicate the acts of another state. Applying this concept to immunity of foreign officials, the principle is that acts of officials are attributed to states and so can also not be adjudicated by foreign courts.<sup>14</sup>

This line of thought has the possible result of expanding immunity, even after the US Supreme Court holding in *Samantar v. Yousuf*,<sup>15</sup> which views common law as the basis for decision-making on these issues.<sup>16</sup> This is even the case if we consider that it is courts and not states<sup>17</sup> that apply international criminal law in the civil context, because ultimately they must also defer to the executive branch.<sup>18</sup> Just recently the official immunity approach received support from a decision by the Supreme Court of Canada, accepting the executive's view that immunity, for allegations of torture prohibited by international criminal law, does not breach the Canadian Charter.<sup>19</sup>

In the context of alleged human rights abuses occurring abroad, courts can be reluctant to intervene in foreign relations which are undoubtedly affected by removing immunity,<sup>20</sup> as adjudicating acts commit-

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<sup>13</sup> UK Court of Appeals, *Luther v. Sagor* [1921] 3 KB 532, 537, 12 May 1921.

<sup>14</sup> Ingrid Wuerth, "Foreign Official Immunity Determinations in U.S. Courts: The Case against the State Department", in *Virginia Journal of International Law*, 2011, vol. 51, p. 957.

<sup>15</sup> US Supreme Court, *Samantar v. Yousuf*, 560 US 305, 1 June 2010.

<sup>16</sup> According to some commentators common law will allow more options for foreign sovereigns to seek immunity from civil suits in US courts. Jennifer K. Elsea, "*Samantar v. Yousuf*: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials", Congressional Research Service Report, R41379, 2013, p. 12.

<sup>17</sup> History shows that such cases are infrequent mainly due to the serious implications such a decision can have on the relationships between states, as examples include the Eichmann, Barbie, Diminyuk, Finta and Kardic cases, as quoted in Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2007, p. 141.

<sup>18</sup> As noted by a US District Court Judge in one of the *Samantar* proceedings: "The Executive Branch has spoken on this issue and that they are entitled to a great deal of deference. They don't control but they are entitled to deference in this case". *Yousuf v. Samantar*, Transcript of order denying motion for reconsideration, 1:04 CV 1360, 1 April 2011; Chimène I. Keitner, "*Germany v. Italy* and the Limits of Horizontal Enforcement", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1, p. 176.

<sup>19</sup> Canada, Supreme Court, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, 10 October 2014.

<sup>20</sup> US Court of Appeals for the Second Circuit, *Matar v. Dichter*, 563 F.3d 9, 16 April 2009.

ted abroad by foreign officials contravenes an almost century-old concept linking sovereignty and independence to the state's ability to regulate acts occurring within its own borders.<sup>21</sup>

When courts refuse to adjudicate acts committed abroad, it means that the case is denied, and there is allegedly no regulation of conduct, no accountability and no retribution. It is important to emphasise that this assertion must not be construed as criticism of the courts. On the contrary, the argument is that this is likely the only legitimate decision the courts can make when civil litigation is concerned, reflecting the potential dangers that the “privatisation effect” can have on the use of international criminal law by private parties, wholly independent from states (as will be shown, the very reasoning at the core of civil cases) in civil litigation.<sup>22</sup>

Corporate liability for human rights violations is a much more novel concept in international law, especially in the context of international civil litigation. The basic underlying notion, established in international law as early as 1905, is that states are not only responsible for their own actions which cause transboundary harm, but also for those actions which they could control (that is, actors under their jurisdiction),<sup>23</sup> which today could be translated as corporations with financial activity in the forum state. This basic concept was somewhat complemented four years later in a 1909 US Supreme Court decision allowing the imposition of criminal liability on a corporation.<sup>24</sup>

When looking at litigation against corporations for alleged human rights abuses, we see a significant reference to international criminal law sources such as the Nuremberg trials. However, in most cases the claim that the Nuremberg trials can serve as a basis for corporate responsibility

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<sup>21</sup> Arbitrator, Max Huber, *Island of Palmas Case (Or Miangas)*, *United States of America v. Netherlands*, Award (1928), II RIAA 829, 838, 4 April 1928.

<sup>22</sup> For a different view about what should be the practice of US courts, arguing in effect that immunity be removed for almost any case of allegations of human rights abuse against foreign officials, see Beth Stephens, “The Modern Common Law of Foreign Official Immunity”, in *Fordham Law Review*, 2011, vol. 79, no. 6, p. 2718. This concept will be elaborated upon further in section 10.4.

<sup>23</sup> *Trail Smelter Arbitration (US v. Canada)*, 3 RIAA (1941) 1905, 1963; Carlos Lopez and Simone B. Heri, *Switzerland's Home State Duty to Protect Against Corporate Abuse*, Fastenopfer, Berne, 2010.

<sup>24</sup> US Supreme Court, *New York Central R. Co. v. United States*, 212 US 481 (1909), 23 February 1909.

is frequently denied,<sup>25</sup> and there were (in the decades since Nuremberg) very rare cases of damages being successfully won.<sup>26</sup> As noted, recently the US Supreme Court held that US courts will have jurisdiction in such cases only if there is a close link between the events in question and the United States, severely limiting the ability of plaintiffs to file claims in US civil courts.<sup>27</sup> All this again points out that for our second case study as well, the end result could be not what was initially expected.

There is a wide variety of possible reasons for the lacklustre success of civil litigation for human rights litigation. First and foremost one can argue that, as the ICJ noted, states have not embraced universal civil jurisdiction in the same way that they have embraced the domestic form of international criminal law, that is, universal criminal jurisdiction.<sup>28</sup> Second, and derivative of the first reasoning, it could be argued that courts and governments do not adhere to the call to extraterritoriality to address human rights breaches conducted abroad, and that such calls remain wishful thinking on the part of some, and might not be based on actual state practice.

While both arguments can be valid, and counterarguments can be found,<sup>29</sup> this section did not wish to focus on the framework of that discussion which has more of a moral-political emphasis. Rather, as already implied, it argues that besides this dilemma (whether we should allow or

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<sup>25</sup> In making such determinations courts rely on such holding as made by the tribunal in the Göring case: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”. International Military Tribunal (‘IMT’), *United States et al. v. Goering et al.*, Judgment, 1 October 1946 (‘IMT Judgment’) (<https://www.legal-tools.org/doc/45f18e/>). See for example, US Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 17 September 2010, p. 119. For criticism on this holding and examples of conflicting decisions, see Antoine Martin, “Corporate Liability for Violations of International Human Rights: Law, International Custom or Politics?”, in *Minnesota Journal of International Law Online*, 2011/2012, vol. 21, p. 110–12.

<sup>26</sup> Michael D. Goldhaber, “Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard”, in *University of California Irvine Law*, 2013, vol. 3, no. 1, p. 137–49. According to data, updated to 2012, only 13 out of 180 have ended with settlement, with almost all other cases still pending or dismissed (with very few verdicts in favour of plaintiffs).

<sup>27</sup> *Kiobel* case, see *supra* note 3.

<sup>28</sup> Arrest Warrant case, para. 48, see *supra* note 7.

<sup>29</sup> Jodie A. Kirshner, “Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute”, in *Berkeley Journal of International Law*, 2012, vol. 30, no. 2, p. 259.

disallow such litigation), the development of case law outcomes poses a threat to the realisation of international criminal law goals. Here, too, there are political possibilities for narrowing the damage, mainly the use of international criminal law in an equal manner, with less focus on those on the losing side of armed conflict or from weaker regions and nations.<sup>30</sup> However, as this chapter sets out a mainly legal analysis, the focus continues on the components of the historical discourse between international criminal law and related civil litigation case studies. The purpose is to explore whether, besides the detrimental affects on the outcomes, there is also demonstrated damage to how basic concepts of international criminal law are interpreted, beginning with the concept of immunity of officials.

### 10.3. The Concept of Immunity

In attempting to understand the historical criminal–civil discourse on the development of the immunity concept we must first understand how the concept of immunities of officials developed. During the early stages of the debate, there was an initial belief that officials acting in official capacity, that is fulfilling orders, should enjoy immunity, as they could not be prosecuted for violations of the laws of war.<sup>31</sup> Realising, thought not without dissenting opinions,<sup>32</sup> that such a perception would in effect preclude any prosecutions, the post-First World War deliberations reached the conclusion that as far as grave violations were concerned immunity should also be revoked for officials, even when acting in an official capacity.<sup>33</sup> In the years that followed this was not implemented in practice.<sup>34</sup>

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<sup>30</sup> Joseph M. Isanga, “The International Criminal Court Ten Years Later: Appraisal and Prospects”, in *Cardozo Journal of International and Comparative Law*, 2013, vol. 21, no. 2, p. 235.

<sup>31</sup> Van Alebeek, 2007, p. 204, see *supra* note 17.

<sup>32</sup> Some argue that this was the US position in the negotiations. See M. Cherif Bassiouni, “World War I: ‘The War to End All Wars’ and the Birth of a Handicapped International Criminal Justice System”, in *Denver Journal of International Law and Policy*, 2002, vol. 30, no. 3, p. 244

<sup>33</sup> Treaty of Peace between the Allied and Associated Power and Germany, Versailles, 28 June 1919, Art. 227 (‘Versailles Treaty’) (<https://www.legal-tools.org/doc/a64206/>), creating the framework for an international criminal trial for the former German Emperor, read as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guaran-

But the Second World War transformed this reality, as the tribunals held that if a state acted in violation of international law, officials could not enjoy immunity from prosecution.<sup>35</sup>

These principles were later confirmed in subsequent decisions,<sup>36</sup> and international instruments related to international criminal law, mainly the Rome Statute of the International Criminal Court ('ICC Statute') stipulating in Article 27(2): "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".<sup>37</sup> This reflected earlier provisions in the Statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR').<sup>38</sup> However, as a matter of practice the issue did not attract attention for some time as historically, and until more recent times, governments refrained from international criminal law prosecution of foreign state officials for international criminal law breaches.<sup>39</sup>

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tees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial.

<sup>34</sup> Van Alebeek, 2007, p. 206, see *supra* note 17.

<sup>35</sup> IMT Judgment, p. 44, see *supra* note 25.

<sup>36</sup> See, for example, in the cases of Slobodan Milošević, Charles Taylor and Omar Al Bashir, in Ingrid Wuerth, "Pinochet's Legacy Reassessed", in *American Journal of International Law*, 2012, vol. 106, no. 4, p. 741.

<sup>37</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Art. 27(2) ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>38</sup> Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Art. 7 ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>); Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by resolution 955, Art. 6 ('ICTR Statute') (<http://www.legal-tools.org/doc/8732d6/>).

<sup>39</sup> Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, Cambridge, 2010, p. 533.



In order to answer that question we turn to case law to understand how immunity has been interpreted in light of comparable international criminal law and universal criminal jurisdiction as its main component, a question that gained prominence in later years as substantive developments in international criminal law encouraged litigation against heads of state.<sup>40</sup> This question is very relevant theoretically but also practically, since even today questions of foreign official immunity, at least in US courts, are decided according to common law,<sup>41</sup> inherently incorporating international criminal law principles.

The first relevant cases in early American history show that even if courts did perceive foreign official (non-diplomat) defendants as different from regular foreign defendants, immunity did not provide a jurisdictional bar from the jurisdiction of the court but rather an affirmative defence to be proven by the defendant. This meant that a defendant had to prove to the court that the actions in question were not unlawful under international law.<sup>42</sup> While in this first line of cases there was no apparent discussion of international criminal law in itself, some related concepts such as immunity as a bar to jurisdiction (though in the context of foreign sovereign immunity)<sup>43</sup> and official capacity were discussed.<sup>44</sup>

Some decades later, and immediately before the first substantial steps in international criminal law, a US Supreme Court Justice, in a constitutional proceeding, ventured into future international criminal law concepts, noting that courts should refrain from looking into the merits and lawfulness of military action.<sup>45</sup> This approach can be seen as an initial foray in international criminal law, and arguably a sign for future interpretations in non-criminal proceedings. Interestingly, the holding was made even after the principle of non-immunity was established not only in the Versailles Treaty but also in practice, although more on a domestic level

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<sup>40</sup> Christopher D. Totten, “Head-of-State and Foreign Official Immunity in the United States After *Samantar*: A Suggested Approach”, in *Fordham International Law Journal*, 2011, vol. 34, no. 2, pp. 337–38.

<sup>41</sup> US Supreme Court, *Samantar v. Yousuf*, 560 US 305, 1 June 2010.

<sup>42</sup> Chimène I. Keitner, “The Forgotten History of Foreign Official Immunity”, in *New York University Law Review*, 2012, vol. 78, p. 758.

<sup>43</sup> US Supreme Court, *The Schooner Exchange v. M’Faddon*, 11 US 116 (1812), 7 Cranch 116, cited in Keitner, 2013, p. 172, see *supra* note 18.

<sup>44</sup> Keitner, 2012, p. 709–10, see *supra* note 42.

<sup>45</sup> US Supreme Court, *Korematsu v. United States*, 323 US 214, 18 December 1944.

as reflected in the Istanbul and Leipzig trials following the First World War, and without great success as relatively few trials were conducted and lenient sentences were imposed.<sup>46</sup>

This different interpretation of immunity could have been disconnected, and it can be argued that the later determination at Nuremberg of lack of immunity for officials engaged in violations of international law had no relevance in the future civil cases. However, it seems much more likely that Nuremberg set the framework of future civil litigation to come, especially in the context of US law, and the Alien Tort Statute in particular.<sup>47</sup> Some years later, for example, this is evident from a 1995 decision of the US Supreme Court which held that war crimes can serve as the basis for civil suits for compensation, relying on the Nuremberg trials for defining war crimes as a violation of the law of nations.<sup>48</sup> One can claim that this decision was a purely natural one as the civil court looked for reliance on the past. But at the same time it could also be presented as a policy choice, when the court could have, for example, relied on the *de facto* immunity provided to the Japanese emperor, who could have been brought to trial for war crimes at the 1946 Tokyo Tribunals alongside his officers, but it was decided not to indict him.<sup>49</sup>

Returning to the chronological account, the 1949 Geneva Conventions and the basic individual responsibility regime established by them,<sup>50</sup>

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<sup>46</sup> Theodor Meron, “Reflections on the Prosecution of War Crimes by International Tribunals”, in *American Journal of International Law* 2006, vol. 100, no. 3, p. 558.

<sup>47</sup> Gwynne Skinner, “Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute”, in *Albany Law Review*, 2008, vol. 71, no. 1, p. 327.

<sup>48</sup> The Court stated: “The liability of private individuals for committing war crimes has been recognised since World War I and was confirmed at Nuremberg after World War II”, US Court of Appeals for the Second Circuit, *Kadić v. Karadžić*, 70 F.3d 232, 243 NY, 13 October 13 1995.

<sup>49</sup> Allison Marston Danner, “Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism”, in *Virginia Journal of International Law*, 2005, vol. 46, no. 2, p. 94, citing Sir William Webb, *US and Others v. Araki Sadao et al.*, Separate Opinion of the President, in R. John Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East*, vol. 108, Edward Mellen Press, New York, 1998, p. 18 (<https://www.legal-tools.org/doc/1db870/>).

<sup>50</sup> George William Mugwanya, “Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of *Delicti Jus Gentium*: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court”, in *Michigan State University-DCL Journal of International Law*, 1999, vol. 8, p. 742.

codifying international criminal law,<sup>51</sup> are also associated by some with the later civil cases. Such a reference is made for the purpose establishing international criminal law causes for Alien Tort Statute litigations,<sup>52</sup> although some courts reject this connection and linkage between the Geneva Conventions and civil proceedings on the basis of the argument that the Conventions do not provide direct remedies for individuals.<sup>53</sup>

The later stage in international criminal law can be considered as the 1962 Eichmann trial. While the trial is sometimes viewed as not precedential for international criminal law due to its unique circumstances,<sup>54</sup> it can still be considered as a basis for the later concept of removing immunity for foreign officials alleged, in a civil proceeding, to have perpetrated war crimes even when acting within their duty and according to domestic law.<sup>55</sup> While there are those who claim that the case as a whole was based on an unlawful act,<sup>56</sup> the trial is still perceived as an example of a “correct” application of international criminal law and an element in the creation of some of its customary international law components.<sup>57</sup>

Establishing the historical line of non-immunity decisions in international criminal law, we can now turn to the relatively recent, but still historical, way of interpretation of this concept by civil courts, mainly in the United States but also in several other jurisdictions. This analysis is important in order to understand how civil courts consider argumentation based on international criminal law non-immunity concepts, since if they view it differently than international criminal law, there is an increasing likelihood that future international criminal law concepts of immunity will be affected, whether only in domestic courts or also in international ones.

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<sup>51</sup> Alexander K.A. Greenawalt, “The Pluralism of International Criminal Law”, in *Indiana Law Journal*, 2011, vol. 86, no. 3, p. 1074.

<sup>52</sup> Michael Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law*, Martinus Nijhoff, Leiden, 2009, pp. 86–87.

<sup>53</sup> *Malenkovic*, Beschluss v. 10 October 2003 (LG Bonn), Az.: 1 O 361/02, cited in Eric A. Engle, “Alien Torts in Europe? Human Rights and Tort in European Law”, ZERP-Discussion Paper, 1/2005, Zentrum für Europäische Rechtspolitik, Universität Bremen, p. 38.

<sup>54</sup> See, for example, Luban, 2013, p. 2, see *supra* note 5.

<sup>55</sup> William R. Casto, “Notes on Official Immunity in ATS Litigation”, in *Fordham Law Review*, 2011, vol. 80, no. 2, p. 584–85.

<sup>56</sup> See, for example, the words of Monique Chemillier-Gendreau before the International Court of Justice in the Arrest Warrant case, p. 23, see *supra* note 7.

<sup>57</sup> Antoni Pigrau Sole, “The Pinochet Case in Spain”, *ILSA Journal of International and Comparative Law*, 2000, vol. 6, p. 661.

As elaborated later, even this is not the root cause of the narrowing of the universal nature of international criminal law, a process that has been gradually developing;<sup>58</sup> it can certainly contribute to it, warranting the attention of international criminal law scholars and practitioners.

At first, civil courts seem to have been fully supportive of the almost blanket non-immunity of officials, holding, as early as 1980, that officials alleged to have conducted violations of the laws of nations cannot enjoy immunity,<sup>59</sup> echoing the spirit of the Nuremberg and Eichmann case law. Following this conceptual message, the claims in the courts, accepted to some extent for the proceeding years, created the notion that civil courts can actually enforce, or at least attempt to enforce, international criminal law (and international humanitarian law at its core) without immunity of foreign officials serving as a procedural bar to jurisdiction.<sup>60</sup> If this had been the ultimate result, then the historical discourse could very well have proven itself as positive for those advocating expansive application of international criminal law, even if such an outcome might not have been internationally accepted, as it is clear that a non-immunity rule in civil courts is not something most states could live with.<sup>61</sup>

Taking another step in this historical journey, more than two decades ago, the tide seemed to have turned, in particular with regard to immunity, as those supporting the use of international criminal law non-immunity concepts in civil litigation expanded their campaign.<sup>62</sup> The courts did not support this campaign as they dismissed international criminal law arguments in cases pertaining to foreign officials, even if allega-

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<sup>58</sup> Luc Reydam, “The Rise and Fall of Universal Jurisdiction”, Working Paper no. 37, Leuven Centre for Global Governance Studies, January 2010.

<sup>59</sup> US Court of Appeals for the Second Circuit, *Filartiga v. Pena-Irala*, 630 F.2d 876, 30 June 1980, pp. 889–90.

<sup>60</sup> Ralph G. Steinhardt, “International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911”, in *George Washington International Law Review*, 2004, vol. 36, no. 1, p. 24.

<sup>61</sup> See, for example, US Supreme Court, *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*, Brief of the Kingdom of Saudi Arabia as *Amicus Curiae* in Support of Petitioner, 2009, p. 9.

<sup>62</sup> Beth Stephens, “The Curious History of the Alien Tort Statute”, in *Notre Dame Law Review*, 2014, vol. 89, no. 4, p. 1469.

tions of war crimes were concerned.<sup>63</sup> The courts reasoned, for example, that there could be immunity for violations of principled international law norms (that is, war crimes), and that even if officials acted in alleged breach of humanitarian standards they have not availed themselves of immunity protections.<sup>64</sup> Later, while not rejecting the argument that war crimes (such as assistance in setting up a terrorist organisation accused of widespread killings) cannot be part of an official duty, courts nevertheless held that allegations of such acts cannot be used as a means to bypass foreign official immunity and that any adjudication will inherently raise issues related to foreign relations.<sup>65</sup>

In the United States, courts accepted that such removal of immunity would not be in line with the concept that states can only act through their agents.<sup>66</sup> While the US Supreme Court later overruled this reasoning to some extent, immunity of officials will still remain when the US State Department argues that its removal will have implications for the conduct of US foreign policy and international relations.<sup>67</sup>

Turning to some examples of non-US jurisdictions, when considering the European legal framework for civil litigation in the context of official immunity liability we must bear in mind the overall framework for discussion in the context of foreign sovereign, rather than official, immunity. In the past decade, for example, courts in Germany held that there is no exception to such immunity for alleged war crimes during the Second World War.<sup>68</sup> Meanwhile, courts in Italy issued a conflicting opinion holding that such an exception applied for relatively similar circumstances, as there could be no immunity for such extreme cases of human rights

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<sup>63</sup> See, for example, US Court of Appeals for the Second Circuit, *Matar v. Dichter*, 563 F.3d 9, 16 April 2009.

<sup>64</sup> *Ibid.*, pp. 14–15.

<sup>65</sup> *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 9 September 2011, p. 250–52.

<sup>66</sup> US Court of Appeals for the Second Circuit, *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 14 August 2008, p. 84 (2d Cir. 2008).

<sup>67</sup> For a relatively recent application of this principle, see United States District Court, Southern District of New York, *Twafik v. Al-Sabah*, 11 Civ. 6455 (ALC) (JCF), 16 August 2012.

<sup>68</sup> Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], 2 BvR 1476/03, 15 February 2006, cited in Markus Rau, “State Liability for Violations of International Humanitarian Law: The *Distomo* Case Before the German Federal Constitutional Court”, in *German Law Journal*, 2006, vol. 7, no. 7, p. 702; for a discussion of the exception aspect of the ruling, *id.*, pp. 705–7.

violations.<sup>69</sup> The ICJ has rejected this latter argument,<sup>70</sup> but the Italian Constitutional Court recently annulled legislation applying the ICJ decision arguing that immunity of states (the issue of officials was not the focus of the case) for war crimes violates the Italian Constitution.<sup>71</sup>

We can also note several examples of how non-US courts related to the question of official immunity, mainly emphasising that state immunity equals official immunity as officials are instrumentalities of the state. This was the decision, for example, by the German Constitutional Court almost four decades ago holding in favour of immunity to a high-level British police official,<sup>72</sup> in a more recent decision by the Ontario Supreme Court<sup>73</sup> and a subsequent decision by the UK Court of Appeals.<sup>74</sup>

More directly relevant to war crimes in their modern perception was the decision by a Belgian court to dismiss a case against a former Israeli prime minister sued for damages due to allegations of unlawful killings.<sup>75</sup> This approach was echoed by a recent decision by the European Court of Human Rights to affirm the 2006 dismissal of a suit in the United Kingdom against a government minister from Saudi Arabia by the UK House of Lords due to official immunity.<sup>76</sup> A less recent Dutch example might have led to a different conclusion as a Dutch court awarded damages due to a civil suit against Libyan officials for torture, but the case involved a

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<sup>69</sup> Ferrini case, p. 658, see *supra* note 4, as cited in the Jurisdictional Immunities case, see *supra* note 4.

<sup>70</sup> Jurisdictional Immunities case, see *supra* note 4.

<sup>71</sup> For a report on the decision, decided on 22 October, and an unofficial summary see Christian Tamms, “Let the Games Continue, Immunity for War Crimes before the Italian Constitutional Court”, in *EJIL: Talk!*, 24 October 2014; summary prepared by Francesco Messineo, “Italian Constitutional Court Judgment 238/2014 Declares Customary International Law on State Immunity Inapplicable in the Italian Legal Order as far as War Crimes and Crimes against Humanity Are Concerned”.

<sup>72</sup> The Church of Scientology Case 65 ILR 1978, cited in UK Court of Appeals, *Property [X PTY] v. X and ANR*, ECWA CIV. 1433, 17 April 1997.

<sup>73</sup> Ontario Supreme Court, *Jaffe v. Miller*, 5 O.R. (2d) 133, 73 D.L.R. (4th) 420, 1990 CarswellOnt 953.

<sup>74</sup> UK Court of Appeals, *Porpend Property [X PTY] v. X and ANR*, ECWA CIV. 1433, 17 April 1997.

<sup>75</sup> See Belgium, Cour de Cassation, *Procureur contre Ariel Sharon et Consorts*, Arrêt, 24 September 2003, quoted in Engle, 2005, see *supra* note 53.

<sup>76</sup> European Court of Human Rights, *Jones and Others v. the United Kingdom*, Judgment, Applications nos. 34356/06 and 40528/06, 14 January 2014, para. 213 (<https://www.legal-tools.org/doc/7307f8/>).

plaintiff with ties to the Netherlands, depriving the example of its universal value, a core international criminal law element.<sup>77</sup>

The question highlighted in these examples is the meaning of these developments for the interpretation of the immunity of officials under international criminal law since the Eichmann trial of 1965, leaving aside for now the case law of international tribunals and looking at the domestic application. While it is true that nothing is clear with regard to official immunity in international criminal law, as indicated by a recent report issued by a rapporteur of the International Law Commission,<sup>78</sup> it will still be interesting to see what occurred in order to understand the linkage to the civil realm.

Briefly reviewing developments in state practice, we can gather that despite early indications of denial of immunity to officials in criminal cases there are two emerging trends. First, as already noted, the great reluctance of states, despite in very exceptional cases, to put alleged war criminals on trial,<sup>79</sup> and second, the limitations posed by legislation and case law. For the latter, there are also two different scenarios: one where the legal framework has always, despite allowing for universal jurisdiction, provided some form of immunity (mostly for acting officials and when the state of the official asserted his immunity);<sup>80</sup> and the other where the legal framework has changed, as was the case in Belgium and the United Kingdom, to provide wider immunity.<sup>81</sup>

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<sup>77</sup> Netherlands, Rechtsbank Gravenhage, *El-Hojouj v. Derba el al.*, no. 400882/HA ZA 11-225221 March 2012, cited and discussed in David Michael Kendal, “CSR and Extraterritorial Jurisdiction: International Law Boundaries to Human Rights Litigation”, Kendal: Human Rights Consulting, Issues Paper, February 2014.

<sup>78</sup> United Nations General Assembly, International Law Commission, Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, prepared by Concepción Escobar Hernández, Special Rapporteur, 31 May 2012, UN doc. A/CN.4/654, para. 67.

<sup>79</sup> Van Alebeek, 2007, p. 206, see *supra* note 17.

<sup>80</sup> United Nations General Assembly, International Law Commission, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, prepared by Roman Antolevich Kolodkin, Special Rapporteur, 10 June 2010, UN doc. A/CN.4/631, para. 70.

<sup>81</sup> For the developments in Belgium see Nahal Kazemi, “Justifications for Universal Jurisdiction: Shocking the Conscience Is Not Enough”, in *Tulsa Law Review*, 2013, vol. 49, p. 28–29. For the developments in the United Kingdom see Christopher Stephen, “International Criminal Law: Wielding the Sword of Universal Criminal Justice?”, in *International and Comparative Law Quarterly*, 2012, vol. 61, no. 1, pp. 64–65.

The legislative framework was not alone in pursuing this approach, as exemplified by the Pinochet series of cases in the United Kingdom ending in 2002, reflecting the trend that while the judicial narrative of the importance of international criminal law sometimes remains intact, the ultimate result is *de facto* immunity. The House of Lords did hold that Pinochet should not enjoy immunity from criminal prosecution of certain acts,<sup>82</sup> but ultimately he did not have to stand trial due to ill health.<sup>83</sup> While the case can be considered as having unique circumstances, the end result corresponds well with the position argued in our analysis.

Another example for a non-consistent approach can be seen by the German practice in relation to war crimes prosecutions, where although some cases were brought before the courts, a link to Germany was required (thus limiting the application of universal jurisdiction) and in at least one case former head of state immunity was applied.<sup>84</sup>

Most interestingly, the legislative changes in the criminal framework have resulted from international pressure from the states of targeted officials, in some cases the very same states that historically took the lead in the creation of international criminal law.<sup>85</sup> This cause and effect can be likened to the current *modus vivendi* of civil suits where, in the United States, states can request the State Department to provide suggestions of immunity to courts, and in many cases such a statement leads to *de facto* immunity and dismissal.<sup>86</sup>

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<sup>82</sup> UK House of Lords, *Regina v. Bow Street Metropolitan Stipendiary, Ex parte Pinochet Ugarte* (no. 3), 24 March 1999.

<sup>83</sup> Robert C. Power, “Pinochet and the Uncertain Globalization of Criminal Law”, in *George Washington International Law Review*, 2007, vol. 39, no. 1, p. 112.

<sup>84</sup> Maximo Langer, “The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes”, in *American Journal of International Law*, 2011, vol. 105, no. 1, pp. 13–15.

<sup>85</sup> The most relevant example is the great pressure put on Belgium by the United States due to attempts by individuals to open criminal cases against leaders involved in the second Gulf War. See Gabriel Bottini, “Universal Jurisdiction After the Creation of the International Criminal Court”, in *New York University Journal of International Law and Politics*, 2004, vol. 36, p. 550.

<sup>86</sup> Recent examples illustrate that in most cases when the government of the acting or former official requests the US State Department to intervene on his behalf and claim immunity, a suggestion of immunity is submitted to the court and the case is dismissed. Erica Smith, “Immunity Games: How the State Department Has Provided Courts with a Post-Samantar Framework for Determining Foreign Official Immunity”, in *Vanderbilt Law Review*, 2014, vol. 67, no. 2, pp. 584–99.



The emerging trend seems to be one of a change in the international criminal law concept of immunity, which can be associated, to some extent, with the developments in the civil aspects of things. Some argue that the trend, like any development in international law, can be diverted if domestic courts fulfil their roles as agents of change in implementation of international law.<sup>87</sup> Such an approach might work. But it is doubtful whether it corresponds with the development of the immunity concept in international criminal law, a politically driven process, and whether in questions of immunity courts can independently develop international law.<sup>88</sup> The chapter will discuss this and other implications of the emerging conclusion on the way the discourse affects international criminal law historical developments at a later stage. But it is already evident that international criminal law does not exist in a contained world of its own, and it is very useful to examine it through the lens of other disciplines such as international civil litigation.

#### 10.4. Corporate Liability

Taking a similar path to the discussion on immunity of officials, we examine the origins of corporate liability to war crimes. Such a journey is more challenging in comparison to the immunity discussion, because the concept of corporate liability is a relatively modern one, and traditionally associated with the Nuremberg Military Trials (as distinct from the Nuremberg International Military Tribunal discussed earlier) and not before they took place.<sup>89</sup> However, we can still make an effort to find some linked discussion in earlier international criminal law development.

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<sup>87</sup> Rosanne van Alebeek, “Domestic Courts as Agents of Development of International Immunity Rules”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, pp. 571–72.

<sup>88</sup> This does not mean that state practice is not reflected by case law, but that in issues related to immunity courts tend to follow the positions of states. See, for example, in relation to foreign sovereign immunity, *Jurisdictional Immunities* case, paras. 77–80, see *supra* note 4.

<sup>89</sup> Some commentators also refer to trials conducted by US and UK tribunals in the post-Second World War era as similar benchmarks. For an extensive analysis see Anita Ramasastri, “Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations”, in *Berkeley Journal of International Law*, 2002, vol. 20, no. 1, pp. 91–159.

The question of imposing criminal liability on corporations is not an obvious one,<sup>90</sup> making the application of international criminal law to their actions a matter of judicial interpretation. As a precondition to the imposition of liability on corporations for war crimes it must be first established that private individuals can stand trial for such acts. In that regard, there is an example of a decision by a French military court which held that industrialists who plundered French property in the First World War were criminally liable (although they were ultimately not convicted).<sup>91</sup> As pillage (or plundering) is today clearly considered a war crime, specifically associated with corporations,<sup>92</sup> as exemplified by an apparent current Swiss investigation into pillage allegations against a Swiss company,<sup>93</sup> this French decision can be seen as the first known interpretation of private involvement in perpetrating war crimes in the international criminal law context.

The second modern-day precondition for corporate liability for war crimes is the link between the act and the corporation in cases where the corporation is not accused of direct involvement in the war crime itself (which is the more frequent, albeit very controversial, case today).<sup>94</sup> This precondition requires finding that the corporation is liable for the acts by secondary or ancillary offences, including conspiracy, aiding and abetting, and complicity.<sup>95</sup> These concepts have also been addressed by interna-

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<sup>90</sup> The following quote adequately expresses the challenge: “Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like”. Lord Edward Thurlow, in Elizabeth Knowles (ed.), *Oxford Dictionary of Quotations*, 7th ed., Oxford University Press, Oxford, 2009, p. 810, cited in Michael J. Kelly, “Prosecuting Corporations for Genocide Under International Law”, in *Harvard Law & Policy Review*, 2012, vol. 6, no. 2, p. 339.

<sup>91</sup> International Human Rights Law Group Amicus Brief, Kardic, p. 9, fn. 6, cited in Anita Ramasastry, “Secrets and Lies? Swiss Banks and International Human Rights”, *Vanderbilt Journal of Transnational Law*, 1998, vol. 31, no. 2, p. 401.

<sup>92</sup> For an analysis of this issue, see James G. Stewart, *Prosecuting the Pillage of Natural Resources*, Open Society Institute, New York, 2011.

<sup>93</sup> For a discussion of this affair, see James G. Stewart, “The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute”, in *New York University Journal of International Law and Politics*, 2014, vol. 47, no. 1, p. 3.

<sup>94</sup> See Michael D. Ramsey, “International Law Limits on Investor Liability in Human Rights Litigation”, 2009, *Harvard International Law Journal*, vol. 50, p. 274.

<sup>95</sup> See, for example, International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v. Laurent Semanza*, Judgment and Sentence, ICTR 97-20-T, 15 May 2003, para. 433 (<https://www.legal-tools.org/doc/7e668a/>); Simon Chesterman, “The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations: The Case of

tional criminal law and the discourse with the civil realm has the potential of affecting them as well. This effect could be more consequential as, unlike corporations (which are not usually subject to international criminal law type proceedings<sup>96</sup>), such derivative concepts are frequently used in international criminal law proceedings against individuals.

Similarly to corporate liability, it is also difficult to find application of the elements of conspiracy prior to the Nuremberg Military Tribunals. However, there is some indication of the use of conspiracy in cases of national military tribunals in the period from 1944 to 1946. These discussed its more expanded version in the form of joint criminal enterprise in a variety of situations, as the principal holding was that there was no need for every member of the conspiracy to be aware of the offence in order to be criminally liable as long as specific elements were proven and a common purpose existed.<sup>97</sup>

Complicity and aiding and abetting are also usually associated with Nuremberg, where cases and judgments usually referred to such roles played by industrialists participating in Nazi activities, allegedly determining that there was no requirement to establish explicit knowledge of the purpose of the act in order to establish aiding and abetting liability.<sup>98</sup> However, the lack of discussion prior to Nuremberg of these concepts, in particular in the corporate liability context, seems to put in doubt whether

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Norway's Sovereign Wealth Fund", in *American University International Law Review*, 2009, vol. 23, no. 3, p. 607.

<sup>96</sup> Although there are now some cases of private attempts to hold companies liable for violations of international humanitarian law. See, for example, with regard to the decision by the state prosecutor not to open a criminal investigation against a company operating in the West Bank: Netherlands, Openbaar Ministerie [Public Prosecution Service], "No further investigation into crane rental company", Landelijk Parket [National Office], 14 May 2013.

<sup>97</sup> See International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgement, IT-94-1-A, 15 July 1999, paras. 187–220 (<https://www.legal-tools.org/doc/8efc3a/>); Allison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, no. 1, p. 110.

<sup>98</sup> Douglass Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", in *Northwestern Journal of International Human Rights*, 2008, vol. 6, no. 2, p. 306.

the interpretation of Nuremberg in this sense is in fact accurate,<sup>99</sup> although for the purpose of our discussion we will assume that it is.

Briefly establishing what can be termed the pre-history of corporate liability, we can now proceed to better understand its Nuremberg application as it serves as the foundation for the criminal–civil discourse. Our goal will be establishing how civil courts applied the Nuremberg ideas and what the ultimate result is. One possible outcome is that while corporate liability in itself is less relevant to international criminal law, the civil interpretation of the ancillary concepts can limit their application in the future.

The international criminal law understanding of corporate liability under both the Nuremberg types of proceedings is twofold: first, the underlying principle that individuals, and not only states, can be held liable for violations of international law;<sup>100</sup> and second, that such individuals can be of a “private” nature and do not necessarily have to be state officials,<sup>101</sup> an approach which was similar to other criminal post-Second World War litigation.<sup>102</sup> The most common examples, as noted, are corporate officials. Another element, although of less certainty, is that legal persons (that is, companies) can be liable for war crimes, based on references (although not convictions) to this possibility in the discussion by the

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<sup>99</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, p. 5.

<sup>100</sup> See, for example, the holding in the IMT Judgment, pp. 46–47, *supra* note 25, rejecting the argument that individuals cannot violate international law.

<sup>101</sup> The US Nuremberg Military Tribunal made this clear in the *Krupp* case:

The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt.

See United States, Military Tribunal, *United States of America v. Alfried Felix Alwyn Krupp von Bohlen und Halbach et al.*, Judgment, 31 July 1948, p. 41 (‘Krupp case’) (<https://www.legal-tools.org/doc/ad5c2b/>).

<sup>102</sup> See United Kingdom, Military Tribunal, *United Kingdom v. Bruno Tesch*, Hamburg, 1–8 March 1946 (‘Zyklon B case’), a 1946 conviction of a corporate official in a company that supplied the poison gas Zyklon B to the Nazis. Ole Kristian Fauchald and Jo Stigen, “Corporate Responsibilities Before International Institutions”, in *George Washington International Law Review*, 2009, vol. 40, no. 4, p. 1036.

Nuremberg Military Court of the complicity of corporations in Nazi atrocities.<sup>103</sup>

The Nuremberg Military Trials also addressed the issues of aiding and abetting, complicity and conspiracy. Other than the already mentioned flexibility of the requirement of knowledge of the criminal act, we can identify several other highlights by the Nuremberg courts in this context which were later addressed by civil courts as part of the international criminal law–international civil litigation discourse.

First, there is the question of how we define aiding and abetting. According to the Nuremberg regulatory structure there is criminal liability for accessories or those “connected with plans or enterprises” with regard to war crimes.<sup>104</sup> In the jurisprudence of the Nuremberg Military Trials the application of this regulatory scheme was elaborated. For example, the holding that a corporation would not be liable in this context when providing financial loans to the entity guilty of war crimes,<sup>105</sup> unless that corporation was knowingly contributing money to further the criminal acts.<sup>106</sup> To this construction of the element of knowledge we can add the case law of the International Military Tribunal for the Far East (‘IMT-

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<sup>103</sup> See, for example, United States, Military Tribunal, *United States v. Carl Krauch et al.*, Decision and Judgment, 30 July 1948 (‘Farben case’) (<https://www.legal-tools.org/doc/38b077/>), cited in Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, in *Yale Law Journal*, 2001, vol. 111, no. 3, p. 461. For a view arguing against such interpretation of the Nuremberg Military Tribunal see Julian G. Ku, “The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking”, in *Virginia Journal of International Law*, 2010, vol. 51, no. 2, p. 353.

<sup>104</sup> Allied Control Council, Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, 20 December 1945, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. XV: *Procedure, Practice and Administration, October 1946–April 1949*, Washington, DC: US Government Printing Office, 1949, pp. 23–28 (‘Trials of War Criminals’) (<https://www.legal-tools.org/doc/ffda62/>).

<sup>105</sup> See United States, Military Tribunal, *United States v. Ernst von Weizsaecker et al.*, Judgment, 11 April 1949, in *Trials of War Criminals*, pp. 621–22 (‘Ministries case’) (<https://www.legal-tools.org/doc/eb20f6/>). For a different interpretation of criminal liability for loans under Nuremberg, see Sabine Michalowski, “No Complicity Liability for Funding Gross Human Rights Violations”, in *Berkeley Journal of International Law*, 2012, vol. 30, no. 2, p. 454.

<sup>106</sup> It is important to stress that in this case as well the corporation itself was not convicted but rather the corporate official. United States, Military Tribunal, *United States v. Friedrich Flick et al.*, Judgment, 22 December 1947 (<https://www.legal-tools.org/doc/861416/>).

FE’), which held that commanders should have known the acts of their subordinates, even if actual knowledge could not have been proved.<sup>107</sup>

The element of knowledge is not strictly applied and corporate officials were held criminally liable even if they did not share the intent of the criminal act and were against it.<sup>108</sup> Further Nuremberg holdings defined aiding and abetting as confiscation of property, illicit use of prisoners of war, and using forced labour, all by corporate entities.<sup>109</sup> In a similar post-Second World War trial a court in the French Military Occupied Zone held that providing advice to the Nazi regime on how to further criminal acts also creates criminal liability, but this determination was reversed on appeal.<sup>110</sup>

Building upon Nuremberg, several international treaties reflected aiding and abetting principles as a basis for imposing criminal liability for violations of international law,<sup>111</sup> but with no specific focus on corporations in the war crimes (even if there are treaties recognising corporate

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<sup>107</sup> United States, Military Tribunal, *United States v. Soemu Toyada*, Tokyo, 6 September 1949, cited in Kelly, 2012, p. 352, see *supra* note 90, referring to Valerie Oosterveld and Alejandra Flah, “Holding Leaders Liable for Torture by Others: Command Responsibility and *Respondet Superior* as Frameworks for Derivative Civil Liability”, in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Hart, Oxford, 2001, p. 444.

<sup>108</sup> See Andrei Mamolea, “The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap”, in *Santa Clara Law Review*, 2011, vol. 51, no. 1, p. 129.

<sup>109</sup> Lillian Manzella, “The International Law Standard for Corporate Aiding and Abetting Liability”, Presented to the UN Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, Washington, DC, Earth Rights International, July 2006.

<sup>110</sup> France, Military Tribunal, *French Government Commissioner v. Hermann Roehling*, Indictment, in 14 Trials of War Criminals, p. 1061, referred to and discussed in Kyle Rex Jacobson, “Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity”, in *Air Force Law Review*, vol. 56, 2005, pp. 191–94.

<sup>111</sup> See, for example, ICTY Statute, Art. 7(1), *supra* note 38:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

ICTR Statute, Art. 6(1), see *supra* note 38:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

liability in other criminal contexts).<sup>112</sup> Other than those international regulatory developments there seems to have been no subsequent interpretation of corporate liability or aiding and abetting in the international criminal law world or context until the late 1990s.<sup>113</sup>

Following the methodology of the immunity discussion, we now briefly turn to the way corporate criminal liability was perceived by the civil courts looking at the international criminal law framework. Similar to the immunity issue, here too the main case law concerns US cases. The 1789 Alien Tort Statute was considered a basis for allowing civil litigation on cases of alleged aiding and abetting by corporations for war crimes occurring outside the United States,<sup>114</sup> although not specifically for torture, where the US Supreme Court held that only natural persons (individuals) can be liable under the 1991 Torture Victim Protection Act.<sup>115</sup> We also attempt to look at how civil courts in other jurisdictions addressed the issue.

The first civil cases, during the 1990s and the subsequent decade, marked an arguably optimistic trend for those supporting international criminal law, as the courts used the Nuremberg precedent to hold corporations liable for war crimes, thus resurrecting the international criminal law corporate liability discussion that had been dormant since Nuremberg.<sup>116</sup> In a string of cases, courts interpreted the Nuremberg legacy expansively, applying aiding and abetting concepts to modern day corporate involvement in war crimes and international law violations.<sup>117</sup> Some of the most basic concepts of such aiding and abetting liability as held by the civil courts include: economic assistance in the furtherance of war crimes by financial institutions (the crime of plundering);<sup>118</sup> providing means of war

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<sup>112</sup> Martin, 2011/2012, p. 105, see *supra* note 25.

<sup>113</sup> Jonathan A. Bush, “The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said”, in *Columbia Law Review*, vol. 109, 2009, no. 5, p. 1098.

<sup>114</sup> For the developments of the use of the Alien Tort Statute for corporations, see Mamolea, 2011, p. 79, *supra* note 108.

<sup>115</sup> United States Supreme Court, *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702 (2012), 18 April 2012.

<sup>116</sup> Bush, 2009, p. 1098, see *supra* note 113.

<sup>117</sup> Skinner, 2008, vol. 71, pp. 336–54, see *supra* note 47.

<sup>118</sup> *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (EDNY 2000), 31 August 2000, cited in *ibid.*, p. 348.

when this affords substantial assistance for war crimes,<sup>119</sup> and encouragement or moral support to states for perpetrating war crimes.<sup>120</sup> This rather unique approach to the issue might have roots in the idea, which can possibly be associated with Abraham Lincoln, that application of international law in the United States should support American values rather than American sovereignty.<sup>121</sup>

Looking at other jurisdictions, we see little evidence for the same view as to universal jurisdiction for corporate liability, similar to the underlying universal concepts of international criminal law. There seems to be no comparable examples in Europe to US case law on corporate liability in the universal sense (if there are cases, they usually emphasise domestic linkages or only when the civil case derives from a criminal proceeding or conviction),<sup>122</sup> and subsequently no discussion of aiding and abetting liability. This could be explained by the fact that in some European jurisdictions, corporate liability for war crimes is not a recognised concept, leading to complaints against individual corporate officials, as was the case in relation to a German-based company operating in Congo.<sup>123</sup>

It is noteworthy that even when there are links to the domestic jurisdiction, non-US jurisdictions are sometimes reluctant to hold that corporate liability for human rights violations should be applied. Examples include decisions by Canadian courts to deny claims against domestic companies for alleged violations abroad,<sup>124</sup> a recent Dutch decision imposing liability only on a subsidiary company (operating where violations

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<sup>119</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 322, US DSNY, 19 March 2003, cited in *ibid.*

<sup>120</sup> *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 53, 54 (EDNY 2005), 10 March 2005, cited in *ibid.*, p. 351.

<sup>121</sup> Antinioi F. Perez, “Lincoln’s Legacy for American International Law”, in *Emory International Law Review*, 2014, vol. 28, no. 1, p. 223.

<sup>122</sup> For a brief analysis, see Kendal, 2014, *supra* note 77. This is despite of the fact that some argue that most European Union legal frameworks allow such proceedings. See Jan Wouters and Leen Chanet, “Corporate Human Rights Responsibility: A European Perspective”, in *Northwestern Journal of International Human Rights*, 2008, vol. 6, no. 2, p. 261.

<sup>123</sup> Pamela Q. Saunders, “Rethinking Corporate Human Rights Accountability”, in *Tulane Law Review*, 2014/2015, vol. 89, no. 3, pp. 656–57.

<sup>124</sup> Superior Court of Quebec, *Bil’in (Village Council) v. Green Park Int’l Ltd.*, 2009 QCCS 4151, 18 September 2009.



took place) of a Dutch corporation;<sup>125</sup> a recent French case holding that corporations are not subject to human rights law and can not violate international law,<sup>126</sup> and cases in the United Kingdom which were mostly settled.<sup>127</sup>

Turning back to the international criminal law world, we can see that for aiding and abetting, international criminal law case law beyond Nuremberg seems to have reached similar conclusions,<sup>128</sup> as in some cases the US civil courts relied on it to resolve international criminal law issues.<sup>129</sup> Principled elements of liability discussed in the ICTY and ICTR case law include, *inter alia*, knowledge of the “commission of a specific war crime by the principle”;<sup>130</sup> without a requirement that the aiding and abetting takes place close in time to the crime, that is, including before or after the act took place;<sup>131</sup> providing tools used to commit the crime;<sup>132</sup> and the need for the assistance to have a “substantial effect” on the preparation of the crime to invoke liability.<sup>133</sup> Most dramatically, the ICTY has also recognised aiding and abetting liability through omission, that is, the failure to prevent the commission of a war crime, when there is a legal duty to act.<sup>134</sup>

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<sup>125</sup> District Court of the Hague, *Akpan v. Royal Dutch Shell Plc*, No. 337050/HA ZA 09-1580 30 January 2013, cited in Goldhaber, 2013, see *supra* note 26.

<sup>126</sup> Milena Sterio, “French Companies May Build in the West Bank: An Assessment of the Versailles Court of Appeals Case”, *Opinio Juris*, 8 May 2013; Versailles Court of Appeal, *Association France-Palestine Solidarité “AFPS” v. Société Alstom Transport SA*, 22 May 2013.

<sup>127</sup> Goldhaber, 2013, pp. 130–31, see *supra* note 26.

<sup>128</sup> International Criminal Law Services, “Modes of Liability – Commission and Participation, Module 9”, International Criminal Law and Practice Training Materials, pp. 9–12 (‘Modes of Liability’).

<sup>129</sup> See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 275 (2d Cir. NY 2007) 12 October 2007.

<sup>130</sup> ICTY, *Prosecutor v. Mitar Vasiljević*, Appeals Chamber, Judgment, IT-98-32, 25 February 2004, para. 102 (<https://www.legal-tools.org/doc/e35d81/>).

<sup>131</sup> ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeals Chamber, Judgment, IT-02-60, 9 May 2007, para. 127 (‘Blagojević and Jokić case’) (<https://www.legal-tools.org/doc/c32768/>).

<sup>132</sup> ICTR, *Prosecutor v. Elizaphan Ntakirutimana et al.*, Appeals Chamber, Judgment, ICTR-96-17-A, 13 December 2004, para. 530 (<https://www.legal-tools.org/doc/af07be/>).

<sup>133</sup> Blagojević and Jokić case, para. 726, see *supra* note 131.

<sup>134</sup> ICTR, *Prosecutor v. Tihomir Blaškić*, Appeals Chamber, Judgment, IT-95-14-A, 29 July 2004, para. 663 (<https://www.legal-tools.org/doc/88d8e6/>).

Taken at face value there seems to be correlation between the civil and criminal interpretation of aiding and abetting concepts of international criminal law. However, if we look at the bigger picture, problematic issues emerge. First, imposing liability on corporations for aiding and abetting through a lower civil threshold is likely to trivialise these concepts as they are used in the criminal sense. Even if the idea of corporate responsibility is in itself justified when the threshold is a criminal one,<sup>135</sup> civil courts use a lower standard of preponderance of evidence, inherently creating interpretation which is less strict, potentially leading to effect on future international criminal law case law. While this conclusion might be premature as there are no examples yet in international criminal law, the very fact that the ICC Statute – despite being promulgated in 1998, following the supposed “re-emergence” of international criminal law corporate responsibility in civil cases – does not specifically refer to it (defining persons as “natural persons”<sup>136</sup>) can be viewed as a significant sign of international criminal law rejection of the concept.<sup>137</sup> As far as aiding and abetting are concerned, we can also see a somewhat narrower basis for liability for ICC trials, reflected by a stricter requirement for proving intent, even if “substantial” participation is not required.<sup>138</sup> Arguably, the decision in June 2014 by the African Union to include criminal corporate liability under the jurisdiction of its new Court of Justice and Human Rights demonstrates a different trend. At the same time, it is difficult to envision how this change will be implemented in practice. It is also noteworthy that another recent decision by the African Union, in a brief foray into our other case study, was also to afford immunity to serving state officials from prosecution in the same newly formed court, again reflecting the possible impact of the civil discourse.<sup>139</sup>

Second, and maybe more significant, is the recent trend in US civil Alien Tort Statute case law substantially limiting the scope of corporate

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<sup>135</sup> This is recognised, for example, in United Nations General Assembly resolution 58/4, Convention against Corruption, 31 October 2003, Art. 26, which is close to universal with 177 states parties.

<sup>136</sup> ICC Statute, Art. 25(1), see *supra* note 37.

<sup>137</sup> Kelly, 2012, p. 346, see *supra* note 90.

<sup>138</sup> Modes of Liability, p. 24, see *supra* note 128.

<sup>139</sup> Stewart, 2014, p. 42, see *supra* note 93, referring to African Union, Specialized Technical Committee, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 15 May 2014, STC/Legal/Min/7(I) Rev.1, on the adoption of the proposals for Arts. 46A and 46C.

responsibility. Today, following the US Supreme Court holding in *Kiobel* (2013),<sup>140</sup> American courts must find substantial links between the corporation alleged to have been involved in aiding and abetting war crimes and US territory.<sup>141</sup> Admittedly, this outcome did not arise from international criminal law but from domestic interpretation of the Alien Tort Statute, but it does emphasise the risks of the civil–criminal international criminal law discourse. Even if the underlying effect is the correct one – that is, that corporations should not be held liable when there is no connection to the forum state – for international criminal law supporters this could serve as a sign for the risks imposed by transplanting international criminal law concepts to civil domestic law.<sup>142</sup> The end result is that if in the past it was somewhat doubtful whether corporations were liable for universal style war crimes, today it would be very difficult to establish such liability. Civil courts have arguably abused the expansive interpretation of Nuremberg to such an extent that it made the US Supreme Court limit it.<sup>143</sup>

In a very similar way to the foreign official immunity discussion in the previous section, we can see a comparable, possibly negative effect of the civil–criminal discourse for the corporate liability issue, including for the aiding and abetting concepts of liability. There are of course positive effects for the discussion in the civil context of corporate aiding and abetting international criminal law concepts in civil litigation, especially considering the very real possibility that after the ICTY and ICTR wind

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<sup>140</sup> *Kiobel* case, see *supra* note 3.

<sup>141</sup> See for example, US Court of Appeals for the Eleventh Circuit, *Cardona v. Chiquita*, No. 12-14898, p. 10, 24 July 2014.

<sup>142</sup> Considering the challenges posed by coherent interpretation of international criminal law in criminal cases, it seems not too far-fetched to assume that the challenges concerning international criminal law application in the civil realm are also formidable. For a discussion in the criminal cases context, see Cassandra Steer, “Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law”, in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford University Press, Oxford, 2014, pp. 39–67.

<sup>143</sup> Commentators highlight the analysis of the Nuremberg Military Trials in the *Kiobel* decision as a main argument in the US Supreme Court’s decision to limit corporate liability in civil trials. Robert C. Bird, Daniel R. Cahoy and Lucien J. Dhooge, “Corporate Voluntarism and Liability for Human Rights in a Post-*Kiobel* World”, in *Kentucky Law Journal*, 2013/2014, vol. 102, no. 3, pp. 609–10.

down<sup>144</sup> there would be relatively few true international criminal law cases, unless the ICC changes its selective approach as advocated by some.<sup>145</sup> However, looking at the bigger international criminal law picture it does seem that there has been little, if any, true benefit to promoting its principles from the civil discourse. Considering that states have also felt compelled to voice their objections to this kind of international criminal law application, mainly its universal component,<sup>146</sup> the potential consequences are evident.

### 10.5. Some Political-Legal Thoughts

Discussing international criminal law and both case studies, our main focus was on the legal aspects, mainly the historical developments of international criminal law and the ramifications on present day civil litigation involving international criminal law concepts. Alongside the legal dilemmas, we must bear in mind that international criminal law has never been a purely legal tool, devoid of any political considerations, especially when it comes to enforcement.<sup>147</sup> This observation should not be construed as criticism of international criminal law, but rather the opposite. It is the very fact that political elements are prominent which ensures its survival, since when exercised by the executive authority it includes political factors.

The histories of both immunity and corporate liability case studies are a clear indication of that fact. First, as noted earlier, some argue that the Nuremberg trials of state or corporate officials were in fact a manifes-

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<sup>144</sup> Some expect both tribunals to end their operations by 2015. See Stuart Ford, “How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts”, in *Saint Louis University Law Journal*, 2011, vol. 55, no. 3, p. 962. The final case at the ICTR is expected to be completed by July 2015. See ICTR Principals Address Town Hall Meeting: Registrar’s Speech, 18 February 2014”, in *ICTR Newsletter*, January–February 2014.

<sup>145</sup> Isanga, 2013, p. 235, see *supra* note 30.

<sup>146</sup> See, for example, US Supreme Court, *Esther Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, 11 July 2013.

<sup>147</sup> William W. Burke-White, “A Community of Courts: Toward a System of International Criminal Law Enforcement”, in *Michigan Journal of International Law*, 2002, vol. 24, no. 1, pp. 24–62.

tation of victor's justice, insofar as purely legal concepts of liability were put aside to satisfy political ends.<sup>148</sup> Second, the fact that in the Nuremberg trials officials from Allied states were not put on trial and that corporations themselves were not indicted (but rather corporate officials) can also be viewed as political decision-making with legal consequences.

The more modern history of international criminal law also reveals that politics must play a role in decisions to prosecute or impose liability, as reflected in the choice by the ICC not to include corporations in its ambit, due to the resistance by at least 25 states,<sup>149</sup> and the political elements in the ICC Statute.<sup>150</sup> The transfer of international criminal law elements to the civil realm, whether for holding officials or corporations civilly liable, seems not to have been justified by either the historical developments of international criminal law, where there is no evidence of a political will to abandon state involvement in imposition of liability on officials (through civil courts and universal civil jurisdiction),<sup>151</sup> or, as noted, on corporations.

Obviously, the lack of political will in itself should not be a bar to the imposition of liability of whatever kind for war crimes, as the underlying principle of international criminal law, as also embodied in its history, is to solve the problem of the lack of domestic political will to address such violations of core international law,<sup>152</sup> despite some relatively rare cases such as the conviction of a Dutch businessman for assisting the Saddam Hussein regime.<sup>153</sup> This notwithstanding, if we bear in mind that the historical international criminal law–civil discourse seems arguably

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<sup>148</sup> This perception is sometimes associated with the attitude of the German populace at the time of the trials, but it can still be viewed as a legitimate perception of the political realities of the proceedings. See Jonathan A. Bush, "Review: Nuremberg: The Modern Law of War and its Limitations: The Anatomy of the Nuremberg Trials: A Personal Memoir by Telford Taylor", in *Columbia Law Review*, 1993, vol. 93, no. 8, p. 2062.

<sup>149</sup> Robert C. Bird *et al.*, 2013-2014, p. 610, see *supra* note 143.

<sup>150</sup> Reflected, for example, in the mechanism allowing for Security Council referral to the court in accordance with the ICC Statute, Art. 5(b), see *supra* note 37.

<sup>151</sup> Arrest Warrant case, see *supra* note 7.

<sup>152</sup> This lack of political will is still evident in the traditional "reluctance" of states to enforce international criminal law at the domestic level. Michael Wahid Hanna, "An Historical Overview of National Prosecutions for International Crimes", in M. Cherif Bassiouni (ed.), *International Criminal Law: International Enforcement*, 3rd rev. ed., Martinus Nijhoff, Leiden, 2008, p. 301.

<sup>153</sup> Netherlands, *Gerechtshof's-Gravenhage, Prosecutor v. Van Anraat*, LJN: BA6734, 2200050906-2, 9 May 2007, cited in Stewart, 2014, at p. 31, see *supra* note 93.

not to have contributed to international criminal law development, but has actually lead to placing obstacles in its way, it seems that it would be justified to question the continued application of international criminal law in civil cases.

One major argument in support of the enhancement, rather than a drawback, of the civil discussion in international criminal law is that it provides opportunity for leading academics to promote theories of international criminal law application in ways which are not possible in international criminal law criminal cases. This is evident in the relatively numerous *amicus curiae* briefs submitted to US courts in the leading cases discussed in the chapter, *Samantar* and *Kiobel*.<sup>154</sup> Subsequently, courts can, if they wish, explore the positions made by the *amici curiae*, thus facilitating an academic impact on the development of international criminal law. However, while in some cases of legal development we should welcome such a result, it is questionable whether such “privatisation” of international criminal law is historically justifiable, bearing in mind that the international civil litigation–international criminal law historical discourse has possibly led to an outcome that conflicts with the way international criminal law is implemented.<sup>155</sup>

The argument of this chapter is that the history of international criminal law does not justify its civil application in the direction the historical development points out, because international criminal law has

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<sup>154</sup> Examples include, for the *Samantar* cases: US Supreme Court, *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*, Brief of Professors of Public International Law and Comparative Law as *Amici Curiae* in Support of Respondents, 27 January 2010; and US Supreme Court, *Bashe Abdi Yousuf et al. v. Mohamed Ali Samantar*, Brief of United States Member of Congress and Law Professors as *Amici Curiae* in Support of the Plaintiffs-Appellants and Reversal of the District Court’s Decision, 3 December 2007. For the *Kiobel* cases: US Court of Appeals for the Second Circuit, *Esther Kiobel et al. v. Royal Shell Petroleum Co. et al.*, Brief of *Amici Curiae* Professors of Federal Jurisdiction and in Supports of Plaintiffs-Appellants Seeking Petition for Rehearing En Banc, 17 June 2011; US Court of Appeals for the Second Circuit, *Esther Kiobel et al. v. Royal Shell Petroleum Co. et al.*, Brief of *Amici Curiae* Nuremberg Scholars, 3 July 2011; US Supreme Court, *Esther Kiobel et al. v. Royal Shell Petroleum Co. et al.*, Brief of *Amici Curiae* International Law Scholars in Support of Petitioners, 11 December 2011; US Supreme Court, *Esther Kiobel et al. v. Royal Shell Petroleum Co. et al.*, Supplemental Brief of Yale School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners, 16 December 2011.

<sup>155</sup> Some explain that this outcome results from the tendency of those involved in the “privatisation” to ignore the traditional boundaries of international law and impose “private” values on state actors despite their reluctance to do so. See Paul B. Stephan, “Privatizing International Law”, in *Virginia Law Review*, 2011, vol. 97, no. 7, pp. 1663–64.

always been, and should remain, mostly in the realm of those responsible for its enforcement, that is, states and international organisations. There is no doubt that non-governmental organisations, the academia and courts have contributed greatly to international criminal law development throughout history,<sup>156</sup> but at the same time the core decision-making powers must be left to the traditional actors involved in international criminal law. Any other way, such as investing increasing international political power in domestic civil courts,<sup>157</sup> will create a backlash reaction, as can be discerned from the historical developments of the international criminal law–civil discourse.<sup>158</sup> This can be exemplified by civil litigation in Canada against domestic government officials for co-operation with wrongdoings of foreign governments, highlighting that states’ concerns about independent use of international criminal law are still relevant today as was the case in the past.<sup>159</sup>

The survival of international criminal law is of vital importance to ensure that impunity for war crimes becomes a thing of the past. Examining the history of the international criminal law–civil discourse we see that in some cases the intentions to promote its application can be counterproductive if we consider the political implications. If our desire is to preserve international criminal law, then we must allow the “targeted” states, of officials or corporations, to be able to influence the enforcement decision by utilising political means, even if the consequence is limiting international criminal law cases or interpretation. As the history of international criminal law indicates, this can only be achieved if we allow political control of responsibility decisions, in the sense of limiting civil jurisdiction in international criminal law-related cases. The counterargument to this assertion can be that it is likely to perpetuate the concern that ultimately international criminal justice, and in particular the Nuremberg and Tokyo trials, is a means of legitimacy for states, international organi-

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<sup>156</sup> See, for example, an analysis of the contribution of non-governmental organisations to the establishment of the ICC, Kristie Barrow, “The Role of NGOs in the Establishment of the International Criminal Court”, in *Dialogue*, 2004, vol. 2, no. 1, pp. 11–22.

<sup>157</sup> For a discussion of courts as international political actors, see Osnat Grady Schwartz, “Changing the Rules of the (International) Game: How International Law is Turning National Courts into International Political Courts”, in *Washington International Law Journal*, 2015, vol. 24, pp. 99–136.

<sup>158</sup> Stephan, 2011, pp. 1663–64, see *supra* note 155.

<sup>159</sup> Oonagh E. Fitzgerald, “The Globalized Rule of Law and National Security: An Ongoing Quest for Coherence”, in *University of New Brunswick Law Journal*, 2014, vol. 65, p. 78.

sations and the international community for actions or failure to act (ICTY and ICTR).<sup>160</sup> Acknowledging that there is some truth to such an argument, the analysis presented by this chapter shows that the civil application of international criminal law, and the potential abuse of international criminal law history, is not the answer to this political-legal dilemma which will remain a mainstay of international criminal law in years to come.

### 10.6. Conclusion

The history of international criminal law can be viewed from many perspectives and its analysis can explore a wider array of viewpoints, from the way basic criminal concepts have been applied to the effect they had on impunity of war crimes. Any such study entails looking at international criminal law case law and its institutional and constitutive elements, reflecting the idea that for international law principles of justice (or equity) override sovereignty.<sup>161</sup> At the same time, like any other field of law, it is also interesting and worthwhile to see how international criminal law corresponds with other related fields of law. This interrelationship is important to explore in order to understand how such discourse affects international criminal law, whether it serves the original goals of international criminal law, and what can we learn from it about the development of international criminal law.

The chapter proposed to look at two principal case studies to examine this question: the immunity of state officials and liability of corporations for war crimes. What the discussion has revealed is first, that international civil litigation in its human rights context could not have developed without international criminal law serving as the core element of the alleged torts; and second, that international criminal law has been applied by civil courts in a way that has likely not been envisioned by its historical founders. In itself, this might not be considered such a negative consequence, but the potential effect on the development of international criminal law might indicate the contrary.

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<sup>160</sup> With regard to Nuremberg and Tokyo, see Frédéric Mégret, “The Politics of International Criminal Justice”, in *European Journal of International Law*, 2002, vol. 13, no. 5, p. 1267.

<sup>161</sup> Frédéric G. Sourgens, “Reconstructing International Law as Common Law”, *George Washington International Law Review*, 2015, vol. 47, p. 17.



Admittedly, the analysis did not uncover any explicit evidence that international criminal law has been weakened as a result of the civil discourse. But circumstantial evidence is plain to see, mainly the rejection by states, and ultimately by courts, of the civil perceptions of international criminal law history for both cases studies. Arguably, the consequences of independent development of international criminal law by other fields is today more than likely to have an impact on the development of international criminal law itself, as the likelihood of future cases of the magnitude of Nuremberg, the ICTY and the ICTR is gradually decreasing.

Seeking broader conclusions from our brief analysis (which can be expanded further to focus on other civil applications of international criminal law and other case studies) there are also some other emerging issues and conclusions. First and foremost, there is the need to consider ways to enhance the role of international criminal law in the face of a world of global law-making, while not precluding the contribution which can be made by external actors, bearing in mind the risks revealed by the analysis when such contributions are made without control or afterthought. Second, substantial benefit can be derived from looking at the way that international criminal law has developed from an outside perspective, facilitating our understanding of both legal and political dimensions of international criminal law formation and application. Third, and equally important, despite the faults in current international criminal law, the results of the discourse show us that states are ultimately not in a position where they want to see its application extended beyond its Nuremberg coordinates. In the main, those who should face international criminal justice are those very few individuals who acted in such a heinous way that there is almost no controversy, political or legal, over the nature of their widespread criminal acts.

The title of the chapter asks whether civil litigation and international criminal law go together even if this is not intended. Despite the critical analysis featured in the argumentation throughout, the question still lingers as it is too early yet to understand the impact of civil interpretation of past and present international criminal law case law and how it will affect the future of international criminal law. What is clear is that this question must be asked and further explored. As international criminal law is currently at a crossroads, close to virtually turning back to the Nuremberg

days,<sup>162</sup> when only one international criminal court was truly functional, it is safe to assume that the history of international criminal law will feature in many related non-criminal international and domestic fields.<sup>163</sup> That is why the international community, in particular politicians, jurists and scholars alike, must put its focus not only on the question of what international criminal law but also on how it co-exists, or not, with other legal fields in an increasing globalised legal field, where boundaries between legal disciplines are slowly beginning to fade away.

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<sup>162</sup> For a brief synopsis of the historical developments in that regard see Mihai Floroiu, “International Criminal Prosecution from Ad-Hoc to Permanent Criminal Jurisdictions”, in *AGORA International Journal of Juridical Sciences*, 2014, vol. 8, no. 4, pp. 46–52.

<sup>163</sup> See, for example, a discussion of the intersection between the 1951 Refugee Convention and International Criminal Law in Sarah Creedon, “Exclusion Clause and the Intersection of International Criminal Law and the Refugee Convention”, in *Trinity College Law Review*, 2015, vol. 18, p. 85.

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## The Significance of Bangladesh's International Crimes (Tribunals) Act in the History of International Criminal Law and Justice

Md. Mostafa Hosain \*

### 11.1. Introduction

States have historically been reluctant to incorporate international crimes into their domestic legal codes.<sup>1</sup> Given this tendency, it is not surprising that relatively few states have achieved the successful integration of international provisions into their domestic systems. One notable exception is Bangladesh's International Crimes (Tribunals) Act ('ICT Act') of 1973.<sup>2</sup> This is one of those rare early attempts of a country facing innumerable challenges, including nation building, and yet committed to ending impunity and ensuring justice. The initiative taken by Bangladesh in introducing the ICT Act to prosecute perpetrators of the most serious crimes committed in violation of customary international law immediately after the Liberation War against Pakistan in 1971 is both praiseworthy and audacious, as it was undertaken despite limited economic resources and expertise. It is among the earliest pieces of domestic legislation to contain international crimes outside the gamut of the crimes committed during the Second World War. The ICT Act would perhaps provide a precedent that international crimes, however grave, may be prosecuted at the domestic level even with limited capacity and means. The incorporation of all international crimes and the prescription of their investigation and prosecu-

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<sup>1</sup> Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, Cambridge University Press, Cambridge, 2006, p. 2.

<sup>2</sup> The International Crimes (Tribunals) Act, 1973, Act No. XIX of 1973, 20 July 1973 ('ICT Act') (<https://www.legal-tools.org/doc/c09a98/>).

tion have made the ICT Act significant. It is also noteworthy because domestic prosecution is regarded as the proper approach to rendering justice after crimes, as it provides for convenience of both investigation and prosecution. This is due to a familiarity with the culture and the situation on the ground. This appreciation has been incorporated more recently in Article 17 of the Rome Statute of the International Criminal Court ('ICC Statute').<sup>3</sup>

The chapter begins with an account of the necessary background in section 11.2. focusing on Bangladesh's efforts to adopt legislation encompassing all international crimes; it offers a succinct history of how heinous international crimes were committed in Bangladesh and how this legislation came into force. Section 11.3. draws attention to the inclusion of rape within the definition of crimes against humanity under the ICT Act and its significance in international criminal law, showing how this inclusion has subsequently become common practice. Section 11.4. deals with the applicability of the ICT Act. The Act was mainly introduced in order to prosecute alleged violators of customary international law who committed crimes against humanity, genocide and war crimes during the conflict with West Pakistan. However, its application is so broad that it encompasses within its jurisdiction any international crimes provided these crimes were committed on the territory of Bangladesh. The concluding part provides an assessment of the overall significance of the ICT Act and the International Crimes Tribunal established in 2009 in the history of international criminal law.

## **11.2. Background and Historical Significance of the International Crimes (Tribunals) Act**

Historically, Bangladesh was part of the Indian sub-continent which was partitioned on the basis of religion at the end of British colonial rule in 1947. Having a Muslim majority, Bangladesh became part of Pakistan and was named 'East Pakistan'. But the viability of the bifurcated state of Pakistan was troubled from the start. The domination of the West over the East was visible in terms of the former's economic domination and its

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<sup>3</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Art. 17 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

discriminatory policies on the basis of language and ethnicity.<sup>4</sup> Thus, tensions between East and West were common throughout the 1950s and 1960s. In the mid-1960s the Awami League emerged as the political voice of the Bengali-speaking population of East Pakistan, demanding greater autonomy. Conflict between the two parts of the country reached a crisis when the Awami League won an absolute majority of seats in the nationwide parliamentary elections of 1970 but was blocked from taking office by the political leaders of West Pakistan, though it had virtually taken over the administration of East Pakistan.<sup>5</sup> In response, West Pakistan military officials launched Operation Searchlight in the early hours of 26 March 1971, a sustained military assault on Dhaka by the Pakistan army that targeted Bengalis. The plan was to take control of all major cities and eliminate both the political and military opposition in East Pakistan. Despite prolonged resistance, Operation Searchlight was responsible for the killing of tens of thousands of Bengalis, the destruction of property and the precipitation of a massive refugee crisis as millions fled to India.<sup>6</sup> Armed attacks were extended to the countryside and aerial bombardment of civilian targets was employed. There were many accounts of the burning and looting of villages. The report of the International Commission of Jurists suggested that Hindus were a particular target of the attack. It concluded that “the atrocities committed against the population of East Pakistan were part of a deliberate policy by a disciplined force”.<sup>7</sup>

The violence initiated by Operation Searchlight led directly to the War of Liberation. Bengali military and paramilitary units revolted against the Pakistan army and formed the Mukti Bahini (Liberation Forces) with the help of India, and mounted a concerted guerrilla movement

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<sup>4</sup> Willem van Schendel, *A History of Bangladesh*, Cambridge University Press, Cambridge, 2009, chs. 11–12.

<sup>5</sup> Mahmudul Islam, *Constitutional Law of Bangladesh*, Mullick Brothers, Dhaka, 2002, p. 12.

<sup>6</sup> This was a carefully planned operation, whose “objectives were to neutralise the political power of the Awami League and to re-establish public order”. It was led by General Tikka Khan, and involved a full armed assault – using tanks, armoured personnel carriers and troops – on the civilians of Dhaka. See Richard Sisson and Leo E. Rose, *War And Secession: Pakistan, India and the Creation of Bangladesh*, University of California Press, Berkeley, 1990, p. 157; and Suzannah Linton, “Completing the Circle: Accountability for the Crimes of the 1971 Liberation War of Bangladesh”, in *Criminal Law Forum*, 2010, vol. 21, no. 2, p. 195.

<sup>7</sup> International Commission of Jurists, *The Events in Pakistan: A Legal Study by The Secretariat of The International Commission of Jurists*, ICJ, Geneva, 1972, pp. 29, 37.

against what it considered to be an “occupation” force. Fighting continued until the unconditional surrender of the Pakistan army on 16 December 1971. During the war, the Pakistan army formed some civilian groups or auxiliary forces such as “peace committees” in order to ensure their control and domination on the ground.<sup>8</sup>

Overall, the War of Liberation caused the deaths of around three million people, 10 million fled across the border to India and 200,000 to 400,000 women were raped, leading to approximately 25,000 pregnancies.<sup>9</sup> In light of this, it was contended that a strong *prima facie* case existed that international crimes, namely war crimes and crimes against humanity and breaches of common Article 3 of the Geneva Conventions of 1949, had taken place.<sup>10</sup>

During the post-war period, Bangladesh, India and Pakistan were engaged in resolving issues such as the return of civilians and the repatriation of prisoners of war. At the same time, Bangladesh was committed to prosecuting alleged violators of grave breaches of the Geneva Conventions. This commitment was reflected in the promulgating of the Bangladesh Collaborators (Special Tribunals) Order in 1972 that identified collaborators of the Pakistan army during the war and initiated their prosecution.<sup>11</sup> The following year, on 17 April 1973, the Appellate Division of the Supreme Court of Bangladesh announced its intention to prosecute 195 Pakistani military personnel held in India for war crimes, genocide and other violations of international law and against whom there was specific evidence of core crimes against humanity.

However, the attempt to bring perpetrators of the most serious crimes under the ICT Act became subject to politics at the international level. Pakistan said that it would not release some 400,000 Bengalis (civilians and former members of Pakistan’s armed forces) who were being

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<sup>8</sup> Linton, 2010, p. 198-9, see *supra* note 6.

<sup>9</sup> Susan Brownmiller, *Against Our Will: Men, Women and Rape*, Ballantine Books, New York, 1975, p. 81.

<sup>10</sup> Linton, 2010, p. 201, see *supra* note 6.

<sup>11</sup> The Bangladesh Collaborators (Special Tribunals) Order (Presidential Order No. 8 of 1972) was enacted in order to initiate and continue prompt and fair trial against those who aided, abetted, facilitated the Pakistani occupation force in committing genocide, crimes against humanity and other crimes of a serious nature in the territory of Bangladesh during the Liberation War. The Order was repealed in 1975 under the Bangladesh Collaborators (Special Tribunals) (Repeal) Ordinance, 1975.

held in Pakistan; nor would it recognise Bangladesh as a sovereign state. These were serious challenges for a newly independent state.<sup>12</sup> Moreover, there was immense pressure from the Pakistan's Western allies and Islamic states as well as assurances from Zulfikar Ali Bhutto, Pakistan's new Prime Minister, given to India and Bangladesh that he would ensure the trial in Pakistan of the 195 prisoners of war after they were returned to Pakistan.<sup>13</sup> These factors influenced the decision to give clemency to those 195 persons under the Bangladesh–India–Pakistan Tripartite Agreement of April 1974.<sup>14</sup> In other words, the intention to prosecute did not actually materialise.<sup>15</sup>

Against this background, the ICT Act has immense significance in the context of the history of international criminal law and justice. During its adoption international jurists considered it “a model of international due process” and “a carefully prepared document”.<sup>16</sup> At that time, it was the only legislation of its nature in the world, containing international

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<sup>12</sup> Other challenges for Bangladesh were getting formal overwhelming recognition, membership of the United Nations and trade and economic assistance from the international community. *Washington Post*, 26 August 1972.

<sup>13</sup> Jordan J. Paust and Albert P. Blaustein, “War Crimes Jurisdiction and Due Process: The Bangladesh Experience”, in *Vanderbilt Journal of Transnational Law*, 1978, vol. 11, no. 1, p. 35.

<sup>14</sup> Bangladesh–India–Pakistan: Agreement on the Repatriation of Prisoners of War and Civilian Internees, New Delhi, 9 April 1974 (“Tripartite Agreement”). An effort to stabilise peace was seriously undertaken by India and Pakistan after 1971. One of the first attempts taken was the adoption of the Simla Agreement of 2 July 1972 to put an end to the conflict and confrontation and work for the promotion of a friendly and harmonious relationship, and the establishment of a durable peace in the sub-continent. Although Bangladesh welcomed the Simla Agreement, it continued its efforts to make laws and arrange for the prosecution of collaborators and violators of customary international law. On 28 August 1973 the governments of India and Pakistan entered into a bilateral agreement (the Delhi Agreement) regarding the repatriation of persons. This agreement urged the immediate repatriation of prisoners of war and civilians – Pakistanis in Bangladesh and Bengalis in Pakistan. Although this agreement was without prejudice to the positions of 195 prisoners of war, it urged Bangladesh not to initiate trials during the entire period of repatriation. Accordingly, the trial process of the 195 prisoners of war did not take place. Finally, The Tripartite Agreement agreed to the repatriation of the prisoners of war by providing clemency. This decision was considered as having been influenced by strong political pressure. Pakistan finally recognised Bangladesh as a sovereign state on 22 February 1974.

<sup>15</sup> Paust and Blaustein, 1978, p. 35, see *supra* note 13.

<sup>16</sup> M. Amir-Ul Islam, “Towards the Prosecution of Core International Crimes before the International Crimes Tribunal”, in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence and Core International Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 217.

standards. It was a piece of progressive legislation that encompassed all the issues of international criminal law as then understood, with a deep understanding of the criminal justice process. It was an unassailable act providing for fair trial and due process rights as contained in the International Covenant on Civil and Political Rights, which had not yet come into force.<sup>17</sup>

The historical background of framing the ICT Act demonstrates the strength of Bangladesh in ensuring justice and ending impunity within the domestic sphere, at a time when Cold War politics was strong enough to obstruct such an undertaking. The period of the early 1970s was deeply challenging. In the absence of national and international justice efforts to address international crimes, a group of jurists, prosecutors, academics and researchers kept the flame alive with their work to promote the concept of an international criminal court under the auspice of the United Nations. The success in introducing the ICT Act was made possible by the efforts undertaken at the international level by a few scholars. In 1972 the World Peace through Law Centre, at its second conference held in Bellagio, Italy, scheduled a special session “to deal with relevant problems involving Bangladesh”.<sup>18</sup> Two international experts, Hans-Heinrich Jescheck and Otto Triffterer, who were among the organisers, contributed to the drafting of the ICT Act. This effort led to the formulation of the legislation with great historical significance.<sup>19</sup>

The ICT Act was given special protection by the first amendment in the Constitution of Bangladesh that had been adopted the previous year.<sup>20</sup> This amendment was brought in to remove any doubt whatsoever or eradicate any foreseeable controversy in the future as to its applicability in

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<sup>17</sup> United Nations General Assembly resolution 2200A (XXI), International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976 (<http://www.legal-tools.org/doc/2838f3/>). Linton, 2010, p. 272, see *supra* note 6.

<sup>18</sup> Islam, 2012, p. 294, see *supra* note 16.

<sup>19</sup> Mofidul Hoque, “Bangladesh 1971: A Forgotten Genocide”, in *Daily Star*, 18 November 2014.

<sup>20</sup> Constitution of the People’s Republic of Bangladesh, 4 November 1972 (<https://www.legal-tools.org/doc/ba1182/>). Constitution (First Amendment) Act 1973, 15 July 1973, allowed prosecution and punishment of any person accused of “genocide, crimes against humanity or war crimes and other crimes under international law”.



identifying as well as investigating and trying such offences whenever and wherever they were committed.<sup>21</sup>

The ICT Act was drafted in a period when there was rarely any precedent of a purely domestic system conducting investigations and prosecutions of international crimes outside the ambit of Second World War crimes. Moreover, there was no positive response from members of the international community, even though Bangladesh continued efforts to convince them.<sup>22</sup> This period has been termed “a half century of silence”.<sup>23</sup> Despite the alleged genocide, Bangladesh was a victim of just such an imposed silence. But the passing of the ICT Act was a remarkable attempt to supersede this silence, a significant contribution to the history of international criminal law and justice, and a precedent for other states particularly those lacking of economic, expertise and other resources.

The ICT Act is distinctive in the post-Nuremberg period for being part of a domestic system containing subject matter jurisdiction that originated in international criminal law. This aspect is reflected in the name of the Act and the Tribunal.<sup>24</sup> This was the first major effort to define inter-

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<sup>21</sup> M. Amir-Ul Islam, “Bringing the Perpetrators of Genocide to Justice”, Paper presented at the International Conference on Genocide, Truth and Justice, Dhaka, Bangladesh, 1–2 March 2008, Conference Proceedings, p. 3.

<sup>22</sup> In 1972 Sheikh Mujibur Rahman, the founding President of Bangladesh, asked that an international tribunal should be sent in Dhaka to try war criminals. Unfortunately, there was no one able or willing to set up such tribunal. Unsuccessful attempts were made at the United Nations to establish a criminal court. The proposal of the UN High Commissioner for Human Rights was blocked. The UN Commission on Human Rights clarified that if Bangladesh wanted to hold a trial they should constitute an international court much in the same way the victorious Allies did in Nuremberg and Tokyo after the Second World War. It was further suggested that the charges should be under international penal law and not only domestic law.

<sup>23</sup> Diane F. Orentlicher, “A Half Century of Silence: The Politics of Law”, in Belinda Cooper (ed.), *War Crimes: The Legacy of Nuremberg*, TV Books, New York, 1999, pp. 107–12. The indifferent attitude of the international community to setting up a tribunal in Bangladesh was caused by Cold War politics. This diverted attention away from post-conflict justice. It has been pointed out that the decade of the 1970s was a dark period for international justice initiatives, and after the pioneering efforts of the International Military Tribunals at Nuremberg and Tokyo, and the adoption of the Genocide Convention in 1948, no further steps were taken in a world torn by Cold War rivalries. This “half century of silence” which was only broken with the collapse of the Soviet Union and the establishment by the UN Security Council of the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994).

<sup>24</sup> Morten Bergsmo and Elisa Novic, “Justice after Decades in Bangladesh: National Trials for International Crimes”, in *Journal of Genocide Research*, 2011, vol. 13, no. 4, p. 505.

national crimes and form appropriate tribunals to deliver justice since the Nuremberg Principles that had been adopted by the International Law Commission in 1950.<sup>25</sup> The ICT Act's historic significance as a distinct piece of national legislation for international crimes cannot be denied. Unlike today, when the ICC exists to investigate matters of violation of most serious crimes, there were no enforcement procedures or sanctions for such violations.<sup>26</sup> This gap in international instruments posed a challenge to end the culture of impunity. The ICT Act filled the lacuna and guaranteed a mechanism to investigate and prosecute such atrocities. It has made many contributions to the field of international criminal law. Among the most notable is the inclusion of rape as part of crimes against humanity.

### 11.3. Inclusion of Rape as Crime against Humanity

Rape as part of crimes against humanity was inserted under the ICT Act. Section 3(2)(a) defines crimes against humanity as follows:

Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated.<sup>27</sup>

M. Cherif Bassiouni points out that the definition to some extent follows Article 6 of the Charter of the International Military Tribunal ('IMT Charter') at Nuremberg.<sup>28</sup> But the definition of crimes against humanity pro-

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<sup>25</sup> Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations, 1950, in Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950, UN doc. A/1316, pp. 11–14.

<sup>26</sup> In the history of the international criminal justice system, there was no international body for conducting investigations and prosecutions of most serious crimes committed in Bangladesh. The legal architecture of that period was very shaky in terms of trying perpetrators of serious crimes. Although the Genocide Convention of 1948 was ratified by Pakistan, there was no enacting legislation to give effect according to Art. 5 of the Convention. United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948 (<http://www.legal-tools.org/doc/498c38/>). The application of common Article 3 of Geneva Conventions, covering situations of non-international armed conflicts, was debatable.

<sup>27</sup> ICT Act, section 3(2)(a), see *supra* note 2.

<sup>28</sup> Charter of the International Military Tribunal, part of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945,

vided in the IMT Charter does not contain any specific reference to rape;<sup>29</sup> nor does Article 5(c) of the Charter of the International Military Tribunal for the Far East ('IMTFE Charter').<sup>30</sup> But under general principles of law, rape and sexual violence were encompassed under "other inhumane acts".<sup>31</sup> In this regard, it has been argued that rape has historically been left to individual states to try in national or military courts.<sup>32</sup> For instance, the IMT dealt with rape where French and Soviet prosecutors showed evidence of mass rape.<sup>33</sup> The IMTFE considered rape as a violation of international criminal law though it did not extensively prosecute it as a crime.<sup>34</sup> Many earlier instruments included rape as part of war crimes.<sup>35</sup>

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in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. I: *Official Documents*, Nuremberg, Germany, 1947, pp. 10–16 ('IMT Charter') (<https://www.legal-tools.org/doc/64ffdd/>). M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2011, p. 717.

<sup>29</sup> IMT Charter, Art. 6(c), see *supra* note 28, defines crimes against humanity as follows:

namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

<sup>30</sup> Charter of the International Military Tribunal for the Far East, Art. 5, 19 January 1946 ('IMTFE Charter') (<https://www.legal-tools.org/doc/a3c41c/>) is well elaborated, but does not mention of rape. Art. 5(c) states that crimes against humanity are:

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

<sup>31</sup> Bassiouni, 2011, p. 425, see *supra* note 28.

<sup>32</sup> *Ibid.*

<sup>33</sup> Testimony of 31 January 1946, 6 IMT Trials, pp. 404–7, cited in *ibid.*, p. 426, fn. 339.

<sup>34</sup> At the IMTFE, there were about 20,000 cases of rape during a Japanese attack on Nanking (Nanjing), China in December 1937 and January 1938 and the testimony described official involvement. Some Japanese military and civilian officials were found guilty of rape for failing to ensure that their subordinates complied with international law. See *ibid.*, fn. 340.

Although the IMTFE Charter did not expressly include rape as a war crime, several military and civilian officials were prosecuted for rape.<sup>36</sup> In the same way, the Geneva Conventions do not explicitly identify rape as a class of grave breaches, but they can be dealt with under Article 147 of Geneva Convention IV, since it deals with the protection of civilians.<sup>37</sup> The earliest instrument to include rape as part of crimes against humanity was Control Council Law No. 10. Article II(1)(c) stated:

Crimes against humanity: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.<sup>38</sup>

The ICT Act included rape as a crime against humanity perhaps following Control Council Law No. 10. The inclusion of rape as part of the most serious crimes signified the gravity of such a crime which would assist in ensuring justice for the victims. It has been evident from the research of Susan Brownmiller and others that rape was committed on a massive scale during the Liberation War against West Pakistan.<sup>39</sup> It has been reported that during the conflict, Pakistani soldiers, including Punjabis, Pashtos and Sindhis, raped an estimated 200,000 Bengali women and girls,<sup>40</sup> with an estimated 25,000 allegedly forcefully impregnated.<sup>41</sup> Evi-

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<sup>35</sup> For example, the Treaty of Amity and Commerce between the United States and Prussia, The Hague, 28 July 1785; General Order No. 100, Instructions for the Government of Armies of the United States in the Field, 24 April 1863, Art. 44 ('Lieber Code').

<sup>36</sup> The cases against Admiral Toyoda Soemu and General Yamashita Tomoyuki are pertinent examples.

<sup>37</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 147 (<https://www.legal-tools.org/doc/d5e260/>); Bassiouni, 2011, p. 429, see *supra* note 28.

<sup>38</sup> Allied Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol XV: *Procedure, Practice and Administration, October 1946–April 1949*, Washington, DC: US Government Printing Office, 1949, pp. 23–28 (<https://www.legal-tools.org/doc/ffda62/>).

<sup>39</sup> Brownmiller, 1975, p. 84, see *supra* note 9.

<sup>40</sup> Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law", in *McGill Law Journal*, 2000, vol. 46, no. 1, p. 197.

<sup>41</sup> Brownmiller, 1975, p. 84, see *supra* note 9.

dence suggests that members of the Pakistani armed forces and certain paramilitary groups boasted of “impregnating Bengali women” and making “pure Muslims” out of Bengalis.<sup>42</sup> Sexual crimes on such a massive scale were recognised by the report of the Commission of Inquiry presided over by Chief Justice Hamoodur Rahman. The Commission was set up in December 1971 by Pakistan’s Prime Minister, Zulfikar Ali Bhutto, and its report was submitted to the government of Pakistan in 1972.<sup>43</sup> The report recognised “the use of rape and sexual violence for revenge, retaliation and torture”.<sup>44</sup> The report recommended public trials for several officers of the armed forces.<sup>45</sup> It was a great challenge for Bangladesh to properly regulate laws for “war babies” who were born out of oppression and sexual offences against women during the conflict. Such sensibilities on the part of the policy-makers found expression in the ICT Act where rape was mentioned as a category of crimes against humanity.<sup>46</sup>

As noted, the ICT Act mentioned rape as part of crimes against humanity at a time when examples of such attempts were rare. Subsequent international criminal law practice suggests that rape has now been included as part of crimes against humanity in a widespread manner. It is found in most international criminal law instruments, including the Statutes of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’),<sup>47</sup> the International Criminal Tribunal for Rwanda (‘ICTR’),<sup>48</sup> Special Court for Sierra Leone (‘SCSL’),<sup>49</sup> the ICC Statute,<sup>50</sup> the United

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<sup>42</sup> Salma Sobhan, “National Identity, Fundamentalism and the Women’s Movement in Bangladesh”, in Valentine M. Moghadam (ed.), *Gender and National Identity: Women and Politics in Muslim Societies*, Zed Books, London, 1994, p. 63.

<sup>43</sup> Hamoodur Rahman Commission, Report of the Hamoodur Rahman Commission of Inquiry into the 1971 War, as Declassified by the Government of Pakistan, Vanguard, Lahore, 2000; Government of Pakistan, *Hamoodur Rahman Commission of Inquiry into the 1971 India-Pakistan War, Supplementary Report*, Arc Manor, Rockville, MD, 2007 (‘Supplementary Hamoodur Rahman Commission Report’).

<sup>44</sup> Supplementary Hamoodur Rahman Commission Report, pp. 33, 44, see *supra* note 46.

<sup>45</sup> *Ibid.*

<sup>46</sup> Islam, 2012, p. 240, see *supra* note 16.

<sup>47</sup> Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Art. 5(g) (‘ICTY Statute’) (<https://www.legal-tools.org/doc/b4f63b/>).

<sup>48</sup> Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by resolution 955, Art. 3 (‘ICTR Statute’) (<http://www.legal-tools.org/doc/8732d6/>).

<sup>49</sup> Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 2(g) (‘SCSL Statute’) (<http://www.legal-tools.org/doc/aa0e20/>).

<sup>50</sup> ICC Statute, Art. 7(1)(g), see *supra* note 3.

Nations Transitional Administration in East Timor ('UNTAET') Regulations,<sup>51</sup> and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ('ECCC').<sup>52</sup>

Undoubtedly, the inclusion of rape in the definition of crimes against humanity during the 1970s is a contribution to the history of international criminal law. The ICT Act is therefore considered one of the earliest pieces of domestic legislation where sexual victimisation was recognised as an international crime.

#### **11.4. Widespread and Overwhelming Applicability to End Impunity**

The basic motto of international criminal law is to end impunity and ensure justice to the victims. The most convenient way to ensure this mandate is perhaps by making laws at the domestic level, containing international crimes and prescribing their investigation and prosecution. The ICT Act provided mechanisms for investigation and prosecution for violations of international crimes such as war crimes including violations of the laws and customs of war, and embracing the humanitarian rules applicable in armed conflicts lay down by the Geneva Conventions of 1949.<sup>53</sup> The inclusion of attempt, abatement and conspiracy to commit such crimes or complicity in or failure to prevent such crimes dictates a similar responsibility under the ICT Act. This signifies the seriousness among the drafters to encompass all persons involved in different capacities in the commission of such atrocities.<sup>54</sup>

The power of the International Crimes Tribunal of Bangladesh, finally established in 2009, to try and punish "any other crimes under international law" sets a unique template of jurisdiction for a domestic tribunal and substitutes for the jurisdiction of the international community as a whole.<sup>55</sup> Any crime under international law, whether in customary international law or in any other law, if committed within the territory of

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<sup>51</sup> United Nations Transitional Administration in East Timor, Regulation No. 2000/15, 6 June 2000, Section 5(1)(g) (<https://www.legal-tools.org/doc/c082f8/>).

<sup>52</sup> 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, 27 October 2004, Art. 5 ('ECCC Establishment Law').

<sup>53</sup> ICT Act, section 3(2)(d) defines war crimes; section 3(2)(e) refers to the Geneva Conventions of 1949.

<sup>54</sup> *Ibid.*, section 3(2)(g)–(h).

<sup>55</sup> *Ibid.*, section 3(2)(f).

Bangladesh regardless of the nationality of the perpetrator was to be within the jurisdiction of the International Crimes Tribunal.<sup>56</sup> This kind of a sweeping provision substantially contributes to the end impunity and indirectly enforces international criminal law at the domestic level. But one has to be cautious when dealing with such a provision. It has been criticised as a clear violation of the principle of legality – the universally recognised requirement that criminal laws should be clear and people are not prosecuted for what was not crime at the time that the acts were committed.<sup>57</sup> Jescheck, who helped with the drafting of the ICT Act, has expressed concern that in relation to customary international law, general principles of law and case law, the principle can only serve “as a guiding doctrine, to be observed when interpreting the rules produced by these sources of law”.<sup>58</sup> But to prosecute people on the basis of “any other crimes under international law” is going too far.<sup>59</sup>

The unique feature of the ICT Act is observed in its scope and jurisdiction. The jurisdiction covers all crimes under international law and this is in distinction to other international legal instruments. The ICC Statute, for example, and most similar international instruments cover mainly genocide, crimes against humanity and war crimes. The IMT Charter was limited to the trial and punishment of the major war criminals of the European Axis countries.<sup>60</sup> The IMTFE was established for the just and prompt trial and punishment of the major war criminals only in the Far East.<sup>61</sup> The ICTY and ICTR statutes are also limited to a specific period and for specific instances.<sup>62</sup> The Statute of the SCSL follows the IC-

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<sup>56</sup> *Ibid.*, section 3(1).

<sup>57</sup> Linton, 2010, pp. 268–69, see *supra* note 6.

<sup>58</sup> Hans-Heinrich Jescheck, “The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 41.

<sup>59</sup> Linton, 2010, p. 269, see *supra* note 6. There are a number of other criticisms levelled against the ICT Act and its current application in the International Crimes Tribunal, but a detailed critical review of these arguments falls outside the scope of this chapter. See Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study*, 2nd ed., Brill, Leiden, 2014, pp. 23–24.

<sup>60</sup> IMT Charter, Art. 6, see *supra* note 28; Art. 1 indicates that there IMT Tribunal would be established for the just and prompt trial and punishment of the major war criminals of the European Axis.

<sup>61</sup> IMTFE Charter, Art. 1, see *supra* note 30.

<sup>62</sup> ICTY Statute, Article 1, see *supra* note 47: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian

TY model as far as the time limit is concerned.<sup>63</sup> The ECCC, on the other hand, follows the ICTR process.<sup>64</sup> Clearly, then, the ICT Act is rather broader in scope and jurisdiction and, as such, seeks to end impunity and ensure justice to the victims. Although the enactment was made for the purpose of investigating and prosecuting alleged perpetrators of international crimes during the Liberation War of 1971, the fact that it was amended in 2009 and the International Crimes Tribunal's Rules of Procedure and Evidence were put in place by 2011 demonstrates that there is now the political will to pursue justice some 40 years after the original events that gave rise to it.<sup>65</sup>

### 11.5. Conclusion

The ICT Act can be understood as a major legal breakthrough in attempting to ensure justice and end impunity. As we have shown, it was mainly enacted in order to prosecute alleged violators of customary international law and perpetrators of crimes against humanity, genocide and war crimes. However, its application is broader than this and includes any situation at any time involving the alleged commission of any international crimes. As such, the ICT Act serves many purposes including meeting obligations under the Genocide Conventions, the complementary jurisdiction under the ICC Statute and the overall peremptory obligation of end-

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law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute". ICTR Statute, Article 1, see *supra* note 34: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute".

<sup>63</sup> SCSL Statute, Article 1.1, see *supra* note 49: "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".

<sup>64</sup> ECCC Establishment Law, Art. 1, see *supra* note 52: "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".

<sup>65</sup> International Crimes Tribunal Rules of Procedure (Amendment), 2011, 28 June 2011.



ing impunity and ensuring justice for the violation of customary international law.

Indeed, criticisms have been advanced that in spite of the amendments made to the ICT Act in 2009 and introduction of the Rules of Procedure and Evidence, the International Crimes Tribunal system needs to look into a number of elements in order to ensure that it maintains international standards. Such criticism includes the arrest of individuals and non-existence of effective right of appeal in those instances; not allowing defence council to be present during interrogation; not questioning the jurisdiction of the Tribunal or constitutional challenges; no obligation of the part of the prosecutor to reveal exculpatory evidence; and non-applicability of international rules of procedure and evidence.<sup>66</sup>

The question now is how far the International Crimes Tribunal will be capable of ensuring a fair trial mandate in the face of these criticisms. With respect to the argument that international rules and evidence are not applicable to the Tribunal, we find contrary instances where the Tribunal viewed in favour of applying international law. The relevance of international criminal law was noted by the International Crimes Tribunal in the *Abdul Quader Molla* case in the following terms: “The Tribunal is not precluded from seeking guidance from international reference and relevant jurisprudence, if needed to resolve charges and culpability of the accused”.<sup>67</sup> It also hinted to the practice of judiciary of Bangladesh by pointing out:

In trying the offences under the general law, the court of law in our country does not rely on our own standards only, it considers settled and recognized jurisprudence from around the world. So, even in absence of any explicit provision on this aspect, the Tribunal ethically, must see what happened in similar situations in other courts and what they have done, and take those decisions into account.<sup>68</sup>

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<sup>66</sup> Knoops, 2014, pp. 23–24, see *supra* note 59. Mahdev Mohan, “‘The Messaging Effect’: Eliciting Credible Historical Evidence from Victims of Mass Crimes”, in Bergsmo and CHEAH, 2012, pp. 177 ff., see *supra* note 16.

<sup>67</sup> International Crimes Tribunal-2, Bangladesh, *Chief Prosecutor v. Abdul Quader Molla*, Judgment, ICTB-2, 5 February 2013, paras. 33, 77 (<https://www.legal-tools.org/doc/42e4c8/>).

<sup>68</sup> *Ibid.*, para. 40.

As far the determination of international crimes is concerned, the International Crimes Tribunal has recognised its limitations and urged the taking of contributions from international criminal law. It mentioned very clearly that “cases before the Tribunal will be decided by depending upon the jurisprudence evolved on these issues in the *ad hoc* tribunals”.<sup>69</sup> Therefore, we find the practice of the International Crimes Tribunal is such that it has attempted to comply with international law to some extent.

The inclusion of rape in the ICT Act as constituting a crime against humanity is perhaps the most significant contribution in the history of international criminal law. The widespread inclusion of rape and other sexual crimes in subsequent international tribunals is evidence of such a contribution. Although rape was committed on a large scale during the Second World War, it was not included in the Statutes of the IMT or IMTFE under the definition of crimes against humanity. Later, it was included in the definition of crimes against humanity in Control Council Law No. 10. The inclusion of such a provision in the ICT Act during the so-called period of silence shows the strength of the legislation and how it created a precedent in the arena of international criminal law.

As noted, the amendment of the ICT Act in 2009 and the establishment of the International Crimes Tribunal thereafter demonstrate a willingness to follow the intentions of the original Act. The successful completion of this phase would further enhance the credibility of the ICT Act in the domestic arena and surely would have significant precedential value for other countries facing similar challenges. Perhaps it would be as significant as Nuremberg. As Otto Triffterer notes:

National jurisdictions may prosecute the relevant crimes committed even prior to the Act of 1973 and its amendments of 2009. Thus the Bangladeshi criminal justice system may become of importance for the interpretation of the Rome Statute and for perpetrators who can be held responsible by the Rome Statute and through its organs. In this sense we can only wish that Bangladesh holds fair trials and interprets the law bearing in mind the need to strictly construe it according to internationally accepted standards.<sup>70</sup>

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<sup>69</sup> *Ibid.*, para. 69.

<sup>70</sup> Otto Triffterer, “Bangladesh’s Attempt to Achieve Post-War (or Transitional?) Justice in Accordance with International Legal Standard”, in Bergsmo and CHEAH, 2012, p. 300, see *supra* note 16.

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With this in mind, one can take solace in the argument advanced by Suzannah Linton that Bangladesh does seem to be making important progress in meeting basic international criminal law standards.<sup>71</sup>

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<sup>71</sup> Linton, 2010, p. 310, see *supra* note 6.



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## The Introduction of Demographic Analysis to Prove Core International Crimes

Helge Brunborg\*

### 12.1. Introduction

This chapter is about the introduction of demographic data and analysis as evidence at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), probably for the first time at an international criminal court. The chapter describes various dilemmas with respect to the choice of data and methods, which concluded with a strong reliance on individual-level data and descriptive methods. Particular attention is given to the case of Srebrenica and the massacre in connection with the fall of Srebrenica in July 1995, and how demographic evidence was used in trials concerning this, including in expert reports and testimonies. There is also a discussion of the response of the defence to the presentation of demographic evidence and the reference to such evidence in the judgments.

The use of demographic data and analysis at the ICTY has demonstrated the important role this can play in proving international crimes, including genocide. It has stimulated the use of such tools at other courts, such as at the Extraordinary Chambers in the Courts of Cambodia. It has also contributed to the development of data collection and methods to estimate the demographic consequences of armed conflict. Reliable figures

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on the number of victims in a conflict are important for trials, reconciliation and history.

There is often a question of *numbers* in war crimes trials, especially in connection with genocide and other war crimes charges: How many people were killed? How many were deported or displaced? How thorough was the ethnic cleansing? What was the population size and ethnic composition before and after the war? What was the age and sex distribution of the victims? Such numbers can be important evidence, if properly documented.

Although the number of victims can be an essential item of evidence in war crimes trials, relatively little attention has been given to the analysis of this in the past. At the International Military Tribunal in Nuremberg in 1945–1946, for example, many cases of crimes were mentioned which included the number of victims.<sup>1</sup> There was, however, little or no authentication and analysis of the presented evidence.<sup>2</sup>

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<sup>1</sup> Some examples from the International Military Tribunal ('IMT') Judgment include:

“Ohlendorf [...] stated in his affidavit: ‘When the German army invaded Russia, [...] and in the course of the year during which I was leader of the Einsatzgruppe D it liquidated approximately 90,000 men, women, and children. The majority of those liquidated were Jews, but there were also among them some communist functionaries’”. (p. 235)

“Altogether the Einsatzgruppen operating in the occupied Baltic States killed over 135,000 Jews in three months”. (p. 250)

“With regard to Auschwitz, the Tribunal heard the evidence of Hoss, the commandant of the camp from 1 May 1940 to 1 December 1943. He estimated that in the camp of Auschwitz alone in that time 2,500,000 persons were exterminated, and that a further 500,000 died from disease and starvation”. (p. 251)

“Adolf Eichmann, who had been put in charge of this program by Hitler, has estimated that the policy pursued resulted in the killing of 6 million Jews, of which 4 million were killed in the extermination institutions”. (p. 252)

International Military Tribunal, “Judgment”, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 1: *Official Documents*, IMT, Nuremberg, 1947.

<sup>2</sup> *Ibid.*, p. 173: “Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases”.

At Nuremberg estimates of the number of killed Jews, based on both German and Jewish sources, were presented. Nevertheless,

[d]espite the frequent references to data throughout the trials, the prosecutors made relatively little use of documents containing statistics or describing statistical systems as exhibits in the early trials.<sup>3</sup>

One of the reasons for this was that

the prosecution was probably unaware of the potential value of looking for statistics and statistical systems, not just to describe the scope of the crime but to provide strong evidence of the deliberate, systematic, and genocidal nature of the killing of the Jewish population of Europe.<sup>4</sup>

Moreover, it was perhaps not seen as necessary to present detailed demographic data and analyses due to the overwhelming evidence of atrocities committed during the Second World War, which were extensively documented by witness statements, photographs, films, the existence of concentration camps and gas chambers, and so on. The best-known number that was referred to in Nuremberg was that 6 million Jews were killed by the Nazis:

Of the 9,600,000 Jews who lived in the parts of Europe under Nazi domination, it is conservatively estimated that 5,700,000 have disappeared, most of them deliberately put to death by the Nazi conspirators.<sup>5</sup>

There have been few attempts to challenge this number.<sup>6</sup>

Very little has previously been written about the use of demography and population statistics in connection with war crimes trials, but in recent years there have been several contributions, including a focus on war crime tribunals in general,<sup>7</sup> and to the *ad hoc* tribunals for Rwanda<sup>8</sup> and

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<sup>3</sup> William Seltzer, "Population Statistics, the Holocaust, and the Nuremberg Trials", in *Population and Development Review*, 1998, vol. 24, no. 3, p. 535.

<sup>4</sup> *Ibid.*, p. 536.

<sup>5</sup> IMT, *Trial of the Major War Criminals before the International Military Tribunal*, vol. II: *Proceedings, 14 November 1945–30 November 1945*, IMT, Nuremberg, 1947.

<sup>6</sup> One of the best-known Holocaust deniers is the historian David Irving, who was declared *persona non grata* in several countries and had to serve a prison sentence in Austria. See Robert Jan van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial*, Indiana University Press, Bloomington, 2002.

<sup>7</sup> Seltzer, 1998, see *supra* note 3; William Seltzer and Herbert F. Spierer, "Obtaining Evidence for International Criminal Tribunals Using Data and Quantitative Analysis", in Jana

Cambodia.<sup>9</sup> Statistics initially played a minor role at the two international *ad hoc* tribunals established in the 1990s to deal with war crimes committed in the former Yugoslavia and in Rwanda ('ICTR'). Gradually, however, statistical data and demographic analysis became increasingly important, especially at the ICTY.

The ICTY was established by the United Nations Security Council in 1993, as the first international criminal court since the Second World War, and started to operate in 1994.<sup>10</sup> It soon became apparent that population numbers could play an important role in investigations and trials. For example, widely differing numbers had been published on the number of victims in the armed conflicts in Bosnia and Herzegovina and in regional events such as the siege of Sarajevo in 1993–95 and the fall of Srebrenica in July 1995. Estimates of the total number of deaths in Bosnia and Herzegovina varied from 25,000 to 329,000, according to different authors.<sup>11</sup> Some of these numbers were biased upwards or downwards because they were based on poor data and weak methods. The estimates may also have been affected by the political views of the authors.

The ICTY Statute, and the nearly identical Statute of the ICTR, specifies four articles that persons can be prosecuted for:

Article 2. Grave breaches of the Geneva Conventions of 1949 [...] (a) wilful killing; (b) torture or inhuman treatment;

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Asher, David Banks and Fritz J. Scheuren (eds.), *Statistical Methods for Human Rights*, Springer, New York, 2008, pp. 195–226.

<sup>8</sup> William Seltzer, "Possible Contributions of Demographic Data and Statistical Methods to the Prosecution of Genocide in Rwanda: Overview and Options", Report for the International Criminal Tribunal for Rwanda, 1996. In the trial of Jean-Paul Akayesu at the International Criminal Tribunal for Rwanda ('ICTR'), who was found guilty of genocide, there was apparently no expert testimony by any demographer or statistician on the number of victims; ICTR, *Prosecutor v. Jean Paul Akayesu*, Appeals Chamber, Judgment, ICTR-96-4, 1 June 2001 (<https://www.legal-tools.org/doc/c62d06/>).

<sup>9</sup> Ewa Tabeau, "Khmer Rouge Victims in Cambodia, April 1975–January 1979: A Critical Assessment of Major Estimates", Demographic Expert Report, Extraordinary Chambers in the Courts of Cambodia, 2009.

<sup>10</sup> The full name of the ICTY is 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", reflecting well the role and mandate of the Court.

<sup>11</sup> Helge Brunborg, "Contribution of Statistical Analysis to the Investigations of the International Criminal Tribunals", in *Statistical Journal of the United Nations Economic Commission for Europe*, 2001, vol. 18, nos. 2/3, pp. 227–38.



[...] (g) unlawful deportation [...]; (h) taking civilians as hostages.

Article 3. Violation of the laws or customs of war [...] (a) employment of poisonous weapons [...]; (b) wanton destruction of cities, towns or villages [...].

Article 4. Genocide means [...] acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; [...].

Article 5. Crimes against humanity [...] (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; [...].<sup>12</sup>

Article 4 does not state the *number* or *proportion* required for a genocide charge, but reliable estimates of the number of victims will usually be important evidence in trials with charges of genocide and other war crimes.<sup>13</sup>

Demographic evidence has been presented to court at the ICTY in cases involving indictments with charges contained in each of these four articles. The demographic evidence has primarily been about violent deaths and missing or wounded persons, and has also included other categories of victims, particularly displaced persons and refugees, but not categories such as tortured and sexually abused persons.

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<sup>12</sup> Updated Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by United Nations General Assembly resolution 827, Arts. 2–5 ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>). Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by United Nations General Assembly resolution 955, Arts. 2–4; the Statute does not contain an Article dedicated to the violation of the laws or customs of war ('ICTR Statute') (<http://www.legal-tools.org/doc/8732d6/>).

<sup>13</sup> According to the ICTY *Popović* Judgment:

The Trial Chamber notes that a precise number of deceased is not necessary in order to reach a conclusion regarding the crimes alleged in the Indictment. However such an estimate is relevant, particularly to the crime of genocide and extermination, a crime against humanity. Therefore, the Trial Chamber will review the body of evidence before it with a view to reaching an estimated number of persons killed in the mass executions following the fall of Srebrenica.

ICTY, *Prosecutor v. Popović et al.*, Trial Chamber, Judgment, IT-05-88, 10 June 2010, para. 607 ('Popović case, Trial Judgment') (<https://www.legal-tools.org/doc/481867/>).

## 12.2. Data for Investigating War Crimes

Lack of data, especially of reliable and authenticated data, is a serious problem when estimating the number of victims in an armed conflict, in particular the number of deaths. Identifying and acquiring such data are important but difficult tasks. The quality of the data, when available, varies tremendously and much time needs to be spent checking and revising the data. Estimation of the number of victims of an armed conflict may be based on different methods and data, depending on availability and resources. In this context the distinction between macrodata and microdata is essential.

*Microdata*, or individual level data, also called raw or primary data, are records with specific information about the persons of concern. If, for example, we have lists of deaths with particulars about the victims, such as name and date of birth, we can check that the persons listed as dead have not been double counted and that they actually existed and lived in a given area before or during the conflict, if pre-war data are available. Another important advantage of working with primary data is that it allows the analyst to run his or her own tables and do his/her own analysis. Moreover, microdata may enable the linking of data from different sources, called record linkage. This is useful both for corroborating the data and for obtaining additional information about the individuals, such as ethnicity and place of residence before the conflict. Different sources of data for the same individuals can also be used to check if people claimed to be killed or missing are survivors reappearing after the conflict, for example, in a voters' list. The greatest drawback of microdata is that collecting, acquiring, checking, cleaning and processing the data can be very complicated, costly and time-consuming. Moreover, we should not forget that data on individuals may be of poor quality, which requires that the analyst studies how the data were collected and checks the quality through various statistical procedures. But generally, it is more difficult to falsify microdata than macrodata, because it is more feasible to cross-verify microdata than macrodata.

*Macrodata*, or aggregate data, are secondary data, often compiled and estimated by international or national institutions, and sometimes by individual researchers or others. Macrodata are normally created by aggregating microdata, but they are sometimes drawn from media reports (such as Iraq Body Count), public health reports (such as for Bosnia and

Herzegovina during the war period), or estimated using more or less solid data and methodology. The quality of such statistics is varying and often unknown. If numbers of victims are collected from the media, for example, we cannot be sure that the same deaths have not been included more than once or that some deaths have been omitted altogether, which is difficult to avoid in a chaotic situation. Consequently, estimates are often biased and wrong. They may be too low or too high, sometimes affected by the political perspective and bias of the people doing the estimation.

If death counts are not available at all, so-called indirect methods may be used. An example of this includes various attempts to estimate the number of victims in the conflicts in Cambodia in the 1970s. Most of these approaches have been based on population censuses taken before (1962) and after (1998, 2008) the conflicts, as well as post-conflict sample surveys.<sup>14</sup> Population counts and vital rates from these sources may be combined with population projections showing what the population size would have been with and without the armed conflict. The problem with this is that it is impossible to know exactly what the birth, death and migration rates would have been *without* the conflicts.

### **12.3. Demographic Effects of the Armed Conflicts in Bosnia and Herzegovina**

The war in Bosnia and Herzegovina started in the spring of 1992 and ended with the Dayton Peace Accords in November 1995.<sup>15</sup> There were several armed conflicts going on, between different ethnic groups of Muslims (also called Bosniaks) and Serbs, Muslims and Croats, Croats and Serbs,

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<sup>14</sup> Ewa Tabeau, “Khmer Rouge Victims in Cambodia, April 1975–January 1979: A Critical Assessment of Major Estimates”, Demographic Expert Report, Extraordinary Chambers in the Courts of Cambodia, 2009; Patrick Heuveline, “‘Between One and Three Million’: Toward the Demographic Reconstruction of a Decade of Cambodian History (1970–1979)”, Paper presented at the Annual Meeting of the Population Association of America, New Orleans, Louisiana, 9–11 May 1996; Patrick Heuveline, “L’insoutenable incertitude du nombre: Estimations de décès de la période Khmer rouge”, in *Population*, 1998, vol. 53, no. 6, pp. 1103–1117.

<sup>15</sup> See Office of the High Representative, The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995 (‘Dayton Peace Accords’). Interestingly, the census plays an important role in the Dayton Peace Accords, as eligibility to vote is defined by appearance of citizens aged 18 years or older on the 1991 census for Bosnia and Herzegovina (Art. IV, Annex 3, Art. IV: Eligibility). It also specifies how a citizen who no longer lives in the municipality in which he or she resided in 1991 shall vote.

and between coalitions of these. Territorial control was an important element of the conflict and, to achieve this, the parties, in addition to conventional warfare, affected the civilian population in various ways, including killing, detaining, threatening, torturing, raping and deporting members of the other ethnic group(s).

Reports and data on atrocities and other events that took place in Bosnia and Herzegovina were compiled during and after the war by a number of national and international institutions and individuals, including journalists, researchers and human rights groups, such as the Federation of Bosnia and Herzegovina and Republika Srpska Institutes of Statistics, the Bosnian Institute of Public Health, the Research and Documentation Centre ('RDC') in Sarajevo,<sup>16</sup> Muslims against Genocide ('MAG'), the United Nations High Commissioner for Refugees ('UNHCR'), the International Committee of the Red Cross ('ICRC'), Physicians for Human Rights ('PHR'), the International Commission for Missing Persons ('ICMP'), the Organization for Security and Co-operation in Europe ('OSCE'), the Bosnia and Herzegovina Ministry of Human Rights and Refugees<sup>17</sup> and Ministry of Defence,<sup>18</sup> as well as the regular vital registration and statistical system.

But generally there was a lack of a systematic recording of deaths, births, migrations and other demographic events during the conflict period. Thus, except for refugees and displaced persons, there were no reliable estimates of the numbers of victims for the whole country. Many of the population changes that occurred during the armed conflicts were poorly recorded or not recorded at all. For many of the events there were only aggregate numbers, for example, 75 deaths in a specific incident, without any names or other particulars of the victims.

Bosnia and Herzegovina had a good civil registration system before the conflict, but this was severely hampered or largely inactive in many municipalities during the war period. Records and buildings were often

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<sup>16</sup> The RDC compiled the Bosnian Book of Dead over a four-year period, and whose findings were published in 2007; see Patrick Ball, Ewa Tabeau and Philip Verwimp, "The Bosnian Book of the Dead: Assessment of the Database (Full Report)", Households in Conflict Network, Research Design Note 5, Institute of Development Studies, University of Sussex, 17 June 2007 (<http://www.hicn.org/wordpress/wp-content/uploads/2012/07/rdn5.pdf>).

<sup>17</sup> This Ministry of Human Rights and Refugees developed, jointly with the UNHCR, the Bosnia and Herzegovina Database of Displaced Persons and Refugees (DDPR).

<sup>18</sup> The Ministry of Defence provided records of military deaths from the 1992–95 war.

destroyed accidentally or wilfully. The division of the country into two, three or more administrative territories greatly contributed to the problems of compiling data on the effects of the war on the population. Moreover, a traditional civil registration system is not set up to handle events that happen during a war. To estimate the number of war-related deaths, for example, one would need to have good records on *causes* of death. And even if such data were available, it would still be difficult to know if a person died in combat or as a result of collateral damage of combat. It would also be difficult to assess if a non-violent death was “normal” or directly or indirectly caused by the warfare, for example, a death from pneumonia due to lack of proper medical treatment, heating or food nutrition. Thus, it would be difficult to use civil registration data as the only basis for war crimes charges.

The available vital statistics for Bosnia and Herzegovina were too incomplete to estimate the number of deaths during the war, not to mention the number of births affected by the war directly or indirectly (which are difficult concepts to define), although it is likely that a war has a fertility-reducing effect. For war-related migrations there were fairly reliable estimates, however: out of the pre-war population of 4.3 million about 1.2 million Bosnians fled the country. Almost 2 million were displaced within the country.<sup>19</sup> As mentioned above, the estimate of the number of dead varied from 25,000 to 329,000.<sup>20</sup>

#### 12.4. The Population Project at the ICTY

The population project at ICTY started at the Office of the Prosecutor (‘OTP’) in 1997. The objective of the project was to obtain as reliable as possible estimates of the population changes in Bosnia and Herzegovina during the 1992–95 armed conflicts, focusing on deaths, displacements and refugees.<sup>21</sup>

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<sup>19</sup> United Nations General Assembly, Report of the United Nations High Commissioner for Refugees to the General Assembly, E/1997/17, 2 May 1997. Compare Table 4, p. 12 in Ewa Tabeau, “War Migration in the Former Yugoslavia, 1991–1999, in the ICTY Practice”, Paper presented at the International Research Conference on the Global Economic Costs of Conflict, Berlin, 19–21 January 2011.

<sup>20</sup> Brunborg, 2001, see *supra* note 11.

<sup>21</sup> The population project was initiated at the proposal of the Norwegian lawyer Morten Bergsmo, the first lawyer employed by the Office of the Prosecutor (‘OTP’), who conceptualised the need for such a project and drafted the application from the OTP securing

The population project, and later the Demographic Unit, became part of the Leadership Research Team of the Office of the Prosecutor, headed by the American historian Patrick J. Treanor in 1998–2009. Besides demographers, the team consisted of historians, political scientists and linguists and conducted extensive analyses and investigations of political and military structures related to indictments and trials, in addition to the Military Analysis Team of the OTP. Similar analytical structures have not been created in other international criminal tribunals.<sup>22</sup>

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funding from the Norwegian government, initially as a temporary one-year project. The project was subsequently extended and changed to a permanent project. The author was the OTP project leader from June 1997 until the end of 1998 and as an external consultant until Ewa Tabeau was employed at the OTP in September 2000. She expanded the work and established the Demographic Unit in the Office of the Prosecutor, which has completed a number of demography projects for the OTP and for ICTY trials. The unit existed in its regular shape for 11 productive years until September 2011, when Ewa Tabeau left the ICTY. In 2012–13 she was an external consultant in the ICTY cases of *Karadžić* and *Mladić*, and in March 2014 she returned to the ICTY to assist in the *Mladić* trial, as well as to contribute to the Mechanism for International Criminal Tribunals ('MICT').

Next to the present writer and Ewa Tabeau, who were the most senior researchers, many other persons contributed to the demography projects at the ICTY as young professionals, assistants and support staff, including (in alphabetical order) Jakub Bijak, Minka Duncer, Gjertrud Halsne, Arve Hetland, Neda Lončarić, Torkild Lyngstad, Anna Smedsdal, Henrik Urdal, Jan Zwierchowski and Marcin Żółtkowski. Many of them were students from Norway and Poland. Several, such as Bijak, Lyngstad, Urdal, Zwierchowski and Żółtkowski, engaged afterwards in academic careers and have grown into talented and very successful researchers in conflict studies or other fields.

The job description in the 2000 announcement for the position as permanent demographer at the ICTY describes well the role of a war crimes demographer:

*Functions:* Under the supervision of the Senior Research Officer, the incumbent will participate in current investigation processes, by undertaking demographic projects as set, liaise with both Prosecution and Investigation teams to establish prioritisation of projects for court purposes as well as authenticate data and assess data both aggregate and individual. He/she participates in briefing and planning conferences, prepares reports and briefs, participates when appropriate, in the presentation of prosecution briefs, testifies in formal proceedings of the Tribunal and performs administrative functions pertaining to the implementation of policies and procedures.

*Qualifications:* University degree in demography or related field. Extensive experience in applied statistics required. Four to eight years of experience with applied demography or statistics, international experience would be desirable. Excellent computer skills.

<sup>22</sup> See Richard Ashby Wilson, *Writing History in International Criminal Trials*, Cambridge University Press, Cambridge, 2011.

The intention of the population project was initially to use the pre-war population as a starting point and to attempt to trace as many persons as possible by using all available data on dead persons and survivors, matching records on individuals on the basis of name, date of birth and so on. With a complete list of the post-war population the difference between the pre- and post-war population would consist of dead and missing persons, allowing for refugees, displaced persons and “natural” births, deaths and migrations during the war period. A complete enumeration of the post-war population in Bosnia and Herzegovina had not been taken, however.<sup>23</sup> Thus, it became clear rather soon that this approach was not feasible, because reliable and relevant data were not available, neither for the war period nor for the post-war period. Adherence to the plan to account for everybody would have required data that are rarely available for any country.<sup>24</sup> In conclusion, it was decided that lists of individual *victims* were needed, in addition to lists of persons living in the country before and after the war.

Fortunately, there were several highly relevant data sources of good quality in Bosnia and Herzegovina, which was a developed country with a good infrastructure. This is unfortunately not the case for most of the other countries where there are charges of war crimes with large numbers of victims, such as Cambodia, Sierra Leone, Sudan and the Democratic Republic of Congo. Over time, the population project at ICTY managed to acquire several sets of good microdata for all or parts of Bosnia and Herzegovina, mostly in electronic format, including for the following categories:

- missing persons;
- persons known to be dead;
- exhumation records;

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<sup>23</sup> The last census before the war was taken in 1991 and the next census would normally be held 10 years later. However, the census was postponed until 2013, as the international society felt that political conditions in Bosnia and Herzegovina were not yet ready for a census that might serve to cement the ethnic cleansing that had occurred through forced displacement during the war. The 2013 census, which was monitored by an international group of observers headed by Eurostat, included several questions relating to the war period, such as on being a refugee, being displaced after 30 April 1991, and having returned to the settlement he/she was displaced from. See the census form at <http://unstats.un.org/unsd/demographic/sources/census/quest/BIH2013enIn.pdf>.

<sup>24</sup> This may probably be done only for the Nordic and a few other countries – and most likely only in the *absence* of war.

- identification records;
- pre-war population census (1991);
- post-war voters' lists (1997, 1998, 2000 countrywide registers);
- displaced persons;
- refugees;
- army records of killed and missing persons;
- death records reported in regular civil registration procedures during the war, both violent and natural deaths;
- people in detention during the war;
- funeral records;
- hospital and ambulance records.

Most of the lists included for each individual the family name, father's name and given names, as well as date of birth, but other information varied. Some lists contained the unique identification number for the former Yugoslavia, some place of birth and residence, some ethnicity, some date of death or disappearance, and so forth. Applying the method of record linkage the OTP demographers could combine items from different sources for the same person and obtain a more complete picture. Ethnicity, for example, was neither recorded in the voters' lists nor in the missing lists but it was recorded in the 1991 census. By merging these data sources the census-based ethnicity could be transferred to the records for the missing persons. Thus, for individuals whose records were linked to both the voters' register and the census, all census information automatically became available, and vice versa.

Most of the lists suffered from several problems, however. The first was *coverage*, which was usually unknown, except for the 1991 census, which was close to 100 per cent complete. The voters' lists, for example, only included people over the age of 18 who registered to vote. The proportion of the population that registered to vote varied significantly by age and ethnicity. For the lists of missing persons the number of people *not* reported as missing was unavailable, for example, if there was nobody left to report missing family members. The second problem was *reliability* of the data, which during armed conflicts were often collected in difficult situations – which the researcher had usually little specific knowledge about. A third problem was *errors* in the variables, in particular misspelling of names, which were critical when records of individuals were being matched. Wrong spelling of names was particularly common when



the data entry was done by optical scanning, such as for the census and the voters' lists. This was critical when names were used as criteria for matching of records from different sources. A fourth problem was *missing data*, such as full date of birth, which was often not remembered or known exactly by the people reporting a person as dead or missing. The year of birth was, however, usually available, albeit frequently slightly wrong. Finally, there was the problem of *duplicates*, where information about the same person had been recorded two or more times, often with slightly different values, making it difficult to detect duplicates and to identify which of two almost identical records that should be removed. A special challenge was presented by monozygotic twins, who had the same family and father's name, often similar first names, usually born on the same day and in the same place, and identical DNA profiles (used to identify exhumed bodies).

Since the population size of many of the war-affected areas was quite large, sometimes several hundred thousand, the matching had to be computerised. Due to the many deficiencies in the data, including errors and missing data, the automated procedures had to be complimented with visual checking of single records, which was a very time-consuming process.

To identify and link persons in the various lists the OTP demographers compared items such as surname, first name, father's name (when available), gender, date of birth, place of birth, members of the household, municipality, locality and address, as well as the national identification number (*jedinstveni matični broj građana*, 'JMBG'). This number was introduced in the former Yugoslavia in 1976 and included both in the 1991 census and in the 1997 voters' register, but not in the missing lists.<sup>25</sup>

For some projects, such as the estimation of the Srebrenica missing and dead, the OTP demographers compared ambiguous records with the 1991 census to look for more information about the persons in question, especially when one of the lists had information on an item included in the census but not in the other sources, such as the JMBG or ethnicity. The spelling of names could also be checked in this way, including in-

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<sup>25</sup> The number includes information about date of birth, gender and place (or registration) of birth. The validity of the JMBG was checked by comparing it with other available items such as date of birth and gender, and by checking that the check digit was consistent with the other digits of the ID number.

specting the names of other family members enumerated in the census. Locating persons in the census records did not only improve and expand the information about them but also provided information about the persons' whereabouts at the outbreak of the conflict and confirmed their existence before the war. For those not matched with the census, no such certainty was available

As mentioned above, names presented a special problem, especially since they had been computerised through optical scanning, which was the case for the 1991 census and the voters' registers. To reduce this problem a computer programme was developed for checking family names according to the syntax and spelling conventions of Bosnian names, suggesting a "correct" name when a name appeared to be wrong, depending on the recorded names of the other household members and the frequency of both the misspelt and the "correct" name. In this way the number of different surnames in the 1997 voters' register was reduced from 85,000 to 45,000, for example.

Examples of the demographic and statistical analysis presented above are maps of the ethnic composition of the municipal populations of Bosnia and Herzegovina before and after the armed conflicts. A map for 1991 is based on data from the 1991 census, where the respondents were asked about their ethnicity. A map for 1997 is based on data from the voters' list where ethnicity was *not* recorded, combined with ethnicity data from the 1991 census through record linkage. The maps illustrate clearly the ethnic cleansing that occurred from 1992 to 1995: the 1991 map shows a patchwork of municipal ethnicity combinations, whereas the 1997/98 map shows three contiguous regions with one dominating ethnic group in each, with only one exception.<sup>26</sup>

The methodology and data presented above have been used in a number of trials and presented to court between 20 and 30 times.<sup>27</sup> This approach has also been used to estimate the total number of deaths due to

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<sup>26</sup> The maps are published in Ewa Tabeau and Jakub Bijak, "Changes in the ethnic composition in Bosanski Šamac and Odžak, 1991 and 1997", Expert Report for ICTY, *Prosecutor v. Blagoje Simić et al.*, IT-95-9, 2001, reprinted in Ewa Tabeau (ed.), *Conflict in Numbers: Casualties of the 1990s Wars in the Former Yugoslavia (1991–1999)*, Testimonies, vol. 33, Helsinki Committee for Human Rights in Serbia, Belgrade, 2009, p. 152 (<http://www.helsinki.org.rs/doc/testimonies33.pdf>).

<sup>27</sup> For an overview of demographic reports presented to the ICTY, see Tabeau, 2009, *supra* note 26.

the war at about 105,000. This estimate is based on 89,186 unique death records and corrected for undercounting in the various sources of deaths. Of the total number of deaths, 35 per cent were civilian and 65 per cent military, 90 per cent were men and 10 per cent women.<sup>28</sup> The total number of deaths is very close to the number of 95,000 published by the Research and Documentation Centre in Sarajevo in 2013 in the Bosnian Book of Dead.<sup>29</sup>

### 12.5. Missing and Dead from Srebrenica

The first presentation of demographic evidence to court was made in the trial of Radislav Krstić, who was charged with genocide, crimes against humanity and violations of the laws or customs of war:

Between about 11 July 1995 and 1 November 1995, RADISLAV KRSTIC planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of a planned and organised mass execution of thousands of captured Bosnian Muslim men from the Srebrenica “safe area”.<sup>30</sup>

In January 1999 the Office of the Prosecutor of the ICTY asked the demography team to determine the minimum number of dead and missing persons related to the fall of the enclave of Srebrenica in July 1995, and to write a report on this.<sup>31</sup>

It had already been documented that serious atrocities had been following the capture of Srebrenica on 11 July 1995, representing “the worst massacre in Europe since World War II”.<sup>32</sup> Nevertheless, there were very

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<sup>28</sup> Jan Zwierzchowski and Ewa Tabeau, 2010, “The 1992–95 War in Bosnia and Herzegovina: Census-based Multiple System Estimation of Casualties’ Undercount”, Paper presented at for the International Research Workshop on ‘The Global Costs of Conflict’, The Households in Conflict Network (HiCN) and The German Institute for Economic Research (DIW Berlin), Berlin, 1–2 February 2010.

<sup>29</sup> Ball *et al.*, 2007, see *supra* note 16.

<sup>30</sup> ICTY, *Prosecutor v. Radislav Krstić*, Amended Indictment, IT-98-33, 27 October 1999 (‘Krstić case, Amended Indictment’) (<https://www.legal-tools.org/doc/2dc6c1/>).

<sup>31</sup> Helge Brunborg and Henrik Urdal, “Report on the Number of Missing and Dead from Srebrenica”, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, 12 February 2000, reprinted in Tabeau, 2009, pp. 385–99, see *supra* note 26.

<sup>32</sup> Jan Willem Honig and Norbert Both, *Srebrenica: Record of a War Crime*, Penguin, London, 1996; David Rohde, *Endgame: The Betrayal and Fall of Srebrenica: Europe’s Worst Massacre since World War II*, Farrar, Straus and Giroux, New York, 1997.

few identified and confirmed dead bodies. Of the approximately 1,900 bodies that had been exhumed from Srebrenica-related graves by the end of October 1999, only 70 had been identified by name.<sup>33</sup> There was no reliable documentation of the total number of persons who had been killed or who were still missing after the fall of Srebrenica. Numbers in the order of 10,000 or more were often mentioned.

When the enclave of Srebrenica fell a number of men tried to escape by walking through the forest to the other side of the confrontation line. Many of them were killed on the way, after fighting, surrendering or being captured. Other men were separated from their families in nearby Potočari, where the remaining families were forced to walk, and later taken away and executed. Several women, children and old men were also killed. Many dead bodies were buried in mass graves, which were often moved to other graves in an attempt to conceal what had happened, while others were left in the forest.

Several organisations collected data on persons missing after the fall of Srebrenica, including the ICRC and the American-based PHR. The ICRC registered missing persons “to help families get an answer as to the fate of their missing loved ones”.<sup>34</sup> PHR registered missing persons with extensive details on body, teeth and clothing to assist in identifying exhumed bodies and to help families to find out what happened to their missing relatives. While PHR concentrated mainly on persons missing from Srebrenica after the fall of the enclave in July 1995, the ICRC registered missing persons from all of Bosnia and Herzegovina throughout the war period from 1992 to 1995. Both organisations collected data primarily from close family members but occasionally accepted reports from more distant relatives and from friends and neighbours. Both organisations had registered persons presumed to be dead but whose bodies had not been found. The ICRC published several versions of its list of “missing persons” for Bosnia and Herzegovina, and had also published a separate list of persons known to be dead (generally previously registered as missing). PHR generated an ante-mortem database which, in principle, was a compilation of data on people believed to be dead.

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<sup>33</sup> Brunborg and Urdal, 2000, see *supra* note 31.

<sup>34</sup> International Committee of the Red Cross, “The Missing: Preventing Disappearances and Finding Answers”, Interview with Renée Zellweger Monin, 27 August 2007 (<https://www.icrc.org/eng/resources/documents/interview/missing-interview-270807.htm>).

The objective of the project was to use these sources of missing persons, as well as other data, to arrive at a reliable estimate of the number of people who were dead or who were still missing after the fall of Srebrenica. At the same time attempts to discredit the ICRC list of missing persons were identified and assessed.

The approach applied for the OTP Srebrenica study was to match data from the lists of missing persons from the ICRC and PHR, compare the data with the OSCE lists of voters for the 1997 and 1998 elections and, if necessary, compare the data with the 1991 census. If key variables were identical in two separate lists the matched records were assumed to represent the same person, otherwise not. The methods used to do this were:

- evaluating the authenticity and quality of the data sources, particularly of the lists of missing persons;
- excluding records of persons who were reported missing before 11 July 1995, and persons who were last seen alive far from Srebrenica;
- comparing the lists with other sources of data on individuals from the Srebrenica area, from both before and after the war; and
- merging the lists of missing persons at the individual level; and
- deleting duplicates.

There were empty fields in both lists. In the ICRC list the least complete items were date of birth (35 per cent incomplete) and date of disappearance (10 per cent incomplete). The *year* of these events was included for almost everybody, however. In the PHR list the least complete items were date of birth (22 per cent incomplete) and place of disappearance (19 per cent incomplete). Other variables were recorded for almost everybody – but that does not necessarily mean that they were always correct. Errors were particularly common in the spelling of names of persons and places. Moreover, from comparing these lists several errors were found, although mostly small, in variables such as date of birth. Such errors are common all over the world in data collected through questionnaires in surveys, censuses and elsewhere. It was, therefore, not surprising that there were many errors in variables concerning tragic events collected in a chaotic and traumatic situation.

For difficult cases the 1991 census was consulted for more information about the persons in question, for example when one of the lists

had information on an item which was also included in the Census but not in the other list, such as ID number or place of birth. The spelling of names was also checked in this way, often by looking at the names of other family members contained in the census files. The use of data from the census was crucial in concluding whether a pair of potential matches of records from two different lists represented the same person.

The ICRC and PHR lists of missing persons were compared with the 1997 and 1998 voters' lists to identify potential survivors, finding a total of nine Srebrenica-related matches. The identities of these nine persons were checked with the 1991 census for eastern Bosnia. These matches were clearly for the same persons and not a mix-up of persons with the same name and identical or similar date of birth. Since dead people cannot register to vote these matches implied that nine persons were either wrongly registered as missing, or that their identities had been misused when registering to vote, wilfully or not. Another possibility was that their names should have been taken off the missing list but that this had not been done, for miscellaneous reasons. The survival of some people may not have been reported to the ICRC, for example, because they did not want their survivorship to be disclosed. Six of the nine persons were reported independently *both* to the ICRC and PHR, decreasing the likelihood that the inconsistencies were due to fraudulent registration of persons as missing. Several of the nine persons were later exhumed from Srebrenica-related mass graves and identified.

The results of the data analysis are shown in Table 1. The main finding was that at least 7,475 persons were dead or missing after the fall of Srebrenica, according to our conservative criteria. An unknown number of persons was probably not reported as missing, for various reasons. Our estimate was lower than the commonly referred to range of 8,000–10,000 dead persons. The actual number of dead and missing was likely to be significantly higher than 7,475. Later developments have shown that this is the case, as explained below.

**Table 1: Srebrenica-related missing and dead persons, 12 February 2000<sup>35</sup>**

	Number of records
On both ICRC and PHR lists	+5,712
On ICRC list only	+1,586
On PHR list only	+192
<i>Srebrenica-related missing persons registered by the ICRC and/or PHR</i>	<i>7,490</i>
Found in voters' registers 1997 and 1998	-9
<i>Srebrenica-related victims, excluding persons found in the voters' registers</i>	<i>7,481</i>
Found alive by ICRC since January 1997 (identities unknown to us)	-6
<b>Srebrenica-related victims</b>	<b>7,475</b>

Ninety per cent of the missing persons were men of “military age” (16–60 years), as indicated in Figure 1. Only 48 (0.6 per cent) were women. The youngest were two girls, aged eight and nine when they disappeared. Of the 5,556 persons for whom ethnicity was known from the PHR list, all but one was a Bosniak (that is, Muslim). The analysis showed that the missing persons were real (and not made-up) persons who lived in the Srebrenica area before 1995. Fully 87 per cent of the missing men were matched with records from the 1991 census for Srebrenica and other municipalities. (Many missing among the remaining 13 per cent may also have been enumerated in 1991, but were not linked with the census due to insufficient information.) Of these, 55 per cent were enumerated in Srebrenica, 43 per cent in the neighbouring municipalities Bratunac, Vlasenica, Zvornik and Han Pijesak, and 1 per cent elsewhere.<sup>36</sup> Thus, almost everybody (98.6 per cent) who was in the enclave before it fell, and consequently went missing or died, lived in these five municipalities four years earlier, that is, in 1991. Most of them probably still lived in the enclave in 1995, since they were reported as missing on dates and from places related to the fall of Srebrenica. We did not succeed in ob-

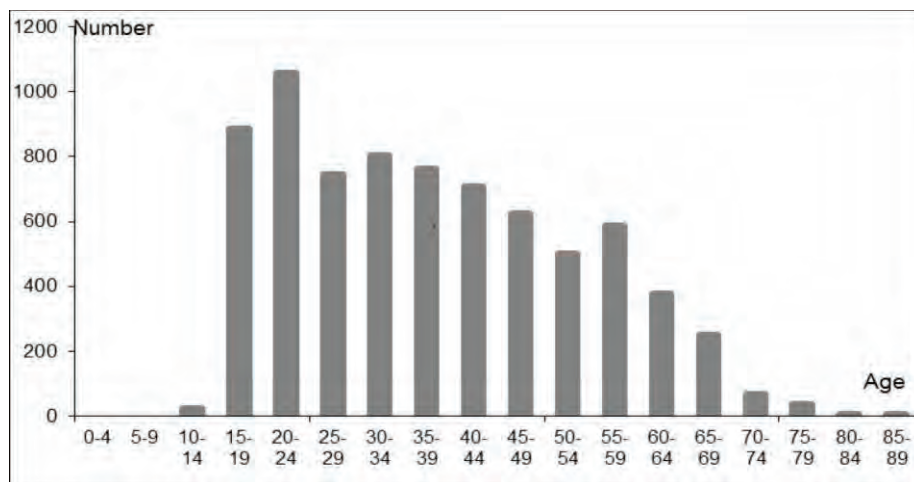
<sup>35</sup> Brunborg and Urdal, 2000, see *supra* note 31.

<sup>36</sup> Helge Brunborg, Torkild Lyngstad and Henrik Urdal, “Accounting for Genocide: How Many Were Killed in Srebrenica?”, in *European Journal of Population*, 2003, vol. 19, no. 3, pp. 229–48.

taining lists of people who stayed in Srebrenica before the fall of the enclave on 11 July 1995. The reason for that was probably that there were no lists with name, age and gender about the population at that time.

Finally, our analysis strongly rejected claims that many persons on the ICRC list were entered wrongly. There was no indication of large-scale fraudulent registration of missing persons, although there may have been a few cases of persons who were listed as missing but who should have been removed from the list. Moreover, there was no evidence of large-scale fraudulent use of Srebrenica missing persons' identities in the registration of voters in 1997 and 1998.

**Figure 1: Number of missing men from Srebrenica by age at disappearance<sup>37</sup>**

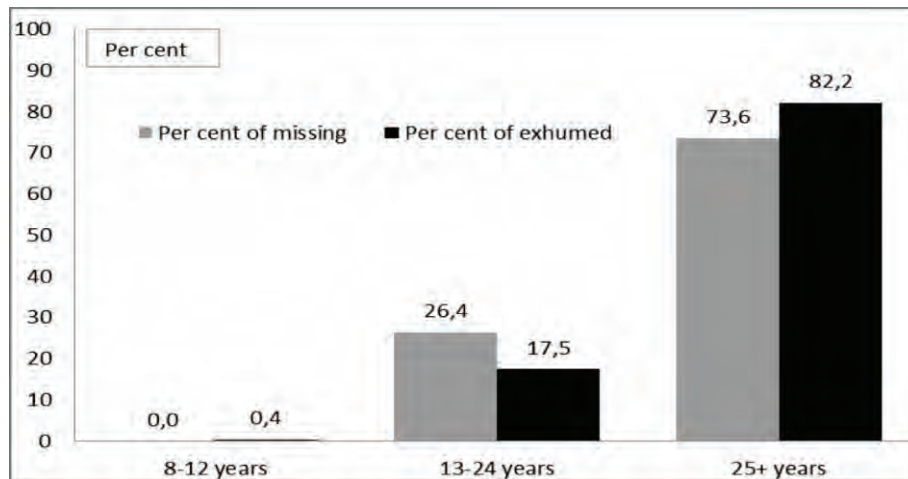


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<sup>37</sup> Brunborg and Urdal, 2000, see *supra* note 31.



**Figure 2: Age distribution of Srebrenica-related missing persons and exhumed bodies (per cent)<sup>38</sup>**



In 1999, when most of the data analysis was done, less than 2,000 bodies had been exhumed from Srebrenica-related graves, and only 68 (0.9 per cent) of them had been identified. There had been no DNA identifications as such analyses were still too complicated and costly. However, the methodology for doing this has developed tremendously since then. By November 2013 the OTP number of missing and dead persons had grown to 8,047 persons, as shown in Table 2.<sup>39</sup> Fully 6,745 of these (83.8 per cent) have been identified by comparing DNA profiles of the bodily remains with close relatives of the missing persons.<sup>40</sup> The *additional* persons included in

<sup>38</sup> *Ibid.*

<sup>39</sup> Presented at the trial of Ratko Mladić in July 2013, who was charged, *inter alia*, with genocide after the fall of Srebrenica: “He participated in a joint criminal enterprise [...] to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children and some elderly men”; ICTY, *Prosecutor v. Ratko Mladić*, Third Indictment, IT-09-92, 20 October 2011 (<https://www.legal-tools.org/doc/fa85f2/>). The case was still ongoing at the time of writing. In her testimony on 10 November 2014 Ewa Tabeau presented results from her recent analysis incorporating identified Srebrenica-related missing and dead persons from the ICMP, finding that 6,745 persons have been identified and that the integrated number of victims has increased from 7,477 in 2000 to 8,047 in 2013.

<sup>40</sup> Note as well that out of the 7,692 Srebrenica missing persons on the 2013 OTP list, 6,603 were confirmed by the ICMP DNA match records (86 per cent). 142 identifications were

the overall total of 8,047 Srebrenica victims were added because they were exhumed from Srebrenica-related graves, or their relatives testified on their disappearance details. Exhumations and identification are still conducted by the ICMP in Tuzla in Bosnia and Herzegovina.

**Table 2: Progress in establishing deaths of Srebrenica missing, 2000–13<sup>41</sup>**

Date of OTP Report	Srebrenica missing (OTP)	Srebrenica identified (ICMP)	Excluded potential survivors	Accepted victims (integrated)	Per cent identified
12.02.2000	7,475	68	9	7,447	0.9
16.11.2005	7,661	2,591	12	7,764	32.5
11.01.2008	7,661	4,263	12	7,826	50.1
09.04.2009	7,692	5,555	12	7,905	65.8
21.07.2013	7,692	6,745	12	8,047	85.8

The study of the Srebrenica missing and dead exemplifies the technique of using individual-level data, collected for other purposes, to estimate the number of victims of an armed conflict.

## 12.6. The Use of Demographic Data in ICTY Trials

The first report with demographic evidence based on the kind of analysis described above was on the number of Srebrenica-related dead and missing in the trial of Radislav Krstić.<sup>42</sup> The report was accompanied by a book with a list of 7,481 names of missing or dead persons, including date and place of birth, date and place last seen alive, and so on.<sup>43</sup> The cross-examination was done on 1 June 2000.<sup>44</sup> Krstić was charged with geno-

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of new and additional persons, not yet included in the 2013 OTP list of Srebrenica missing.

<sup>41</sup> Office of the Prosecutor, International Commission for Missing Persons; excerpt from court presentation of Ewa Tabeau in the *Mladić* case during expert testimony, 2–3 and 8 November 2013.

<sup>42</sup> Brunborg and Urdal, 2000, see *supra* note 31.

<sup>43</sup> SREBRENICA MISSING: Persons Reported Missing and Dead after the Take-Over of the Srebrenica Enclave by the Bosnian Serb Army on 11 July 1995, The Hague, 2 May 2000, Exhibit 271 (Krstić).

<sup>44</sup> ICTY, *Prosecutor v. Radislav Krstić*, Transcript of Cross-Examination, IT-98-33, 1 June 2000 (<http://www.icty.org/x/cases/krstic/trans/en/000601ed.htm>).

cide, crimes against humanity and violations of the laws or customs of war, in connection with the fall of Srebrenica on 11 July 1995.<sup>45</sup>

The *Krstić* Trial Judgment made several references to the demographic and statistical evidence presented in court. First, it noted, as shown in Figure 2, that

[t]he correlation between the age and sex of the bodies exhumed from the Srebrenica graves and that of the missing persons support the proposition that the majority of missing people were, in fact, executed and buried in the mass graves.<sup>46</sup>

Second, it referred to the finding that the overwhelming majority of people registered as missing from Srebrenica were men. And third, it referred to the minimum of 7,475 persons from Srebrenica that were still listed as missing, conservatively estimated, as reported in Table 1.

The Trial Chamber found Krstić guilty of genocide, persecution, murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians, and murder as a violation of the laws and customs of war. He was sentenced to 46 years' imprisonment.<sup>47</sup> Krstić became the first person to be convicted of genocide at the ICTY.<sup>48</sup> In the Appeals Judgment Krstić was found guilty of

[a]iding and abetting genocide, aiding and abetting murder (violation of the laws or customs of war), aiding and abetting extermination, aiding and abetting persecutions on political, racial and religious grounds (crimes against humanity),

and the sentence was reduced to 35 years.<sup>49</sup> The Appeals Chamber did not discuss or question the demographic and statistical findings in the Trial Chamber Judgment.

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<sup>45</sup> Krstić case, Amended Indictment, see *supra* note 30.

<sup>46</sup> ICTY, *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, IT-98-33, 2 August 2001, para. 75 ('Krstić case, Trial Judgment') (<https://www.legal-tools.org/doc/440d3a/>).

<sup>47</sup> *Ibid.*, para. 82.

<sup>48</sup> ICTY, "Radislav Krstić Become the First Person to Be Convicted of Genocide at the ICTY and Is Sentenced to 46 years Imprisonment", Press Release, 2 August 2001, ([http://www.icty.org/x/cases/krstic/tjug/en/010802\\_Krstic\\_summary\\_en.pdf](http://www.icty.org/x/cases/krstic/tjug/en/010802_Krstic_summary_en.pdf)).

<sup>49</sup> ICTY, *Prosecutor v. Radislav Krstić*, Appeals Chamber, Judgment, IT-98-33, 19 April 2004 (<https://www.legal-tools.org/doc/86a108/>).

In the *Krstić* trial the defence seemed to have been taken by surprise by the presentation of demographic evidence and asked few questions during the cross-examination of the prosecution expert witness, and with no serious challenge of the report that was presented. However, in the next trial with demographic evidence on Srebrenica, that of Vidoje Blagojević and Dragan Jokić, the defence was better prepared and had hired their own expert, Svetlana Radovanović, a demographer from Belgrade. She had been given access to the same computerised lists of missing and dead persons as the demography team in the Office of the Prosecutor had been using. Her expert report criticised the data sources and the matching methodology, calling it superficial, not objective and unscientific:

Despite the given facts and circumstances which are well known to population statistics experts, and which serve to differentiate between statistical science and profession on the one hand, and statistical manipulation on the other, the Prosecution expert, in order to achieve the task he has been given, has turned to unsupported and imaginative combinatorics which undermines the very foundations of statistical science and profession. [...] the expert opinion of H. Brunborg et al is a typical example of statistical construction and is, as such, unacceptable as a scientific and expert basis for deliberating, and resolving, the question of the number of victims of July 1995 Srebrenica events.<sup>50</sup>

Radovanović's most unsettling finding was, however, that she had identified 10 examples of "certain" or "highly likely" duplicates in the OTP list of missing persons.<sup>51</sup> It turned out that eight of these duplicates had already been identified as such by the OTP in 2000, but due to an oversight they had unfortunately not been deleted. Further analysis by the Demographic Unit of the OTP revealed an additional 24 duplicates, which were removed from the list of missing and dead. The defence expert also claimed that there were fictitious persons in the missing list. These persons were, however, found to have been enumerated in the 1991 census, making it unlikely that they were not real persons. Finally, Radovanović claimed that there were examples of survivors in the missing list. The

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<sup>50</sup> ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60, Svetlana Radovanović, "Report on the Number of Missing and Dead Persons from Srebrenica", Expert Report Submitted by the Defence in the trial of V. Blagojević, 2004.

<sup>51</sup> ICTY, *Prosecutor v. Blagojević and Jokić*, Transcript of Testimony, IT-02-60, 21 June 2004 ([http://www.icty.org/x/cases/blagojevic\\_jokic/trans/en/040621IT.htm](http://www.icty.org/x/cases/blagojevic_jokic/trans/en/040621IT.htm)).

OTP demographers checked this and did not find any more survivors than those already identified, the nine persons in the voters' list. It was later found that two of those nine persons were dead.<sup>52</sup>

The *Blagojević* Trial Chamber Judgment did not make any reference to the criticism by the defence expert. The number of dead and missing, 7,475 persons as noted in Table 1, was referred to without any further comments.<sup>53</sup> Blagojević was sentenced to 15 years' imprisonment for aiding and abetting murder, persecutions on political, racial and religious grounds and inhumane acts (forcible transfer).

In the trial against *Popović et al.* two demographers testified for the prosecution (Ewa Tabeau and the author) and two for the defence (Miladin Kovačević and Svetlana Radovanović).<sup>54</sup> One of the criticisms of the prosecution experts was that they concluded in their report that all dead and missing persons were civilians,<sup>55</sup> and that one hundred persons on the missing list were killed *before* July 1995.<sup>56</sup> Both of these criticisms were rejected as invalid. Another criticism was the unsubstantiated use of terms such as "killed" and "executed", which the prosecution expert admitted was a mistake since information about the cause of death of the victims were not included in the report.

The defence experts had again been given access to the same data files as the prosecution experts. Kovačević used these and Bosnia and Herzegovina documents to estimate both the total and the minimum number of displaced persons, concluding that the number of missing persons in Srebrenica after the fall could not be greater than 3,000. The Trial Chamber criticised his estimates of people who became displaced from Srebrenica in 1995, and that he excluded data concerning the number of persons *reported* missing following the fall of Srebrenica, concluding that

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<sup>52</sup> Helge Brunborg, Ewa Tabeau and Arve Hetland, "Rebuttal Report Blagojević et al. (IT-02-60) regarding: Report on the Number of Missing and Dead from Srebrenica by Helge Brunborg and Henrik Urdal, 12 February 2000", Demographic Unit, Office of the Prosecutor, ICTY, 25 August 2004. ICTY, *Prosecutor v. Blagojević and Jokić*, Transcript of Testimony, IT-02-60, 1 February 2007 (<http://www.icty.org/x/cases/popovic/trans/en/070201ED.htm>).

<sup>53</sup> ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, IT-02-60, 17 January 2005 (<https://www.legal-tools.org/doc/7483f2/>).

<sup>54</sup> Popović case, Trial Judgment, paras. 625–37, see *supra* note 13.

<sup>55</sup> ICTY, *Prosecutor v. Popović et al.*, Transcript of Testimony, IT-05-88, 9 May 2007, p. 11210 ('Popović case, Testimony') (<http://www.icty.org/x/cases/popovic/trans/en/070509ED.htm>).

<sup>56</sup> *Ibid.*, p. 11211.

“[i]n the opinion of the Trial Chamber, this approach is not only puzzling, it is fundamentally flawed and renders Kovačević’s analysis unreliable”.<sup>57</sup> Judge Kwon disagreed with this for the fact that he did not consider the ICRC and PHR data as a source for his analysis, although he concurred with the Trial Chamber’s finding that Kovačević’s analysis was unreliable.

The other defence demographer, Radovanović, criticized the prosecution expert’s approach on the basis that it ignored many other available sources which, if used in his study, would have produced a more reliable list of missing persons. [...] [She] concluded that the 7,661 persons on the 2005 List of Missing should be reduced by one quarter, representing two categories of persons wrongly included.<sup>58</sup>

The first category were persons who could not be found on the 1991 census, and the second category is made up of people who the OTP demographers were able to match with the 1991 census, but were not associated with the July 1995 events in Srebrenica because they either died prior to 10 July 1995 or they could not be territorially linked to the Srebrenica enclave. The Trial Chamber did not agree with the assertions of Radovanović.

The *Popović et al.* Judgments discussed the demographic findings at length. The Trial Chamber concluded that it considered the evidence of Kovačević and Radovanović “to be pure speculation”. The Appeals Chamber Judgment discussed the objections of some of the accused to the testimonies and reports of prosecution experts Brunborg and Tabeau but did not support any of these. It concluded: “The Appeals Chamber has dismissed all challenges regarding the total number of deceased”.<sup>59</sup>

In several of the trials concerning the fall of Srebrenica the defence argued that many of the men died in combat and should not be included in the number of missing and dead from Srebrenica,<sup>60</sup> as it is not a war crime to kill persons in combat. The response of the demographic expert witness to this was that the OTP demographers were not asked to consider the

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<sup>57</sup> Popović case, Trial Judgment, fn. 2303, see *supra* note 13.

<sup>58</sup> *Ibid.*, fn. 634–37.

<sup>59</sup> ICTY, *Prosecutor v. Popović et al.*, Appeals Chamber, Judgment, IT-05-88, 30 January 2015, paras. 311–42 (<https://www.legal-tools.org/doc/4c28fb/>).

<sup>60</sup> Popović case, Testimony, p. 11219, see *supra* note 55.

cause of death and/or to distinguish between military or civilian deaths.<sup>61</sup> Krstić was, for example, charged with “planning, preparation or execution of a planned and organised mass execution of thousands of captured Bosnian Muslim men from the Srebrenica ‘safe area’”.<sup>62</sup> The Trial Chamber Judgment in the *Krstić* case concluded that “the majority of missing people were, in fact, executed and buried in the mass graves [...] and that the majority of bodies exhumed were not killed in combat; they were killed in mass executions”. Some of the arguments given for this were the large numbers of blindfolds and ligatures found on exhumed bodies from many different sites, which “are inconsistent with combat casualties”.<sup>63</sup> Another argument was the removal of many bodies from mass gravesites and the reburial in more remote locations, “to conceal the bodies of the men in these primary gravesites”.<sup>64</sup> Finally, the Judgment referred to the forensic and demographics evidence presented by the OTP, stating:

The correlation between the age and sex of the bodies exhumed from the Srebrenica graves and that of the missing persons support the proposition that the majority of missing people were, in fact, executed and buried in the mass graves.<sup>65</sup>

In other ICTY cases, the Trial Chamber has made its own estimates in several trials, including in the Judgment in *Zdravko Tolimir*. There, the Chamber estimated that the total number of Bosnian Muslims killed by Serb forces other than in combat in the aftermath of the fall of Srebrenica was at least 5,749. The sources of this estimate were exhumation reports cross-referenced with relevant DNA identifications. The number excludes Bosnian Muslims who died as a result of other causes such as suicide, mines and fighting among the Bosnian Muslims.<sup>66</sup>

The Srebrenica data on the number of missing and dead have been presented in a number of other trials, totalling 10 trials with 15 accused, including Slobodan Milošević, Momčilo Perišić, Zdravko Tolimir, Ra-

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<sup>61</sup> ICTY, *Prosecutor v. Blagojević and Jokić*, Transcript of Testimony, IT-02-60, 3 February 2004, p. 6998 ([http://www.icty.org/x/cases/blagojevic\\_jokic/trans/en/040203IT.htm](http://www.icty.org/x/cases/blagojevic_jokic/trans/en/040203IT.htm)).

<sup>62</sup> Krstić case, Amended Indictment, see *supra* note 30.

<sup>63</sup> Krstić case, Trial Judgment, para. 75, see *supra* note 46.

<sup>64</sup> *Ibid.*, para. 78.

<sup>65</sup> *Ibid.*, para. 82.

<sup>66</sup> ICTY, *Prosecutor v. Zdravko Tolimir*, Trial Chamber, Judgment, IT-05-88/2, 12 December 2012, para. 596 (<https://www.legal-tools.org/doc/445e4e/>).

dovan Karadžić and Ratko Mladić. Results based on similar methods (record linkage) and sources (census, voters' lists) have also been presented in a number of other trials, including the siege of Sarajevo and changes in the ethnic composition of a large area of Bosnia and Herzegovina.

Almost 40 demographic reports have been presented by OTP demographers at the ICTY for conflicts in several geographic areas in Bosnia and Herzegovina, Vojvodina, Kosovo and Croatia:<sup>67</sup>

- Eastern Bosnia and Bosanska Posavina, 1992;
- Bosnia and Herzegovina, 1993–94;
- Siege of Sarajevo, April 1992 – December 1995;
- Take-over of Srebrenica in 1995;
- Changes in ethnic composition, larger Bosnia and Herzegovina areas 1991–97;
- Conflict in Vojvodina in 1992;
- Kosovo conflict, including the development of population size and ethnic composition and the relationship between refugee movements and bombings in 1999;
- Conflict in Croatia, including migration movements (Operation Storm).

So far demographers/statisticians have testified for the prosecution about 30 times. In some cases two or more demographers testified in the same trial, as in Milošević case (see Table 3).<sup>68</sup> Evidence presented in these testimonies and in the accompanying reports has been referred to in a number of judgments.

Moreover, at least six expert reports by defence experts have been presented in response to prosecution reports at ICTY trials. Most of these reports can unfortunately not be seen as being up to international scientific standards, however, and frequently “offensive language played the role of the defence experts’ main weapon”.<sup>69</sup> The evidence presented by defence experts and the cross-examination of prosecution demographers by the defence lawyers are hardly referred to in the judgments and generally do not seem to have had any significant effect on the verdicts.

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<sup>67</sup> Tabeau, 2009, see *supra* note 26.

<sup>68</sup> Transcripts of the testimonies may be found at <http://www.icty.org/> by entering the name of the accused (or the case number) and the date of the testimony under “Selected documents”.

<sup>69</sup> Tabeau, 2009, see *supra* note 26.



**Table 3: Testimonies for the prosecution by demographers in trials at the ICTY, 2000–2013**

<i>Expert witness*</i>	<i>Date of testimony</i>	<i>Accused</i>	<i>Case number</i>	<i>Crime region</i>	<i>Verdict</i>
Brunborg	01.06.2000	Krstić	IT-98-33	Srebrenica	35 years
Tabeau	19.09.2001	Vasiljević	IT-98-32-1	Višegrad	15 years
Ball	13–14.03.2002 02.05.2003	Slobodan Milošević	IT-02-54	Bosnia, Srebrenica, Kosovo	Died in detention
Tabeau	07.10.2003				
Brunborg	11.02.2004				
Tabeau	10.07.2002	Simić <i>et al.</i>	IT-95-9	Bosanski Samac, Odzak	Simić 15 years, Tadić 8 years, Zarić 6 years, Miljković died in detention
Tabeau	22–23.07.2002 30.07.2002	Galić	IT-98-29-I	Sarajevo	Life imprisonment
Tabeau	24–25.07.2002 23.09.2002	Stakić	IT-97-24	Prijedor	40 years
Brunborg	03.02.2004	Blagojević and Jokić	IT-02-60	Srebrenica	15 years
Brunborg	22.11.2006	Milutinović <i>et al.</i>	IT-05-87	Kosovo	Milutinović acquitted; other five accused sentenced to imprisonment ranging from 14 to 22 years
Ball	20–21.02.2007				
Brunborg	01.02.2007 09–10.5.2007	Popović <i>et al.</i>	IT-05-88	Srebrenica	Popović and Beara sentenced to life imprisonment, Nikolić to 35 years, Miletić to 18 years, Pandurević to 13 years, Borovčanin to 17 years, and Gvero to 5 years <sup>70</sup>
Tabeau	05.02.2008				

<sup>70</sup> Popović and Beara were convicted of genocide, conspiracy to commit genocide, crimes against humanity and violations of the laws or customs of war; Nikolić of aiding and abetting genocide, crimes against humanity, and violations of the laws or customs of war; and the others of crimes against humanity and/or violations of the laws or customs of war. This was the first full genocide judgment at the ICTY. Previous judgments were convictions of

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Tabeau	01.05.2007	Dragomir Milošević	IT-98-29/1	Sarajevo	29 years
Tabeau	03, 23 and 30.08.2007	Prlić <i>et al.</i>	IT-04-74-PT	Herzegovina, Bosnia	Imprisonment ranging from 10 to 25 years; appeals proceedings ongoing
Tabeau	22.09.2008 24.09.2008	Lukić and Lukić	IT-98-32/1	Višegrad	Milan Lukić sentenced to life imprisonment, Sredoje Lukić to 27 years
Tabeau	21–23.10.2008	Šešelj	IT-03-67-PT	Vojvodina	Trial ongoing
Brunborg Tabeau	16.12.2008 05.05.2009	Perišić <i>et al.</i>	IT-04-81	Srebrenica	Acquitted
Brunborg	16.06.2009	Vlastimir Đorđević	IT-05-87/1	Kosovo	18 years
Tabeau	05–07.10.2010	Mico Stanišić and Župljanin	IT-08-91-PT	Bosnia	Both sentenced to 22 years; appeals proceedings ongoing
Tabeau	07–08.12.2010	Jovica Stanišić and Franko Simatović	IT-03-69	Croatia, Bosnia	Acquitted; appeals proceedings ongoing
Brunborg Tabeau	9–10 and 17.02.2011 16–17.03.2011	Tolimir	IT-05-88/2	Srebrenica	Life imprisonment for genocide in Srebrenica and Žepa
Tabeau	26.04–02.05.2012	Karadžić	IT-95-5/18-I	Bosnia	Trial ongoing
Bijak	03.06.2013	Hadžić	IT-04-75	Croatia	Trial ongoing
Brunborg Tabeau	25–26.07.2013 11–13.11 and 18.11.2013	Mladić	IT-09-92	Srebrenica	Trial ongoing

\* Full names of expert witnesses: Patrick Ball, Jakub Bijak, Helge Brunborg and Ewa Tabeau

aiding and abetting genocide, such as of Krstić. Source: Popović *et al.*, Case Information Sheet, IT-05-88, ICTY ([http://www.icty.org/x/cases/popovic/cis/en/cis\\_popovic\\_al\\_en.pdf](http://www.icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf)).

## 12.7. Methods

In the *Krstić* trial the evidence presented in court included a printed list with the names of 7,475 missing and dead persons, including date of birth and date last seen alive, accompanied by a report.<sup>71</sup> The methodology that was used to arrive at this list consisted of record linkage combined with a number of methods for quality control, addressing issues such as duplicates, misspelling of names, wrong or missing date of birth and other variables, and the possibility of “phantom” persons and possible survivors. For the *Blagojević and Jokić* trial several more advanced methods were used: introduction of algorithms for correcting misspelled names; information about where the missing persons lived before the armed conflicts started, derived from matching the missing persons with the 1991 population census; estimates of fatality rates, that is, the probability of being reported as missing in 1995 given that a person lived in Srebrenica in 1991, to adjust for normal mortality; application of the multiple systems method (capture-tag-recapture) to obtain an estimate of the total number of missing persons, including those not reported, to take care of possible undercounting.<sup>72</sup> It was found, for example, that about 50 per cent of the Muslim men who were enumerated in the municipality of Srebrenica in the 1991 census, and who were 50–54 years of age in 1995, were killed or reported as missing after the fall of Srebrenica.<sup>73</sup>

These methodological improvements were not referred to in the Judgment of *Blagojević and Jokić*, however. The judges were apparently satisfied with the estimate of the number of missing and dead presented in the *Krstić* trial and did not find it necessary to refer to more numbers or demographic analyses.

Generally, the methods used to present statistical and demographic findings to the ICTY Court have primarily been descriptive. Indirect and complicated methods, such as analyses and statements based on probabilities, significance levels and confidence intervals, are likely to be met with more scepticism and critique than simple counts of victims. An important reason for this is that they are more difficult to understand. But another

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<sup>71</sup> Brunborg and Urdal, 2000, see *supra* note 31, and SREBRENICA MISSING, see *supra* note 43.

<sup>72</sup> Helge Brunborg, “Addendum on the Number of Missing and Dead from Srebrenica”, Expert Report Submitted to the ICTY, 2002.

<sup>73</sup> Brunborg *et al.*, 2003, see *supra* note 36.

reason is that probabilistic results are inherently uncertain. For example, if a result says that there is a 90 per cent probability that the true value of a variable lies within the confidence interval, there is a 10 per cent probability that the true value is outside the interval. Such arguments are likely to be used in court proceedings by the defence – or the prosecution. A court wants certainty, whenever possible. Thus, descriptive statistics seem to be favoured over so-called probabilistic or inferential statistics.

An example of the use of probabilistic statistics is the study “Killings and Refugee Flow in Kosovo” written by Patrick Ball *et al.* for the ICTY.<sup>74</sup> The report was presented to the court in the trials of *Milošević*, *Milutinović et al.* and *Đorđević*. The prosecution in the *Milutinović* trial, relying upon the statistical analysis of Ball, asserted that there was a pattern of killing and refugee migration that indicates a common cause “consistent with the hypothesis that the cause of these events had been the action of the Yugoslav forces”. The defence called statistics expert Eric Fruits to review Ball’s reports and testimony, and based on this the “defence disputed the accuracy and comprehensiveness of Ball’s underlying data, alleged that there were flaws in his methodology, and rejected his conclusion”. The Trial Chamber concluded that “such doubt has been cast upon the study’s conclusions that reliance upon them would not be appropriate”.<sup>75</sup> In the trial of *Đorđević* the defence contended that the methods of prosecution expert Ball were unreliable, speculative and misleading and that he should be excluded as an expert witness, but this was not supported by the Trial Chamber.<sup>76</sup>

Another type of report using demographic material and analysis was written on the development of size and ethnic composition of the population of Kosovo.<sup>77</sup> This report was based entirely on already pub-

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<sup>74</sup> Patrick Ball, Wendy Betts, Fritz Scheuren, Jana Dudukovich and Jana Asher, “Killings and Refugee Flow in Kosovo March–June 1999”, A Report to the International Criminal Tribunal for the Former Yugoslavia, American Association for the Advancement of Science and the American Bar Association and Central and East European Law Initiative, 2002.

<sup>75</sup> ICTY, *Prosecutor v. Vladimir Lazarević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Nebojsa Pavković, Sreten Lukić*, Trial Chamber, Judgment, vol. 3, paras. 21–29, IT-05-87, 26 February 2010 (<https://www.legal-tools.org/doc/d79e85/>).

<sup>76</sup> ICTY, *Prosecutor v. Vlastimir Đorđević*, Trial Chamber, Decision on Defence Notice under Rule 94bis, IT-05-87/1, 5 March 2009 (<https://www.legal-tools.org/doc/c29cdb/>).

<sup>77</sup> Helge Brunborg, 2002, “Report on the size and ethnic composition of the population of Kosovo”, Expert report presented in the Slobodan Milošević Case (IT-02-54), 2002, published in Tabeau, 2009, see *supra* note 26. The report was referred to in ICTY, *Prosecutor*

lished macrodata, mostly from the Yugoslavia Statistical Institute in Belgrade, in addition to a household survey conducted in Kosovo. No microdata were used. The purpose of the study was to show the development of the proportion of Albanian Kosovars, who boycotted the 1991 census. The report was presented in the trials of *Slobodan Milošević*, *Milutinović et al.* and *Vlastimir Đorđević*.

### 12.8. Conclusions

Demography can contribute substantially to a war crimes tribunal through the collection, evaluation, validation, analysis and presentation of data relevant for war crimes charges. It took considerable time, however, to convince investigators and trial attorneys about the value of presenting demographic evidence in court. But after the breakthrough in the trial of *Krstić*, demographic data have been used frequently and have become an essential part of investigations and expert testimonies in a large number of trials at the ICTY.

One reason for the reluctance to use demographic data is the strict requirements to qualify as evidence in court. A few cases of faulty data may sometimes be enough to convincingly weaken, or destroy, the credibility of the findings. Moreover, indirect and complicated methods, such as statements based on probabilities, may be met with more scepticism than simple counts of victims. Demographic results may not be persuasive for the court, but they can be very useful as corroboration or numerical confirmation of events based on witness statements.

For legal purposes not all war-related deaths may be included in the documentation of a war crime in trials.<sup>78</sup> For some cases deaths in combat or deaths resulting from collateral damage could not be included, for example, as such deaths are not covered by the Statute of the ICTY. To be on the conservative side the prosecution may for some cases choose to exclude war-related deaths occurring to men of military age, often defined widely as 15–60 years, even if the men may have been unarmed civilians when they were killed. But this depends on the actual situation. For the

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v. *Vlastimir Đorđević*, Trial Chamber, Judgment, IT-05-87/1, 23 February 2011, para. 2009 (<https://www.legal-tools.org/doc/058c16/>).

<sup>78</sup> William J. Fenrick, “International Humanitarian Law and Combat Casualties”, in Helge Brunborg, Ewa Tabeau and Henrik Urdal (eds.), *The Demography of Armed Conflict*, International Studies in Population, vol. 5, Springer, Dordrecht, 2006, pp. 179–96.

events following the fall of Srebrenica in 1995, for example, all men were included in the estimates of the number of missing and dead persons, as many (or most) of them were exhumed from mass graves.

Although demographic data and analyses have proved to be important evidence at war crimes trials, trial demography has several limitations. Demography is usually not able to distinguish or identify legally important categories such as civilian and military victims, “lawful” and “unlawful” victims, combat deaths and collateral deaths.<sup>79</sup> Moreover, a demographer is usually not able to say anything about who the perpetrators were and what their motives for committing the crimes were. Additional evidence is needed to answer such questions. But demographic evidence can play an important role in supplementing such evidence, as well as giving an overview of the consequences of the war for the population.

The prosecution experts have sometimes been criticised for not being independent since they were employed by the Office of the Prosecutor of the ICTY. One example of this is the cross-examination of prosecution expert Ewa Tabeau by the accused Vojislav Šešelj, who claimed that she could not be an unbiased and international person in the scientific and professional sense since she had worked for the prosecution for eight years. Tabeau responded to this by saying that “I’m independent in my work, and nobody’s telling me how to do my work and what kind of results to obtain. The results are obtained from studying the sources, and from data processing, and from studying related materials”.<sup>80</sup>

Those of us who have worked with demographic evidence at the ICTY will strongly support that statement. Working for the prosecution has primarily led to a cautious and conservative approach, with the number of victims being very conservative and only attempting at estimating the *minimum* number of victims. It has also been important to present any exculpatory evidence in reports and testimonies. In academic work there is usually more attention to estimating the *likely* number of victims. The disadvantage of the conservative approach is that the historical value of the estimates may be somewhat reduced.

The presentation of demographic evidence by the prosecution at ICTY trials is important for several reasons and has had implications in a

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<sup>79</sup> *Ibid.*

<sup>80</sup> Ewa Tabeau, “Demographic Expert Reports of the Prosecution in the ICTY Trials: Introduction”, 2009, in Tabeau, 2009, see *supra* note 26.

number of areas. First, it represents a breakthrough in the use of demographic evidence in international criminal trials, which have had an impact on many judgments, including for genocide.

Second, there has been an emphasis on collecting and using data on individuals, rather than on available macrodata as in most other international criminal trials. These data sources, which were generated for other purposes, have proven very valuable in estimating the number of victims in an armed conflict. The most important of these are lists of missing persons, population censuses, voters' lists, and lists of refugees and displaced persons. Unfortunately, there are a number of other conflicts where data on individuals are very hard to collect, if possible at all.

Third, methods that were developed for other purposes have been applied to the analysis of war crimes, such as record linkage and the capture-recapture methodology. There has also been a strong emphasis on quality control. These applications have stimulated the interest in the development of methods to study war crimes, including data collection methods.<sup>81</sup>

Fourth, the estimation of the number of victims has contributed to history and to reconciliation. This is the case both for specific events during the war, such as the fall of Srebrenica and the siege of Sarajevo, as well as for all of Bosnia and Herzegovina. The conservative approach is believed to have had only a small and almost negligible effect on the estimates (for example, 12 possible survivors out of 7,692 missing after the fall of Srebrenica). While this chapter documents the history of the introduction of demographic evidence at the ICTY, it also emphasises the value of the demography projects for history at the ICTY and other international criminal tribunals, as for other types of analyses, records and evidence.<sup>82</sup>

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<sup>81</sup> See, for example, Michael Spagat, Andrew Mack, Tara Cooper and Joakim Kreutz, "Estimating War Deaths: An Arena of Contestation", in *Journal of Conflict Resolution*, 2009, vol. 53, no. 6, pp. 934–50; and Ziad Obermeyer, Christopher J.L. Murray and Emmanuela Gakidou, "Fifty Years of Violent War Deaths from Vietnam to Bosnia: Analysis of Data from the World Health Survey Programme", in *British Medical Journal*, 2008, no. 336, pp. 1482–86.

<sup>82</sup> Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia", in *Human Rights Quarterly*, 2005, vol. 27, no. 3, pp. 908–42.

Fifth, the extensive (and successful) use of demography at the ICTY has led to the establishment of a new scientific discipline, first called “the demography of violence”, which was later changed to “the demography of armed conflict” (to exclude regular crimes and domestic violence). Since 2000 there have been a number of seminars, conference sessions,<sup>83</sup> articles and books on this.<sup>84</sup>

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<sup>83</sup> Including at the International Population Conferences of the International Union for the Scientific Study of Population (‘IUSSP’) in 2005, 2009 and 2013.

<sup>84</sup> IUSSP appointed two consecutive scientific committees on this topic: the Working Group on the Demography of Conflict and Violence (2002–2004) and the Panel on the Demography of Armed Conflict (2005–2009), both chaired by the author. The Working Group organised an international seminar on this theme near Oslo, 8–11 November 2003, which resulted in special issues on demography and conflict in the *Journal of Peace Research*, 2005, vol. 42, no. 4, and the *European Journal of Population*, 2005, vol. 21, nos. 2/3, as well as the book *The Demography of Armed Conflict*, see *supra* note 78. The major demographic reports presented to court at the ICTY have been collected in a book edited by Tabeau, 2009, see *supra* note 26.



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## The Historical Contribution of International Fact-Finding Commissions

Mutoy Mubiala \*

### 13.1. Introduction

Since 1992 the United Nations ('UN') has established a number of international commissions of inquiry and other fact-finding mechanisms to investigate serious violations of international human rights law and international humanitarian law. These investigations have been mostly carried out in the context of conflicts characterised by the perpetration of international crimes. These include genocide, war crimes and crimes against humanity. This has provided several of these commissions with the opportunity to identify the crimes perpetrated and the applicable law. They have also been instrumental in some developments, including the establishment of international criminal tribunals, their operation, as well as the prevention of international crimes and international human rights law and international humanitarian law violations.

In this framework, the chapter will examine the contribution of international fact-finding commissions in four main areas: 1) institutional and normative developments of international criminal law; 2) the judicial application of international criminal law, with a focus on the interaction of international commissions of inquiry (hybrid commissions) with international and national criminal tribunals and courts, with special attention paid to their interplay with the International Criminal Court ('ICC'); 3)

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quality control in international “fact-work”<sup>1</sup> and “account-work”;<sup>2</sup> and 4) the preventive role of international fact-finding commissions. The chapter will conclude with some recommendations to address the challenges faced by the commissions. Before examining these substantive points, it is important to provide a brief historical background to international fact-finding in the fields of international human rights law, international humanitarian law and international criminal law.

### **13.2. Historical Developments of International Fact-Finding Commissions: A Brief Overview**

International fact-finding is one of the dispute settlement mechanisms provided in Article 33 of the UN Charter. Over the decades, before the adoption of the Charter, it was used to collect evidence of human rights and international law violations. Examples in this field include the 1913 Balkans Commission established by the Carnegie Foundation, the 1919 Commission created under the Versailles Treaty to identify the presumed authors of war crimes perpetrated during the First World War, and the United Nations War Crimes Commission (‘UNWCC’), tasked to investigate crimes committed during the Second World War and which operated from 1943 to 1948. Overall, these fact-finding commissions did not receive the required political support and had little impact on the prosecutions undertaken by the courts and tribunals established by the Allied powers.<sup>3</sup> Moreover, the UNWCC’s Draft Convention for the Establishment of a United Nations War Crimes Court, largely based on the failed 1937 Convention of the League of Nations for the Creation of an Interna-

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<sup>1</sup> According to Marina Aksenova and Morten Bergsmo, the novel term of “fact-work” refers to “fact-finding” and “inquiry”, and encompasses “several types of work on facts or alleged facts, including work processes to identify, locate, obtain, verify, analyse, corroborate, summarise, synthesise, structure, organize, present and disseminate these facts”. Marina Aksenova and Morten Bergsmo, “Non-Criminal Justice Fact-Work in the Age of Accountability”, in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, p. 2.

<sup>2</sup> The proposed novel term “account-work” refers to the process of identification of the presumed authors of international crimes and the handing over of their names and files to international criminal courts or tribunals and/or to the relevant bodies (in particular the UN Security Council) for the purpose of their prosecution and trial.

<sup>3</sup> Sandrine Barbier, “Les commissions d’enquête et d’établissement des faits” [Inquiry and Fact-Finding Commissions], in Hervé Ascension, Emmanuel Decaux and Alain Pellet (eds.), *Droit international pénal* [International Criminal Law], 2nd ed., Pedone, Paris, 2012, p. 773.

tional Criminal Court, was not further considered by the Allied powers which, in turn, signed the London Agreement for the Prosecution and Punishment of Major Criminals of the European Axis and Establishing the Charter of the International Military Tribunal ('IMT Charter') on 8 August 1945.<sup>4</sup> Despite this failure, and the criticisms made of its operation and outcome, Dan Plesch and Shanti Sattler highlight the forgotten legacy of the UNWCC:

The overarching legacy of the UNWCC is its success in instigating pivotal theoretical development of international criminal law and accompanying practical action. While largely overlooked by modern legal proceedings, the work of the UNWCC offers a valuable legacy of expansive legal precedent on a range of issues of international criminal and humanitarian law. A part of this legacy is its unique focus on holding mid-level criminals to justice as opposed to the current practice of focusing on the leaders of mass atrocities and those most responsible. Another key part of this legacy is the sheer number of trials conducted through efforts supported by the UNWCC.

The success of the UNWCC in following through with action is especially important when compared with the largely unsuccessful efforts by some of the same nations to initiate international criminal justice efforts following the First World War. The UNWCC, along with the IMTs at Nuremberg and Tokyo, deserves credit for the fact that trials and punishment are common practice in international law 70 years later. It is also important to recognise that the standard of working to afford a fair trial to suspected war criminals is also strived for today.<sup>5</sup>

Following the end of the Cold War in the early 1990s, the world witnessed an increase in violent internal conflicts, characterised by mass atrocities. To respond to these situations, the UN and several regional organisations established dozens of international fact-finding commissions

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<sup>4</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed., Cambridge University Press, Cambridge, 2011, pp. 5–6.

<sup>5</sup> Dan Plesch and Shanti Sattler, "Before Nuremberg: Considering the Work of the United Nations War Crimes Commission of 1943–1948", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law*, vol. 1, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 470–71.

or missions.<sup>6</sup> Of these commissions, the Office of the United Nations High Commissioner for Human Rights ('OHCHR') has so far supported around 50. According to the OHCHR:

There have been particular cases of high profile success with respect to implementation of recommendations to the international community in regard to investigation, prosecution and other forms of accountability. For example, following the first interim report of [the Commission of Experts on the former] Yugoslavia (1992–1994), and consistent with its observations, the Security Council created the International Criminal Tribunal for the former Yugoslavia. Similarly, consistent with the findings of [the Commission of Experts on] Rwanda, the Security Council created the International Criminal Tribunal for Rwanda. The recommendation of [the International Commission of Inquiry on] Darfur (2004) [...] resulted in the Security Council referring the situation to the International Criminal Court. The reports of commissions/missions may also have been influential in the Prosecutor of the International Criminal Court initiating preliminary investigations, for example, in response to the report of [the International Commission of Inquiry on] Guinea.<sup>7</sup>

### **13.3. Contribution of International Fact-Finding Commissions to Institution Building and International Criminal Law since 1992**

By its resolution 780 (1992), the Security Council requested the Secretary-General to establish a Commission of Experts

to examine and analyse information gathered with a view to providing it with its conclusions on the evidence of grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law perpetrated in the territory of the Former Yugoslavia.<sup>8</sup>

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<sup>6</sup> See Aksenova and Bergsmo, 2013, pp. 23–33, *supra* note 1.

<sup>7</sup> Office of the United Nations High Commissioner for Human Rights ('OHCHR'), *Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice*, United Nations, New York, 2015, p. 110. The ICC Legal Tools Database contains an International (ised) Fact-Finding Mandates Collection with the relevant documents of a large number of such mandates.

<sup>8</sup> The Commission of Experts on the former Yugoslavia was composed of five members. It was successively headed by Frits Kalshoven, Torkel Opsahl (deceased after his appointment) and M. Cherif Bassiouni.

In accordance with this resolution, the Secretary-General appointed the members of the Commission. Based in Geneva and supported by the then UN Centre for Human Rights (actually the OHCHR), the Commission of Experts submitted an interim report in February 1993. In this report, the Commission found that genocide (in the form of ethnic cleansing), war crimes and crimes against impunity were perpetrated in the territory of the former Yugoslavia. It recommended the creation of an *ad hoc* international tribunal to prosecute and try the presumed authors of these international crimes. In response to the recommendation of the Commission of Experts, the Security Council established, by its resolution 827 (1993), the International Criminal Tribunal for the former Yugoslavia ('ICTY') to prosecute the persons responsible for serious violations of international humanitarian law. The applicable law identified by the Commission was subsequently reflected in the ICTY Statute, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 12 August 1949 for the Protection of War Victims, the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and the Regulations annexed thereto, and the 1945 IMT Charter.<sup>9</sup> Thus, the Commission of Experts on the former Yugoslavia played a catalytic role in the establishment of the first-ever international criminal tribunal. It also served as a model for the creation of the Commission of Experts on Rwanda by Security Council resolution 935 (1994) of 1 July 1994.<sup>10</sup>

The Commission of Experts on Rwanda, based on the experience of the Commission of Experts on the former Yugoslavia, recommended in its preliminary report the expansion of the jurisdiction of the ICTY to the crimes committed in Rwanda.<sup>11</sup> For practical reasons, while establishing a

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<sup>9</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 27 May 1994, UN doc. S/1994/674, p. 13 (<https://www.legal-tools.org/doc/4eb957/>); Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827 ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>).

<sup>10</sup> United Nations Security Council resolution 935 (1994), Requesting the Secretary-General to Establish a Commission of Experts to Examine Violations of International Humanitarian Law Committed in Rwanda, 1 July 1994, UN doc. S/RES/935 (1994) (<https://www.legal-tools.org/doc/eef9ca/>). The Commission of Experts on Rwanda was composed of three members: Kofi Amega (Togo), Haby Dieng (Guinea) and Salifou Fomba (Mali).

<sup>11</sup> Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), UN doc. S/1994/1125, 4 October 1994, para. 14, p. 30. See also Lyal S. Sunga, "The Commission of Experts on Rwanda and the Crea-

second *ad hoc* tribunal for Rwanda (based in Arusha, Tanzania), the Security Council provided both the ICTY and the International Criminal Tribunal for Rwanda ('ICTR') with a common prosecutor and chamber of appeals based in The Hague. As with the ICTY, the means for the creation of the ICTR were criticised. In particular, the role of the Security Council in setting up the judicial bodies was disputed. In fact, the Commission of Experts on Rwanda, which carried out only one field visit, was established to provide the Security Council with a basis for the creation of the ICTR.<sup>12</sup>

To avoid the politicisation that prevailed in the establishment of other *ad hoc* tribunals,<sup>13</sup> the project of the creation of a permanent criminal court, initiated since 1949 by the UN International Law Commission ('ILC'), was reactivated. In less than four years, the ILC was able to complete the draft statute of the ICC,<sup>14</sup> subsequently adopted by a diplomatic conference convened in Rome in July 1998. One can conclude that the outcome of the two Commissions of Experts on the former Yugoslavia and Rwanda paved the way for the establishment of the ICC, thus contributing to the institutional development of international criminal law. In addition, the Commission of Experts on the former Yugoslavia, in particular, was influential on the legislative process of some international crimes included in the Rome Statute of the ICC ('ICC Statute').

The codification and development of international criminal law is very recent, especially through the adoption of the ICC Statute in 1998.<sup>15</sup>

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tion of the International Criminal Tribunal for Rwanda: A Note", in *Human Rights Law Journal*, 1996, vol. 16, no. 3, pp. 121–24.

<sup>12</sup> M. Cherif Bassiouni, "Appraising UN Justice-Related Fact-Finding Missions", in *Washington University Journal of Law and Policy*, 2001, vol. 5, no. 1, p. 41.

<sup>13</sup> At least two *ad hoc* tribunals, including the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon were created as a result of the recommendation made by two Commissions of Inquiry established by the UN General Assembly and Security Council, respectively. Apart from these examples, the UN's main bodies have been reluctant to approve another *ad hoc* tribunal. In contrast, the Security Council has started the practice to defer the situations to the ICC, in accordance with the ICC Statute establishing it.

<sup>14</sup> Ahmed Mahiou, "La contribution de la CDI à la répression des crimes internationaux" [The Contribution of the International Law Commission to the Punishment of International Crimes], in Zidane Meriboute (ed.), *International Criminal Court (ICC)*, Geneva, ICRC, 1997, p. 76.

<sup>15</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Art. 74(1) ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

The adoption of this core instrument benefited from many sources, including specialised conventions, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions and the 1977 Additional Protocols I and II, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, state practice relating to the repression of international crimes, the jurisprudence of *ad hoc* or military tribunals (for example, Tokyo, Nuremberg, and so on), the doctrine of the most qualified authors in international criminal law, as well as international fact-finding commissions. In the context of international fact-finding, some commissions, including the Commission of Experts on the former Yugoslavia, played an important think tank role in defining, clarifying and conceptualising international crimes, in particular genocide, crimes against humanity and war crimes. They have made an intellectual contribution to the formulation of Articles 6, 7 and 8 of the ICC Statute.<sup>16</sup> In addition, international fact-finding commissions have been playing an increasing role in the interpretation and application of international criminal law.

#### **13.4. The Contribution of International Fact-Finding Commissions to the Judicial Application of International Criminal Law**

Traditionally, international fact-finding commissions have acted as the implementing bodies of international human rights law and international humanitarian law. Recently, however, they have been tasked to investigate serious violations of international human rights law and international humanitarian law leading to international crimes. Moreover, the mandating bodies, in particular the UN organs, have developed since 1995 a practice of tasking international commissions of inquiry to identify the perpetrators of international crimes to ensure accountability, in addition to establishing the facts surrounding the concerned situation. As stressed by Dan Saxon, there has been a “marriage of fact-finding and accountabil-

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<sup>16</sup> For a commentary of Articles 6, 7 and 8 of the ICC Statute, see, among others, Lyal S. Sunga, “The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5–10)”, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, vol. 6, no. 4, pp. 61–83; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting (revs.), *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, Oxford 2013, pp. 63–130; Schabas, 2011, pp. 99–146, see *supra* note 4.

ity”,<sup>17</sup> which has led to the hybridisation of international fact-finding in international human rights law, international humanitarian law and international criminal law. In this context, international fact-finding commissions referred to in this chapter as “hybrid” commissions have increasingly been interacting with international and national criminal justice.

### 13.4.1. Hybrid Commissions

Hybrid commissions are characterised by some specificities relating to their mandate, composition and operation, including the application of international criminal law, their methods of work and the judicial outcome of the account-work.

#### 13.4.1.1. Mandate

By its resolution 1012 of 28 August 1995, the Security Council established the International Commission for Burundi, with two missions:

- (a) *To establish the facts* relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed;
- (b) To recommend measures of a legal, political or administrative nature, as appropriate, after consultation with the Government of Burundi, and measures with regard to *the bringing to justice of persons responsible for these acts*.<sup>18</sup>

Since 1995 the Security Council has tasked several international commissions of inquiry with a similar mandate, including the fact-work and account-work dimensions. More recently, by its resolution 2127 (2013) of 5 December 2013, on the situation in the Central African Republic, the Security Council requested the Secretary-General

to rapidly establish an international commission of inquiry [...] in order immediately to *investigate reports of* violations of international humanitarian law, international human rights

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<sup>17</sup> Dan Saxon, “Purpose and Legitimacy in International Fact-Finding Bodies”, in Bergsmo, 2013, p. 219, see *supra* note 1.

<sup>18</sup> United Nations Security Council, resolution 1012, 28 August 1995, UN doc. S/RES/1012 (1995) (‘Burundi Commission resolution’) (emphasis added) (<https://www.legal-tools.org/doc/80c1a0/>).



law and abuses of human rights law and abuses of human rights in the Central African Republic by all parties since 1 January 2013, to compile information, to help *identify the perpetrators* of such violations and abuses, point to their possible *criminal responsibility* and to help ensure that *those responsible are held accountable*.<sup>19</sup>

For its part, the UN Human Rights Council, which recently deployed a number of international commissions of inquiry, has adopted the same language in determining their mandates, including those for Côte d'Ivoire (2011), Libya (2011) and Syria (2011).

At the regional level, this trend is illustrated by the African Union's decision establishing the Commission of Inquiry on South Sudan, tasked with the following missions:

*Investigate* human rights violations and other abuses during the conflict by all parties [...];

*Establish facts* and circumstances that may have led to and that amount to violations and of any crimes that may have been perpetrated;

Compile information based on these investigations and in so doing assist in *identifying perpetrators* of such violations and abuses with a view to ensuring accountability for those responsible.<sup>20</sup>

Based on their account-work, several hybrid commissions mandated by the UN have developed the practice of submitting to their mandating bodies a confidential list of the presumed authors of international human rights law, international humanitarian law and/or international criminal law violations with a view to their prosecution and trial,<sup>21</sup> in addition to their findings on the facts and circumstances of these violations, which

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<sup>19</sup> United Nations Security Council, resolution 2127, 5 December 2013, UN doc. S/RES/2127 (2013) (emphasis added).

<sup>20</sup> African Union, Concept Note on the Establishment of the Commission of Inquiry on South Sudan, 22 April 2014 (emphasis added).

<sup>21</sup> Koffi Kumelio A. Afande, "Les commissions internationales d'enquête en vue de l'établissement des faits en matière de justice pénale (inter)nationale ou les 'anti-chambres de mise en accusation'", [International Commissions of Inquiry for Fact-finding in (Inter)National Criminal Justice or 'Pre-Trial Chambers'], in *African Yearbook of International Law*, 2009, vol. 17, p. 171. In exceptional cases (for example, the International Commission on Guinea established in 2009), the list of the presumed authors of crimes against humanity perpetrated in Conakry on 28 September 2009 was made public in the report.

are included in public reports. The quasi-judicial orientation of hybrid commissions is reinforced by their composition.

#### **13.4.1.2. Composition**

There is a trend to appoint former judges and prosecutors as members and/or chairpersons of hybrid commissions. As Mona Rishmawi points out:

In addition to Judge Antonio Cassese, who presided over the Darfur Commission in 2004–2005, ICTY former Prosecutor Judge Goldstone presided over the Commission that considered the situation in the Occupied Palestinian Territory and Southern Israel in 2009; Mr. Mohamed Bedjaoui, former ICJ President, was the Chairman of the International Commission of Inquiry on Guinea; former ICC President Philippe Kirsch presided over the Commission of Inquiry on Libya; Ms. Christine Chanet, Judge of the Court of Cassation of France and member of the United Nations Human Rights Committee, chaired the International Fact-Finding Mission on Israeli Settlements; and we have Madame Carla del Ponte as a member of the Syria COI, Judge Michael Kirby of the High Court of Australia and former UN Special Representative of the SG on Cambodia chairing the North Korea COI, and Mr. Bernard Muna, a former magistrate who was Deputy Chief Prosecutor for ICTR, now chairs the Commission of Inquiry on the Central African Republic.<sup>22</sup>

There is also an emerging tendency to recruit the staff of the secretariats of international fact-finding commissions from former staff of international criminal tribunals. For example, the core staff of the Commission of Inquiry on the Central African Republic, including its co-ordinator and one investigation team leader, came from the ICTR. The judicial membership and leadership of hybrid commissions have led to an increased application of international criminal law by several of them.

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<sup>22</sup> Mona Rishmawi, “The Role of Human Rights Fact-Finding in the Prevention of Genocide”, Paper presented at the International Conference on the Prevention of Genocide, Brussels, 31 March–1 April 2014, p. 2.

### 13.4.1.3. International Criminal Law as a Subject Matter of Hybrid Commissions

Traditionally, international fact-finding commissions were tasked to investigate serious international human rights law and international humanitarian law violations. In many recent mandates, several hybrid commissions have been tasked to investigate international crimes as included in the ICC Statute. This development has led to increased application of international criminal law by the hybrid commissions. On the Libya Commission, according to Philippe Kirsch:

International human rights law applied at all stages of the situation, i.e. both in peace and times of armed conflicts. [...] When it comes to situations of non-international and international armed conflicts, international humanitarian law applies. [...]

In addition to the above, international criminal law also applies to the Libyan situation, by virtue of the referral by the Security Council to the International Criminal Court (ICC) of the situation in Libya [...] even though Libya is not party to the Rome Statute [...]. The ICC can currently exercise jurisdiction on three categories of crimes, two of which, war crimes and crimes against humanity, are relevant.<sup>23</sup>

Considering that both the ICC and the Libya Commission were investigating the same facts, Kirsch also observes that “while the mandate of the Commission was broader than and different from that of the International Criminal Court (ICC) [...], the Commission also would need to consider whether some form of cooperation was required with the Court”.<sup>24</sup> The difference of the material scope between the two types of investigation is increasingly being reduced, as both have been progressively applying international criminal law. In its final report to the Security Council, the Commission of Inquiry on the Central African Republic clearly included international criminal law in the listing of bodies of applicable laws, in addition to international human rights law and international humanitarian law. The Commission provided detailed analysis on the applicability of

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<sup>23</sup> Philippe Kirsch, “The Work of the International Commission of Inquiry for Libya”, in M. Cherif Bassiouni and William A. Schabas (eds.), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Bodies and the Human Rights Council Procedures?*, Intersentia, Cambridge, 2011, pp. 294, 304.

<sup>24</sup> *Ibid.*, p. 294.

international criminal law to the Central African Republic context, as follows:

2. Bodies of Applicable International Law

102. The Commission has applied three bodies of international law to the situation in the CAR: international human rights law, international humanitarian law and international criminal law.

[...]

iii) International Criminal Law

111. Although the Security Council resolution creating the Commission of Inquiry makes no specific reference to international criminal law, this body of law is an essential complement to both international human rights law and international humanitarian law, in that it establishes individual criminal liability for serious violations of those other two bodies of law. The Central African Republic ratified the Rome Statute of the International Criminal Court on 3 October 2001, thereby giving the Court jurisdiction over war crimes, crimes against humanity and genocide as defined in the Statute in relation to crimes committed on the territory of the CAR or by its nationals since 1 July 2002. On 30 May 2014 the transitional government of the CAR referred the situation on the territory of the CAR since 1 August 2012 to the Prosecutor of the ICC.<sup>25</sup>

As a result of the application of international criminal law to fact-finding, the hybrid commissions have been progressively adopting a quasi-judicial approach to their work.

#### 13.4.1.4. Methods of Work

In principle and practice, international fact-finding commissions apply human rights methodology, in the context of which valuable information may be collected and contribute to the establishment of patterns for criminal investigations. Recently, the hybrid commissions have developed quasi-criminal methodological approaches. Influenced by the former or current judicial affiliation of their members and staff, some commissions of

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<sup>25</sup> United Nations, International Commission of Inquiry on the Central African Republic, Final Report, Annex, 22 December 2014, UN doc. S/2014/928, pp. 37, 39.

inquiry have adopted the “beyond a reasonable doubt” standard of proof, which is relevant to criminal investigations, rather than to fact-finding outside criminal justice. International fact-finding commissions should apply the “reasonable ground to believe” standard of proof (fact-work), as well as the “reasonable suspicion” standard of proof (account-work).<sup>26</sup>

The reasonable suspicion standard of proof in the account-work was, in particular, articulated in the report of the International Commission on Darfur:

The criteria of identifying perpetrators was first spelled out by the Darfur Commission of Inquiry, which decided that it could not comply with the standards adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a *prima facie* case). It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.

The Darfur Commission also set the methodology of how to practically approach this issue. While it has collected sufficient and consistent material (both testimonial and documentary) to point to numerous (51) suspects, the Commission decided to withhold the names of these persons from the public domain. This decision was based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead listed the names in a sealed file that was placed in the custody of the United Nations Secretary-General. The Commission recommended that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission’s recommendations), who may use that material as he or she deems fit for his or her investigations.<sup>27</sup>

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<sup>26</sup> OHCHR, 2014, pp. 50–51, see *supra* note 7.

<sup>27</sup> Rishmawi, 2014, p. 8, see *supra* note 22.

By its recommendation and outcome (the Security Council's referral of the Darfur case to the ICC), the Darfur Commission played a catalytic role in increasing the interplay between the hybrid commissions and judicial bodies.

### **13.4.2. The Interplay of Hybrid Commissions and Judicial Bodies**

The hybrid commissions have been interacting increasingly with international criminal tribunals or courts, hybrid courts, as well as national criminal courts, with regard to the prosecution and trial of the authors of international crimes.

#### **13.4.2.1. The ICC**

In her presentation of the Darfur Commission's report to the Security Council, the then High Commissioner for Human Rights, Louise Arbour, demonstrated that the violence and crimes were so clear and well documented that the Security Council had to refer the case to the ICC.<sup>28</sup> By its resolution 1593 (2005) of 31 March 2005, the Security Council decided to refer the Darfur situation to the prosecutor, thus exercising its powers under Article 13(b) of the ICC Statute.<sup>29</sup> The outcome of the Darfur Commission's report provides an important precedent to the potential role of international fact-finding commissions, in general, and the hybrid commissions, in particular, for the effective implementation of Article 13(b). As Philip Alston points out:

From the perspective of the ICC, the Darfur process should also be seen as a major contribution to the evolution of a

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<sup>28</sup> United Nations, Press Release, "Secretary-General, High Commissioner for Human Rights Call for Urgent Action by Security Council to Halt Violence in Sudan", 16 February 2005, UN doc. SC/8313. See also Mutoy Mubiala, "L'affaire du Darfour devant la Cour pénale internationale" [The Darfur Case at the International Criminal Court], in Stéphane Doumbe-Bilé (ed.), *Justice et solidarité* [Justice and Solidarity], Bruylant, Brussels, 2012, p. 32.

<sup>29</sup> United Nations Security Council, resolution 1593 (2005), Sudan – Referral of the Situation in Darfur to the Prosecutor of the ICC, 31 March 2005, UN doc. S/RES/1593 (2005) (<https://www.legal-tools.org/doc/4b208f>). According to the ICC Statute, Art. 13(b):

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if [...] (b) A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

practice which has the potential to maximize the value of the Court. Given the still limited number of States Parties to the Rome Statute and the assumption that voluntary referrals are unlikely to bring many of the worst situations before the Court, the process of establishing a Commission of Inquiry to evaluate whether or not a situation warrants a referral by the Security Council provides an appropriate filtering mechanism before the Council takes a decision. It ensures a thorough and systematic preliminary review of the facts, it provides a fully reasoned legal analysis, and it gives Council members the opportunity to consider alternative approaches which might be better suited to ensure a just outcome.<sup>30</sup>

Following the example of the Darfur Commission, several commissions of inquiry established by the UN mandating bodies have recommended the referral of situations to the ICC by the Security Council. These include the UN Fact-Finding Mission on Gaza,<sup>31</sup> the International Commission of Inquiry on Guinea,<sup>32</sup> the International Commission of Inquiry on Syria<sup>33</sup> and the International Commission on North Korea.<sup>34</sup> Despite these recommendations, the Security Council has only referred the Darfur situation to the ICC, the Libya situation being the other referred so far. This has raised some criticisms of the Security Council's "selectivi-

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<sup>30</sup> Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations", in *Journal of International Criminal Justice*, 2005, vol. 5, no. 3, p. 607.

<sup>31</sup> United Nations General Assembly, Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009, UN doc. A/HRC/12/48, pp. 423–24.

<sup>32</sup> United Nations Security Council, Report of the International Commission of Inquiry mandated to establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, 18 December 2009, UN doc. S/2009/693, p. 60.

<sup>33</sup> United Nations General Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 12 February 2014, UN doc. A/HRC/25/65, p. 25. The Syrian Commission recommended that the Human Rights Council "(b) Take appropriate action by referring to situation to justice, possibly to International Criminal Court, bearing in mind that, in the context of the Syrian Arab Republic, only the Security Council is competent to refer the situation to the Court".

<sup>34</sup> United Nations General Assembly, Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, 7 February 2014, UN doc. A/HRC/25/63. During the presentation of the report by the Commission to the Human Rights Council, 37 member states supported the recommendation relating to the referral of the situation by the Security Council to the ICC.

ty”. As Arbour, a former prosecutor of the ICTY and ICTR, recently states:

The Council’s actions in response to allegations of human rights violations in Sudan and Libya are in stark contrast to its silence in the face of equally credible allegations of gross violations and international humanitarian law by government forces in Sri Lanka where the last few months of the war saw thousands of civilians subjected to indiscriminate attacks. More recently, the lack of support for a referral of the situation in Syria to the court has confirmed for many the suspicion that states with powerful allies among the P-5 can act with relative impunity. This selective use of ICC referrals by the Council suggests that legal principles are viewed as subservient to political agendas. This selectivity in turn taints the broader work of the ICC, bolstering accusations that the court has been politicized.<sup>35</sup>

To address this challenge, there has been increased advocacy, even from member states, for Security Council action in this field. This is illustrated by the strong statement made before it by Ambassador Gary Quinlan, the permanent representative of Australia to the UN:

The Arria formula meetings held in April brought incisive reports on two truly horrific human rights situations directly before Council members. The meeting on the Caesar report exposed the extraordinary abuses committed in Syrian government detention facilities – widespread and systematic use of arbitrary detention, torture, starvation and murder, carried out on an industrial scale; abuses that are just one aspect of the devastating picture of violations in the Syrian conflict. And are part of a military strategy which deliberately targets civilians through aerial bombardment, barrel bombs, sieges, and the use of starvation and the withholding of medicines and medical assistance as calculated weapons of war.

The briefing by the Commission of Inquiry on DPRK established by the Human Rights Council exposed the devastating human rights situation in North Korea, including in the system of gulags that have been in place for decades and in which at the very least 80,000 prisoners – maybe 120,000 – are brutally perishing. The list of crimes against humanity

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<sup>35</sup> Louise Arbour, “The Relationship between the ICC and the UN Security Council”, in *Global Governance*, 2014, vol. 20, no. 2, p. 199.



found by the Commission is chilling – arbitrary detention; enslavement; rape; torture; sexual violence; forced abortion; infanticide; murder, and extermination. *In response to both briefings, many Council members called for accountability, and specifically an ICC referral.* In both cases, further Council action is required.<sup>36</sup>

Regarding the situation in Syria, in particular, a group of United Nations independent human rights experts<sup>37</sup> issued a joint statement on 30 May 2014 in which they

emphasized that the UN Security Council’s decision not to refer the situation in Syria to the International Criminal Court (ICC) leaves the door wide open for new atrocities in the ongoing conflict.

“The double veto last week to a resolution referring the situation in Syria to the ICC is likely to expose the Syrian population to further gross human rights and humanitarian law violations,” they said. “The failure to hold those responsible for the violations to account may fuel further atrocities.”

The human rights experts stressed that “given the absence of prosecution at the domestic level it was the UN Security Council’s responsibility to refer the situation to the International Criminal Court.”

“Referring the situation in Syria to the ICC would have been an important and most necessary step both to protect civilians against continued and future violations by all sides to the conflict, and to curb impunity for the grave violations

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<sup>36</sup> United Nations Security Council, Statement by HE Mr. Gary Quinlan, Ambassador and Permanent Representative of Australia to the United Nations at United Nations Security Council, 30 April 2014, p. 3 (emphasis added).

<sup>37</sup> The experts involved in this statement included the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson; the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo De Greiff; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez; the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns; and the Working Group on Arbitrary Detention and Working Group on Enforced or Involuntary Disappearances.

of human rights and humanitarian law, some amounting to crimes against humanity,” they noted.<sup>38</sup>

On North Korea, the Third Committee of the UN General Assembly, based on the findings and recommendation of the International Commission of Inquiry on the situation of human rights in that country, recently recommended the referral of the situation to the ICC. The debate demonstrated the trend of the “politicisation” of the follow-up on such a recommendation, anticipating the use of veto by at least one of the permanent members of the Security Council.<sup>39</sup>

Contrary to the Security Council, the ICC has increasingly been taking into account the outcome of fact-work and account-work of international fact-finding commissions, in particular the hybrid commissions. The ICC prosecutor has initiated preliminary investigations in some situations, based on the findings and recommendations of international fact-finding commissions. This has been the case in Guinea (2009) and in Mali (2012). In addition, the Office of the Prosecutor has also requested the OHCHR to provide it with documentation and material collected by international commissions of inquiry it has supported (for example, the 2004 International Commission of Inquiry on Côte d’Ivoire, whose report was not officially issued).<sup>40</sup> This raises the question as to whether human rights fact-findings could be used for judicial purposes. The jurisprudence of the ICC on this is not coherent. While the ICC Trial Chamber in the *Katanga and Ngudjolo* case admitted the evidence provided by the UN Human Rights Field Office in the Democratic Republic of the Congo,<sup>41</sup> the ICC Pre-Trial Chamber in the *Gbagbo* case did not attribute probative

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<sup>38</sup> OHCHR, News Release, “Syria: Door Remains Wide Open for Further Atrocities after Lack of Referral to the ICC, UN Experts Warn”, Geneva, 30 May 2014.

<sup>39</sup> United Nations General Assembly, Third Committee, Promotion and Protection of Human Rights: Situation of Human Rights in the Democratic People’s Republic of Korea, 14 November 2014, UN doc. A/C.3/69/L.28/Rev.1; Ray Sanches, “UN Votes against North Korea on Human Rights”, in CNN, 19 November 2014.

<sup>40</sup> In co-operating with the Office of the Prosecutor of the ICC, OHCHR has always ensured that the sharing of information based on testimonies is done with respect to the prior consent of the concerned victims and/or witnesses.

<sup>41</sup> International Criminal Court (‘ICC’), Situation in the Democratic Republic of Congo, *Prosecutor v. Germain Katanga*, Application by the United Nations for Leave to Submit Observations Pursuant to Article 75 of the Statute, ICC-01/04-01/07, 13 February 2015 (<https://www.legal-tools.org/doc/510f33/>); Lyal S. Sunga, “What Should Be the UN Human Rights Council’s Role in Investigating Genocide, War Crimes and Crimes Against Humanity?”, in Bassiouni and Schabas, 2011, pp. 345–46, see *supra* note 23.

value to the materials provided by several sources, including United Nations reports.<sup>42</sup> In fact, contrary to this recent decision, the ICC and the UN Department of Peacekeeping Operations adopted standard operating procedures allowing the former to benefit from the information gathered and documented by the human rights components of peace missions. In this context, the OHCHR guidance to the human rights components of the UN peace missions has been to authorise the sharing of the relevant information in due respect for the confidentiality rule, the informed consent of the concerned victims and/or witnesses, as well as their protection (do no harm principle).

The increased complementarity between the hybrid commissions and the ICC does not exclude the risk of parallel or competing investigations between the former and the ICC's Office of the Prosecutor, as illustrated recently by the involvement of both the Central African Republic Commission of Inquiry and the latter in that country. On 7 February 2014 the ICC prosecutor, Fatou Bensouda, announced the opening of a preliminary examination of the alleged crimes perpetrated in the Central African Republic. In May 2014 the transitional government of the Central African Republic also referred the situation to the ICC. On 24 September 2014 the ICC prosecutor opened a new investigation into atrocities, including murder, rape and persecution during ruthless sectarian fighting since 2012.<sup>43</sup> In addition to the dual involvement of the Commission of Inquiry and ICC, other fact-finding missions have been investigating the situation in the Central African Republic. They include the Panel of Experts established by the Security Council in the framework of its Committee of Sanctions, the Independent Expert on the situation of human rights appointed by the UN Human Rights Council, the Human Rights Division of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic, the Human Rights Unit of the Mission internationale de soutien à la République centrafricaine of the African Union (until 15 September 2014), the Fact-Finding Mission of the African

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<sup>42</sup> International Criminal Court ('ICC'), Situation in the Republic of Côte d'Ivoire, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber, ICC-02/11-01/11. Stephen Wilkinson, "Finding the Facts": Standards of Proof and Information Handling in Monitoring, Reporting and Fact-finding Missions", Working Paper, Programme on Humanitarian Policy and Conflict Research at Harvard University, 2014, p. 40.

<sup>43</sup> Associated Press, "ICC Opens New Central African Republic Probe", 24 September 2014.

Commission on Human and Peoples' Rights (September 2014),<sup>44</sup> as well as the Cellule spéciale d'investigation established by the transitional government to investigate past human rights abuses committed since 2004. Aware of the challenge emerging from the implication of these various fact-finding mechanisms, the Commission of Inquiry on the Central African Republic met with all these bodies to have exchanges, including on the similarities and differences of their respective mandates and expected outcomes. With regard to its relationship and cooperation with the ICC in particular, the Commission of Inquiry noted in its preliminary report:

The Commission has also enjoyed the full support of the Office of the Prosecutor of the International Criminal Court, which has opened a preliminary examination in order to ascertain whether the criteria of the Rome Statute for opening an investigation into the alleged crimes committed in the Central African Republic, which fall within the jurisdiction of the Court, have been met. On 1 April 2014, the Commission sent a request to the Prosecutor to facilitate access to open-source material gathered by the Office of the Prosecutor, a broad selection of open-source material was subsequently provided to the Commission.<sup>45</sup>

The International Commission of Inquiry on Libya faced the same challenge of concurrent deployment with the ICC in 2011. The Commission managed to clarify its mandate vis-à-vis that of the ICC and the complementarity of the two bodies. As Francesca Marotta points out:

Where parallel investigations are being undertaken, it is important to ensure full understanding of the role of each entity and the relationships between them. Established only one day before the referral by the Security Council of the situation in Libya to the International Criminal Court, the International Commission of Inquiry on Libya is operating in parallel to the Court's investigations. In its preliminary report, the Commission set out the similarities as well as the differences in mandates, noting in particular that while it had identified some violations that led to it to conclude that international

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<sup>44</sup> African Commission on Human and Peoples' Rights, Press Release on the Fact-Finding Mission of the African Commission on Human and Peoples' Rights to the Central African Republic, 23 September 2014.

<sup>45</sup> United Nations Security Council, Preliminary Report of the International Commission of Inquiry on the Central African Republic, Submitted Pursuant to Security Council resolution 2127, 26 June 2014, UN doc. S/2014/373, p. 10.

crimes were committed in Libya, it was the role of ICC to assess individual criminal responsibility.<sup>46</sup>

Also, the involvement of international fact-finding commissions in the identification of the presumed authors of international crimes, as referred to in many texts establishing them, raises the issue of the treatment of the information gathered on those identified, in particular if their list is made public, as in the case of the International Commission of Inquiry on Guinea. As Stephen Wilkinson points out:

Such an approach can be criticized, especially concerning due process implications; hence, before guidelines can be drafted for how and when this could be done, the first question to ask is should this public listing ever be done? If so, in what situations and circumstances? When answering this question, it should not be forgotten that even missions that have kept names confidential have also been subject to criticism by those advocating for more transparency and genuine accountability.<sup>47</sup>

#### 13.4.2.2. *Ad Hoc International Criminal Tribunals*

After the Commission of Experts on the former Yugoslavia submitted its final report, the Security Council requested it to continue to gather evidence on serious violations of human rights and international humanitarian law, pending the appointment of the ICTY's prosecutor. At the end of this mission and after the appointment of the prosecutor of the ICTY, the Commission of Experts on the former Yugoslavia handed over the evidence collected to the latter.<sup>48</sup> The Commission of Experts on Rwanda did the same after the completion of its mandate. In early 1995 a delegation of the UN Centre for Human Rights handed over material and evidence col-

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<sup>46</sup> United Nations Security Council, Report of the Workshop on Accountability and Fact-Finding Mechanisms for Violations of International Humanitarian Law and Human Rights Law: The Role of the Security Council – Past and Future, 30 May 2012, UN doc. S/2012/373, p. 49 ('Report of the Workshop on Accountability').

<sup>47</sup> Wilkinson, 2014, p. 42, see *supra* note 42. For more detail, see Rob Grace, "The Design and Planning of Monitoring, Reporting, and Fact-finding Missions", Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, 2013, pp. 36–40.

<sup>48</sup> M. Cherif Bassiouni, "The United Nations Commission of Experts Established pursuant to Security Council Resolution 780 (1992)", in *American Journal of International Law*, 1994, vol. 88, no. 4, pp. 790–91.

lected by the Commission to Justice Richard Goldstone, the then prosecutor of the ICTY and ICTR, in The Hague. The OHCHR Field Office in Rwanda also provided information and evidence collected by its monitoring team and Special Investigative Unit to the ICTR, whose deputy prosecutor was based in Kigali, Rwanda.

#### 13.4.2.3. Hybrid and National Criminal Courts

Apart from international *ad hoc* tribunals and the ICC, there has been the development of various mechanisms at the national level to ensure accountability for international crimes.<sup>49</sup> These include national criminal courts as well as hybrid courts. The role of the International Commission of Inquiry on Cambodia mandated by the UN General Assembly in the establishment of the Extraordinary Chambers in the Courts of Cambodia's judicial system was mentioned above, as was that of the International Commission of Inquiry on Lebanon on the creation of the Special Tribunal for that country. All international fact-finding commissions have made recommendations including national measures to ensure accountability for international crimes identified in their findings. These recommendations include the ratification of the ICC Statute and its integration in national legislation, the establishment of special or hybrid courts, the setting-up of transitional justice mechanisms and national human rights institutions, and so on. In doing so, international fact-finding commissions have contributed to promoting the development of implementing mechanisms of international criminal law at the national level. For example, in the Democratic Republic of Congo, following the recommendation of the OHCHR Mapping Report on the serious violations of international human rights law and international humanitarian law violations committed from 1993 to 2003,<sup>50</sup> the Parliament adopted a law establishing Special Chambers

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<sup>49</sup> On the increased involvement of national courts in the prosecution and trial of the authors of international crimes, see Anjali Pathmanathan, "Round Peg, Square Hole? The Viability of Plea Bargaining in Domestic Criminal Justice Systems Prosecuting International Crimes", in *International Criminal Law Review*, 2013, vol. 13, pp. 319–84; Chacha Murungu and Japhat Biegon (eds.), *Prosecuting International Crimes in Africa*, Pretoria University Law Press, Pretoria, 2011.

<sup>50</sup> United Nations, Haut-Commissariat aux droits de l'homme, République démocratique du Congo, 1993–2003. Rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo [Office of the High Commissioner for Human Rights, Democratic Republic of the Congo, 1993–2003:

within the Congolese judicial system, including international judges. While not endorsed by the Senate, the National Assembly is still considering the draft law, even though there has also been strong advocacy by non-governmental organisations for the establishment of an *ad hoc* international tribunal, one of the options recommended by the Mapping Report.<sup>51</sup> In Guinea, in response to a recommendation of the International Commission of Inquiry on the events of 28 September 2009, the government appointed a pool of three judges to investigate the crimes perpetrated during these events. One can, however, recognise that the process of these investigations has been very slow and inefficient, thus obliging the ICC to seriously consider the prosecution of the presumed authors of the crimes against humanity perpetrated, as identified by the Commission of Inquiry.

Prosecution and trial of several presumed authors of genocide in Rwanda have been carried out by national courts in several countries, in particular in Belgium, Canada and France. For its part, the International Crimes Unit of the Netherlands National Prosecutor's Office, which is responsible for the investigation and prosecution of genocide, war crimes, torture, crimes against humanity and enforced disappearances perpetrated in the Netherlands, by Dutch nationals or against Dutch nationals or by persons residing in the Netherlands, has been dealing with the crimes committed in the Democratic Republic of Congo, Afghanistan, Rwanda, Iraq, Liberia and Sri Lanka. In the context of national prosecution of the authors of international crimes, national criminal courts and lawyers from these countries have benefited from the findings and reports of international fact-finding commissions. Some national courts dealing with the prosecution and trial of the presumed authors of international crimes have requested the OHCHR to provide them with the information on the situations in the concerned countries, collected by international fact-finding commissions it has supported.<sup>52</sup> The use of such findings by national

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Mapping Report on the Most Serious Violations of Human Rights and International Humanitarian Law Committed between March 1993 and June 2003 on the Territory of the Democratic Republic of the Congo], August 2010, pp. 483–86.

<sup>51</sup> A group of 52 women, who met with the then UN High Commissioner for Human Rights Navanethem Pillay, in Geneva, on 15 May 2014, are supporting this option, despite the reluctance of the UN to create new international *ad hoc* tribunals, based on the lessons learned from the experience of the ICTY and ICTR, considered as very expensive

<sup>52</sup> The OHCHR has received several requests from Canada and France regarding the prosecution carried out in relation to events in Rwanda and Côte d'Ivoire, respectively.

criminal tribunals and/or hybrid courts, in addition to international criminal tribunals and courts, justifies discussing quality control in fact-work and account work.

### **13.5. Quality Control in Fact-Work and Account-Work: Challenges and Opportunities**

The basic challenge of international fact-finding commissions is the lack of a (common) regime. With a special emphasis on the creation and operation of international fact-finding commissions, this section examines the reasons for the origins of this gap and its main consequences on the quality of fact-work and account-work. It also reviews the efforts made by official and private institutions to fill this gap at both normative and methodological levels, the progress made so far and the challenges ahead.

#### **13.5.1. The Creation of International Fact-Finding Commissions**

The multiplicity of the mandating bodies, their *ad hoc* approach and the lack of a legal framework relating to the establishment of international fact-finding commissions have caused the political, institutional and legal challenges faced by fact-finding in international human rights law, international humanitarian law and international criminal law.

##### **13.5.1.1. Political, Institutional and Legal Issues**

The first challenge is caused by the *multiplicity* of the mandating bodies and the risk of competition, for example between the UN and regional organisations. This is illustrated by the decision of the African Union to establish the International Commission on Inquiry on South Sudan in December 2013, while the UN had the intention of doing the same. Due to the African Union's reluctance to accept a joint Commission, the only way to make the UN's Commission effective was for it to request technical assistance from the African Union's Commission. Even within the UN, the risk of competition between the mandating bodies remains high. There are at least five mandating bodies – namely, the General Assembly, the Security Council, the Human Rights Council, the Secretary-General and the High Commissioner for Human Rights. There are no criteria determining the conditions of the respective interventions of these bodies. Also, depending on their decision-making process, the main mandating bodies are not in the same situation while establishing an international



fact-finding commission. For example, it was easier for the Human Rights Council to establish the Commissions of Inquiry on Gaza, Syria and North Korea than to have the Security Council establish them. The Security Council, which was blocked by the use of a veto in the case of Syria, would have faced similar a situation in trying to establish commissions for the two other countries. This largely explains the increased leadership of the Human Rights Council in this field, due to its decision-making process (adoption of the decisions by a majority of the votes).

From January to September 2014 the Human Rights Council established four fact-finding commissions and missions, including the OHCHR Investigative Team on the last years of the Sri Lankan conflict,<sup>53</sup> the Commission of Inquiry on Eritrea,<sup>54</sup> the Commission on the recent conflict in Gaza<sup>55</sup> and the Special Mission to investigate Iraq to examine human rights abuses and war crimes allegedly committed by Islamic State.<sup>56</sup> In addition, as demonstrated by participants in a workshop jointly organised by the Permanent Mission of Portugal (during its presidency of the Security Council) and the UN Office of the Coordination for Humanitarian Affairs in New York in November 2011, there is no consistent approach to fact-finding between the Security Council and the other UN mandating bodies. Moreover, even the practice of the Security Council itself is not coherent.<sup>57</sup> Further, the OHCHR, as the supporting body to the

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<sup>53</sup> United Nations General Assembly, Human Rights Council, resolution 25/1, Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, 9 April 2014, UN doc. A/HRC/RES/25/1, requested the OHCHR to “undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission (LLRC), and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders”.

<sup>54</sup> United Nations General Assembly, Human Rights Council, resolution 26/24, Situation of Human Rights in Eritrea, 14 July 2014, UN doc. A/HRC/RES/26/24. The Commission of Inquiry presented its first report to the Human Rights Council in June 2015: United Nations General Assembly, Human Rights Council, Report of the Commission of Inquiry on Human Rights in Eritrea, 4 June 2015, UN doc. A/HRC/29/42.

<sup>55</sup> United Nations General Assembly, Human Rights Council, resolution S-21/1, Ensuring Respect for International Law in the Occupied Palestinian Territory, including East Jerusalem, 24 July 2014, UN doc. A/HRC/RES/S-21/1.

<sup>56</sup> United Nations General Assembly, Human Rights Council, resolution S-22, The Human Rights Situation in Iraq in the Light of Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups, 29 August 2014, UN doc. A/HRC/S-22/L.1.

<sup>57</sup> Report of the Workshop on Accountability, pp. 12–13, see *supra* note 46.

UN international fact-finding commissions, has rarely been consulted by the UN mandating bodies to give its advice on the conformity of their mandate to international standards. The OHCHR's prior advice would contribute to ensuring objectivity, transparency and fairness of these UN international fact-finding commissions. This is largely due to the political process of the decision-making.

This leads to the issue of *politicisation*. Since the mandating bodies of international fact-finding commissions are political organs, the process of their creation has political implications. There have been criticisms on the "selectivity" of the mandating bodies, in particular within the UN, in the founding of international fact-finding commissions. Recently, for example, North Korea denounced the political agenda behind the creation of the Commission of Inquiry on North Korea, during the presentation of its report to the Human Rights Council. In the past, Israel condemned the establishment of the UN Mission of Inquiry on the Gaza conflict.<sup>58</sup>

The other consequence of the multiplicity of the mandating bodies has been the *proliferation* of international fact-finding commissions. There has been a plethora of such commissions. Over the past two decades the OHCHR has provided support to 40 international fact-finding commissions established by various UN bodies. Some countries have hosted several international fact-finding commissions in a short period. For example, various UN bodies, including the Human Rights Council, the Secretary-General (at the request of the Security Council) and the OHCHR, have deployed five international fact-finding commissions in Côte d'Ivoire from 2002 to 2011. This proliferation is a serious challenge in international fact-finding.

On the *legal aspects*, international fact-finding commissions have been established on an *ad hoc* basis, mostly through the adoption of resolutions by the mandating bodies. Each international fact-finding commission has its legal framework and is mostly guided by the practice established so far by previous commissions. To address the lack of a legal regime for the establishment and operation of international fact-finding commissions, there have been some official initiatives. The first notable one was the creation of the International Fact-Finding Commission estab-

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<sup>58</sup> See Tom Farer, Dinah PoKempner, Ed Morgan, Richard Falk and Nigel S. Rodley, "The Goldstone Report on the Gaza Conflict: An Agora", in *Global Governance*, 2010, vol. 16, no. 2, pp. 139–207.

lished by Article 90 of the 1977 Additional Protocol I to the 1949 Geneva Conventions on Armed Conflicts,<sup>59</sup> which is the only treaty body in the field of international fact-finding. So far, the Commission has not yet investigated any violations in a given context and has to be considered a “sleeping” mechanism.<sup>60</sup> One can also mention some non-binding instruments, limited to the UN, including the General Assembly Declaration on Fact-Finding by the UN in the Field of the Maintenance of International Peace and Security,<sup>61</sup> as well as the 2006 Code of Conduct for Special Procedures Mandate-holders of the UN Human Rights Council.

At the private level, the International Law Association adopted in 1980 a draft statute of a permanent international commission of inquiry.<sup>62</sup> This proposal and the above efforts to “unify” guiding principles on international fact-finding aim at responding to the proliferation of international fact-finding commissions and the methodological challenges faced in their operation.

### 13.5.2. Operations

Rob Grace and Claude Bruderlein point out:

The international community – imbued, since the end of the Cold War, with a new sense of responsibility for international legal accountability and civilian protection – has increasingly employed monitoring, reporting, and fact-finding (MRF) mechanisms to collect information on the vulnerabilities of civilian populations and investigate potential violations of international law.

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<sup>59</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 90, 8 June 1977. See Charles Garraway, “Fact-Finding and the International Humanitarian Fact-Finding Commission”, in Bergsmo, 2013, pp. 427–46, *supra* note 1.

<sup>60</sup> Frits Kalshoven, “The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?”, in *Reflections on the Law of War: Collected Essays*, Martinus Nijhoff, Leiden, 2007, p. 214.

<sup>61</sup> United Nations General Assembly, Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, 9 December 1991, UN doc. A/RES/46/59. See Axel Berg, “The 1991 Declaration on Fact-finding by the United Nations”, in *European Journal of International Law*, 1993, vol. 4, no. 1, pp. 107–14.

<sup>62</sup> The International Law Association, Report of the Fifty-Ninth Conference, Belgrade, 1980, p. 421.

But the recent proliferation of MRF mechanisms has out-paced endeavours of MRF policymakers to reflect on best practice. As a consequence, MRF actors have struggled – and continue to struggle – with a paucity of sufficient resources and guidance. [...]

The MRF community – a diverse array of political actors (such as government mandators and donors) and practitioners (such as commissioners, investigators, legal experts, and interpreters) – has become locked in a conundrum. On the one hand, the multiplicity of MRF mandating bodies – including international, regional, and national entities – is beneficial, providing political actors with various venues for reaching consensuses around initiating MRF mechanisms. On the other hand, institutional barriers have fragmented the MRF community, hindering the development of adequate guidelines, training opportunities, and rosters of qualified and available MRF leaders and investigators. Hence, though different individuals engaged in engineering and implementing MRF mechanisms face distinct challenges – for example, the challenges of political actors aiming to create an MRF mission differ from those of investigators engaged in technical data gathering and analysis – the MRF community is united by a need for increased guidance and understanding of how MRF mechanisms function.<sup>63</sup>

Other challenges include:

- The need for clear mandates
- Ensuring that the timeframes established for carrying out the investigations and reporting back were commensurate with the complexity of the situation
- The need for the members of the body to have a wide range of expertise including legal (international humanitarian law, human rights, criminal justice, victim protection), military, forensic and ballistic [...]
- The need for adequate funding
- Access and the cooperation of the relevant authorities

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<sup>63</sup> Rob Grace and Claude Bruderlein, “On Monitoring, Reporting and Fact-Finding Mechanisms”, in *ESIL Reflection*, 2012, vol. 1, no. 2, pp. 1–2.

- Ensuring the protection of witnesses, victims and other sources of information.<sup>64</sup>

To address all these challenges, there have been efforts by the UN and academic institutions to develop guiding principles and manuals on international fact-finding, largely on the basis of best practices. Ironically, the multiplicity of the guiding bodies has caused the proliferation of guidance.

### 13.5.2.1. A Methodological “Tower of Babel”

To illustrate the pattern of fragmentation of the methodological techniques or approaches to international fact-finding, one can mention the example of the language used by international fact-finding commissions regarding the standards of proof. As Wilkinson points out:

I thought I’d have a little read of standards that were put on paper, and this is what I found: “beyond reasonable doubt”, “sufficient credible and reliable information”, “sufficiently substantiated”, “overwhelming evidence”, “substantial evidence”, “concrete evidence”, “systematic evidence”, “reasonable to assume”, “serious and concurring evidence”, “less than expected by a criminal trial” (which by the way is one of the favorite phrases which is often used), “an approach proper to judicial standards”, “convincing proof”, “leaves no doubt” – I could go on. But the point to reiterate is that as these mechanisms, especially at the Human Rights Council, are new and developing. I think it is important that we make sure that the institution of a fact-finding mission is protected: applying clear, realistic and appropriate standards of proof can play a key role in this.<sup>65</sup>

To meet the above challenge and other methodological issues, the UN and several other private bodies have developed guidance or guiding principles.

The UN guiding documents include the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to

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<sup>64</sup> Report of the Workshop on Accountability, 2012, p. 9, see *supra* note 46.

<sup>65</sup> Stephen Wilkinson, “Fact-finding: Practice and Challenges”, in Michel Veuthey (ed.), *Respecting International Humanitarian Law: Challenges and Responses*, FrancoAngeli, Milan, 2013, p. 118.

Combat Impunity,<sup>66</sup> the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,<sup>67</sup> and the Model Standard Rules of Procedure for Commissions of Inquiry and Fact-Finding Missions on Violations of International Human Rights Law and International Humanitarian Law.<sup>68</sup> The UN's normative efforts have been complemented by several private codification initiatives.

Private guiding documents include the Chicago Principles on Post-Conflict Justice,<sup>69</sup> the Lund-London Guidelines,<sup>70</sup> the Belgrade Rules,<sup>71</sup> the University of Nottingham's *Guiding Principles for Human Rights Field Officers Working in Conflict and Post-Conflict and Post-Conflict Environments*,<sup>72</sup> the Institute for International Criminal Investigations' *Investigators Manual*.<sup>73</sup>

The proliferation of guiding documents has complicated and undermined the work of international fact-finding commissions, leading to efforts towards standardisation and unification.

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<sup>66</sup> United Nations Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 8 February 2005, UN doc. E/CN.4/2005/102/Add.1.

<sup>67</sup> United Nations General Assembly, resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, 21 March 2006, UN doc. A/RES/60/147.

<sup>68</sup> OHCHR, 2015, Annex II: Model Standard Rules of Procedure for Commissions of Inquiry and Fact-Finding Missions on Violations of International Human Rights Law and International Humanitarian Law, pp. 108–13, see *supra* note 7.

<sup>69</sup> M. Cherif Bassiouni (ed.), *The Chicago Principles on Post-Conflict Justice*, International Human Rights Law Institute, 2007.

<sup>70</sup> International Bar Association: Human Rights Institute, *Guidelines on International Human Rights Fact-Finding Visits and Reports* ('Lund-London Guidelines'), 1 June 2009.

<sup>71</sup> International Committee on Human Rights, Minimum Rules of Procedure for International Human Rights Fact-Finding Visits, Report of the 59th Conference held at Belgrade, 17 August 1980.

<sup>72</sup> *Guiding Principles for Human Rights Field Officers Working in Conflict and Post-Conflict and Post-Conflict Environments*, Human Rights Law Centre, University of Nottingham, July 2008.

<sup>73</sup> *Investigators Manual*, 3rd ed., Institute for International Criminal Investigations, The Hague, 2006.

### 13.5.2.2. Efforts towards Standardisation and Unification

Four notable initiatives for standardisation and unification of the guidance to international fact-finding can be highlighted. These include the recently published OHCHR guidance and practice manual,<sup>74</sup> the *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*,<sup>75</sup> the Monitoring, Reporting, and Fact-Finding Project Program on Humanitarian Policy and Conflict Research at Harvard University,<sup>76</sup> as well as the ongoing research project on Quality Control in Fact-Finding Outside Criminal Justice for Core International Crimes of the Forum for International Criminal and Humanitarian Law ('FICHL'). The reason for selecting these initiatives is their comprehensive and practical approach in the response to the fractured guidance on fact-finding. The recent and proposed standardised guidance produced by both official – the OHCHR – and private institutions would constitute a good basis for the codification of international fact-finding by the ILC.

#### 13.5.2.2.1. The OHCHR Guidance and Practice

Based on these non-binding documents, methodological tools and good practice developed by international fact-finding commissions over the two past decades, the OHCHR has recently published *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*. This describes the following core principles and standards applicable to fact-finding: do no harm; independence; impartiality; transparency; objectivity; confidentiality; credibility; visibility; integrity; professionalism; and consistency.<sup>77</sup> In addition, it provides a list of international legal and methodological standards and instruments, including selected UN declarations, principles and reports, as well as manuals and guidelines. It also includes a Model Standard Rules of Procedure for Commissions of Inquiry/Fact-Finding Missions on Violations of International Human Rights Law and International Humanitari-

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<sup>74</sup> OHCHR, 2015, see *supra* note 7.

<sup>75</sup> M. Cherif Bassiouni and Christina Abraham (eds.), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, Intersentia, Cambridge, 2013.

<sup>76</sup> *HPCR Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding*, Program on Humanitarian Policy and Conflict Research, Harvard University, Cambridge, MA, 2015.

<sup>77</sup> OHCHR, 2015, pp. 29–30, see *supra* note 7.

an Law,<sup>78</sup> drawing upon the rich experience of the OHCHR as a supporting department for about 40 international fact-finding commissions over the past two decades. Even before this publication, the OHCHR Guidance has been used by the members and secretariats of the recent international fact-finding commissions supported by it.

#### **13.5.2.2.2. Siracusa Guidelines**

The *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* was adopted in 2013 by a meeting of experts under the auspices of the International Institute of Higher Studies in Criminal Sciences.<sup>79</sup> Three important elements characterise the process and outcome of this meeting. First, there is the participatory and inclusive approach involving officials, independent experts, academics and international civil servants. Second, the *Siracusa Guidelines* drew upon the comprehensive review of the extant guidance, from both official and private sources, including an empirical analysis of UN Commissions of Inquiry for the development of a standardised methodology. And third, there is the global scope of the guidance, adopted not only for international fact-finding commissions but also for regional and national fact-finding bodies. As M. Cherif Bassiouni points out in his preface:

The Siracusa Guidelines seek to promote an effective approach to human rights fact-finding based upon compliance with international best practices. The Guidelines have been developed as a practical guide for establishing and operating a fact-finding body investigating human rights violations. The Guidelines are intended to aid a mandating body in establishing a mandate and selecting Commissioners, as well as to aid Commissioners and staff in effectively carrying out their mandate. They are therefore designed to address the three main phases of the life of a fact-finding body: 1) establishment; 2) investigation; and 3) reporting and follow-up.

The structure of the Guidelines recognizes that each mission operates within different contexts. The effectiveness of any fact-finding body requires that it considers this context in its establishment and operation. As such, the Guidelines contain a degree of flexibility, and all guidelines may not

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<sup>78</sup> *Ibid.*, pp. 80–86.

<sup>79</sup> Bassiouni and Abraham, 2013, see *supra* note 75.



apply in all situations equally. Because of the variety of different contextual possibilities, the applicability of each Guideline may not be reflected in the text; however, compliance with the Guidelines will result in enhanced credibility and effectiveness for missions.<sup>80</sup>

### **13.5.2.3. Harvard’s Monitoring, Reporting, and Fact-Finding Project**

The Monitoring, Reporting, and Fact-Finding Project was initiated by the Program on Humanitarian Policy and Conflict Research at Harvard University. As noted in the project’s background statement:

The “Monitoring, Reporting, and Fact-Finding” Project is a multi-year initiative geared toward, at the outset, conducting scientific research on past and current MRF mechanisms. Ultimately, HCPR aims to assemble a Group of Professionals, composed of expert MRF practitioners, to participate in the creation of the Draft Guidelines on Crafting MRF Mandates and the Recommendations for Implementation. This manual will offer guidance on all aspects of creating and implementing MRF mechanisms.<sup>81</sup>

In addition to its practical approach, the added value of the project is the attempt to build a holistic guidance to its three components. Fact-finding is not an isolated element. A comprehensive guidance to the implementation of the mandates related to the three components would help diffuse the existing confusion of their functions. It would also assist in strengthening the corrective role of international fact-finding commissions. So far, the Monitoring, Reporting, and Fact-Finding Project has generated the publication of stimulating working papers, including two by Grace and Wilkinson already referred to earlier.<sup>82</sup> It is expected that these papers will contribute to the development and publication of an authoritative guidance in the concerned fields, including fact-finding.

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<sup>80</sup> *Ibid.*, pp. xvi–xvii.

<sup>81</sup> Rob Grace and Claude Bruderlein, “Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms”, Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, 2012, p. i.

<sup>82</sup> Grace, 2013, see *supra* note 47; Wilkinson, 2014, see *supra* note 42.

#### 13.5.2.4. FICHL's Quality Control in International Fact-Finding

The credibility of the work and outcome of international fact-finding commissions has mostly depended on the personality and expertise of their members and leadership. This is a personal point of reference, rather than objective criteria. This in turn raises the issue of the professionalisation of international fact-finding.

In order to contribute to addressing this challenge and the others mentioned above, the FICHL organised a seminar on the “Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes” at the European University Institute in Florence, Italy on 20 May 2013. The seminar, which involved high-level experts, academics and practitioners, looked at the ways and means to improve the quality of international fact-finding (analysis and reporting) through its professionalisation. In particular, participants discussed quality control in the following five particular contexts: 1) the formulation of the mandate of relevant international fact-finding; 2) the work processes in relevant fact-finding and analysis; 3) the composition, staffing, resources and organisation of such fact-work; 4) the writing of fact-finding reports and conclusions; and 5) public communication in connection with the submission of the final report.<sup>83</sup>

The proceedings of the seminar were subsequently published in a book titled *Quality Control in Fact-Finding*, whose contents were well summarised by Martin Sørby of the Ministry of Foreign Affairs of Norway in a speech delivered at the book's launch ceremony in The Hague on 25 November 2013:

Firstly, there seems to be a widely held view that there should be a greater measure of spill-over from large investments in international criminal justice fact-finding over many years, to fact-finding outside criminal justice, while respecting the different natures of international criminal, humanitarian and human rights law. The book helps to take the discussion forward on what such spill-over could entail. Secondly, there seems to be a growing expectation that there should be some sort of standing capacity to support internationalised fact-finding. This should not become a discussion driven by competing interests centred around locations, such

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<sup>83</sup> Aksenova and Bergsmo, 2013, p. 4, see *supra* note 1.

as the UNHQ in New York or the UNHCHR in Geneva. Rather, the book reminds us of the need to analyse further which functions should be included in a positive standing support capacity, to facilitate an informed assessment of the expected added value. It warns us against generalising between the needs of UN human rights fact-finding, internationalised commissions of inquiry, humanitarian law fact-finding, truth and reconciliation commissions, and NGO fact-finding. Thirdly, the book points out that rules and manuals cannot replace the importance of individual leadership of fact-finding mandates, of the will among staff to professionalise, and of always returning to the wording of the mandate on which fact-finding is based [...]; the book launched today draws our attention to the importance of vigilance in quality control when working on facts in the context of international criminal, humanitarian and human rights law. The challenge of quality control cuts across a variety of fact-finding mandates.<sup>84</sup>

As the challenge of quality control concerns both fact-work and account-work, it is important to note that FICHL's book covers the aspects relating to both processes. In addition, this book fills the awareness gap in this field. As such, this chapter is part of FICHL's efforts to highlight the added value of effective quality control in the contribution of international fact-finding commissions to the implementation of international human rights law, international humanitarian law and international criminal law.

### **13.5.2.5. Possible Future Codification by the International Law Commission?**

As noted, the ILC played a catalytic role in the design of the draft project of the ICC Statute.<sup>85</sup> Its work benefited from the existing official and private codification initiatives. In addition to its ongoing work on the codification of crimes against humanity, the author would like to recommend

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<sup>84</sup> Forum for International Criminal and Humanitarian Law, Side Event at the 2013 ICC-ASP Session: "Quality Control in Fact-Finding" and Complementarity Online, The Hague, 25 November 2013 (<http://www.fichl.org/activities/side-event-at-the-2013-icc-asp-session/>).

<sup>85</sup> See Doudou Thiam, "Responsabilité internationale de l'individu en matière criminelle" [International Criminal Responsibility], in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission*, United Nations, New York, 1997, pp. 329–37.

that the ILC includes the item on the codification of fact-finding in international human rights law, international humanitarian law and international criminal law in their planning. The existence of the guidance represents a momentum for such an initiative. As for some other items, due to the contextual or situational character of international fact-finding commissions, the best way to approach the proposed codification will be to develop a framework agreement adaptable to various contexts. The proposed agreement would provide for the establishment of a permanent commission of inquiry as a subsidiary body of the Security Council. Such a permanent fact-finding commission could help address the proliferation bias and the timing deployment of fact-finding missions, fill the institutional gap between the Security Council and the ICC with regard to the implementation of Article 13(b) of the ICC Statute, as well as provide standing capacity and predictable funding for international fact-finding. In addition, a permanent commission of inquiry would have a deterrent effect on the behaviour of potential authors of serious violations of international human rights law, international humanitarian law and international criminal law, thus contributing to the strengthening of the preventive dimension of international fact-finding commissions, an aspect often forgotten in research on fact-finding.

### **13.6. The Preventive Role of International Fact-Finding Commissions**

Of the human rights preventive mechanisms,<sup>86</sup> only a few explicitly deal with international crimes. At the universal level, these include the Early Warning and Urgent Procedures of the UN Committee on the Elimination of Racial Discrimination<sup>87</sup> and the Sub-Committee on the Prevention of the Torture of the Committee Against Torture. Also, to ensure the promotion of the awareness and co-ordinated action in the prevention of genocide, the UN Secretary-General has appointed a Special Adviser on Genocide.<sup>88</sup> At the regional level, one can mention the European Committee for

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<sup>86</sup> See Bertrand G. Ramcharan, *Preventive Human Rights Strategies*, Routledge, New York, 2010.

<sup>87</sup> United Nations General Assembly, Report of the Committee on the Elimination of Racial Discrimination, GAOR, 55th sess., suppl. no. 18, ch. II, Prevention of Racial Discrimination, including Early Warning and Urgent Procedures, 2000, UN doc. A/55/18.

<sup>88</sup> The current holder of this position is Adama Dieng (Senegal), a former Registrar of the ICTR.

the Prevention of Torture<sup>89</sup> and the Regional Committee on the Prevention of Genocide of the International Conference on the Great Lakes Region.<sup>90</sup>

International fact-finding commissions have had a deterrent effect on the ground, in the context of their deployment, thus contributing to the prevention of further abuses, including international crimes such as genocide.<sup>91</sup> They have, therefore, contributed to the implementation of the preventive dimension of the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide. The preventive role of international fact-finding commissions was recently recognised by the Chairperson of the UN Human Rights Council, Baudelaire Ndong Ella (Gabon), in a statement on South Sudan, in which he welcomed “the establishment by the African Union of a commission of inquiry for South Sudan as an important step towards ensuring accountability and *preventing* the recurrence of such abuses”.<sup>92</sup> In the same vein, on the Central African Republic, the UN Secretary-General Ban Ki-moon, in a statement at a press conference in Bangui on 5 April 2014, stressed that “the UN Commission of Inquiry [...] will help address accountability and *prevent* further appalling human rights violations”.<sup>93</sup>

As far as the Commission of Inquiry, on the Central African Republic is concerned, its chairperson, Bernard Muna (Cameroon), has taken several initiatives aimed at fostering the preventive action of the Commission. On 10 March 2014, before the deployment of the Commission for its first field visit on the ground, he warned the parties to the conflict on the impact of hate propaganda in the perpetration of genocide, with an explic-

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<sup>89</sup> See Antonio Cassese, “A New Approach to Human Rights: The European Convention for the Prevention of Torture”, in *American Journal of International Law*, 1989, vol. 83, no. 1, pp. 128–53.

<sup>90</sup> See Mutoy Mubiala, “Le Comité régional pour la prévention du génocide de la Conférence internationale sur la région des Grands Lacs” [The Regional Committee on the Prevention of Genocide of the International Conference on the Great Lakes Region], in Emmanuel Decaux and Sébastien Touzé (eds.), *La prévention des violations des droits de l’homme*, [Preventing Human Rights Violations], Pedone, Paris, pp. 115–123.

<sup>91</sup> See Rishmawi, 2014, pp. 1–8, see *supra* note 22.

<sup>92</sup> United Nations General Assembly, Human Rights Council, Situation of Human Rights in South Sudan, PRST 25, 24 March 2014, UN doc. A/HRC/25/L.34, p. 2 (emphasis added).

<sup>93</sup> United Nations Secretariat, Secretary-General Remarks at Press Conference on Departure, Bangui, 5 April 2014, p. 1 (emphasis added).

it reference to the Rwandan experience in 1994.<sup>94</sup> On 8 April 2014, at the end of this visit, he reiterated his message in calling upon the parties to the conflict, in general, and the media, in particular, to refrain from incitement to violence.<sup>95</sup>

It is not easy to evaluate the impact of the preventive action of international fact-finding commissions. That said, one can suggest that by their establishment and presence on the ground several international fact-finding commissions have had a deterrent effect on people engaged in a conflict or in a situation in the context of which serious violations of international human rights law and international humanitarian law, as well as international crimes have been committed. As the UN Secretary-General pointed out in a report to the Security Council:

Member States faced with situation of politically sensitive crimes, violent incidents or alleged grave human rights violations, have increasingly turned to the Organization to conduct impartial inquiries. Some of these have been mandated by the Security Council or by the Human Rights Council, while others have been established by the Secretary-General. The entities created are as diverse as the situations and requests they respond to. Though not part of the traditional conflict prevention toolkit, these mechanisms have, in recent years, been effectively leveraged to support preventive diplomacy efforts, helping to shift the calculations of the parties, defuse tension and build confidence. For instance, a joint fact-finding inquiry carried out with ECOWAS into the deaths of Ghanaian migrants found in the Gambia in 2007 was seen as helpful in rebuilding relations between the two countries. Other examples include the United Nations-backed International Commission against Impunity in Guatemala, created in 2007 to help the country to investigate and dismantle clandestine criminal networks; the Commission of Inquiry to investigate the events of 28 September 2009 in

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<sup>94</sup> United Nations News Centre, “Central African Republic: UN Probe Set to Investigate Reports of Rights Violations”, 10 March 2014.

<sup>95</sup> United Nations, International Commission of Inquiry on the Central African Republic, Press Release, *La Commission internationale d’enquête souligne l’urgence pour toutes les parties de faire preuve de retenue dans la crise actuelle* [The International Commission of Inquiry Stresses the Urgency for All Parties to Show Restraint in the Current Crisis], 01/2014, Bangui, 8 April 2014.

Conakry; and the Panel of Inquiry on the Gaza flotilla incident of 31 May 2010.<sup>96</sup>

Beyond the immediate deterrent effect, international fact-finding commissions certainly play a sustainable preventive role through the implementation of follow-up measures to their findings and recommendations. These measures include the prosecution of the authors of international crimes by national courts, hybrid and/or international courts or tribunals; the promotion of the ratification of the ICC Statute and its integration in national legislations; national legislative and institutional reforms; transitional justice and reconciliation processes, and so on.

Going beyond the recognition of the implicit deterrent role of international fact-finding commissions, some mandating bodies have explicitly included the preventive function of international fact-finding commissions in their mandate. For example, in the resolution establishing the International Commission of Inquiry on Burundi, noted above, the UN Security Council tasked it with the missions, *inter alia*, “to prevent any repetition of deeds similar to those investigated by the Commission”.<sup>97</sup>

### 13.7. Conclusion

From the above analysis, one can conclude that international fact-finding commissions have been an important building block in the recent evolution of international criminal law and its implementation. First, they have contributed to its institutional developments, as illustrated by the process leading to the establishment of the ICTY and ICTR, as well as other special and hybrid tribunals, bearing in mind that these bodies, in particular the two former, represented an accelerating factor in the establishment of the ICC. Second, international criminal law has increasingly become a central concern of international fact-finding commissions, in addition to international human rights law and international humanitarian law. And third, as a consequence of the above, international fact-finding commissions have been operating as auxiliary implementing mechanisms of international criminal law, through their increased interaction and interplay with international, national and hybrid criminal tribunals or courts. In particular, hybrid commissions, through their account-work, have been par-

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<sup>96</sup> United Nations, Report of the Secretary-General, Preventive Diplomacy: Delivering Results, 26 August 2011, UN doc. S/2011/552, p. 15.

<sup>97</sup> Burundi Commission resolution, see *supra* note 18 (emphasis added).

ticipating in the judicial application of international criminal law, thus contributing to its effectiveness.

In order to consolidate this development and to address the numerous political, institutional, legal and operational challenges faced by international fact-finding commissions, two recommendations can be made in conclusion. First, the ILC may envisage codifying and developing the law relating to international fact-finding in the fields of international human rights law, international humanitarian law and international criminal law. The proposed codification could also contribute to the institutionalisation of international fact-finding through the establishment of a permanent international commission of inquiry under the auspices of the UN Security Council with possible regional offices. Second, academic and research institutions could join their efforts in creating a training centre in international fact-finding in the above disciplines, with a view to building the missing standing capacity.



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## Addressing Genocide, Crimes against Humanity and War Crimes in INTERPOL's Practice: Historical Milestones and Recent Developments

Yaron Gottlieb\*

### 14.1. Introduction

INTERPOL – the International Criminal Police Organization – considers the field of serious international crimes, namely genocide, crimes against humanity and war crimes,<sup>1</sup> as one of its major crime areas.<sup>2</sup> To assist the world community in combating these crimes, INTERPOL has published hundreds of INTERPOL notices<sup>3</sup> and has been working closely with both international tribunals and national investigative units specialising in this field of criminality. This year, INTERPOL's Secretary-General, Ronald K. Noble, announced the creation of a dedicated war crimes unit at its headquarters in Lyon, France.<sup>4</sup>

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<sup>1</sup> Different terms such as “international crimes”, “core crimes” or “universal crimes” have been used to describe this group of crimes (genocide, crimes against humanity and war crimes). For the purpose of this chapter, this category of crimes will be referred to as “serious international crimes”.

<sup>2</sup> INTERPOL's website at <http://www.interpol.int/Crime-areas/War-crimes/War-crimes>.

<sup>3</sup> INTERPOL notices are international requests for co-operation or alerts allowing police in member countries to share critical crime-related information; see further discussion below in section 14.2.4.

<sup>4</sup> INTERPOL, “‘Closing the Impunity Gap’ Focus of INTERPOL Genocide, War Crimes and Crimes against Humanity Meeting in Rwanda”, 14 April 2014 (<https://www.legal-tools.org/doc/b28d8b/>).

This, however, has not always been the case. For four decades following the Second World War, INTERPOL chose not to engage in the fight against *génocidaires* and war criminals. This position derived from various policy and legal grounds. Notably, its primary legal foundation was the view that INTERPOL's assistance in the international search for war criminals would not be in conformity with Article 3 of the Organization's Constitution, which forbids it from engaging in matters of a political, military, religious or racial character. It was not until the mid-1980s that INTERPOL began to reconsider this position, and it was only following the creation of the International Criminal Tribunal for the former Yugoslavia ('ICTY') that it decided to enable collaboration in this field based on a more contemporary interpretation of Article 3. While this positive and welcome development led to successful co-operation with international tribunals and states, it also exposed the Organization to interstate disputes and the risk of being politicised. This necessitated another policy and legal adjustment, which has guided the Organization to this date in its assessment of requests for police co-operation concerning perpetrators of serious international crimes.

These dramatic changes in the practice of an international organisation resemble the swings of a pendulum, moving from one extreme (no co-operation at all) to the other (full engagement at the potential risk of compromising the Organization's neutrality) and then finally back to an equilibrium point, where co-operation is possible – indeed, encouraged – without drawing the Organization into political disputes.

This chapter tells the tale of the legal and policy transformations INTERPOL has undergone in the field of serious international crimes. It begins with a brief historical overview of INTERPOL, and continues with a discussion on two pertinent constitutional provisions: the prohibition embodied in Article 3 of the Constitution and the obligation to adhere to the spirit of the Universal Declaration of Human Rights.<sup>5</sup> It then proceeds to describe, in chronological order, “the pendulum movement”, namely the developments in INTERPOL's practice and policy in this field of criminality.

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<sup>5</sup> INTERPOL, Office of Legal Affairs, Constitution of the ICPO-INTERPOL, adopted by General Assembly, 1956, Art. 2(1) ('INTERPOL Constitution') (<https://www.legal-tools.org/doc/07a066/>).

## 14.2. INTERPOL: A Brief Historical Overview

### 14.2.1. The Creation of INTERPOL and Its Early Years

In April 1914 the first International Criminal Police Congress was held in Monaco. This meeting brought together police officers and judicial representatives from 24 countries to find ways to co-operate in solving crimes, notably with regard to arrest and extradition procedures, identification techniques and the idea of centralised criminal records. Participants at the Congress expressed 12 wishes for the future of international police co-operation.<sup>6</sup> Among them was wish number VIII which read:

The First International Criminal Police Congress adopts the principle of creating centralized international records as likely to be examined by the authorities concerned, and requests that the matter be referred for closer examination to the Committee whose purpose, as decided in principle, is to create an international identification bureau.<sup>7</sup>

The outbreak of the First World War a few months later frustrated the good intentions expressed in the Congress. Nonetheless, the concept of establishing an international body to facilitate police work was not forgotten. In 1923 the second International Criminal Police Congress was convened in Vienna, Austria. This time the delegates were successful in creating a permanent body to support international police co-operation. Thus, the International Criminal Police Commission ('ICPC') was established, with a mandate to promote the widest mutual assistance between police authorities, a mandate that continues to guide INTERPOL's activities to this day.<sup>8</sup> The ICPC's headquarters were in Vienna and its first President was Johannes Schober, Chief of the Vienna Police and the driv-

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<sup>6</sup> INTERPOL, INTERPOL 1914–2014: 100 Years of International Police Cooperation (<http://www.interpol.int/About-INTERPOL/History/1914-2014/INTERPOL-1914-2014/INTERPOL-1914-2014>).

<sup>7</sup> INTERPOL, 1st International Criminal Police Congress, Monaco (April 1914), Summary of the Wishes Expressed at the Sessions and Assemblies held on 15, 16, And 18 April 1914 (<http://www.interpol.int/About-INTERPOL/History/1914-2014/INTERPOL-1914-2014/INTERPOL-1914-2014>).

<sup>8</sup> Statute of the International Criminal Police Commission, 1923, Art. 1. A copy of the Statute – as well as of all subsequent Statutes of the ICPC and ICPO-INTERPOL – is found in Rutsel Sylvester J. Martha, *The Legal Foundations of INTERPOL*, Hart Publishing, Oxford, 2010, pp. 203–25.

ing force behind the organisation of the 1923 conference that had led to the creation of ICPC.

Shortly after its creation, notices for wanted persons were published in the *International Public Safety Journal*. In 1927 the ICPC adopted a resolution on the establishment of a central point of contact within its police structure. The concept of national focal points exists to this day. The focal points are called National Central Bureaus ('NCB'), and in accordance with INTERPOL's current Constitution each NCB has a three-fold role: to liaise with the various national departments in the country; with NCBs in other countries; and with INTERPOL's General Secretariat.<sup>9</sup> In 1935 the Organization's international radio network was launched solely for the use of the criminal police authorities at the national level. Enabling direct, prompt and secure communication among police authorities remains an INTERPOL priority.

#### **14.2.2. The Second World War and the Nazi Takeover**

In 1938 the Nazi regime annexed Austria in what was known as the *Anschluss*. Shortly afterwards, the Nazis assumed control over the ICPC after deposing its President Michael Skubl. Most countries stopped participating in the Organization's activities and the ICPC effectively ceased to exist as an international organisation. In 1940 Reinhard Heydrich, the head of the German Gestapo, was appointed as the ICPC President. Two years later, the ICPC fell completely under German control and the Organization's headquarters were relocated to Berlin.<sup>10</sup>

#### **14.2.3. The Recreation of INTERPOL after the Second World War**

The fate of the ICPC during the Second World War did not discourage countries from continuing to pursue means to enhance international police co-operation. To that end, the ICPC was recreated anew following the war, with a new Statute and new headquarters in Paris, France.

In 1956 the ICPC General Assembly changed the Organization's name to the International Criminal Police Organization – INTERPOL – and adopted a new Constitution, which serves as the primary legal in-

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<sup>9</sup> INTERPOL Constitution, Art. 32, see *supra* note 5.

<sup>10</sup> INTERPOL, History (<http://www.interpol.int/About-INTERPOL/History>).

strument governing its work to this day. Article 2 of the new Constitution defined the aims of the Organization as follows:

- 1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the Spirit of the Universal Declaration of Human Rights.
- 2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.<sup>11</sup>

This mandate reflects the previous one enshrined in the 1946 Statute, except for the important addition relating to the spirit of the Universal Declaration of Human Rights (which did not exist in 1946), and the fact that INTERPOL's aims – previously defined in one provision (Article 1 of the 1946 Statute) – were now split in two.

#### **14.2.4. INTERPOL Today**

Since 1956 INTERPOL has gradually expanded its membership and activities. Currently, the Organization has 190 member countries – practically universal membership. It supports police around the world in combating a variety of crimes, from more classic ones such as drug trafficking to relatively new threats posed by environmental, cyber or pharmaceutical crimes. INTERPOL hosts various criminal databases such as a DNA database and a database containing stolen and lost travel documents (SLTD). It has put in place modern tools, such as an internet-based communication system called I-24/7 which enables its membership to communicate directly, rapidly and securely.<sup>12</sup> No less important, while the creation of the Organization by chiefs of police raised doubts in the past over its legal status and nature, INTERPOL has progressively obtained recognition as an international organisation operating under international law.<sup>13</sup>

Among the Organization's best-known tools – and perhaps the most relevant for the discussion in this chapter – are INTERPOL notices. The notices are international requests for co-operation or alerts allowing police in member countries to share critical crime-related information. They are

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<sup>11</sup> INTERPOL Constitution, Art. 2, see *supra* note 5.

<sup>12</sup> INTERPOL, Overview (<http://www.interpol.int/INTERPOL-expertise/Overview>).

<sup>13</sup> Martha, 2010, p. 4, see *supra* note 8.

published by INTERPOL's General Secretariat upon the request of a member country, sent via its NCB, or at the request of an international entity – such as an international tribunal – with which INTERPOL has concluded a co-operation arrangement. Noteworthy among the eight types of notices that currently form the system are the Red Notice, which is a request to seek the location and arrest of wanted persons with a view to extradition or similar lawful action, and the Blue Notice, which is a request seeking additional information about a person's identity, location or activities in relation to a crime.<sup>14</sup>

In addition to using the notices system, member countries and international entities connected to the I-24/7 system can also send diffusions, which are formatted messages sent directly by member countries and simultaneously recorded in INTERPOL's databases. Unlike the notices, which are circulated to the entire INTERPOL community, a diffusion may be sent on a more limited basis (for example, only to some regions or some countries).<sup>15</sup> Finally, requests or alerts may also be sent via INTERPOL's channels through messages, which are direct communications not recorded in INTERPOL's databases.<sup>16</sup> Accordingly, an NCB or an international tribunal that wishes to send a request for police co-operation concerning an individual sought for serious international crimes may do so using a notice, a diffusion or a message.

### **14.3. The Prohibition on Engaging in Certain Matters and the Obligation to Adhere to the Spirit of the Universal Declaration of Human Rights**

#### **14.3.1. The Prohibition on Engaging in Political, Military, Religious or Racial Matters**

As an organisation dealing with police matters, INTERPOL was not created to accomplish political goals. The apolitical nature of INTERPOL was underscored in the opening address of the 1923 Congress, where Schober stated:

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<sup>14</sup> INTERPOL, Notices (<http://www.interpol.int/INTERPOL-expertise/Notices>). The rules governing the publication and circulation of notices are INTERPOL's Rules on the Processing of Data ('INTERPOL RPD') (<http://www.interpol.int/About-INTERPOL/Legal-materials>).

<sup>15</sup> INTERPOL, Notices, see *supra* note 14; INTERPOL RPD, Art. 1(14), see *supra* note 14.

<sup>16</sup> INTERPOL RPD, Art. 1(15), see *supra* note 14.

[T]he objective that we are pursuing [in setting up the Commission] rises above every day's political quarrels. It is an effort of pure civilisation, for we are addressing ourselves solely to the common enemy of all human society, the criminal of general law.<sup>17</sup>

This notion, however, was not reflected in the ICPC's Statutes before the Second World War. Against the background of the Organization's fall into the hands of the Nazi regime during the war, one of the tenets that guided the "refounding fathers" of the ICPC was ensuring its political neutrality. Indeed, at the conference held in June 1946 in Brussels, Belgium, which led to the re-establishment of the ICPC, the newly elected President, Florent Louwage, stated that by adhering to the principle of political neutrality the Organization "had succeeded in gaining the respect of administrative and judicial authorities in all member countries".<sup>18</sup> This principle was integrated into the ICPC Statute in 1948, when the phrase "to the strict exclusion of all matters having a political, religious or racial character" was added to the end of Article 1(1), a provision that defined the Organization's mandate.<sup>19</sup>

When the Organization changed its name and adopted a new Constitution in 1956, the prohibition in Article 1(1) of the previous Statute was incorporated into Article 3 of the new Constitution, with one addition (ban on activities of military characteristics). Article 3 therefore reads as follows: "It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character".<sup>20</sup>

The contemporary primary objectives of Article 3 are first, to ensure the independence and neutrality of INTERPOL as an international police organisation; second, to reflect established principles of international extradition law; and third, to protect individuals from persecution.<sup>21</sup>

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<sup>17</sup> Johannes Schober, Chief of the Vienna Police, Opening Speech at the 1923 Conference that created International Criminal Police Commission (ICPC) (on file with author).

<sup>18</sup> Florent Louwage, INTERPOL's President, Opening Speech at the 1946 Brussels Conference that re-established INTERPOL (on file with author).

<sup>19</sup> INTERPOL, Neutrality (Article 3 of the Constitution) (<http://www.interpol.int/About-INTERPOL/Legal-materials/Neutrality-Article-3-of-the-Constitution>).

<sup>20</sup> INTERPOL Constitution, Art. 3, see *supra* note 5.

<sup>21</sup> Yaron Gottlieb, "Article 3 of INTERPOL's Constitution: Balancing International Police Cooperation with the Prohibition on Engaging in Political, Military, Religious, or Racial Activities", in *Florida Journal of International Law*, 2011, vol. 23, no. 2, pp. 135, 152.

Article 3 remains among the most fundamental constitutional provisions governing INTERPOL's work, and has successfully enabled it to promote international police co-operation among countries that have very different political structures, legal regimes and cultures. Nonetheless, as explained below, the interpretation and implementation of Article 3 served for many years as the primary reason – or, depending on one's view, as a pretext – behind INTERPOL's decision to refrain from any activity in the field of serious international crimes.

### **14.3.2. The Obligation to Adhere to the Spirit of the Universal Declaration of Human Rights**

Among the innovative aspects of the 1956 Constitution was the explicit obligation to ensure that the Organization's activities were carried out “in the spirit of” the Universal Declaration of Human Rights (‘UDHR’).<sup>22</sup> The significance of this principle was also highlighted in the new set of rules, which entered into force in July 2012, concerning the processing of data via INTERPOL's channels. As provided in Article 2 of the Rules on the Processing of Data (‘RPD’), the aim is

to ensure the efficiency and quality of international cooperation between criminal police authorities through INTERPOL channels, with due respect for the basic rights of the persons who are the subject of this cooperation, in conformity with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers.<sup>23</sup>

The RPD include other important provisions that make an explicit reference to human rights and the spirit of the UDHR.<sup>24</sup>

Unlike Article 3, which conveys only a negative obligation (that is, a prohibition on engaging in certain activities), the reference to the spirit of the UDHR can be understood as imposing both negative and positive obligations on the Organization. In other words, this phrase in Article 2(1) of the Constitution should guide INTERPOL not only in refraining from

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<sup>22</sup> INTERPOL Constitution, Art. 2(1), see *supra* note 5.

<sup>23</sup> INTERPOL RPD, Art. 2, see *supra* note 14.

<sup>24</sup> *Ibid.*, Arts. 11 and 34. Another noteworthy provision concerns the legal review by the General Secretariat of all Red Notices to ensure compliance with Articles 2 and 3 of the Constitution; *id.*, Art. 86.



supporting certain activities that might compromise individuals' rights but potentially also in taking steps – within INTERPOL's mandate as an international organisation dedicated to enhancing international police co-operation – to promote the rights enshrined in the UDHR. This interpretation can be of particular relevance in combating serious international crimes that result in the violation of the most fundamental human rights, such as the right to life and the right not to be subject to torture.

#### **14.4. 1946–1985: No Co-operation in the Search for *Génocidaires* and War Criminals**

##### **14.4.1. The 1947 INTERPOL Article on “The Crime of Genocide and International Co-operation”**

Among INTERPOL's past activities was the publication of the *International Criminal Police Review*, a periodic journal with articles related to police work. An article published in 1947 in this journal was written by Paul Marabuto, who served at the time as a Commissaire Divisonnaire and Rapporteur of the ICPC. It was entitled “The Crime of Genocide and International Co-operation”,<sup>25</sup> and the position it expressed reflected that of INTERPOL for almost four decades.

Marabuto's article aimed at describing the nature of certain serious international crimes and ICPC's role in their repression. The impetus for his article was a number of studies published at the time on the crime of genocide and crimes against humanity. Notably, Marabuto reflected on two articles, the first published in November 1946 by Raphael Lemkin.<sup>26</sup> As described by Marabuto, that study showed “the necessity of a repression of the author of this crime on the international plan, since the facts which characterise it violate not only the laws of war, but wound the

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<sup>25</sup> Paul Marabuto, “The Crime of Genocide and International Co-operation”, in *International Criminal Police Review*, 1947, p. 23.

<sup>26</sup> Lemkin is known today as the person who coined the term “genocide”. The study referred to by Marabuto was published by the Belgian Ministry of Justice as Raphael Lemkin, “Le crime de génocide” [The Crime of Genocide], in *Revue de droit pénal et de criminologie*, 1946, vol. 17, pp. 371–86; see Marabuto, 1947, p. 23, see *supra* note 25.

whole of humanity”.<sup>27</sup> The second study examined by Marabuto was an article titled “Le crime contre l’humanité” by Eugène Aronéanu.<sup>28</sup>

Marabuto’s own article started by underlying that

there can be no doubt as to the international nature of this crime [genocide]. [...] Genocide must be considered as a crime against the Rights of Man and in this respect, it must be put under sanction by the way of an international co-operation.<sup>29</sup>

He further noted that the ICPC dealt with crimes “wounding universal conscience or putting the moral well-being of humanity in danger”.<sup>30</sup> The list of crimes admitted by the Organization as “specially international crimes” included “piracy, the drug traffic, counterfeiting, white slavery of women and children, the slave trade and the traffic of obscene publications”.<sup>31</sup> Marabuto continued by mentioning that the author of the crime of genocide could be punished “not only by the courts of the country where the crime was committed, but also by the jurisdictions of the country in which he could be arrested”.<sup>32</sup> This assertion corresponds to the concept of universal jurisdiction, though without using this specific term. Marabuto concluded this part by stating:

It would, therefore, only be necessary to admit that the legal status of genocide be assimilated to that of the crimes specified above [i.e. piracy, drug traffic, etc.]. Their gravity is such, that all the States should feel a great moral solidarity in order to bring the criminal before the justice of the country in which he was arrested.<sup>33</sup>

Had Marabuto stopped his analysis at that point, one would have assumed that the ICPC should and would actively engage in the pursuit of Nazi and

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<sup>27</sup> *Ibid.*

<sup>28</sup> Eugène Aroneanu, “Le crime contre l’humanité” [Crime against Humanity], in *Nouvelle revue de droit international privé*, 1946, vol. 13, pp. 369–413. Aroneanu wrote extensively about crimes against humanity and his compilation of eyewitness accounts of the horrors that took place in the Nazi concentration camps was used by the Nuremberg Tribunal.

<sup>29</sup> Marabuto, 1947, p. 24, see *supra* note 25.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

other war criminals – as it did with regard to perpetrators of the other international crimes listed by Marabuto.

Yet Marabuto's article continued on a different path. It went on to analyse Aronéanu's study, specifically with regard to the question of whether crimes against humanity could be viewed as "common law crimes". Marabuto appeared to accept the argument that crimes against humanity possess a character independent of the notion of an act of war.<sup>34</sup> He further mentioned that, following Aronéanu's study, the crimes could certainly be seen as "common law crimes" from the point of view of the victim whose rights were directly affected by these crimes. From the point of view of the criminal, however, Marabuto concluded that crimes against humanity "can no more be accommodated as common law".<sup>35</sup> This conclusion was based on Aronéanu's analysis and his proposed definition of crimes against humanity,<sup>36</sup> according to which such crimes were acts of state sovereignty, which, to be prevented, required laws limiting of this sovereignty. As noted by Marabuto, these limitations were included in the laws and customs of war, but not yet in peacetime laws.

In the last part of his article, Marabuto addressed the question of the potential involvement of the ICPC in the field. He began by recalling the ICPC's pre-war collaboration in applying conventions aimed at repressing certain serious acts wounding universal morality or conscience, such as those related to the above-mentioned crimes of slavery and drug trafficking. He further mentioned the ICPC's participation in the activities of the League of Nations in domains relating to such crimes, and the fact that the ICPC would continue to support the work of the United Nations when asked to do so.

It was at that juncture in the article, however, that Marabuto's analysis took a drastic turn that deviated from the path leading to co-operation. Marabuto offered a reminder that the ICPC "must remain faith-

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<sup>34</sup> *Ibid*, p. 25.

<sup>35</sup> *Ibid*.

<sup>36</sup> Marabuto, *ibid.*, quoted Aroneanu's definition of crimes against humanity, which reads as follows:

An international crime of common law by which a State renders itself guilty of attacks or a racial, national, religious or political character, against the liberty, the rights or the life of a person or group of persons not guilty of an infraction of common law or, in case of infraction, of attacks going beyond the punishment provided.

ful to its traditional line of conduct: the prevention and the criminality of *common law*".<sup>37</sup> Though he agreed that "the juridical discussions regarding the crime of genocide tend to allow this infraction to be admitted as a crime against common law",<sup>38</sup> he continued by stating that the "contribution which our organization, however, is able to bring, can be influenced by the very nature of the infraction and in its execution".<sup>39</sup> In that regard, he pointed to Aronéanu's view of the political motivation behind the crime (even if Aronéanu qualified it as a common crime), as well as to the fact that the "opposition to this crime is envisaged under the form of limitation to state sovereignty, therefore the exercise of the powers of a government, a political power".<sup>40</sup>

Bearing that in mind, Marabuto recalled the principle prohibiting the ICPC from intervening in questions of a political, religious or racial nature.<sup>41</sup> In addition, he argued that

the repression envisaged is not directed against individuals but against collective groups, in the instance of a State, or groups of individuals within this, which increases the difficulties of the practical realization, even when the recognition of the characteristics of common law would bring the full and complete adhesion of the I.C.P.C.<sup>42</sup>

On this point, while he agreed that "in our time [...] we seem to be orienting ourselves clearly towards the recognition of the direct penal responsibility of moral persons",<sup>43</sup> Marabuto added that the problem "still remains very debated in its very principle",<sup>44</sup> and stated that in "any case, it is on the practical plan of the enquiry and prosecution that the question interests us and we must recognize that it would be very difficult, if not impossible, to apply it".<sup>45</sup> Based on this analysis, Marabuto concluded as follows:

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<sup>37</sup> *Ibid.*, p. 27 (emphasis in the original text).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> The term "military" was added only later, namely in Article 3 of the 1956 Constitution, see *supra* note 5.

<sup>42</sup> Marabuto, 1947, p. 27, see *supra* note 25.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

In this way, it seems to be sufficiently pointed out that the crime of genocide, both in its principle and its practical application, goes outside of the domain of common law, such as the I.C.P.C. has always traditionally considered it. Its participation with the U.N.O.,<sup>46</sup> therefore, will call for a certain prudence, no matter what may be the nobility of thought and the humane ideal on which it is founded. The I.C.P.C.'s domain of activity is sufficiently large, its co-operation with the U.N.O. in the various pre-war international problems remains whole, but it must stay the path which it has historically traced out for itself.<sup>47</sup>

The arguments put forward by Marabuto can be easily contested. In particular, his point concerning the envisaged repression of collectives rather than individuals clearly ignored the concept of individual criminal responsibility in the context of serious international crimes, embodied in Article 6 of the Charter that established the International Military Tribunal at Nuremberg ('IMT Charter'), according to which "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".<sup>48</sup> This provision served as the legal basis for addressing the role and culpability of individuals taking part in the criminal scheme of the Nazi machine, and laid out the foundations for the theory of joint criminal enterprise that would be integrated in the Statutes and jurisprudence of future international tribunals.<sup>49</sup> The collective versus individual argument is also unconvincing considering the jurisprudence of the International Military Tribunal ('IMT') prior to the publication of Marabuto's article,<sup>50</sup> and the fact the Tribunal already held individuals responsible for the heinous crimes committed on behalf of a collective (the Nazi regime).

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<sup>46</sup> Marabuto referred to the United Nations as the U.N.O.

<sup>47</sup> Marabuto, 1947, p. 27, see *supra* note 25.

<sup>48</sup> Charter of the International Military Tribunal, Part of the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 August 1945, Art. 6 ('IMT Charter') (<https://www.legal-tools.org/doc/64ffdd/>).

<sup>49</sup> Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge University Press, Cambridge, 2013, pp. 68–85, discussing the contribution of the Nuremberg Trials to establishing the concept of joint criminal enterprise as customary international law.

<sup>50</sup> The IMT issued its Judgment in the trial of the 22 Nazi leaders on 1 October 1946; International Military Tribunal, *Nuremberg Tribunal v. Goering et al.*, Judgment, 1 October 1946.

The successful prosecutions before the IMT also put into serious question Marabuto's argument on the "practical plan of the enquiry and prosecution". On the other hand, one has to bear in mind that the legal regime governing serious international crimes was certainly not as clear as it is today. The Genocide Convention was still being negotiated and the terms "genocide" and "crimes against humanity" did not have agreed-upon definitions distinguishing one from the other, as was later introduced in the Statutes of the *ad hoc* international tribunals established in the 1990s. The focus of the IMT on prosecution of crimes committed during the war, and the link required between crimes against humanity and war crimes, did not add much clarity to the view of crimes committed in outside an armed conflict context, crimes which were traditionally of interest to the ICPC and later INTERPOL.

It is also noteworthy that in the post-war period, serious international crimes were not incorporated in many national laws. As noted by Paul Shapiro, Director of the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum,

[T]he failure to bring more Holocaust perpetrators to justice was not unavoidable, but at the time the law was not equipped to deal with crimes committed on such a monumental scale. It has taken decades of hard work to develop the law and legal precedents to fix this.<sup>51</sup>

One reported example of such a long-awaited change was the case of John (Ivan) Demjanjuk, who was convicted as late as 2011 by a German court as an accessory to the murder of all 28,060 people who died during the time he served at the Sobibor Nazi concentration camp. That ruling overturned a 1969 precedent that had required evidence linking suspects to a specific killing, and opened the way for more prosecutions of guards who served in camps.<sup>52</sup>

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1946 (<https://www.legal-tools.org/doc/45f18e/>). Interestingly, Marabuto mentioned the Tribunal in passing (when he noted, on p. 25, that Aroneanu's study on concentration camps was deposited with the Tribunal), and also incorporated in his article one of the famous pictures taken at the Tribunal during the trials. He nonetheless chose not to mention at all the Tribunal's Judgment.

<sup>51</sup> Melissa Eddy, "Chasing Death Camp Guards With New Tools", in *New York Times*, 5 May 2014.

<sup>52</sup> *Ibid.*

Another possible explanation – also found in Marabuto's article – was INTERPOL's focus on combating "common law crimes". Though, as Marabuto himself admitted, crimes such as genocide can be viewed as "common law crimes" from certain aspects (such as that of the victim), it cannot be contested that such crimes have not been considered – certainly not at that time – as classic common law crimes. In that regard, when defining the Organization's mandate, the 1946 Statute of ICPC made – for the first time – a specific reference to the concept of combating "common law crimes".<sup>53</sup> It should be recalled, however, that in 1956, when a new Constitution was adopted, the Organization's aims were split in two and the term "ordinary law crime" was linked only to the second aim.<sup>54</sup> The first aim – to "ensure and promote the widest possible mutual assistance between all criminal police authorities" – could have therefore also potentially accommodated activities that did not fall within the narrower scope of classic "common law crimes".

#### **14.4.2. Secretary-General Sicot and the Position of the Executive Committee**

The position espoused by INTERPOL did not go unnoticed. For example, in May 1961 the American Jewish Congress complained before the United Nations Economic and Social Council about the fact that

governments are refusing to extradite war criminals on the ground that they are political refugees and that Interpol – the international criminal police organization – has, in harmony with this attitude, refused to cooperate in tracking down Nazis accused of crimes against humanity.<sup>55</sup>

A month later, the French section of the World Jewish Congress adopted a resolution that called upon INTERPOL to apprehend those Nazi war criminals who were still at large in the world.<sup>56</sup> The Jewish Congress later openly accused INTERPOL of failing to cooperate in the arrest of Nazi

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<sup>53</sup> The previous Statutes of INTERPOL – from 1923 and 1939 – did not make an explicit reference to the concept of combating "common law crimes"; Martha, 2010, p. 42, see *supra* note 8.

<sup>54</sup> *Ibid.*

<sup>55</sup> "World Jewish Congress Complains to U.N. on Protection Given to Nazis", in *Jewish Telegraphic Agency*, 2 May 1961.

<sup>56</sup> "French Renew Assurances that Status of Algerian Jews Will Be Protected", in *Jewish Telegraphic Agency*, 21 June 1961.

criminals and requested J. Edgar Hoover, Director of the US Federal Bureau of Investigation, to support an amendment to INTERPOL's rules that would enable such co-operation.<sup>57</sup>

This criticism, however, did not persuade INTERPOL to change its position. In a book published that same year (1961), Marcel Sicot, the Secretary-General, argued that those criticising INTERPOL for protecting war criminals did not consider the negative implications for INTERPOL – and therefore for international public security – of its potential intervention in matters of this nature.<sup>58</sup> More specifically, Sicot contended that such interventions would not be effective unless an extradition treaty existed between the requesting and the requested countries, and only if the government of the requested country decided to carry out the extradition request. A request to locate a wanted individual and the possibility of obtaining his arrest and transfer to the requesting county were two distinct matters. To what end, Sicot asked, should we risk the very existence of the Organization when the potential results were so uncertain? Moreover, the governments of the countries that were most affected, notably Israel and West Germany, had perfectly understood the situation and did not insist on the matter despite their initial requests. Additionally, INTERPOL's position did not hinder direct collaboration between countries without INTERPOL involvement.

Later in his book, Sicot reverted to this topic and specifically to the public campaign of the Jewish Congress.<sup>59</sup> In response to their argument on the applicability of the 1949 Geneva Conventions as a legal basis for INTERPOL's involvement, he claimed that thus far no international court had been created to address criminal matters, not all countries had ratified the Conventions, and those that had were far from having taken the necessary measures to implement them. The various national laws did not have the same common principles, which remained difficult to enact. For example, genocide is a collective crime against humanity, which is not necessarily committed in the context of war. Crimes against humanity committed in the context of war constitute war crimes. Yet, Sicot contended that by then the notion of war had evolved and it would have been diffi-

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<sup>57</sup> “Jewish Congress Accuses Interpol of Evading Capture of Ex-nazis”, in *Jewish Telegraphic Agency*, 12 September 1961.

<sup>58</sup> Marcel Sicot, *A la barre de l'Interpol*, Les Productions de Paris, Paris, 1961, pp. 220–21. Sicot served as INTERPOL's Secretary-General from 1951 to 1963.

<sup>59</sup> *Ibid.*, pp. 269–70.



cult to define it. Additionally, it would have been problematic to establish the responsibilities of those involved, namely that of the perpetrator and that of the person ordering the execution of the crimes. Military regulations, he further argued, required absolute obedience. To what extent could a subordinate refuse to execute the orders of a direct superior or a person of higher rank?

Furthermore, Sicot continued, at the centre of the debate was the fact that the victors – whether of an international or internal war – always imposed their wills and dictate laws. Of course, the vanquished side may be guilty, but the victor was sometimes responsible for starting the conflict and the loser might not be the only party to have committed war crimes. An international tribunal had to be an impartial institution, otherwise the notion of a war crime would lend itself to different interpretations and extraditions would continue to be refused. As things stood, INTERPOL had no decision-making power and, whether we liked it or not, a war crime – at least in relation to the Second World War – fell into the category of “activities of a political, military, racial or religious character”, with which INTERPOL must not, under Article 3 of its Constitution, concern itself.

Sicot's argument regarding the lack of incorporation of appropriate national laws and procedure to effect arrest warrants against war criminals may have had, as explained above, some value. It should be recalled, however, that unlike the state of affairs in 1947, when Marabuto published his article, by 1961 a significant number of INTERPOL member countries had already ratified both the 1948 Genocide Convention and the 1949 Geneva Conventions. The rest of Sicot's arguments are even less persuasive. In particular, his points on total obedience to military orders, the question of command responsibility and the concept of victors' justice had all been addressed – and rejected – by the IMT.

A few months after the publication of the book, Sicot's position was presented and unanimously adopted by INTERPOL's Executive Committee.<sup>60</sup> The discussion, which took place at an Executive Committee meeting in May 1962, was triggered by the appeal of the Jewish Congress. Si-

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<sup>60</sup> INTERPOL's Executive Committee sets the organisational policy and direction and supervises the work of the General Secretariat. It meets three times a year and is composed of 13 members, representing all four geographical regions of INTERPOL. The various functions of the Executive Committee are enumerated in INTERPOL Constitution, Art. 22, see *supra* note 5.

cot reiterated most of the arguments presented in his book, such as the lack of clear definitions of the crimes concerned, victor's justice, and the low prospects for successful co-operation even if INTERPOL intervened. The participants fully agreed and added their concern that if the topic were raised before the UN General Assembly, it might lead to arguments affecting Article 3. At the end of the discussion, Sicot also concluded that he had been authorised to reply that the Executive Committee was unanimously opposed to a public discussion of the problem of war criminals.

#### 14.4.3. The Klaus Barbie Case

As far as INTERPOL was concerned, that last conclusion reached by Sicot indeed closed off public discussions of the matter. The general public, however, did not shy away from continuing to criticise INTERPOL and demanded its action in the pursuit of war criminals. One of the most noteworthy cases for which INTERPOL was criticised was that of Klaus Barbie, an SS officer nicknamed “the butcher of Lyon” for his heinous crimes – such as personally torturing prisoners – while heading the Gestapo in Lyon during the Second World War. After the war, he apparently escaped to Latin America. In December 1982 the French authorities reportedly requested INTERPOL to publish a Red Notice against Barbie.<sup>61</sup> In response, INTERPOL allegedly advised that this case was of a political character and that the circulation of a Red Notice would be contrary to Article 3 of the Constitution. The General Secretariat reportedly proposed that channels other than INTERPOL's be used in this case.<sup>62</sup> The French authorities apparently chose to do so and in January 1983, shortly after France's request to INTERPOL, Barbie was arrested in Bolivia and extradited to France, where he was convicted and sentenced to life imprisonment.

Thirty-five years had passed since Marabuto's article and 20 years since the decision taken by the Executive Committee to refrain from any co-operation in chasing Nazi criminals. In the meantime, a growing number of states had joined the Genocide Convention and governments as

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<sup>61</sup> The author is unaware of any existing file at INTERPOL regarding the case. The description of the case in this article is based on sources external to INTERPOL's archives such as in Laurent Greilsamer, *Interpol: le siège du soupçon*, Alain Moreau, Paris 1986, pp. 91 ff.

<sup>62</sup> *Ibid.*, p. 92, and references at fn. 2, quoting the message of response sent by INTERPOL's General Secretariat.

well as non-governmental organisations continued to track down perpetrators of serious international crimes. Yet, more time had to pass for INTERPOL to change its position. The eventual change and the start of the pendulum's movement were brought about by a combination of a clear-cut case and new leadership at INTERPOL.

#### 14.5. 1985: Mengele Case – The First Winds of Change

In March 1985 a request to publish a Red Notice against Josef Mengele was sent by the German NCB to INTERPOL's General Secretariat. Mengele was an SS officer and a physician who, *inter alia*, carried out experiments on human beings in the Auschwitz concentration camp and was among the most sought-after Nazi criminals. The facts, as provided in the Red Notice request, stated that Mengele was accused

of having shot, having designated for killing by gas or having himself killed by gas a large number of persons between May 1943 and January 1945 in Auschwitz and the surrounding area, in his capacity as SS camp doctor, a position he held during that period in the district of the Auschwitz concentration camp. He was also accused of having caused the death of several persons in a cruel manner by injections and pseudo-medical experiments, of having attempted to commit such offences, and of encouraging others to do likewise.<sup>63</sup>

The request was examined by INTERPOL's Legal Department. In a note sent on 14 March 1985 to Raymond Kendall, INTERPOL's acting Secretary-General,<sup>64</sup> the Legal Department assessed the request in light of Article 3 of the Constitution.<sup>65</sup> It began by making a reference to an INTERPOL General Assembly resolution, adopted only a year earlier, which provided guidelines on the application of Article 3.<sup>66</sup> This resolution, together with another one adopted the same year,<sup>67</sup> paved the way for the

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<sup>63</sup> The Red Notice is on file with the author. The full French version of the notice is quoted in *ibid.*, pp. 101–2.

<sup>64</sup> Kendall began his official duties as INTERPOL's Secretary-General only in October 1985. At the time the Mengele case was addressed (March 1985), he replaced André Bossard, who had served as the Secretary-General since 1978.

<sup>65</sup> "Note to the Attention of Mr. Kendall", 14 March 1985 (on file with author).

<sup>66</sup> INTERPOL, General Assembly resolution, Application of Article 3 of the Constitution, AGN/53/Res/7 (1984) ('1984 Resolution') (<https://www.legal-tools.org/doc/77693a/>).

<sup>67</sup> INTERPOL, General Assembly resolution, Violent Crime Commonly Referred to as Terrorism, AGN/53/Res/6 (1984) (<https://www.legal-tools.org/doc/e0e14e/>).

Organization's participation in the counterterrorism field.<sup>68</sup> As mentioned in the legal note, the 1984 resolution did not expressly take into consideration cases of individuals who committed crimes upon the order of governmental authorities. While the resolution referred to acts committed by politicians – concluding that such acts, if committed in the individual's official capacity, were covered by Article 3 – the legal note considered that this appeared to relate to the leaders rather than those executing their decisions. Thus, the existence of Article 3 benefited only the “intellectual” perpetrators of the crime, whereas in reality they were more responsible than those carrying out the crime upon their instructions.

The note found, however, that such a conclusion would be “simply astounding”. A sounder solution could not stem from the position held by a person but rather should be based on the very nature of the crime perpetrated. In the case of Mengele, this crime was murder or, in the legal term adopted following the Second World War, genocide.

In that regard, the legal note mentioned the existence of the Genocide Convention to which approximately 80 states were party at the time. The note recalled Article VII of the Genocide Convention, according to which the crimes covered by the Convention should not be considered political crimes for the purpose of extradition. It noted that even if the crimes for which Mengele was charged were committed before the entry into force of the Convention, one could argue that, at that time, the vast majority of states considered these facts as acts of genocide. If there were a universal opinion as such on the subject of these crimes, one would be unable to say that such acts fell under Article 3, also considering that a large number of states party to the Convention were also members of INTERPOL. Finally, in support of the conclusion that Article 3 should not bar co-operation in this case, the note mentioned that Mengele did not act as a “simple executer of orders”, but rather contributed to the atrocious decisions made by the governmental authorities by adding to his own atrocities in carrying out so-called medical experiments on human beings, which were none other than torture.

Kendall endorsed the legal analysis and the Red Notice was therefore published and circulated to INTERPOL member countries in April 1985. Kendall was later quoted stating: “The first thing I did when I came

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<sup>68</sup> For further discussion of the 1984 resolutions, see Gottlieb, 2011, pp. 148–51, see *supra* note 21.

on board [as the Secretary-General] was to issue a wanted notice for Josef Mengele".<sup>69</sup> At the time when the Red Notice was published, however, Mengele was already dead, a fact confirmed by the Brazilian authorities a few months after its publication.<sup>70</sup>

From an institutional perspective, it is interesting to note that Kendall did not deem it necessary to consult with INTERPOL's decision-making organs – the Executive Committee and the General Assembly, the supreme organ<sup>71</sup> – on a matter thus far considered by the Organization as so sensitive as to prevent it from taking any action. One possible explanation for the confidence with which the decision was taken was the progress made on the international level in recognising genocide as an extraditable offence – a point mentioned in the note of the Legal Department. Since a Red Notice serves as a precursor for extradition, INTERPOL has traditionally followed developments in extradition law and adjusted its practice in light of such developments. It can also be assumed that the risk of member countries protesting against the decision to publish a Red Notice against such a notorious criminal, decades after the dust of war had settled, was perceived to be low.

Two years after the Mengele case, another request was sent by the German NCB, this time against Alois Brunner, another infamous Nazi criminal. Brunner was sought for being responsible for the deportation of thousands of Jews mainly to the Auschwitz concentration camp. The Red Notice was published and circulated as requested – apparently without any particular legal assessment. Brunner's precise whereabouts, however, were never found.<sup>72</sup>

Though the two Red Notices against Mengele and Brunner did not lead to concrete operational results, they nonetheless signalled a change in INTERPOL's view of its role in supporting member countries combating

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<sup>69</sup> Alan Riding, "Lyons Journal; Interpol Regrets Shady Past, Vows Better Future", in *New York Times*, 22 February 1990.

<sup>70</sup> Greilsamer, 1986, p. 103, see *supra* note 61; see also the description of Mengele's atrocities and the post-war pursuit of his whereabouts in the *Holocaust Encyclopedia* (<http://www.ushmm.org/wlc/en/article.php?ModuleId=10007060>), explaining that Mengele died in Brazil in 1979 and that in "1985, German police, working on evidence they had recently confiscated from a Mengele family friend [...] located Mengele's grave and exhumed his corpse. Brazilian forensic experts thereafter positively identified the remains as Josef Mengele. In 1992, DNA evidence confirmed this conclusion".

<sup>71</sup> INTERPOL Constitution, Art. 6, see *supra* note 5.

<sup>72</sup> It is believed that Brunner escaped to Syria and may have died and been buried there.

these most heinous crimes. For this change to materialise as the Organization's new policy, however, almost another decade had to pass.

#### **14.6. 1994: A Legal and Policy Turning Point**

##### **14.6.1. The 1994 General Assembly Report and Resolution on Co-operation with the ICTY**

The creation of the ICTY was the impetus for the long-awaited policy change. Shortly after the decision of 22 February 1993 of the United Nations Security Council to create an international tribunal with jurisdiction over the crimes committed during the conflict in the former Yugoslavia,<sup>73</sup> a discussion was held between Boutros Boutros-Ghali, the UN Secretary-General, and Kendall, his counterpart at INTERPOL. Boutros-Ghali requested that INTERPOL consider providing assistance in the search for individuals sought by the tribunal once it was established.

In a letter dated 10 March 1993 Kendall followed up on the discussion.<sup>74</sup> He pointed to two possible difficulties in relation to the proposed co-operation. The first difficulty was of a legal nature, specifically the possible application of Article 3 of INTERPOL's Constitution. In that regard, the letter highlighted a number of aspects. First, it noted that if the statute of the proposed tribunal specified that the crimes subject to its jurisdiction were not considered as political or military crimes for extradition purposes, this would be a significant criterion in favour of the non-application of Article 3 and therefore the possible collaboration of INTERPOL with requests from the tribunal. In support of this point, the letter recalled Article VII of the Genocide Convention, according to which genocide and the other crimes listed in Article 3 of the Convention are not considered political crimes for the purpose of extradition.

In the absence of such a clear determination, the letter continued, the Article 3 analysis of the specific offences could lead to favourable results if the definitions of the crimes in the ICTY Statute pointed to the predominant ordinary law character of the crimes, even if politicians or military personnel committed them. With regard to the latter, the letter

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<sup>73</sup> United Nations Security Council, resolution 808, 22 February 1993, UN doc. S/RES/808 (<https://www.legal-tools.org/doc/513f7f/>).

<sup>74</sup> Letter from INTERPOL's Secretary-General to the UN Secretary-General (on file with author).

also highlighted the difficulty arising from the involvement of both members of the regular army and militias in the acts committed in the former Yugoslavia. If, the letter explained, the perpetrators were considered military personnel, they could not be sought through INTERPOL's channels unless the crime for which they were sought was an ordinary law crime or was of a predominantly ordinary law character.

On a different point (but still in the context of the Article 3 discussion), Kendall noted that Security Council resolution 808 recalled that persons who committed or ordered the commission of grave breaches of the applicable Conventions (in particular the 1949 Geneva Conventions) were individually responsible in respect of such breaches. It was therefore presumed that this point would be integrated into the ICTY Statute in the spirit of Article IV of the Genocide Convention, which prescribes that "[p]ersons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".<sup>75</sup>

By mentioning the hurdles posed by Article 3 of INTERPOL's Constitution, Kendall clearly aimed at encouraging the drafters of the ICTY Statute to consider the main legal concerns that could impede potential co-operation.

The second type of difficulty mentioned in the letter was an institutional one. Kendall noted that INTERPOL could not engage in any activity unless it was requested to do so by its member countries. Accordingly, INTERPOL would not be able to act on a direct request from the Tribunal and it would be necessary that one or more INTERPOL members expressly requested that the Organization intervene in the matter.

Whether a letter of response was sent to Kendall's letter is unknown to this author. The ICTY was created two months later via Security Council resolution 827, adopted under Chapter VII of the UN Charter. The same resolution adopted the ICTY Statute as proposed by the UN Secretary-General.<sup>76</sup>

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<sup>75</sup> United Nations General Assembly, resolution 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, Art. IV (<http://www.legal-tools.org/doc/498c38/>).

<sup>76</sup> Statute of the International Tribunal for the former Yugoslavia, adopted by United Nations Security Council, resolution 827, 25 May 1993, UN doc. S/RES/827 ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>).

On 13 December 1993 the President of the ICTY wrote to INTERPOL's Secretary-General requesting information about the Organization since he considered that INTERPOL's Constitution, in particular Article 3, was of great relevance to the Tribunal's work on its Rules of Procedure.<sup>77</sup> A few months later, the ICTY adopted its Rules of Procedure and Evidence.<sup>78</sup> Article 39 of the Rules stated that "in the conduct of an investigation, the Prosecutor may seek [...] the assistance [...] of any relevant international body including the International Criminal Police Organization (Interpol)".<sup>79</sup> The Tribunal therefore introduced the notion of co-operation with INTERPOL without expressing an opinion on how far INTERPOL would be competent in the matter.<sup>80</sup>

Consequently, INTERPOL had to define its position with regard to the general question on co-operation with the ICTY and the possible application of Article 3 of the Constitution to cases the Tribunal had to deal with.<sup>81</sup> To that end, and to also address the institutional aspect mentioned by Kendall in his 1993 letter to Boutros-Ghali, the matter was brought for the consideration of INTERPOL's Executive Committee and General Assembly in the course of 1994. Before the Executive Committee, INTERPOL's General Counsel presented the study conducted by the Legal Department, highlighting that INTERPOL's rules allowed the General Secretariat to process police information sent to it by an intergovernmental organisation and consequently allowed co-operation with the United Nations with respect to the ICTY. He further explained that the legal study had shown that the only case in which Article 3 of the Constitution would prevent such co-operation would be where persons had been forcibly compelled to serve in the forces of a hostile power.<sup>82</sup> Kendall then high-

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<sup>77</sup> See the introductory part of the INTERPOL, General Assembly Report, "Consequences of the Establishment of an 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", AGN/63/RAP/13, Rome, 1994 ('INTERPOL, 1994 Report') (on file with author).

<sup>78</sup> Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted 11 February 1994, IT/32 ('ICTY, Rules of Procedure and Evidence') (<https://www.legal-tools.org/doc/02712f/>).

<sup>79</sup> *Ibid.*, Art. 39.

<sup>80</sup> INTERPOL, 1994 Report, Introductory Part, see *supra* note 77.

<sup>81</sup> *Ibid.*

<sup>82</sup> See further discussion below on the position adopted by INTERPOL's General Assembly regarding this crime.



lighted the importance of adopting a favourable approach. He stressed that if INTERPOL refused to co-operate, either the ICTY or the United Nations would have no option but to set up a new institution to carry out the role that they intended assigning to INTERPOL. He added that for the time being the situation was limited to the former Yugoslavia, but events could occur elsewhere that might also require INTERPOL's co-operation. Kendall therefore considered it absolutely vital for the Organization's international image to adopt a policy that could be applied in a manner appropriate to the circumstances.<sup>83</sup>

The position of the General Secretariat combined both legal and policy considerations. The first addressed the main legal hurdle that prevented co-operation in the past, namely the interpretation and implementation of Article 3 of the Constitution; the second focused on ensuring that INTERPOL remained relevant on the international level. Both types of consideration reflected not only the shift in the international community's view of dealing with serious international crimes but also the legal and policy positions that enabled the publication of the Red Notice against Mengele almost a decade earlier. The question was whether the Organization was ready to move from an *ad hoc* approach (such as in the Mengele case) towards adopting a general governing policy.

The Executive Committee endorsed the General Secretariat's position and the draft resolution to be submitted to the General Assembly. The matter was therefore brought before INTERPOL's General Assembly in its annual meeting of 1994. To facilitate the discussions, the study carried out by the Legal Department was presented in the form of a General Assembly report.<sup>84</sup> The report's title was "Consequences of the Establishment 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",<sup>85</sup> and it was adopted via a General Assembly resolution entitled "Application of Arti-

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<sup>83</sup> The description of the discussion before the Executive Committee in its 1994 meeting is based on the minutes of the meeting (on file with the author).

<sup>84</sup> Draft resolutions submitted to the General Assembly are typically accompanied by a General Assembly report, which provides pertinent background information on the draft resolution.

<sup>85</sup> INTERPOL, 1994 Report, see *supra* note 77.

cle 3 of the Constitution in the context of serious violations of international humanitarian law”<sup>86</sup>.

As mentioned in the 1994 resolution, the General Assembly was “[c]onvinced of the need to facilitate the interpretation and application of Article 3 of the Organization’s Constitution in the area of serious violations of international humanitarian law”<sup>87</sup>. It endorsed the analysis and considerations contained in the report, and invited the Secretary-General as well as the NCBs – should their co-operation be requested in connection with investigations relating to serious violations of international humanitarian law – to follow the report’s guidelines.<sup>88</sup>

#### **14.6.2. The Interpretative Paradigm of the 1994 Report and Its Shortcomings**

The 1994 report noted that INTERPOL’s legal framework allowed the Organization to engage in co-operation with other international organisation for the purpose of promoting international police co-operation. In light of the rules applicable at the time, the report concluded that if the

International Tribunal so wishes and if the States concerned, in conformity with their own laws, wish to co-operate through Interpol in the cases being dealt with by the Tribunal, the cooperation facilities set up within the context of Interpol may be used.<sup>89</sup>

The report continued by mentioning that despite the above general conclusion, INTERPOL could not become involved in the type of cases referred to in Article 3 of its Constitution. Considering that the ICTY Statute did not expressly determine that the crimes subject to the Tribunal’s jurisdiction were not political or military for extradition purposes, a hope that had been expressed by Kendall in his letter of March 1993 to his UN counterpart, the report therefore turned to analyse the various offences in light of Article 3 of the Constitution. The purpose of this analysis was to determine the nature of each separate offence, namely whether the offence

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<sup>86</sup> INTERPOL, General Assembly resolution, Application of Article 3 of the Constitution in the Context of Serious Violations of International Humanitarian Law, AGN/63/Res/9 (1994) (‘1994 Resolution’) (<https://www.legal-tools.org/doc/d76a18/>).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> INTERPOL, 1994 Report, point 3, see *supra* note 77.

was of predominantly ordinary law character as opposed to a political or military one.

In doing so, the report provided some important general guidelines on the interpretation of Article 3, some of which departed from INTERPOL's previous policy. For example, the report concluded that the previous test – provided for in the 1984 resolution – which applied to assessing crimes committed by politicians, namely a test based on the distinction between acts committed in official capacity as opposed to those committed in private capacity, was “based on a faulty concept”.<sup>90</sup> Specifically, the report stated:

The fact is that political power can only be exercised within the limits of the law, and that includes international law. It has to be admitted that there are many areas in which the exercise of political power cannot be developed in legal form. It is, however, clear that in this respect, international penal law sets absolute limits. Consequently, the offences referred to in the Tribunal's Statute cannot have been committed in the exercise of political power; they can only have been committed outside of such power and the offender bears personal responsibility for them as the Statute states. Offences committed by politicians must therefore be assessed to determine whether the political or the ordinary criminal law aspect is predominant, in the same way as offences committed by other people.<sup>91</sup>

This point of the 1994 report corresponds to the legal note written almost 10 years earlier by the Legal Department on the Mengele case, which found that viewing politicians' orders to carry out heinous crimes as covered by Article 3 would be “astounding”.<sup>92</sup>

The 1994 report further underscored that INTERPOL's practice with regard to the application of Article 3 had evolved considerably throughout the years, thereby also reflecting developments under international law. Notably, the direction of such developments had been to progressively restrict the application of provisions that could ensure that those who committed certain crimes were treated more favourably because of the political context of the act. In that regard, the report noted

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<sup>90</sup> *Ibid.*, point 5.2.1.

<sup>91</sup> *Ibid.*

<sup>92</sup> See the discussion above on the Mengele case.

that “genocide is now accepted as coming within INTERPOL’s field of activities, from which it was originally considered to be excluded”.<sup>93</sup> Thus, the position taken by the General Secretariat almost 10 years earlier in the Mengele case was finally endorsed as general policy by the Organization’s supreme body.

Notwithstanding this positive approach and the noteworthy contribution of the 1994 report to INTERPOL’s evolving practice in reference to Article 3, the interpretative paradigm of the report, namely the assessment of the elements of each offence enumerated in the ICTY Statute, presented a challenge with regard to certain crimes. Thus, for example, while concluding that the list of the crimes against humanity in Article 5 of the ICTY Statute included offences against ordinary criminal law (such as murder, rape or torture), the report found that in two offences – “persecutions” and “other inhumane acts” – the “relatively imprecise wording requires some knowledge of the facts in order to be able to detect the presence of violations of ordinary criminal law”.<sup>94</sup> The report therefore did not provide a clear answer on the compatibility of these offences with Article 3; instead, it required a factual case-by-case analysis.

The report’s assessment in light of the military element of Article 3 proved to be even more problematic. The report correctly determined that offences which comprised violations of ordinary criminal law and appeared unnecessary for military purposes were not “military offences” in the meaning of Article 3. Nonetheless, the report concluded:

Compelling a prisoner of war or a civilian to serve in the forces of a hostile power (Article 2(e) of the Statute), an operation linked with the constitution of armed forces and therefore inextricably linked with military matters could be considered an essentially military offence; it therefore seems that Article 3 of the Constitution must be applied.<sup>95</sup>

This view derived from the traditional paradigm that governed an Article 3 analysis at the time, namely, the focus on an examination of the elements of a crime. Nonetheless, this approach and its underlying rationale raised difficulties not only concerning this particular crime but also when evaluating other serious war crimes that were ostensibly of “military” na-

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<sup>93</sup> INTERPOL, 1994 Report, point 4.2., see *supra* note 77.

<sup>94</sup> *Ibid.*, point 5.1.4.

<sup>95</sup> *Ibid.*, point 5.2.2..

ture, such as illegal conscriptions of child soldiers or unlawful use of certain weapons.

The position expressed by the 1994 report may have corresponded to the Organization's past practice, yet today it no longer appears sustainable. Among the objectives of Article 3 is to reflect principles of international law. Accordingly, the assessment of a particular offence in the context of Article 3 should consider the background for criminalising the act, as well as the stance of the international community with regard to that offence. Unlike pure military offences such as desertion, which are derived solely from military law and are therefore considered as non-extraditable offences,<sup>96</sup> the criminalisation under national law of serious international crimes reflects international conventions such as the Genocide Convention and such serious international crimes are frequently incorporated in the domestic ordinary laws or similar penal legislation.<sup>97</sup>

Furthermore, serious international crimes are considered extraditable offences in light of their heinous nature.<sup>98</sup> One cannot ignore developments in international law with regard to these offences and the clear recognition by the international community of the importance of bringing to justice perpetrators of these crimes.

INTERPOL's practice in the years that followed the 1994 report demonstrates that the Organization endorsed the view that the entire category of serious international crimes fell outside the ambit of Article 3. Indeed, INTERPOL has significantly increased its involvement in the field without distinguishing between the various crimes. Notably, INTERPOL's General Assembly resolution approving the co-operation agreement with the International Criminal Court ('ICC') clearly stated that the crimes that come within the jurisdiction of the ICC fell outside Article 3.<sup>99</sup> By adopting this resolution, the General Assembly acknowl-

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<sup>96</sup> M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Oxford University Press, New York, 2007, pp. 732–34.

<sup>97</sup> See, for example, US War Crimes Act of 1996, 21 August 1996, 18 USC 2441.

<sup>98</sup> For example, the United Nations General Assembly, Model Treaty on Extradition, 14 December 1990, UN doc. A/RES/45/116 (<https://www.legal-tools.org/doc/43b6b5/>) excludes serious international crimes from both the political offence and the military offence exceptions to extradition. See United Nations Office on Drugs and Crime, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, part I, IM, pp. 45, 49.

<sup>99</sup> See INTERPOL, General Assembly, resolution, Co-operation Agreement with the International Criminal Court, AG-2004-RES-16 (2004) ('INTERPOL, ICC resolution')

edged the special status of serious international crimes, and in fact rejected, although without discussion or explanation, the underlying reasoning of the 1994 report and its conclusion with regard to the crime of compelling a prisoner of war or a civilian to serve in the forces of a hostile power,<sup>100</sup> and possibly similar war crimes that are ostensibly of “military nature”. The resolution endorsing co-operation with the ICC should be considered as a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” within the meaning of the Vienna Convention on the Law of Treaties.<sup>101</sup>

INTERPOL’s co-operation with the ICC further supports the position that, in practice, the approach of the 1994 report has been abandoned. INTERPOL has published a number of Red Notices upon the request of the ICC against individuals sought for crimes such as enlisting and conscripting of children under the age of 15 years, a crime whose elements could have been considered to be of “military” nature if the rationale of the 1994 report had been applied.<sup>102</sup> The publication of these Red Notices reflects a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” under the terms of the Vienna Convention.<sup>103</sup>

Hence, in application of general principles of treaty interpretation, it can be claimed that the interpretative paradigm of the 1994 report regarding the assessment of the nature of serious international crimes in light of Article 3 is no longer applicable, and does not pose a *prima facie* obstacle for co-operation in requests concerning those crimes.

Finally, while the 1994 report analysed the question of co-operation in the field only through the prism of Article 3, the constitutional obligation of Article 2(1), requiring INTERPOL to carry out its activities in “the

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(<https://www.legal-tools.org/doc/69fa9b/>). In the resolution, the General Assembly considered “that the crimes which come within the jurisdiction of the International Criminal Court also fall within the aims of the Organization as defined in Articles 2 and 3 of the Constitution”.

<sup>100</sup> This crime is listed in Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Art. 8(2)(a)(v) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>101</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(3)(a) (‘Vienna Convention’) (<https://www.legal-tools.org/doc/6bfcd4/>).

<sup>102</sup> For example, the Red Notices issued by INTERPOL in 2006 against the leaders of the Lord’s Resistance Army in Uganda sought by the ICC for, *inter alia*, the crime of forced enlisting of children.

<sup>103</sup> Vienna Convention, Article 31(3)(b), see *supra* note 101.

spirit of the Universal Declaration of Human Rights”, can further support an interpretation that permits – if not calls for – INTERPOL’s engagement in combating serious international crimes. For example, the prohibition on conscription of child soldiers is enshrined in the Convention on the Rights of the Child.<sup>104</sup> Thus, a decision to publish a Red Notice against perpetrators of this crime can be based not only on the appropriate interpretation of Article 3 (as described above) but also in support of protecting children’s rights in accordance with the “spirit of the Universal Declaration of Human Rights”.

#### **14.6.3. Co-operation with National Jurisdictions and the Principle of Primacy of the ICTY and ICTR**

In resolution 827, which created the ICTY, the UN Security Council decided that “all States shall cooperate fully with the International Tribunal and its organs”.<sup>105</sup> In addition, to avoid any interference with the Tribunal’s attempts to exercise its jurisdiction, the ICTY Statute provided that 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”.<sup>106</sup> A similar approach was pronounced when the International Criminal Tribunal for Rwanda (‘ICTR’) was established via Security Council resolution 955.<sup>107</sup>

The duty to co-operate with the tribunals and the principle of primacy became relevant following the 1994 resolution and during the first stages of the co-operation between INTERPOL and the ICTY. While the 1994 report focused on co-operation with the ICTY, the 1994 resolution adopting this report addressed the matter in more general terms, as evidenced by the resolution’s title (Application of Article 3 of the Constitution in the Context of Serious Violations of International Humanitarian Law) as well as by the resolution’s recommendation to NCBs to follow

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<sup>104</sup> United Nations General Assembly, resolution 44/25, Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, UN doc. A/44/49 (1989), Art. 38 (<https://www.legal-tools.org/doc/f48f9e/>).

<sup>105</sup> ICTY Statute, see *supra* note 76.

<sup>106</sup> *Ibid.*, Art. 9(2).

<sup>107</sup> Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by Security Council resolution 955, Art. 8(2) (‘ICTR Statute’) (<http://www.legal-tools.org/doc/8732d6/>).

the guidelines of the report should their co-operation be requested in connection with investigations relating to serious violations of international humanitarian law. Consequently, in addition to opening the way for co-operation with international tribunals, the 1994 resolution enabled member countries to use INTERPOL's channels for the purpose of circulating requests for police co-operation, for example, through the publication of Red Notices based on charges of genocide, crimes against humanity or war crimes. This approach was later reflected also in the 1997 General Assembly resolution on co-operation with the ICTR, which recommended that NCBs co-operate as well "with the Rwandan police and judicial authorities".<sup>108</sup>

INTERPOL's member countries therefore began using the Organization's channels to circulate requests related to serious international crimes. This included requests sent by countries that comprised the former Yugoslavia and in reference to crimes committed during the armed conflicts that took place in the region in the 1990s.

Such requests have apparently posed difficulties for the Tribunals' prosecutor and the matter was raised during a series of meetings that took place with Kendall.<sup>109</sup> As a result, on 18 August 1995 Kendall sent a circular letter to all heads of NCBs. The letter, entitled "Procedure related to notices concerning war criminals in the former Yugoslavia and Rwanda", began by stressing that following the adoption of the 1994 report the General Secretariat "bases its action on the widest collaboration with both the ICTY and the ICTR".<sup>110</sup> This was the first formal reference by the General Secretariat to the collaboration also with the ICTR. In light of this clear statement on broad co-operation with the Tribunals, the letter explained that each time an NCB requested that the General Secretariat circulates an arrest warrant, diffusion or notice against a person for war crimes, crimes against humanity or genocide that concerns either the former Yugoslavia or Rwanda, the General Secretariat would immediately forward a copy of the request to the Tribunal's prosecutor in order to ob-

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<sup>108</sup> INTERPOL, General Assembly, resolution, Co-operation in Searching for Persons Accused of Serious Violations of International Humanitarian Law Committed in Rwanda and Neighbouring Countries between 1 October 1990 and 31 December 1994, AGN/66/RES/10 ('INTERPOL, Rwanda resolution') (<https://www.legal-tools.org/doc/4cc9c6/>).

<sup>109</sup> At that point in time, Richard J. Goldstone served as the prosecutor of both Tribunals.

<sup>110</sup> Circular letter of INTERPOL's Secretary General, 18 August 1995, Ref. No. 27.95/D.3/RELCO/960 (on file with author).



tain his confirmation that the request did not interfere with an ongoing investigation conducted by the Tribunal.

Accordingly, the letter continued, it would be best if all requests concerning suspects of the serious international crimes in the former Yugoslavia or Rwanda be addressed to the General Secretariat without being exchanged directly among the NCBs. Once the request was shared with the Tribunal, the prosecutor could choose either to allow the requesting country to pursue the criminal case or to seek the publication of a Red Notice on behalf of the Tribunal. In the latter case, and in accordance with the primacy principle enshrined by the Tribunal's Statute, the General Secretariat would give priority to the notice published at the request of the Tribunal over the request of the NCB. This, however, would not prevent the NCB from requesting that its own notice be maintained. Finally, if either of the Tribunals wished that the request from the NCB not be circulated or that it be postponed, the General Secretariat would contact the NCB to see if it agreed to suspend its request. It might also be the case that the prosecutor would engage via the appropriate diplomatic channels with the political authorities of the country concerned (that is, of the NCB that sent the request) to express his point of view.

The procedure laid out in the Secretary-General's letter therefore tried to strike a balance between the role of INTERPOL in supporting police work in its member countries, on the one hand, and the importance of facilitating the Tribunals' work, deriving from both the principle of primacy and the co-operation agreement, on the other.

#### **14.6.4. Increased Co-operation with International and Hybrid Tribunals**

INTERPOL's successful co-operation with the ICTY, which followed resolution 1994, opened the way for co-operation with other international and hybrid criminal tribunals. As mentioned, the Organization began collaborating with the ICTR and in 1997 INTERPOL's General Assembly formally approved that co-operation.<sup>111</sup> The co-operation with the ICTY and ICTR was also mentioned in another resolution adopted by the Gen-

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<sup>111</sup> INTERPOL, Rwanda resolution, see *supra* note 108.

eral Assembly that year on co-operation with the United Nations.<sup>112</sup> In 2003 the General Assembly approved a co-operation agreement with the Special Court for Sierra Leone<sup>113</sup> and a year later with the ICC.<sup>114</sup> With regard to the latter, it is noteworthy that the possible use of INTERPOL's channels to circulate arrest warrants was explicitly mentioned in the Rome Statute of the International Criminal Court ('ICC Statute').<sup>115</sup> In 2009 a co-operation agreement with the Special Tribunal for Lebanon was approved by INTERPOL's General Assembly.<sup>116</sup>

INTERPOL's role in supporting the work of international tribunals was also recognised by the Security Council. Security Council resolution 1503 (2003) called on all states "to cooperate with the International Criminal Police Organization (ICPO-INTERPOL) in apprehending and transferring persons indicted by the ICTY and the ICTR".<sup>117</sup> Similarly, Securi-

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<sup>112</sup> INTERPOL, General Assembly, resolution, Co-operation Agreement with the United Nations, 27 October 1997, AGN/66/RES/5 (<https://www.legal-tools.org/doc/e2b0d3/>). The agreement called for, *inter alia*:

Cooperating, where appropriate, in the implementation of the mandates of international judicial institutions, such as 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 and 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, which have been or may be established by the United Nations

See Cooperation Agreement between the United Nations and the International Criminal Police Organization (INTERPOL), 8 July 1997, Art. 1(d) (<http://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements>).

<sup>113</sup> INTERPOL, General Assembly, resolution, Co-operation Agreement between the International Criminal Police Organization – Interpol – and the Special Court for Sierra Leone, 2003, AG-2003-RES-08 (<https://www.legal-tools.org/doc/8f41c4/>).

<sup>114</sup> INTERPOL, ICC resolution, see *supra* note 99.

<sup>115</sup> ICC Statute, Art. 87(b), see *supra* note 100, reads: "When appropriate [...] requests [for co-operation] may also be transmitted through the International Criminal Police Organization or any appropriate regional organization".

<sup>116</sup> See INTERPOL, General Assembly, resolution, Draft Co-operation Agreement between the International Criminal Police Organization-INTERPOL and the Special Tribunal for Lebanon, 13 October 2009, AG-2009-RES-10 (<https://www.legal-tools.org/doc/585720/>).

<sup>117</sup> United Nations Security Council, resolution 1503, 28 August 2003, UN doc. S/RES/1503 ('UN Security Council, resolution 1503') (<https://www.legal-tools.org/doc/05a7de/>).

ty Council resolution 1940 (2010) on the situation in Sierra Leone called on “all States to cooperate with the International Criminal Police Organization (INTERPOL) in apprehending and transferring [to the Special Court of Sierra Leone] Johnny Paul Koroma, if he is found to be alive”.<sup>118</sup> To date, the Red Notice issued against Koroma is still valid. As of March 2015, there are 22 Red Notices issued by INTERPOL and recorded in its databases upon the requests of international and hybrid tribunals.

#### **14.7. INTERPOL's General Assembly Resolution of 2004 and Its Aftermath**

##### **14.7.1. The 2004 Resolution**

As noted, circulation through INTERPOL's channels of requests for police co-operation in relation to serious international crimes based on national investigations began shortly after the adoption of the 1994 resolution, and has intensified following the introduction in 2003 of the INTERPOL I-24/7 system.

This period was also marked by the increased role of national investigations of serious international crimes and the creation of specialised investigative units both in post-conflict countries such as Rwanda and countries exercising extraterritorial jurisdiction (such as certain European countries). Consequently, a new challenge arose, namely the need to co-ordinate national investigations and avoid duplication of efforts.

To that end, in March 2004 INTERPOL hosted the first International Expert Meeting on War Crimes, Genocide, and Crimes against Humanity. The meeting adopted 12 recommendations including one on increasing the support of INTERPOL in co-ordinating national efforts.<sup>119</sup> One outcome of the meeting was the creation of a Working Group, which held its first meeting at INTERPOL's General Secretariat in July 2004. The Working Group's recommendations included an increased use of INTER-

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<sup>118</sup> United Nations Security Council, resolution 1940, 29 September 2010, UN doc. S/RES/1940 (<https://www.legal-tools.org/doc/3224b1/>).

<sup>119</sup> Recommendations of the First International Expert Meeting on War Crimes, Genocide, and Crimes against Humanity, Lyon, 23–25 March 2004 (on file with author).

POL's databases, the preparation of best practice manual and identification of points of contact in member countries.<sup>120</sup>

Against this backdrop, a new resolution was adopted by INTERPOL's General Assembly in 2004 on Increased ICPO-Interpol support for the investigation and prosecution of genocide, war crimes and crimes against humanity.<sup>121</sup> The resolution recalled previous reports and resolutions and noted the creation of national specialised units, whose role is to investigate and prosecute cases of serious international crimes committed both within and outside national borders. The resolution further underscored the importance of international co-operation in this field, and recommended that

within the limits of national and international law, ICPO-Interpol member countries co-operate with each other and with international organizations, international criminal tribunals, and non-governmental organizations as appropriate in a joint effort to prevent genocide, war crimes, and crimes against humanity, and to investigate and prosecute those suspected of committing these crimes.<sup>122</sup>

The resolution further asked the General Secretariat "to assist member countries in the investigation and prosecution of these crimes".<sup>123</sup>

The resolution therefore presented a broad approach, taking the uncommon step of emphasising co-operation not only among police authorities of member countries but also among police authorities and other stakeholders such as international tribunals and organisations, and, no less important, non-governmental organisations. It conveyed a strong message in support of a joint action in combating the most heinous crimes, which has indeed led to successful co-operation.

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<sup>120</sup> See INTERPOL, General Assembly, Report, Increased ICPO-INTERPOL Support for the Investigation and Prosecution of Genocide, War Crimes, and Crimes against Humanity, AGN/73/RAP/23, 2004 (on file with author).

<sup>121</sup> INTERPOL General Assembly, resolution, Increased ICPO-INTERPOL Support for the Investigation and Prosecution of Genocide, Crimes against Humanity, and War Crimes, AG-2004-RES-17 ('2004 resolution') (<https://www.legal-tools.org/doc/a03f11/>).

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

### **14.7.2. Successful Police Co-operation**

Thus, shortly after the adoption of the 2004 resolution, INTERPOL officers on mission in Kigali, Rwanda, assisted the local Rwandan authorities in issuing 10 Red Notices against individuals sought for serious international crimes committed in the context of the Rwandan genocide. As noted by Noble, INTERPOL's Secretary-General, at the opening address of the sixth International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, which took place in Rwanda in April 2014, these were the first of more than 140 Red Notices published at the request of NCB Kigali for genocide and crimes against humanity.<sup>124</sup>

Some of these Red Notices led to successful international co-operation. For example, in June 2009 INTERPOL issued a Red Notice requested by the NCB of Kigali for the arrest of Charles Bandora for genocide, complicity in genocide and crimes against humanity. He was alleged to have organised and participated in the killing of hundreds who had taken refuge in a church. On 7 May 2010 NCB Brussels, Belgium, informed INTERPOL and NCB Kigali of the arrival of Bandora at Zaventem airport. He was in possession of a forged Malawian passport which he had used to travel from Malawi to Belgium via Ethiopia. Bandora sought asylum in Belgium, but in June 2010 he travelled to Norway. The INTERPOL Red Notice, which was still in circulation, helped to provide NCB Oslo and Norway's National Criminal Investigation Service with a basis to arrest Bandora and later extradite him to Rwanda. Norway thus became the very first country to extradite an individual wanted for genocide and crimes against humanity to Rwanda.<sup>125</sup>

### **14.7.3. Interstate Disputes over the Publication of Notices and Diffusions Related to Serious International Crimes**

The 2004 resolution has therefore led to successful international police co-operation. Yet, it also had one unintended outcome. Disputes between INTERPOL's member countries over the publication of Red Notices and circulation of diffusions related to serious international crimes.

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<sup>124</sup> Ronald K. Noble, INTERPOL Secretary General, Opening Address at the 6th International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, Kigali, Rwanda, 14 April 2014 (<https://www.legal-tools.org/doc/55c6c5/>).

<sup>125</sup> *Ibid.*

In less than five years following the adoption of the 2004 resolution, INTERPOL's organs had to deal with no less than six disputes between member countries over requests relating to genocide, crimes against humanity or war crimes cases. Though the six disputes involved different countries and different situations, they all shared the same characteristics. They were all very complex and highly political, involving officials and former officials, sometimes at the highest level. The requests generated strong formal protests by the countries whose officials were sought via notices or diffusions. These disputes were not technical disagreements between INTERPOL NCBs; rather, they were interstate disputes for all intents and purposes.<sup>126</sup>

The proliferation of those highly political disputes carried with it negative implications for INTERPOL's work. Notably, they significantly increased the risk of the Organization being drawn into political debates, thus threatening its independence and neutrality and preventing it from carrying out its mandate as an international organisation dealing with police matters rather than political ones. It was therefore considered imperative to identify another policy change, one that would strike the appropriate balance between enhancing international police co-operation in this field of criminality, on the one hand, and preventing interstate disputes, on the other. To that end, the matter was brought before INTERPOL's Executive Committee in 2009 and then before the General Assembly in its annual meeting of 2010.

## **14.8. Striking a Balance: The 2010 Resolution**

### **14.8.1. The Executive Committee's Interim Policy**

The new policy, proposed by the General Secretariat, was first endorsed as an interim procedure by INTERPOL's Executive Committee in its meeting of June 2009. According to this procedure, co-operation relating to Red Notice requests based on war crimes charges would continue with international tribunals but would be excluded where a member country protested against a request submitted by another member country pertaining to a national of the protesting country. The interim policy was dis-

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<sup>126</sup> Martha, 2010, p. 63, see *supra* note 8: "The careful drafting of Article 24 notwithstanding, it cannot mask the fact that disputes between NCBs are, ultimately, disputes between governments".

cussed by the Executive Committee at its October 2009 session and shortly afterwards by the General Assembly in its 2009 meeting. The implementation of the interim policy proved to be successful. From June 2009 to October 2010 it allowed for the publication of over 100 Red Notices based on charges of genocide, crimes against humanity and war crimes. During this test period, the interim policy led to the denial of Red Notice requests in only two instances, where, without the application of the new policy, the publication of the Red Notices would have quickly evolved into complex interstate political disputes.

#### **14.8.2. The 2010 General Assembly Resolution**

In light of the success of the interim policy, the matter was brought before the General Assembly in 2010 with a view to transforming the interim policy into a permanent one. The General Assembly adopted the proposed resolution on Co-operation with New Requests Concerning Genocide, Crimes against Humanity and War Crimes.<sup>127</sup> The resolution recalled previous General Assembly resolutions in this field, but also expressed concern over the increase in the number of requests for police co-operation that raised doubts over their compliance with Article 3 of the Constitution and that led to disputes. The General Assembly therefore decided as follows:

[...] in addition to the application of INTERPOL's general rules and regulations with regard to processing of requests for international police co-operation, the processing via INTERPOL channels of new requests concerning genocide, crimes against humanity and war crimes shall continue with regard to:

1. Requests submitted by international tribunals;
2. Requests submitted by entities established by the United Nations Security Council, subject to the specific arrangements agreed upon with regard to such requests;
3. Requests submitted by member countries, except in cases where the request concerns a national of another member country, and that other member country, upon being in-

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<sup>127</sup> INTERPOL, General Assembly, resolution, Co-operation with New Requests Concerning Genocide, Crimes against Humanity and War Crimes, 11 November 2010, AG-2010-RES-10 ('2010 Resolution') (<https://www.legal-tools.org/doc/cfce37/>).

formed by the General Secretariat of the request, protests against the request within thirty days.<sup>128</sup>

### **14.8.3. The Interpretation and Implementation of the 2010 Resolution<sup>129</sup>**

The 2010 resolution did not aim at changing any substantive rules related to the processing of information via INTERPOL's channels. Rather, the objective of the new policy was to serve as a specific procedure in this crime area, adopted with a view to reducing the number of disputes between member countries. Thus, the new policy serves as a *lex specialis* rule governing potential disputes between member countries over the processing of data based on charges related to serious international crimes. Where the request for police co-operation concerns a national of another member country and that member country protests, the new policy will apply, instead of engaging in the standard procedure for settlement of disputes provided for in INTERPOL's rules.<sup>130</sup>

In light of the sensitive nature of the subject and considering the cases that have required consideration by the General Secretariat since the adoption of the resolution, the implementation of the resolution requires some clarification. The main points are as follows.

#### **14.8.3.1. Scope *Ratione Materiae* and *Ratione Temporis***

The resolution applies to all types of requests for police co-operation (including notices, diffusions and messages) based on charges of genocide, crimes against humanity and war crimes, received at the General Secretariat after 9 November 2010 (the date of adoption of the resolution). The implementation of the resolution prevents publication of notices and registration of information if the request is submitted or circulated by a member country against a national of another member country and the

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<sup>128</sup> *Ibid.*

<sup>129</sup> I would like to thank Patricia Ramos Pinto, my former colleague, for her contribution on this part.

<sup>130</sup> INTERPOL RPD, Art. 135(1), see *supra* note 14, provides for a procedural rule in handling disputes between member countries, which reads as follows: "Disputes that arise in connection with the application of the present Rules should be solved by concerted consultation. If this fails, the matter may be submitted to the Executive Committee and, if necessary, to the General Assembly".



latter country opposes the request within 30 days of being informed thereof by the General Secretariat.

Hence, the resolution continues to allow publication of notices and registration of information in the following cases:

- the request is submitted by international tribunals;
- the request is submitted by entities established by the UN Security Council, for example, the United Nations Interim Administration in Kosovo,<sup>131</sup> subject to specific agreements concerning the conditions and treatment of such requests;
- the request is submitted by a member country against its own nationals;
- the request is submitted by a member country against a national of another member country and the latter does not protest against the request within 30 days of being informed thereof by the General Secretariat.
- the request renews a previous request submitted prior to the adoption of the resolution.

#### 14.8.3.2. Multiple Nationalities

The resolution introduced a new procedure when a request concerns “a national of another member country”. Accordingly, a question arises with regard to the implementation of the resolution where the individual concerned is a national of more than one country. In that regard, two scenarios have been identified.

Scenario A. The individual concerned is a national of the requesting country and of another country (or other countries). In such a case and as a general rule, the resolution should not apply. This conclusion is based on the following reasoning. First, the resolution refers to requests concerning “a national of *another* member country” (emphasis added). An individual who holds the nationality of the requesting country is not a na-

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<sup>131</sup> The United Nations Interim Administration in Kosovo (‘UNMIK’) was created following the adoption of United Nations Security Council, resolution 1244, 10 June 1999, UN doc. S/RES/1244 (<https://www.legal-tools.org/doc/80cf5a/>). In 2002 a Memorandum of Understanding (‘MOU’) was signed between INTERPOL and UNMIK, granting the latter the rights accorded to an NCB, *mutatis mutandis*, including the possibility of seeking the publication of INTERPOL’s notices (<http://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements>).

tional of another country but rather *also* a national of another country. In addition, the interpretation of the resolution should be made while bearing in mind the background for its adoption. As mentioned, the primary impetus for the new policy was the increase in the number of disputes between member countries related to this crime area. An examination of those disputes reveals that they all erupted where the individual concerned was a national of the protesting country and not of the requesting country. This finding also corresponds to the alleged illegal acts of the individuals concerned, which were often conducted in an official capacity (including politicians and military officers) of the country of nationality, hence further explaining the reason for the protest on behalf of the country of nationality. Notwithstanding the above general conclusion – namely the non-application of the resolution in scenario A – one cannot rule out the possibility of invoking it in certain circumstances involving an individual who is a national of the requesting country. For example, consideration should be given to a situation where the protest is raised by a UN administration of a territory that in the past was part of the requesting country and therefore the individual concerned is still a national of that country. Such situations should therefore be assessed on a case-by-case basis.

Scenario B. The individual concerned has multiple nationalities of countries other than the requesting country. In this scenario, the resolution should apply to all other countries of nationality since the rationale behind the resolution – namely avoiding potential disputes – exists in this scenario in the same manner it exists when the individual has only one nationality. Accordingly, in such a case all countries of nationalities are informed of the request and are given the opportunity to protest.

#### **14.8.3.3. Requests from Countries that Receive the Case or Gain Jurisdiction from an International Tribunal**

Aware of the fact that the *ad hoc* tribunals were established with a temporary purpose, the President of the ICTY drew up the so-called Completion Strategy, that is, a policy intended to conclude cases within a certain time frame and transmit the remaining and less serious ones to national jurisdictions. The UN Security Council supported this policy by means of resolutions 1503 (2003) and 1534 (2004), both adopted under Chapter VII of the UN Charter. In resolution 1503, the UNSC stressed that the ICTY and ICTR should focus on the “most senior leaders suspected of being most responsible for crimes” within their jurisdiction while “transferring cases

involving those who may not bear this level of responsibility to competent national jurisdictions".<sup>132</sup> In that resolution the UN Security Council also called on the international community "to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and ICTR" and to "intensify cooperation with and render all assistance" to the *ad hoc* tribunals.<sup>133</sup>

In light of the above, whenever a request is circulated by a member country that has gained jurisdiction via the transfer of proceedings or relinquishing of jurisdiction by an international tribunal in the context of the Completion Strategy, the request addressed against nationals of another country can be perceived as if it were submitted on behalf of that international tribunal or in application of its mandate and jurisdiction, thus falling under point (1) of the resolution (requests from international tribunals) rather than point (3). Indeed, a different conclusion may undermine the effort of countries to comply with obligations imposed under Chapter VII of the UN Charter. Accordingly, in such cases, the normal procedure for assessing requests shall apply rather than that of the new policy as provided for in point (3) of the resolution.

#### **14.8.3.4. Requests from Hybrid Tribunals**

In addition to the *ad hoc* international tribunals of the ICTY and ICTR, a second generation of tribunals of international character emerged. These tribunals are often referred to as "hybrid tribunals" since their nature is mixed, incorporating both international and national features. Examples of this kind can be found in Cambodia, East Timor, Kosovo, Lebanon, Senegal and Sierra Leone. These tribunals vary one from the other with regard to their composition and their applicable substantive and procedural rules.

INTERPOL has concluded a co-operation agreement with some tribunals, such as those for Sierra Leone and Lebanon. Requests from such tribunals are processed in accordance with the co-operation agreement. In general, these tribunals are considered to be "international tribunals" in the meaning of the resolution, that is, the special procedure requiring consultation with the country of nationality does not apply.

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<sup>132</sup> UN Security Council, resolution 1503, see *supra* note 117.

<sup>133</sup> *Ibid.*

Requests from other hybrid tribunals are first assessed in light of the nature of the particular tribunal and to ensure no other concerns related to INTERPOL's rules arise. In that regard, it is also noteworthy that the reference to "international crimes" in the title or the statute of a particular tribunal does not make it an international tribunal in the meaning of the resolution. For example, if one of INTERPOL's member countries decided to establish an "international crimes tribunal" for the purpose of investigating and prosecuting suspects of the genocide committed in the country, this tribunal would be considered a national tribunal that does not possess an international character. Accordingly, requests from the tribunal submitted to INTERPOL via the NCB of the country are considered under point (3) rather than point (1) of the resolution.

Conversely, upon assessing a request sent from the NCB Dakar based on arrest warrants issued by the Extraordinary African Chambers, which were created in Senegal in 2013 to try the persons most responsible for genocide, crimes against humanity, war crimes and torture committed in Chad from 7 June 1982 to 1 December 1990, it was concluded that the Chambers are of international character in the meaning of the resolution and its requests should therefore be assessed under point (1). The Chambers were created following an international agreement between the African Union ('AU') and the Government of Senegal, and is composed of both Senegalese and other African judges, all appointed by the Chairperson of the AU Commission. The conclusion on the non-applicability of the new procedure provided for in point (3) of the resolution was also supported by the fact that Chad supports the work of the Chambers, a fact that reduces the risks of potential interstate disputes over the circulation of the request by NCB Dakar.

#### **14.9. INTERPOL's Current Activities in Combating Serious International Crimes**

Identifying the proper balance when addressing requests for police cooperation related to genocide, crimes against humanity and war crimes has enabled INTERPOL to focus its activities in this field on three main areas: operational support to national authorities and international justice institutions; training and development; and building partnerships.<sup>134</sup> The

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<sup>134</sup> INTERPOL's website, available at <http://www.interpol.int/Crime-areas/War-crimes/War-crimes>, last accessed at 13 September 2015.

first pillar includes activities such as the publication of INTERPOL notices and assisting in tracing fugitives. Among INTERPOL's recent activities under that pillar was the creation of Project BASIC (Broadening Analysis on Serious International Crimes), which targets fugitives wanted for genocide, war crimes and crimes against humanity. Within this framework, INTERPOL co-operates with national authorities and international institutions to locate, arrest and develop information concerning individuals suspected of these crimes. Under the second pillar, INTERPOL plays a key role in enhancing capability among investigators of serious international crimes. This includes organising an annual intensive international training course, which brings together law enforcement and justice officials from various countries as well as international organisations to share best practices for successfully investigating heinous crimes. Finally, in the context of building partnerships under the third pillar, INTERPOL holds an annual activities International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, which provides a forum for information and discussion among specialists.

#### **14.10. Conclusion**

In 2014 INTERPOL marked 100 years of international police co-operation, a journey that began at the first International Criminal Police Congress, which took place in Monaco on the eve of the First World War. The centenary coincided with the twentieth anniversary of the historic policy decision of INTERPOL's General Assembly regarding co-operation with the ICTY, which in turn paved the way for successful initiatives in combating serious international crimes in collaboration both with international tribunals and member countries. Admittedly, that policy change came decades too late and INTERPOL was rightly criticised for adopting a very conservative legal and policy position that may have played into the hands of Nazi and other war criminals. Certain obstacles persisted even after 1994, requiring the Organization to reconsider and adjust its policies to ensure the proper balance between promoting international police co-operation, on the one hand, and ensuring that INTERPOL would not be drawn into interstate political quarrels and thereby compromise its neutrality, on the other. While it might be premature to reach definitive conclusions, a five-year assessment of the recent change made to INTERPOL's policy demonstrates that the appropriate balancing

point may have been identified. The pendulum has finally found its equilibrium.

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## The History of the International Association of Penal Law, 1924–1950: Liberal, Conservative, or Neither?

Mark A. Lewis\*

Previous histories dealing with the building blocks of international criminal law have largely comprised histories of international tribunals: their founding, politics, proceedings and cultural meanings.<sup>1</sup> As an alternative to examining political leaders and diplomats as the central actors in these affairs, some political scientists and historians have drawn attention to the role of non-governmental organisations as potent lobbies, arguing that their vision of a permanent international criminal court was shaped by their intellectual worldview or their political and social interests.<sup>2</sup> Lurking

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<sup>1</sup> Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971; Ann Tusa and John Tusa, *The Nuremberg Trial*, Atheneum, New York, 1986; Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford University Press, Oxford, 2001; Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order”, in *American Historical Review*, 2008, vol. 113, no. 3, pp. 701–30; Yuma Totani, *The Tokyo War Crimes Trial*, Harvard University Asia Center, Cambridge, MA, 2008; Thierry Cruvellier, *Court of Remorse: Inside the International Tribunal for Rwanda*, trans. Chari Voss, University of Wisconsin Press, Madison, 2010.

<sup>2</sup> Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, London, 2006; Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen*

beneath the surface of these investigations is the question of which ideologies shaped the views of these organisations and ultimately the types of tribunals they proposed. The notion that they were all shaped by pacific internationalism, liberal legalism or a universal concept of rights cannot be sustained.

The concept of ideology is tricky, as various political thinkers have defined it positively and negatively since the term was first used in the late eighteenth century.<sup>3</sup> One contemporary definition holds that it requires three elements: a political or social vision of a reality that does not yet exist, an agent that will create that reality and a defined obstacle that stands in the way. To this I would add that ideologies emerge from specific historical contexts, often in response to economic, social or cultural crises. The groups that support them have specific bases of social support, develop their own discourses and cultural reference points, and prioritise certain forms of action over others.<sup>4</sup>

An assessment of non-governmental organisations that supported the construction of international law in the nineteenth and twentieth centuries shows that their demands did not exist in an ideological vacuum but were shaped by social group interest, national interest, concepts of the international state system, schools of criminology, visions of history or some combination of these. For example, the International Law Association, whose predecessor organisation was founded around 1873, was formed by liberal international lawyers and peace activists, but the merchants and shippers who later joined the organisation wanted to codify international law to ensure smoothly functioning commerce.<sup>5</sup> The Red

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*Debatte 1872–1945* [Law Instead of Vengeance or Vengeance Through Law? The Punishment of War Crimes in the International Scholarly Debate, 1872–1945], Ferdinand Schöningh, Paderborn, 2010; Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, Oxford University Press, Oxford, 2014.

<sup>3</sup> Terrell Carver, “Ideology: The Career of a Concept”, in Terence Ball and Richard Dagger (eds.), *Ideals and Ideologies: A Reader*, Longman, Boston, 2011, pp. 4–10.

<sup>4</sup> Miroslav Hroch, *Social Preconditions of National Revival in Europe: A Comparative Analysis of the Social Composition of Patriotic Groups among the Smaller European Nations*, trans. Ben Fowkes, Columbia University Press, New York, 2000; Charles Tilly, *Popular Contention in Great Britain, 1758–1834*, Harvard University Press, Cambridge, MA, 1995.

<sup>5</sup> Irwin Abrams, “The Emergence of International Law Societies”, in *Review of Politics*, 1957, vol. 19, no. 3, pp. 361–80.



Cross movement, founded in the 1860s initially to establish volunteer medical corps for wartime, expressed the Christian humanitarianism of the Swiss Protestant bourgeoisie.<sup>6</sup> The International Association of Penal Law (Association Internationale de Droit Pénal, ‘AIDP’), founded by European criminal law specialists from Allied and neutral countries in 1924, comprised political liberals and conservatives. Many wanted to reform penal systems using the ideas of “social defence” but also believed that an international criminal jurisdiction was needed to protect states against aggression. In the 1930s the World Jewish Congress, representing an assembly of democratic Jewish organisations from the Diaspora, represented the interests of a religious/cultural minority during a time when the League of Nations’ system of protecting minority rights was breaking down.<sup>7</sup> In the 1970s Amnesty International represented a “non-partisan morality” of middle- and upper-class American activists who protested against torture and the death penalty without calling for social or political revolution abroad. Soviet human rights activists in the same period rejected reform communism and instead criticised government abuses based on the fact that they violated socialist law. Both groups adopted moral and legal intervention because revolution or political reform seemed like ideological dead ends.<sup>8</sup> Finally, in the 1990s, during the negotiations for the Rome Statute establishing the permanent International Criminal Court, civil society organisations did not represent a uniform ideology for women’s issues. The Women’s Caucus for Gender Justice, representing different types of feminists, wanted to criminalise rape and sexual slavery under international law and ensure that prosecutors and judges had expertise with gender issues. “Pro-family” organisations, such as REAL Women of Canada and the International Right to Life Federation, opposed any mention of gender in the Court’s Statute and argued that including “forced

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<sup>6</sup> John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder, CO, 1996; David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, New York, 2005, pp. 202–10.

<sup>7</sup> Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938*, Cambridge University Press, New York, 2004, pp. 49–57, 148–51, 316–22; Mark A. Lewis, “The World Jewish Congress and the Institute of Jewish Affairs at Nuremberg: Ideas, Strategies, and Political Goals, 1942–1946”, in *Yad Vashem Studies*, 2008, vol. 36, no. 1, pp. 181–210.

<sup>8</sup> Samuel Moyn, *The Last Utopia: Human Rights in History*, Belknap Press, Cambridge, MA, 2010, pp. 130–36.

pregnancy” as a crime in the Court’s Statute would conflict with states whose domestic legislation prohibited abortion.<sup>9</sup>

Yet the view that all concepts in international law are shaped by different group interests and ideological currents does not address how non-governmental organisations have been forced to change their practices as a result of wars or failures, as one of the longest-standing organisations, the International Committee of the Red Cross, had to do.<sup>10</sup> The goal of this chapter is to explain how a different organisation, the AIDP, changed its ideology between its founding in 1924 and the early Cold War. At that point, it had been unable to achieve two of its major projects from the late 1920s: the formation of a permanent international criminal court and a global penal code against aggression.

The ideological transformation of the AIDP is an important topic because the organisation was and remains a prominent formulator of ideas, statutes and draft conventions that have been adopted by the League of Nations and the United Nations. The AIDP was explicitly founded to develop international criminal law as a new discipline. Several of its members invented the term in the early 1920s, something that cannot be claimed about other groups of lawyers in the nineteenth century who codified the laws of war or worked on military tribunals. Two of its members in the 1925–1950 period, Vespasien V. Pella and Henri Donnedieu de Vabres, were major architects of international criminal law: both developed concepts of state criminality, and both worked on a draft statute for an international criminal court in the 1920s. Pella played a role in drafting a world penal code in the late 1920s and early 1930s, and Donnedieu de Vabres was France’s chief judge at Nuremberg. A third jurist, Raphael Lemkin, was a member of another organisation closely related to the AIDP – the International Bureau for the Unification of Penal Law – where Lemkin developed his early formulation of the genocide concept in the midst of debates about which crimes warranted universal jurisdiction. All three figures wrote the first draft of the United Nations Convention for the Prevention and Punishment of Genocide.

This chapter will argue that from 1924 to roughly 1950 the AIDP experienced a series of ideological transformations and was neither whol-

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<sup>9</sup> Glasius, 2006, pp. 77–93, see *supra* note 2.

<sup>10</sup> Jean-Claude Favez, *The Red Cross and the Holocaust*, trans. John and Beryl Fletcher, Cambridge University Press, Cambridge, 1999; Forsythe, 2005, see *supra* note 6.

ly liberal nor conservative. Liberal was a term used by AIDP jurists in the 1920s to 1940s to describe their support for fair trials based on pre-established laws and more humane treatment of prisoners. Yet their liberalism was not the liberalism of the nineteenth century, which stressed individual liberty, republicanism and the nation-state. It was a social liberalism that was anti-communist, anti-revolutionary and pro-“social defence”, a school of criminology that believed crime stemmed from social conditions, so the type of punishments and corrective measures applied must address specific social categories, such as juveniles, alcoholics and the insane. Conservatism in the 1920s was a philosophy supporting nationalism, state sovereignty and authoritarianism rather than democratic government. It was distinct from the new radical right-wing movements of fascism and Nazism, which also stressed state sovereignty and were anti-democratic, but sought to overthrow the existing social order and political system with a corporatist economic system and the domination of a single nation or race. In the 1920s the AIDP developed a “criminological” liberal internationalism based on criminal prosecution of states and individuals who started illegal wars or created international disorder. During the turbulent 1930s, when economic depression, fascism and militarism destroyed the international system erected by the League of Nations, it grew slightly more conservative, moving toward state security and even opening up lines of communication with Nazi jurists. During the Second World War it was inactive and silent; it did not play a major role in advocating or preparing for post-war trials, either national or international. After the war, it attempted to resuscitate its criminological internationalism from the 1920s, but it was caught in the Cold War and had to figure out how to position its own criminological programme in that ideological debate. The AIDP’s ideological changes represent a larger transformation in the ideas of the European intellectual bourgeoisie and enlightened upper classes from the 1920s to the 1950s. They sought stability and social order in the interwar period, did not support fascism during the Second World War but did not actively resist it, and then adopted anti-communist views and human rights doctrines in the Cold War, as these two were closely connected.

### **15.1. Was the AIDP Liberal or Conservative? Previous Views**

In 1924 a group of French jurists and penal reformers founded the AIDP, attempting to rejuvenate the work of the more German-oriented Interna-

tional Union of Criminal Law (Internationale Kriminalistische Vereinigung, 'IKV') whose German faction had split off due to the German–French animosity of the First World War.<sup>11</sup> Previous legal and political science scholarship on the AIDP and the IKV have addressed their ideological roots and the AIDP's contributions to international criminal law, taking different viewpoints on whether the two organisations were liberal or conservative. The criminal law scholar and former AIDP President Hans-Heinrich Jescheck views both organisations as a unity, believing they propelled liberal-progressive ideas, such as suspended sentences and fines as alternatives to prison sentences. He briefly summarises a few AIDP projects in international criminal law (support for an international criminal jurisdiction in 1926, Pella's international penal code and law against aggression in 1935, and the AIDP's influence on a League of Nations terrorism convention in 1937), but he does not delve into the political circumstances or the ideological motives behind them.<sup>12</sup> The criminal law scholar and former AIDP Vice President Sir Leon Radzinowicz concentrates on the ideology of the IKV in relation to domestic penal law, but does not discuss the AIDP's international projects. He takes a more nuanced view of the IKV's ideological profile, arguing that its criminal law concepts reflected social Darwinism (especially the view that the poor were dangerous and social radicals should be repressed) but also social liberalism (criminal codes should be reformed to define different types of penalties for attempted crimes, completed crimes and repeated crimes.) He briefly notes that the Soviet Union and Nazi Germany ruthlessly amplified criminal law doctrines developed by the Italian positivists and the IKV's social defence theorists, though he does not discuss whether the latter concepts influenced the AIDP's *international* criminal law concepts.<sup>13</sup>

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<sup>11</sup> Elisabeth Bellmann, *Die Internationale Kriminalistische Vereinigung (1889–1933)* [The International Union of Penal Law (1889–1933)], Peter Lang, Frankfurt am Main, 1994.

<sup>12</sup> Hans-Heinrich Jescheck, "Der Einfluß der IKV und der AIDP auf die internationale Entwicklung der modernen Kriminalpolitik" [The Influence of the IKV and AIDP on the International Development of Modern Criminal Policy], in *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal for the Entire Science of Penal Law], 1980, vol. 92, no. 4, pp. 997–1020.

<sup>13</sup> Leon Radzinowicz, *The Roots of the International Association of Criminal Law and Their Significance: A Tribute and a Re-assessment on the Centenary of the IKV*, Max-Planck-Institut für Ausländisches und internationales Strafrecht, Freiburg, 1991, pp. 26–41, 47–48, 91.

The international criminal law scholar and former AIDP President M. Cherif Bassiouni contends that the AIDP's approach to penal science represents "humanistic and universalist philosophies [...] embodied in the modern approach to human rights".<sup>14</sup> However, in the area of international criminal law, he shows the influence of human rights more clearly for the late 1960s to 1990s, when AIDP jurists worked on conventions against torture, illegal human experimentation and apartheid<sup>15</sup> than he does for the 1920s to 1930s, when AIDP jurists were more concerned with using an international criminal court to defuse frictions that could lead to war than they were in protecting civilians and minorities from government abuses.

The political scientist Martin David Dubin, in a 1991 book about the 1937 terrorism convention and a corresponding convention to establish an international criminal court for terrorism cases, explains two of the AIDP's main projects in the interwar period: creating interstate law (Pella's term for an international criminal jurisdiction that would hold states as well as individuals responsible for various crimes that threatened international relations) and unifying domestic penal codes. Ultimately, he concludes that Pella and other AIDP jurists were utopian reformers who confused their hopes with reality. Few states were serious about repressing terrorism: France propelled the convention to support its ties with its Eastern European allies, while Italy, Germany and the Soviet Union supported foreign terrorist groups or used police terror domestically.<sup>16</sup>

## 15.2. The Division of the IKV during the First World War and the Founding of the AIDP in 1924

The IKV, founded in 1888 by the Austrian Franz von Liszt, the Dutchman Gerardus van Hamel and the Belgian Adolphe Prins, collapsed due to First World War tensions. According to Radzinowicz, the organisation was under strong German leadership. Its main journal, *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal for the Entire Science of Penal

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<sup>14</sup> M. Cherif Bassiouni, "AIDP: International Association of Penal Law: Over a Century of Dedication to Criminal Justice and Human Rights", in *Nouvelles Études Pénales. Recueil de l'Association internationale de droit pénal* [New Penal Studies. Anthology of the International Association of Penal Law], 1999, no. 18, p. 40.

<sup>15</sup> *Ibid.*, pp. 56, 58, 60.

<sup>16</sup> Martin David Dubin, *International Terrorism: Two League of Nations Conventions, 1934–1937*, Kraus International Publications, Millwood, NY, 1991, pp. 21–31, 65–69, 75–76.

Law], was a German-language publication. However, the IKV had many active national subgroups, including a large number of Russian liberals who joined after the 1905 Russian Revolution. The Great War of 1914 ignited German–French tensions, played out during the war as a cultural debate about German *Kultur* versus French *civilisation*, the rivalry between the German claim to philosophical depth and commitment to the collective nation versus the French claim to individual liberty and universalism. In 1915 two German members resigned from the IKV for “national reasons”, as von Liszt wrote, but other German members remained in the group, believing that the split would be resolved after the war was over, and Europeans could again return to scientific work free of politics.<sup>17</sup> That conception of legal theory free of all other considerations represented a nineteenth-century positivist view that could not be recovered after nearly five years of horrendous warfare. Van Hamel died in 1917, and the deaths of von Liszt and Prins followed in 1919. The Swiss group in the IKV wanted to resurrect the old organisation and invite the membership to a conference in Zurich, but the response was cool, so no meeting occurred.<sup>18</sup>

The German *Landesgruppe* (national branch) of the IKV continued an independent existence and kept publishing its *Zeitschrift*, but some of its scholars in 1917 were already discussing closer bonds among Central European states’ penal systems, not a pan-European system or even an international system. The Swiss German jurist, Ernst Delaquis, for example, described how certain German, Austrian and Hungarian jurists wanted to unify their criminal codes after the war, believing this would build on the (supposedly) closer ties these countries had developed before the war. (He wrote this before the German Empire and Austria-Hungary had collapsed.) He thought that countries with similar cultures were most likely to find common ground in their approaches to crime, but he also noted that it was unlikely that Austrian legislators would accept the IKV idea of allowing judges to issue flexible sentences, since those legislators feared that Czech judges would intentionally rule with harshness against Austro-Germans.<sup>19</sup> Such concerns about Austria’s nationality conflicts proved to

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<sup>17</sup> Franz von Liszt, “G.A. van Hamel. Die Zukunft der IKV”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1917, vol. 38, pp. 508–9.

<sup>18</sup> Bellmann, 1994, pp. 139–45, see *supra* note 11.

<sup>19</sup> Ernst Delaquis, “Strafrechtliche Kriegsziele. Vortrag gehalten in der Juristischen Gesellschaft zu Frankfurt a.M. am 26. November 1917” [War Goals for Criminal Law.

be accurate in another sense: at the end of First World War, Austria-Hungary dissolved due to internal nationality problems and economic collapse. Furthermore, after the war, the Paris Peace Treaties forbade German-Austrian unification, and the conservative German bureaucracy, including some judges and university professors, resented the Versailles Treaty. In the early 1920s, when Germany was in the midst of a hyperinflation and France occupied the Ruhr industrial region, German–French reconciliation and a rebirth of the IKV seemed highly unlikely.

The idea to refound the IKV came from the Spanish jurist Quintiliano Saldaña, who discussed it with French criminal law professor Henri Donnedieu de Vabres. Donnedieu de Vabres then obtained support from Henri Berthélemy, Dean of the Law Faculty in Paris, and financial backing from the Société générale des prisons, a prison reform organisation. The first Congress, held by the AIDP in Paris in 1924, elected Henri Carton de Wiart, a former Belgian Prime Minister, as its first president, who served until 1946.<sup>20</sup> Fifty-two members of the AIDP voted for a board of directors, electing 11 men (no women), all of whom were jurists or law professors from states that had fought on the side of the Allies, had been neutrals during the war or were from newly created states, such as Czechoslovakia and Poland.<sup>21</sup>

The AIDP's founders denied that they had any political goal<sup>22</sup> and welcomed all branches of criminal law and penology. According to their statute, their purpose was to hold congresses and publish journals to study

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Lecture held by the Legal Society in Frankfurt am Main on 26 November 1917], in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1918, vol. 39, pp. 282–83.

<sup>20</sup> Carton de Wiart had worked for many years with Adolphe Prins, who had been Belgium's Inspector General of its prisons.

<sup>21</sup> The directors were Mariano D'Amelio (Italy), Megalos Caloyanni (Greece), Henri Carton de Wiart (Belgium), André Mercier (Switzerland), August Miříčka (Czechoslovakia), Albert Rivière (France), Jean-André Roux (France), Quintiliano Saldaña (Spain), Julian Teodorescu (Romania) and John Wigmore (United States). See Association Internationale de Droit Pénal, "Assemblée générale constitutive. Tenue le vendredi 28 Mars 1924 à la Faculté de Droit de Paris" [Constitutive General Assembly. Held on Friday 28 March 1924 at the Law Department of Paris], in *Revue internationale de droit pénal* [International Review of Penal Law], 1924, no. 1, pp. 4–6.

<sup>22</sup> Henri Berthélemy *et al.*, "Projet d'une Association Internationale de Droit Pénal" [Draft for an International Association of Penal Law], in *Revue internationale de droit pénal*, 1924, no. 1, p. 2.

the causes of criminality and means to repress it.<sup>23</sup> This was similar to the IKV's pre-war mission. Both organisations were types of “professional internationalism”, a historical term that describes a phase of internationalism in the nineteenth century in which self-selected experts from different nation-states joined together to address common problems, and, ideally, build international bases of support for changes they sought at home.<sup>24</sup> Like the IKV, the AIDP carried the torch of reforming criminal codes according to the ideas of “social defence”, supporting alternatives to prison confinement and promoting the view that different types of offenders required particular forms of “security measures” and rehabilitation according to whether they were juveniles or recidivists.

### 15.3. The AIDP's Ideological Features

The AIDP was not a reincarnation of the IKV, since it contained several new ideological features. First, the founders stated that the impetus for forming the group was the dislocation caused by the Great War, the material and moral disequilibrium it left behind.<sup>25</sup> Authors across Europe – in Austria, Britain, Switzerland and France – all feared that the war had caused an increase in crime due to demobilised soldiers and unsupervised youth.<sup>26</sup> The French founders of the AIDP gave this an international meaning, explicitly stating in their founding document that *international crime* was multiplying due to “the interpenetration of people, the presence in a good many territories of foreign elements”.<sup>27</sup> This was a refrain among conservatives in Europe after the war: not only had the war de-

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<sup>23</sup> See articles one and two, Association Internationale de Droit Pénal, “Statuts de l'Association Internationale de Droit Pénal” [Statutes of the International Association of Penal Law], in *Revue internationale de droit pénal*, 1924, no. 1, p. 17.

<sup>24</sup> Martin H. Geyer and Johannes Paulmann (eds.), *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War*, Oxford University Press, Oxford, 2001, p. 22.

<sup>25</sup> Berthélemy *et al.*, 1924, p. 1, see *supra* note 22.

<sup>26</sup> For example, see Sicherheitsbericht für das Jahr 1915 [Security Report for 1915], 31 July 1916, in the Austrian State Archives, Allgemeines Verwaltungsarchiv, Ministerium des Innern, Allgem., K. 2089, 20. Polizei-, Gewölbe-, Grenz- und Sicherheitswache, in genere 1915–1918, Protokoll Nr. 22276/18; Edith Abbott, “Crime and the War”, in *American Institute of Criminal Law and Criminology*, 1918, vol. 9, no. 1, pp. 32–43; Delaquis, 1918, see *supra* note 19, pp. 284–85; Maureen Healy, *Vienna and the Fall of the Habsburg Empire: Total War and Everyday Life in World War I*, Cambridge University Press, New York, 2004, pp. 253–54.

<sup>27</sup> Berthélemy *et al.*, 1924, p. 1, see *supra* note 22.



stroyed the traditional family, but it brought refugees with foreign customs into their countries, and increases in crime were sometimes blamed on outsiders. Borders were porous, and states' penal systems were not domestically unified, particularly in Central and Eastern Europe, where new states were created out of territories from defeated states and empires. The police's viewpoint was that it could expel a criminal from one province or country, but he or she might well set up shop in the neighboring one. Thus, the AIDP started with the basic view that society was in turmoil, crime was increasing and outsiders were at fault. Donnedieu de Vabres in 1922 argued that France should exercise jurisdiction over everyone in its territory, whether a citizen or a foreigner, in the interest of public security. Indeed, he defended the right of the state to expel foreigners at the border, arguing that four times as many foreigners as French were prosecuted by French criminal courts in 1910 because "the average morality of those who have left their countries of origin [...] is inferior to the morality of sedentary people".<sup>28</sup> But were foreigners who were brought before the courts subjected to unfair prejudice? Donnedieu de Vabres did not say.

Members of the AIDP were not social liberals in the sense of the British writer L.T. Hobhouse, who advocated the rights of the working class and argued that "the function of State [is] to secure the conditions upon which mind and character may develop themselves".<sup>29</sup> For criminal law jurists, the role of the state was to protect society against criminals, not re-educate and rehabilitate them for their own sake. Pella argued that highly dangerous criminals (such as murderers who attack their guards) should be shipped to the penal colonies, far from continental Europe, where they should be kept in perpetuity. He supported this policy because he thought it sprang from the same humanitarian motives as eliminating the death penalty.<sup>30</sup> At the AIDP's first congress in Brussels in 1926, the

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<sup>28</sup> Henri Donnedieu de Vabres, *Introduction à l'étude du droit pénal international: essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger* [Introduction to the Study of International Criminal Law: An Essay on History and Critique of Criminal Competence in Relations with Foreign Countries], Recueil Sirey, Paris, 1922, p. 441.

<sup>29</sup> L.T. Hobhouse, *Liberalism*, Batoche, Kitchener, ON, 1999 [1911], p. 68.

<sup>30</sup> Vespasien Pella, "Proposition adressée à la Société des Nations en vue de l'organisation d'un système général internationale d'élimination des criminels dangereux et des délinquants d'habitude" [Proposal Addressed to the League of Nations Regarding a

group voted in favour of the idea that penal codes should include “*mesures de sûreté*”, which judges would apply to minors, mentally ill people or so-called delinquents,<sup>31</sup> such measures included civil commitment in mental institutions and reformatory schools, which were supposed to be more lenient than penitentiaries.

Another element in the AIDP’s ideology was the influence of French law, French language and French ideas of economic solidarism. The AIDP’s seat was France, the main language of its journal and congresses was French, and the Eastern European jurists who joined the organisation had either been educated in France or looked to the French legal system as the trendsetter. Furthermore, there were virtually no German, Austrian or German Swiss members in the AIDP in the 1920s and 1930s. (The Germans and Austrians published instead in the rival *Zeitschrift für die gesamte Strafrechtswissenschaft*, the house journal of the German national group of the IKV.) The AIDP’s intention to build international criminal law and press for domestic penal reform became imprinted with certain French concepts. For example, debates on the repression of terrorism looked to French anti-anarchism laws in the nineteenth century as models, and the French government took the lead in calling for a League of Nations convention to repress counterfeiting and another convention to repress terrorism.

A third new feature in the AIDP was that it was explicitly founded “to promote the theoretical and practical development of international criminal law [*droit pénal international*], in order to achieve the concept of a universal criminal law, [and] the coordination of the rules of procedure and criminal inquiry”.<sup>32</sup> What precisely the AIDP founders meant by “international criminal law” in this statement is a little hard to say. The IKV had taken up the issue of “international crime”, meaning crime across borders, a problem it believed was increasing in 1905 due to the expansion of international trade and international communications. However,

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General International System to Eliminate Dangerous Criminals and Habitual Delinquents], in *Revue internationale de droit pénal*, 1924, vol. 1, pp. 141–46.

<sup>31</sup> “Tableau d’ensemble des vœux et des résolutions adoptées par les Congrès de l’Association internationale de droit pénal” [Collective Table of the Vows and Resolutions Adopted by the Conferences of the International Association of Penal Law], in *Revue internationale de droit pénal*, 1948, vols. 3–4, p. 391.

<sup>32</sup> Article 1, point 3, Association Internationale de Droit Pénal, 1924, p. 17, see *supra* note 23.

the IKV did not formulate a legal definition of “international crime” or do much more than call on police forces in capital cities to join together and exchange information about it (something they began doing, incidentally, after the First World War). Another related problem was the attempt to unify extradition laws, so that states would be required to prosecute or extradite persons charged with certain offences. The sticking point was political crime: should a state be required to extradite a person who had not committed a crime on its territory (or against its citizens or subjects), but whose actions had allegedly injured the security of another state? The IKV had been trying to unify the rules of extradition, but this touched on the sensitive issue of state sovereignty, so states did not want to deal with it at upcoming Hague Conferences to codify international law.<sup>33</sup>

The extradition question was one of the main topics in the so-called “classical” field of “international criminal law” after the First World War. For example, Maurice Travers, a French criminal law scholar, proposed a system in 1922 based on the concept that the group (*groupement*), not merely the state, used criminal laws to protect itself against social disorder; this was the doctrine of social defence. In Travers’ system, each group only needed to refer to its own municipal criminal law and the threat to its own social order when determining whether to prosecute a person. The person’s nationality and the place where the person committed the crime were not important; therefore, extraterritorial jurisdiction was possible. Groups (such as states) only co-operated with each other in sharing information about suspects, making arrests and extraditing suspects to protect their own interests, that is, to ensure that their own security would be guaranteed, *not* because states belonged to an international community, as previous scholars had asserted.<sup>34</sup> Travers, therefore, allowed for mutual assistance, but based his system on a very strong concept of sovereignty of the group (which could be a state). Hence, he rejected the idea of an international criminal court for war crimes and asserted that the accused should be prosecuted under a state’s jurisdiction.

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<sup>33</sup> Bellmann, 1994, pp. 107–11, see *supra* note 11.

<sup>34</sup> Maurice Travers, *Le droit pénal international et sa mise en oeuvre en temps de paix et en temps de guerre* [International Criminal Law and Its Application in Peacetime and Wartime], vol. 1, Librairie de la Société du Recueil Sirey, Paris, 1920, pp. 3–4, 11–12; Jesse S. Reeves, “*Le Droit Pénal International et sa mise en oeuvre en temps de paix et en temps de guerre*. Par Maurice Travers”, in *American Journal of International Law*, 1922, vol. 16, no. 2, pp. 342–44.

#### 15.4. The AIDP's Plan for an International Criminal Court, 1926–1928

AIDP scholars accepted the view that penal law should be employed for social defence, but several believed that states should co-operate because they indeed belonged to a community of nations – an idea embodied in the League of Nations. They also held that states should institute similar penal codes so that each one could prosecute individuals who committed crimes that were directed against the security or social order of foreign states; in other words, states were supposed to assist each other by prosecuting people who damaged persons, communication networks, financial systems or moral values that existed outside the framework of the prosecuting state. Therefore, several AIDP jurists, such as Saldaña, Donnedieu de Vabres and Pella, did not follow Travers' lead, instead developing the idea of an international criminal court in the early 1920s.<sup>35</sup> Essentially they synthesised social defence with mutual assistance and wanted an international jurisdiction to handle a variety of tasks: jurisdictional conflicts, the prosecution of criminals who worked across borders, the prosecution of crimes that could not be entrusted to a national court in the interest of fairness and the regulation of state behaviour for the prevention of war.

A series of concrete events had influenced their thinking. In the Versailles Treaty of 1919, the Allies had declared their intention to prosecute ex-Kaiser Wilhelm II with an international tribunal and extradite German nationals to stand trial before mixed military tribunals. In the Treaty of Sèvres, they declared that they would create tribunals to prosecute members of the Ottoman government responsible for the Armenian massacres of 1915. No international tribunals for these cases were actually held.<sup>36</sup> Pella blamed this on the defeated states, which did not want to

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<sup>35</sup> Quintiliano Saldaña y García Rubio, *La justicia penal internacional* [International Criminal Law], Imprenta de Alrededor del mundo, Madrid, 1923; Henri Donnedieu de Vabres, "La Cour Permanente de Justice Internationale et sa vocation en matière criminelle" [The Permanent Court of International Justice and Its Role in Criminal Matters], in *Revue internationale de droit pénal*, 1924, no. 1, pp. 175–201; Vespasien V. Pella, *La criminalité collective des États et le droit pénal de l'avenir* [The Collective Criminality of States and the Criminal Law of the Future], Imprimerie de l'État, Bucarest, 1925, p. 119.

<sup>36</sup> For the general history, see James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, Westport, CT, 1982; Walter Schwengler, *Völkerrecht, Versailler Vertrag und*

accept the jurisdiction of the victor powers. He also noted that these states had argued that there was no “regime of repression” (meaning an international criminal jurisdiction) that existed when their nationals committed actions that the Allies deemed were violations of the laws and customs of war, and crimes against humanity.<sup>37</sup>

Another influence was an attempt by the Belgian jurist, Baron Édouard Descamps, to add a criminal chamber to the Permanent Court of International Justice, a world court connected to the League of Nations that would handle interstate disputes. When he and other international jurists met in The Hague in 1920 to write the rules for that court, he proposed that the criminal chamber should prosecute individuals for “crimes against the international order” and “crimes against the law of nations”. Other jurists were troubled by the prospect that the court might have the power to prosecute state officials for executing state policy. Nevertheless, they decided to transmit his proposal to the League of Nations Assembly, which rejected any further work on the idea ostensibly because there was no international penal code. (There were other political reasons, as well.)<sup>38</sup> Thus, AIDP jurists were inspired to create such a code.

The AIDP’s effort to develop a statute for an international criminal court was also stimulated by the work of another international legal organisation, the International Law Association (‘ILA’), which had gained a head start on the project in 1922. The movement was spearheaded by the British international lawyer Hugh H.L. Bellot, who had written during the

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*Auslieferungsfrage. Die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses 1919/20* [International Law, the Versailles Treaty and the Question of Extradition. The Criminal Prosecution of War Crimes as a Problem of the Peace Settlement, 1919–20], Deutsche Verlags-Anstalt, Stuttgart, 1982; Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* [The Leipzig Trials: German War Crimes and Their Criminal Prosecution after the First World War], Hamburger Edition, Hamburg, 2003; Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, trans. Paul Bessemer, Metropolitan Books, New York, 2006.

<sup>37</sup> Association Internationale de Droit Pénal, *Projet de Statut d’une Cour de Justice Criminelle Internationale*, précédé d’une introduction de M. le Conseiller Megalos A. Caloyanni et du rapport de M. Vespasien V. Pella, Professeur à l’Université de Jassy, Député [Draft Statute for a Court of International Criminal Justice, Preceded by an Introduction by Counsellor Megalos A. Caloyanni and with a Report from Mr. Vespasien V. Pella, Professor at the University of Jassy and Parliamentarian], Librairie des Juris-Claisseurs-Éditions Godde, Paris, 1928, p. 8.

<sup>38</sup> Lewis, 2014, pp. 80–89, see *supra* note 2.

First World War about a need for an international tribunal to prosecute German officers. After the war, he was disappointed in the meagre results of the German government's trials of certain junior-level officers, which were heard by the German Supreme Court in Leipzig. He considered the trials

absolutely fair and impartial [...]. And yet they were unsatisfactory – not because in British eyes the sentences appeared inadequate, but because one of the worst offenders, Lieut.-Commander Karl Neumann, who sank without warning the British hospital ship *Dover Castle*, was acquitted on the plea of superior orders.<sup>39</sup>

Bellot wanted a neutral international tribunal to prosecute violations of the laws and customs of war in the future, a project that some German and Hungarian lawyers eventually supported in 1926.

Finally, the AIDP's interest in creating a jurisdiction that could prosecute states for aggression was stimulated when the League of Nations Assembly in 1924 passed the Geneva Protocol for the Pacific Settlement of International Disputes, which required that states submit their conflicts to an international arbitration panel; states that refused would be deemed aggressors. The Assembly also declared that war was an international crime (a cultural redefinition of war that stemmed from the First World War), yet the Protocol did not define aggression or explain what steps League members would be obligated to take to deal with an outlaw state. The whole change in scene – the establishment of a League to prevent aggressive war, the cultural outcry that war was a crime, the return of international organisations as a means of regulating world affairs – propelled Pella in 1924 to propose a plan for an international criminal jurisdiction to the Inter-Parliamentary Union, an international organisation of parliamentarians who wanted to codify international law as a whole. After discussing Pella's plan in 1925, the Union created a permanent subcommittee to study the causes of war and means to prevent it, but the organisation worked slowly and prioritised the grand codification project over Pella's concept for a criminal court.<sup>40</sup> Pella found a more receptive audience for his ideas inside the AIDP, since it specialised in criminology and

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<sup>39</sup> Hugh H.L. Bellot, "A Permanent International Criminal Court", in International Law Association, *Report of the Thirty-First Conference Held at the Palace of Justice, Buenos Aires, 24th August–30th August, 1922*, Sweet & Maxwell, London, 1923, p. 73.

<sup>40</sup> Segesser, 2010, pp. 248–51, see *supra* note 2.

its members were also writing about international criminal courts and state liability for aggression.

Donnedieu de Vabres and Pella departed from nineteenth- and early twentieth-century debates on the prosecution of the violation of the laws of war in an important way: by adding much more weight to the concept that states could be held *criminally* liable under international law. Both thought that to improve the international security system, the Permanent Court should be invested with the power to decide if states (not simply individuals within them) were guilty of criminal aggression. If so, the court could punish them with various types of sanctions, suspensions of diplomatic relations, economic boycotts and revocation of colonial mandates – but not territorial annexations.<sup>41</sup> Pella called this system “inter-state criminal law”, distinguishing it from “classical” international penal law that dealt with questions of overlapping jurisdictions and extradition.<sup>42</sup> This reoriented the concept of criminal liability, showing the influence of the relatively new theories of collective psychology and sociology, which had developed in the pre-First World War era of social anxiety about masses, crowds and anomie. Pella argued that a state became aggressive when a power-hungry, chauvinistic *corps* within a country persuaded the intellectuals and youth that their existence as a nation was threatened. The instinct of “species defence” would trigger a type of robotic thinking that would lead the crowd to follow the aggressive leadership.<sup>43</sup> Pella viewed aggression as a social-psychological phenomenon, not merely the pursuit of political power through war and diplomacy. Although this was probably not the only interpretation of the First World War within the AIDP, it indicates that Pella (who was also a Romanian diplomat in the League) now analysed war as a type of collective criminality rooted in group behaviour, rather than the pursuit of politics for state interest.

Liberal internationalists in the 1920s wanted the League of Nations to function as a sort of nightwatchman over sovereign nation-states which had agreed to limit their power in key respects. But the criminological internationalists wanted to supervise and regulate international politics through criminal law. Criminal prosecution was supposed to be the main

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<sup>41</sup> Pella, 1925, pp. 217–23, see *supra* note 35.

<sup>42</sup> *Ibid.*, pp. 164–69.

<sup>43</sup> *Ibid.*, pp. 25–34.

enforcement mechanism, rather than the force of international public opinion, injunctions enunciated by the League Council or judgments from an international arbitration panel. This is a stark difference between the AIDP jurists who supported an international criminal court against aggressive war and the key figures in the United States and Britain, such as Salomon Levinson, Philip Kerr and James Shotwell, who developed some of the main ideas and transatlantic policy connections that pushed the US and French governments to negotiate the Kellogg-Briand Pact of 1928.<sup>44</sup>

At the AIDP's first conference in Brussels, held in 1926, the organisation voted in favour of establishing a criminal chamber inside the Permanent Court that would have jurisdiction over states for "unjust aggression and all violations of international law", and individuals for the crime of aggression, violations of international law in peacetime, and cases where the nationality of the accused was unknown or the sovereignty of the territory where the crime had been committed was contested. The ILA had completed its draft statute for an international criminal court in 1926, but it was only to have jurisdiction over individuals, while the AIDP statute was to be a "two-track" court, meaning one panel of judges would hear cases against individuals, and another would hear cases against states. All the infractions were to be defined in advance by international conventions, which would determine the penalties and *mesures de sûreté*, demonstrating that the social defence doctrine had penetrated international criminal law. The conference also resolved that the League of Nations Council would supervise the punishment of states, while an individual state, assigned by the Council, would supervise the sentence of an individual. The AIDP then turned the drafting of the criminal court's statute over to a special AIDP commission, consisting of Carton de Wiart (serving as the chair), Pella, Donnedieu de Vabres, Saldaña, Bellot (from the ILA), Megalos Caloyanni (a Greek judge who had served on the High Court of Appeals in Cairo), Georges Leredu (a former French Minister of Hygiene who helped found the AIDP), André Mercier (a Swiss professor at the University of Lausanne and president of the Franco-German Mixed Arbitral Tribunal in the 1920s), and Jean-André Roux (a French law pro-

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<sup>44</sup> Daniel Gorman, *The Emergence of International Society in the 1920s*, Cambridge University Press, Cambridge, 2012, pp. 263–64, 267–77.



fessor at the University of Strasbourg and Supreme Court counsellor). They completed the project by July 1928.<sup>45</sup>

The court would have three essential functions: 1) to hear cases in which states disagreed about their jurisdiction over an individual, thereby reducing tension; 2) offer a neutral forum for the prosecution of individuals or states for “international military infractions” and violations of common law committed in occupied territory; and 3), most important for Pella and Donnedieu de Vabres, prosecute states for violations of international law, including aggression. The court would base its rulings on positive texts, either an anticipated international penal statute or international conventions among states.<sup>46</sup> Two types of chambers were envisioned: a 15-judge chamber for prosecutions against states, and a five-judge chamber for prosecutions against individuals. The plaintiff state and the defendant state would be allowed to each appoint one judge to the bench; this was supposed to make the process more just. On the other hand, the court would not have had an independent prosecutor. Instead, only a state would be able to bring a complaint against another state, and the League Council would have the power to decide whether a case could go forward. The prosecution of an individual could also trigger the prosecution of a state, if it emerged during proceedings that a state might be ultimately responsible; this too would have to be approved by the Council.

How liberal or conservative was this statute? Considering the nineteenth-century definition of liberalism (supporting liberty, penal reform, equality before the law, parliamentary government), the statute had some liberal elements. It was not to apply law retroactively; the accused would not be imprisoned during the proceedings; punishments did not only include prison but might include civil confinement or the payment of reparations; the death penalty was explicitly excluded because, the drafters wrote, “the contemporary moral conscience rejects [it]”.<sup>47</sup> On the conservative side, several aspects of the statute preserved state power and the

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<sup>45</sup> The commission started with a draft written by Pella, which was partly based on the International Law Association’s draft. That draft had been largely shaped by Bellot, but ILA members had pushed for greater protection for the individual rights of defendants. Bellot also participated in the AIDP drafting project, and jurists such as Donnedieu de Vabres and Roux made important contributions. For some of the drafting issues, see *Association Internationale de Droit Pénal*, 1928, pp. 21–49, see *supra* note 37.

<sup>46</sup> Arts. 35 and 36, *ibid.*, p. 43.

<sup>47</sup> *Ibid.*, p. 32.

role of the Great Powers on the Council. Only states could have filed criminal complaints with the court, not individuals or representatives of minority groups; this prevented access to the citizenry of the world. The League Council, which had to reach its decisions unanimously, would have controlled which cases were actually heard; hypothetically it might have quashed cases when powerful states were accused. The drafters, however, did not see it this way, contending that the League Council would have protected states from the “continual menace of unseasonable prosecutions”.<sup>48</sup> In the sense that conservatism means conserving the existing order, the statute did not specify any sanctions in case a state refused to extradite a suspect, so the statute did not solve this important problem. Finally, the statute stated that sitting heads of state did not have to testify, which might have significantly restricted a prosecution. Maintaining immunity based on political standing contradicted the liberal value of equality before the law.

The AIDP never succeeded in getting the League to consider its statute, much less pass it.<sup>49</sup> The central reason is that between 1926 and 1929 the League was preoccupied with revising the statute of the Permanent Court of International Justice to meet US demands. The United States had not acceded to the court but was willing to entertain the possibility if it could have an effective veto over the court’s power to issue an advisory opinion on any question affecting US interests. The League appointed a committee of jurists to rewrite the statute along these lines in 1929, but after doing so, the US Senate still rejected ratification.<sup>50</sup> This project did not involve a criminal chamber. In any case, neither the League’s Committee of Jurists nor the League’s Legal Section were interested in taking up the idea of a criminal chamber. Carton de Wiart and Pella lacked the diplomatic weight to move the Council to act, plus there was little enthusiasm in the mid-1920s for an international jurisdiction, as states were divided into those that asserted territorial jurisdiction versus those that asserted extraterritorial jurisdiction.<sup>51</sup>

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<sup>48</sup> *Ibid.*, p. 29.

<sup>49</sup> Lewis, 2014, pp. 110–113, see *supra* note 2.

<sup>50</sup> F.P. Walters, *A History of the League of Nations*, Greenwood Press, Westport, CT, 1986 [1952], pp. 351–54.

<sup>51</sup> J.J. Brierly, “Progressive Codification of International Law. Criminal Competence of States in Respect of Offences Committed Outside Their Territory”, 14 December 1925, C.P.D.I.26, in League of Nations. Committee of Experts for the Progressive Codification

### 15.5. Drafting a Global Penal Code, 1930–1935

Instead of giving up on the international criminal court project, the AIDP pressed ahead with defining the international code that the court would use. Several developments, philosophical and political, influenced the organisation's decision. Philosophically, the drafters of the 1928 court statute believed that criminal law had to be based on positive legal codes. The Hague and Geneva Conventions, for example, did not specify precise penalties or even define violations as crimes incurring individual liability. Plus, the League Assembly in 1920 had shot down Descamps' proposal because there was not yet an international penal code. In 1925 (as mentioned above) another international organisation, the Inter-Parliamentary Union, started working on a code. This body comprised parliamentarians who had formed a type of non-official world parliament to codify international law and serve the cause of world peace. Pella, who was a member of the Romanian parliament, was active in the organisation, which had charged him with the task of defining the criminal acts – in this case, those dealing with individuals – that would go into the code.<sup>52</sup> Caloyanni believed that the parliamentarians were politically influential, so he wanted to create a code whose ideas would harmonise with the Inter-Parliamentary Union's. "[I]ts draft is prepared not only by jurists, but at the same time by parliamentarians, some of whom today occupy important positions in their country and even hold the portfolio of Minister", he said.<sup>53</sup>

Another important factor was the Kellogg-Briand Pact, signed by 14 states in August 1928 (later signed by 47 in total), which outlawed war

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of International Law. Criminal Competence of States in Respect of Offences Committed Outside their Territory. C.50.M.27.1926.V.

<sup>52</sup> Union Interparlementaire, *Compte rendu de la XXIIIe conférence tenue à Washington du 1er au 7 octobre et à Ottawa le 13 octobre 1925* [Interparliamentary Union, Summary of the XXIIIrd Conference Held in Washington from the 1st to the 7th October and in Ottawa on 13 October 1925], Payot, Lausanne, 1926, pp. 45–50. See also "Procès-Verbaux de la Commission chargée de la rédaction d'un projet de code répressif international [Minutes of the Committee Charged with Writing a Draft International Repressive Code. Meetings of 11 and 13 January 1930]", in *Revue internationale de droit pénal*, 1930, vol. 7, pp. 255, 276–77.

<sup>53</sup> "Commission de rédaction d'un projet concernant les infractions internationales et leur sanctions" [Drafting Committee for a Draft Concerning International Infractions and Their Penalties. Meeting of 10 January 1933], in *Revue internationale de droit pénal*, 1935, vol. 12, p. 339.

as an instrument of national policy. American pacifists and religious reformers had formed a popular anti-war movement in the 1920s that pressured the US government to back such a pact instead of simply an international arbitration treaty. American, Canadian and British intellectuals and policy advisers also helped persuade US Secretary of State Frank Kellogg and French Premier Aristide Briand to negotiate a broad international agreement that would require the pacific settlement of disputes, rather than a more limited mutual security pact between the United States and France.<sup>54</sup>

For AIDP jurists, however, the Pact was vague and even seemed to be a retrogressive step, since the AIDP had voted in 1926 to create an international criminal jurisdiction with competence over both individuals and states, and the League Assembly, in 1924, had already declared that an aggressive war was an international crime. Donnedieu de Vabres and Pella pointed out that the Pact did not define aggression, an extremely complex issue, given all the possible ways that a state or non-state actor could threaten another state without necessarily starting a war. The Pact did not contain any penalties for violators or specify the authority that would determine whether a war was illegal. It did not state when self-defence was legitimate and at what point a state that entered a war to defend itself from an aggressive attack was guilty of using “excessive force”. The Pact was not integrated with the League Covenant, which allowed other states to go to war to defend another League member if it had been illegally attacked.<sup>55</sup> When the AIDP learned that a special League of Nations “committee of experts” intended to examine the Pact and its relation with the League Covenant, the AIDP decided at its 1929 conference in Bucharest that this League committee should consider the AIDP’s 1926 resolution for an international criminal jurisdiction encompassing both states and individuals. This essentially meant that the AIDP wanted to see a real criminal enforcement system for Kellogg-Briand, and not take a step backwards and accept that a general pact renouncing war was the last word on the matter.<sup>56</sup>

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<sup>54</sup> Gorman, 2012, pp. 259–84, see *supra* note 44.

<sup>55</sup> See Pella and Donnedieu de Vabres’s discussion of these issues in Procès-Verbaux de la Commission chargée de la rédaction d’un projet de code répressif international [Meetings of 11 and 13 January 1930], 1930, pp. 294–300, see *supra* note 52.

<sup>56</sup> See Pella’s statement in *ibid.*, pp. 257–58.

The AIDP formed a drafting committee to write the international criminal code, this time including Caloyanni (the chairman), Pella (the rapporteur), Donnedieu de Vabres, Mercier, Roux, Saldaña (who never attended meetings) and Emil Stanisław Rappaport, a criminal law professor from the University of Warsaw. The Yugoslav law professor and AIDP member Thomas Givanovitch later joined the committee. The committee held three meetings in 1930, 1931 and 1933 (always in January), with Pella finally producing a draft sketch in 1935 that was very similar to a more detailed report and projected code that he had presented to the Inter-Parliamentary Union in 1925.<sup>57</sup> The committee's three meetings were filled with legal disputes (which were entirely natural) but were hampered by controversies over the committee's working method and by the fact that various members were absent from different meetings. In fact, all members never met in the same place at the same time.

In January 1930 the key issues were whether the committee should first work on a code dealing with states or individuals; what should be done in relation to Kellogg-Briand; what types of infractions, based on other jurists' lists, should they include; whether there should be a public prosecutor; and whether they should collaborate with the International Law Association, since that had been a fruitful relationship when the AIDP brought Hugh Bellot onto its committee to draft the international criminal court statute of 1928. The controversy of starting with states versus individuals was settled in favour of individuals, mainly because this was easier to swallow from a traditional legal point of view. However, Pella, Donnedieu de Vabres and Rappaport all affirmed that the criminality of states had to be developed as a legal concept,<sup>58</sup> and the AIDP had already declared in 1926 its intention to create a two-track system of repression. The discussion about Kellogg-Briand was wide-ranging in its criticisms (some of which I enumerated above), though not much was decided other than the fact that they needed a clear definition of aggression. The controversy over whether there would be a public prosecutor was not

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<sup>57</sup> Union Interparlementaire, 1926, pp. 204–42, esp. pp. 217–18, see *supra* note 52.

<sup>58</sup> For Rappaport's position in favour of a type of international criminal law that would repress the actions of collectivities, not just individuals, in the interest of social defence, see Emil Stanislaus Rappaport, *Le problème du droit pénal interétatique* [The Problem of Inter-State Criminal Law], Warsaw, 1930, League of Nations Archive (Geneva), Brochure and Pamphlet Collection: Droit International-Criminal, Location: B 65/shelf 10, Box 4/folder 15, pamphlet #258.

settled; jurists pointed out that the 1928 criminal court statute did not include one, and British and US jurists, whose support the AIDP eventually hoped to obtain, did not support one. The issue, though, was never raised again in later AIDP committee meetings. More significant was the fact that Caloyanni was able to obtain the collaboration of the ILA's Secretary General, Wyndham Bewes, who attended the meeting in 1931 (but not 1933). He acted in a private capacity but affirmed it was possible to reconcile the differences between Anglo-American and continental European law. This mainly had a symbolic effect on the committee, which believed that its project would be more truly international with ILA participation.

In addition to Bewes's participation, the main event during the 1931 meeting was that Pella presented an extensive oral report, giving his vision of an international code.<sup>59</sup> Briefly, it would be based on three principles: the international code must specify precise definitions of crimes (upholding the principle of *nullum crimen sine lege*); it would have primacy over national law when they were in conflict; and it would apply when a violation was committed on the territory of a signatory or when a violation was directed against a signatory. (Thus, if the violator was from a country that had not signed the code, but the injured party was, the code would apply.) For the system of punishments, he proposed two options. Crimes specified in the international code, such as a head of state who declared an aggressive war, could be "assimilated" to a particular crime in a national code (such as treason), and the penalty for that crime would apply. The other option was that the drafters could take the most common punishments from national codes (be they warnings, fines or prison) and write them into the code using non-controversial language. The international criminal court would then use these as guidelines. On a practical level, the League would assign a particular state to administer the sentence, whether it was confinement in a special wing of a prison or civil confinement in a non-penitentiary-type institution. Pella also intended that the code would have a special section defining culpability when a defendant was following a legitimate authority, though he did not indicate how he might define a legal defence of superior orders. Finally, he cited a series of concepts from "social defence" theory – judicial stays, conditional

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<sup>59</sup> "Procès-Verbaux des travaux de la Commission chargée de la rédaction d'un projet de code pénal international [Minutes of the Work of the Committee Charged with Writing a Draft International Criminal Code. Meeting of 10 January 1931]", in *Revue internationale de droit pénal*, 1931, vol. 8, pp. 194–204.

liberty, pardons, defences under statutes of limitations – that would have to be worked out by the committee. However, the committee never debated these issues, so they were not included in the 1935 draft.

Pella in 1931 envisioned a second section of the code that would list the infractions applicable to states and individuals, just as he had done in 1925. He advanced two criteria for crimes that rose to the international level: they had to threaten international peace, and they could not be objectively adjudicated in a national court. As Pella told the committee,

[t]he experience of the repression of crimes committed during the Great War, the fact that the inter-Allied tribunals were not able to function because they were supposed to be excessively severe, the circumstance that the judgment of the Leipzig court was the object of rather serious criticism, all that reinforces the objections against an excessive indulgence of national jurisdictions and necessarily compels the creation of an international jurisdiction.<sup>60</sup>

As for specific infractions, he urged that the committee think creatively. “To make a complete list in this matter is more a question of imagination than a legal question”, he said, suggesting that the committee members should ponder the various possibilities that might lead to war or threaten international stability.<sup>61</sup> His own legal imagination naturally led him to the scenario of a head of state who declares a war (though interestingly he did not state that it had to be an illegal war) and a diplomat who abuses his privileges by working against the interests of a foreign state. Additionally, the code should cover terrorism and counterfeiting (both of which he had believed since the 1920s to be crimes that could disturb international relations), as well as disseminating pro-war propaganda and publishing documents that could “aggravate an international situation”.<sup>62</sup> Regarding violations of the laws of war, he primarily saw these as limits on the means of warfare that states would use during a policing action against an aggressor. He maintained that various types of violations, including the execution of hostages, the destruction of merchant marine ships and the destruction of populations by epidemic diseases (biological warfare), were all illegal under a state’s common law, so the committee should just draft a text that gave the international criminal court the com-

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<sup>60</sup> *Ibid.*, p. 200.

<sup>61</sup> *Ibid.*, p. 201.

<sup>62</sup> *Ibid.*

petence to apply the national law of the accused. According to one of his more controversial positions, states should not be able to give asylum to persons accused of political crimes when they were sought by the international criminal court. A crime such as counterfeiting had “exceptional gravity” and therefore could not be considered a political crime eligible for extradition,<sup>63</sup> a position he later took with terrorism. His fundamental argument was that under the League of Nations Covenant, states were supposed to respect the sovereignty and territorial integrity of other League members; therefore, they should not provide assistance or asylum to persons who intended to injure League members.<sup>64</sup>

His positions regarding the source of law for the punishments and the treatment of political crimes were the most controversial within the committee, especially for Roux (who was French) and Mercier (who was Swiss). Roux wanted the international code to specify the penalties rather than having the court assimilate them from national codes. Furthermore, Roux did not want the international criminal court to handle political crimes, arguing that this would politicise the court and make it unstable. Mercier thought the same:

It will be extremely dangerous to send acts considered political to the Permanent Court of International Justice<sup>65</sup> [...]. In the same way that a State does not want to meddle in the domestic questions of foreign states, likewise would the international Court not be able to take on the judgments of these questions without running the same risks.<sup>66</sup>

Mercier argued that above all states signed various extradition conventions with each other that defined which crimes were extraditable and which were not, and Pella’s interpretation of the League Covenant did not change that fact.<sup>67</sup>

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<sup>63</sup> Vespasien V. Pella, *La coopération des États dans la lutte contre le faux monnayage. Rapport et Projet de convention présentés à la Société des Nations* [The Co-operation of States in the Struggle against Counterfeiting. Report and Draft Convention Presented to the League of Nations], Editions A. Pedone, Paris, 1927, p. 13.

<sup>64</sup> Procès-Verbaux des travaux de la Commission chargée de la rédaction d’un projet de code pénal international [Meeting of 10 January 1931], 1931, pp. 217–20.

<sup>65</sup> The reader will recall that the AIDP’s 1928 statute created two chambers inside the Permanent Court, rather than creating a separate court.

<sup>66</sup> Procès-Verbaux des travaux de la Commission chargée de la rédaction d’un projet de code pénal international [Meeting of 10 January 1931], 1931, pp. 216, see *supra* note 59.

<sup>67</sup> *Ibid.*, p. 215.



Apparently there was no meeting in 1932, and when the committee met again on 10 January 1933, the only members who attended were Caloyanni, Rappaport, Givanovitch and Donnedieu de Vabres. Pella was ill, getting medical treatment in Vienna, while Roux was absent because his son-in-law had been in some type of serious accident. Strikingly, the AIDP's drafting project (which technically began in 1929, when Caloyanni first sent a questionnaire to the committee) had started as a highly utopian project which the members thought was realisable, given the "spirit of Geneva" and the fertile intellectual work that the jurists had been involved in during the 1920s. But at the start of 1933 the international situation was in crisis. The Great Depression had spread across Europe; the collapse of the banking system and the decline in international trade caused massive unemployment in the Western industrialised countries as well as severe plunges in agricultural prices in Eastern Europe. The League's collective security system had failed in 1931, as members refused to take action against Japan for invading the Chinese province of Manchuria. The Nazi party had grown from a fringe party in Germany to the party obtaining the largest number of seats in the German parliament in the summer of 1932; Hitler became Chancellor on 30 January 1933, a few weeks after the AIDP's 1933 meeting.

On 10 January Rappaport commented on the general situation without naming specifics, hoping against hope that the AIDP could propel the project in spite of what he called the "political disorder and legal disorder".

[T]he moment of our labours was unfavorable, the world finds itself in the presence of great difficulties of every kind; the general spirit, however, is not hostile to certain ideas of condemning certain acts that affect international peace; we must therefore carry out the work, pressing hard and above all not let others surpass us.<sup>68</sup>

He thought it was especially important to focus their work on the criminal repression of states, rather than individuals, first because individuals were already governed by domestic laws, and second because the League's Disarmament Conference had various plans on the table to sanction states that did not abide by terms to reduce their militaries and armaments. Caloyanni, though, stated that they had to start with a code for individuals

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<sup>68</sup> Commission de rédaction d'un projet concernant les infractions internationales et leur sanctions [Meeting of 10 January 1933], 1935, p. 345, see *supra* note 53.

first, since a code for states raised more obstacles. He noted that the Inter-Parliamentary Union, which had met in Geneva in March–April 1932, had decided to concentrate on individuals first, and being politicians, that group was in a better position to know “whether the work of interstate law was already ripe or not”.<sup>69</sup> Additionally, Caloyanni had learned in December 1932 that the ILA had agreed formally to collaborate with the AIDP, but it is unclear whether any meetings were held. Ultimately the AIDP committee agreed to engage in a general exchange of views at its next conference in Palermo in April 1933, then meet again the following year.<sup>70</sup>

Two years later, on 15 March 1935, Pella presented a report giving a sketch of the proposed world penal code.<sup>71</sup> Dubin speculates that Pella published it at this point because the next month, a special League committee was going to start working on a convention outlawing international terrorism, and Pella wanted to present an overall code to show how the repression of terrorism was supposed to fit into a broader international criminal jurisdiction.<sup>72</sup> This is possible. There is also the curious fact that the date Pella picked to sign the report (15 March 1935) was one day before Nazi Germany violated the terms of the Versailles Treaty by declaring general military conscription. His text was published in *Revue internationale de droit pénal* later that year, so he could have added that date at the end of his article later to make a symbolic point that his world system would have led to criminal charges against the Nazis.

The 1935 sketch used many of the same basic state and individual infractions that were in Pella’s 1925 report, indicating that the 10-year interval and the committee’s discussions had not changed the project significantly. For example, the crime of supporting armed bands that prepared or carried out an attack against a foreign state was in both documents; so was intervention into another state’s internal affairs, recruiting troops and building up armaments beyond limits specified by treaty, conducting military moves designed to demonstrate belligerence, menacing another state with ultimatums of war and counterfeiting another state’s

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<sup>69</sup> *Ibid.*, p. 347.

<sup>70</sup> *Ibid.*, p. 344.

<sup>71</sup> See “Plan d’un code répressif mondial. Rapport de M. Vespasien V. Pella” [Draft of a World Repressive Code. Report by Mr. Vespasien V. Pella], in *Revue internationale de droit pénal*, 1935, vol. 12, pp. 348–369.

<sup>72</sup> Dubin, 1991, p. 25, see *supra* note 16.

currency. His 1925 report had made “aggressive war” the very first crime in the list without defining it, but the 1935 sketch broke it down into separate pieces. A state could be indicted for a war declaration; invasion or attack with terrestrial, maritime or aerial forces; a naval blockade; or the aforementioned support for armed bands. The 1935 sketch included infractions that his 1925 report did not, namely prohibitions against chemical, incendiary and biological weapons, and terrorist infractions, such as attacks against foreign public officials and international transportation networks. The introduction of terrorism-type offences, an issue that the AIDP had been discussing since the late 1920s, became more urgent in the mid-1930s as a result of high-profile assassinations (one of which is discussed below). Importantly, Pella did not deal with the controversial issues raised during the AIDP meetings, such as the public prosecutor, the extradition of political crimes or the system of punishments.

Pella then mapped various state infractions to individual infractions, so a head of state or other person, for example, could be held criminally liable for ordering an invasion or a blockade. Likewise, an individual could be held liable for participating in an armed band that invaded another state. Diplomats could be held criminally liable if they misused their privileges to execute an attack against a state or “public international order”. There were also individual offences designed to repress pro-war propaganda, such as “spreading false documents or false news capable of compromising international relations”, and committing an “outrage” against a foreign state by accusing it of “manifestly inexact actions” designed to “provoke hatred or mistrust” against that state.<sup>73</sup> These infractions left a lot of latitude for interpretation and might easily conflict with liberal principles of free speech and free press. The penultimate infractions on the list were crimes committed during international armed conflict: “international military offences and infractions of common law committed by civilians or military personnel belonging to an occupying authority in occupied territory”. This language was taken directly from the AIDP’s 1928 criminal court statute. Although Pella had disparaged the laws of war in his 1925 book, *The Collective Criminality of States*, arguing that it was absurd to speak of the laws of war once war was turned into a crime,<sup>74</sup> he backed away from that position in 1931, arguing that the

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<sup>73</sup> Plan d’un code répressif mondial. Rapport de M. Vespasien V. Pella, 1935, p. 368, see *supra* note 71.

<sup>74</sup> Pella, 1925, pp. 10–11, 56–7, see *supra* note 35.

laws should govern the use of legitimate force, akin to the laws that govern a police officer who makes an arrest.<sup>75</sup>

The 1935 plan was a type of criminological international liberalism, utopian in nature. It contained the AIDP's earliest ideas about social defence on the international level but did not solve the question of political crimes, arrest and extradition that became central in the 1930s. As a sketch, the code was incomplete and not likely to get significant governmental support, especially as more violations of international law and treaties followed in the late 1930s. After the Second World War Pella wanted his draft to serve as a model for the International Law Commission's Draft Code of Offences against the Peace and Security of Mankind, though the Commission was actually charged with trying to create an international legal code based on the Nuremberg Judgment. That decision took as a given that an international tribunal could prosecute individuals for violations of the laws and customs of war and also tried to create individual criminal liability based on the Kellogg-Briand Pact. More controversial was the concept of conspiracy to prepare and wage crimes against the peace, a concept that was not contained in Pella's code and not discussed by the AIDP in the interwar period.

#### **15.6. A Conservative Transformation to Protect States against Counterfeiting and Terrorism**

During the same period that the AIDP was working on the world criminal code, its jurists turned to issues related to the internal security of states – counterfeiting and terrorism – stressing a more conservative ideology. The AIDP's involvement in these problems was a reaction to revisionism in Europe, meaning efforts by the losers of the First World War to overturn the Paris Peace Treaties and regain some of the territories that they had lost in Central and Eastern Europe. AIDP jurists also responded to domestic fears in their own countries about political assassinations and terrorist attacks committed by groups on the extreme left and right that received money and sanctuary from foreign governments. There were two specific criminal cases that exercised AIDP jurists: a 1925 plot by Hungarian nationalists (including a prominent Hungarian noble and members of the military's Cartographic Institute) to print and circulate millions of

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<sup>75</sup> Procès-Verbaux des travaux de la Commission chargée de la rédaction d'un projet de code pénal international [Meeting of 10 January 1931], 1931, p. 203, see *supra* note 59.

counterfeit French francs throughout Europe, and a 1934 plot in which a Croatian terrorist organisation assassinated the French Foreign Minister and King of Yugoslavia in Marseille, France.

Counterfeiting foreign currency had turned into a major problem in Europe after the First World War, first because refugees with the technology and know-how freely circulated around Europe, and second because certain ultra-nationalists (especially in Hungary) wanted to counterfeit the currency of states such as Czechoslovakia and France in order to weaken their financial systems. This was a real concern in the early to mid-1920s, when governments faced high debt, price inflation and devalued currency. In the Hungarian counterfeiting case, Hungarian nationalists intended to use the proceeds either to influence elections in Slovakia, which had been part of Hungary before the First World War, or to prepare an attack against Romania to recover Transylvania.<sup>76</sup> This threatened the system of diplomatic alliances that France had created in Eastern Europe after the First World War. Counterfeiting French currency threatened France itself, which experienced a serious currency devaluation and period of governmental instability in 1925–1926.<sup>77</sup> Many of the jurists in the AIDP were French or from its Eastern European allies, so they were extremely concerned that international counterfeiting was an attack against the borders established by the Paris Peace Treaties. From their perspective, when the Hungarian government finally put the counterfeiters on trial, the penalties for forging a foreign currency were not as stiff as counterfeiting the national currency, and the French government, whose currency had been forged, did not have legal standing in the case. The trial also raised the possibility that the perpetrators could claim they acted from patriotic motives (to recover Slovakia and Transylvania) and that therefore their crime was political and not eligible for extradition to France, should it wish to prosecute them.

In the 1934 Marseille assassinations, the plot was organised by a group of fascist Croatian separatists, the Ustaša, who since 1929 had bombed train lines between Austria and Yugoslavia and murdered pro-Yugoslav journalists and officials in order to weaken a Serbian centralist

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<sup>76</sup> David Petrucci, “Banknotes from the Underground: Counterfeiting and the International Order in Interwar Europe”, in *Journal of Contemporary History*, pre-published 2015, DOI: 10.1177/0022009415577003; Andor Klay, “Hungarian Counterfeit Francs: A Case of Post-World War I Political Sabotage”, in *Slavic Review*, 1974, vol. 33, no. 1, pp. 107–13.

<sup>77</sup> Petrucci, 2015, see *supra* note 76.

dictatorship and spark a Croatian separatist uprising.<sup>78</sup> Here the legal issues were intertwined with political ones. France had arrested several of the Ustaša operatives in Marseille (the actual assassin, a paid Macedonian terrorist, had been killed in the melee after the murders), but it could not obtain custody of several Ustaša leaders who were living in fascist Italy and Austria, because those countries were succouring the Ustaša as a way to destabilise Yugoslavia. Another problem was that the French police attempted to work with the Austrian and Hungarian police forces in its investigation, but since these police agencies had tolerated the presence of Ustaša on their territories, they were more interested in concealing information than helping.<sup>79</sup> Furthermore, Yugoslavia argued in the League of Nations that Hungary, striving to regain territories lost after the First World War, had actively supported the Ustaša, and Hungarian support for foreign armed groups should be viewed as a violation of the League Covenant. Overall, then, these were politically charged cases that brought questions of extradition, political asylum for so-called political crimes, police co-operation and state support for counterfeiting and terrorism to the fore.

The League of Nations became the forum for negotiating two conventions in response: the International Convention for the Suppression of Counterfeiting, a project begun in 1926 and completed in 1929, and the Convention for the Repression and Punishment of International Terrorism, negotiated between 1935 and 1937.<sup>80</sup> The counterfeiting convention required that states pass legislation that they would prosecute cases of both domestic and foreign counterfeiting and issue penalties with the same degree of severity, as well as fulfil extradition demands in accordance with their own national laws (which was not an absolute requirement

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<sup>78</sup> Bogdan Krizman, *Ante Pavelić i Ustaše [Ante Pavelić and the Ustaša]*, Globus, Zagreb, 1978, pp. 68–83; James J. Sadkovich, *Italian Support for Croatian Separatism, 1927–1937*, Garland, New York, 1987, pp. 125–9; Arnold Suppan, *Jugoslawien und Österreich 1918–1938. Bilaterale Aussenpolitik im europäischen Umfeld [Yugoslavia and Austria 1918–1938. Bilateral Foreign Politics in the European Environment]*, Verlag für Geschichte und Politik, Vienna, 1996, pp. 395–414; Jozo Tomasevich, *War and Revolution in Yugoslavia, 1941–1945: Occupation and Collaboration*, Stanford University Press, Stanford, CA, 2001, pp. 17–33, 49–61; Mario Jareb, *Ustaško-domobranski pokret: od nastanku do travnja 1941. godine [The Ustaša-Home Guard Movement: From Its Founding to April 1941]*, Školska knjiga, Zagreb, 2006, pp. 215–45, 303–43.

<sup>79</sup> Mark Lewis, “The Failure of the Austrian and Yugoslav Police to Repress the Croatian Ustaša in Austria, 1929–1934”, in *Austrian History Yearbook*, 2014, vol. 45, pp. 186–212.

<sup>80</sup> Dubin, 1991, see *supra* note 16.

to extradite).<sup>81</sup> The terrorism convention defined terrorism as assassination of public officials, destruction of public property or “any wilful act calculated to endanger the lives of members of the public”.<sup>82</sup> The convention only covered international actions, defined as acts in which perpetrators of one nationality carried them out in another country or when the perpetrators obtained refuge in another country. As in the counterfeiting convention, signatories were not absolutely required to extradite the accused, as extradition remained subject to a state’s own laws or practices.<sup>83</sup> The inclusion of this clause was supported by Britain, Denmark, Sweden and Switzerland, which did not want to limit their right to offer political asylum.<sup>84</sup>

The AIDP had input into these conventions because four of its key members, Carton de Wiart, Pella, Givanovitch and Simon Sasserath (a Belgian criminal lawyer attached to the Belgian appellate court) were involved in the negotiations. Pella was selected to be on special League committees that wrote the drafts of both conventions. In fact, he provided the initial draft of the counterfeiting convention,<sup>85</sup> while the initial draft of the terrorism convention came from the French government.<sup>86</sup> Carton de Wiart was the president of the committee that wrote the terrorism convention, while Pella, Sasserath and Givanovitch represented their respective states during the diplomatic negotiations that finalised the terrorism convention in 1937. Thus, several main figures from the AIDP pressed their ideas about unifying criminal jurisdictions and eliminating “political crimes” from the list of non-extraditable crimes. Furthermore, Pella pro-

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<sup>81</sup> Ernestine Fitz-Maurice, “Convention for the Suppression of Counterfeiting Currency”, in *American Journal of International Law*, 1932, vol. 26, no. 3, pp. 541–46.

<sup>82</sup> League of Nations, Convention for the Prevention and Punishment of Terrorism, Art. 2(3), in *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations, Geneva, 1938, C.94.M.47.1938.V., p. 5.

<sup>83</sup> Article 8(4), in *ibid.*, p. 7.

<sup>84</sup> League of Nations, “Records of the Seventeenth Ordinary Session of the Assembly, Meetings of the Committees, Minutes of the First Committee, Constitutional and Legal Questions”, in *Official Journal Special Supplement No. 156*, Geneva, 1936, p. 47.

<sup>85</sup> Pella, 1927, pp. 125–31, see *supra* note 63.

<sup>86</sup> League of Nations, *Bases pour la conclusion d’un accord international en vue de la répression de crimes commis dans un but de terrorisme politique* [Bases for the Conclusion of an International Agreement Regarding the Repression of Crimes Committed with the Goal of Political Terrorism], 10 December 1934, Geneva, C.542.M.249.1934.VII, in v. 1380 (Council and Member States Documents 1934.C.483.M.210 to C.583.M.274), League of Nations Archives (Geneva).

pelled the idea that the terrorism convention should also contain a statute for an international criminal court, which would serve as a third option for states: they could prosecute accused terrorists in their own courts, extradite them to other adherents to the convention, or send them to the international criminal court if they feared that the trials in another state would not be fair, or if they did not want to try the person at home, perhaps because the perpetrator's motives were supported by the public. However, the concept of the court was still extremely controversial and was ultimately made the subject of a separate convention, which was only signed by twelve states and never implemented.<sup>87</sup> Britain strongly opposed the court, arguing that national courts were more efficient, and "harm was done to international institutions generally by the establishment of an institution not supported by the general assent of public opinion".<sup>88</sup> Pella argued, however, that a state would still retain its right to use its own courts to prosecute cases, as well as to decide whether an offence was political. Still, there was a catch: if the state's jury found the offence political and hence non-extraditable, "the country was still responsible from an international point of view", Pella stated. "What was then the solution? Only one solution remained – namely, to refer the case to the international criminal court".<sup>89</sup> The bargain, then, was that states would relinquish some of their sovereignty in favour of expanded international responsibility, which, according to Pella, would maintain international solidarity and peace.

The AIDP maintained that the counterfeiting and terrorism conventions were progressive developments that ensured public security (social defence) and promoted more efficient police and judicial communication across borders – concepts first included in the 1910 International Convention for the Suppression of the White Slave Traffic and the 1923 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. However, liberal organisations opposed the terror-

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<sup>87</sup> For the text of both conventions, see League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, Geneva, 1938, C.94.M.47.1938.V., pp. 4–33. By 1938 the criminal court convention was signed by Belgium, Bulgaria, Cuba, Spain, France, Greece, Monaco, the Netherlands, Romania, Czechoslovakia, the USSR, and Yugoslavia.

<sup>88</sup> League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, p. 54, see *supra* note 82.

<sup>89</sup> *Ibid.*, p. 69.



ism convention because they feared it would give excessive repressive power to authoritarian states in the 1930s. This was indeed a legitimate concern, since both fascist Italy and the Soviet Union participated in the special League committee that wrote the terrorism convention, and both aggressively imprisoned political dissidents in the 1920s and 1930s.<sup>90</sup> The Howard League for Penal Reform, an anti-death penalty organisation in Britain that worked with the AIDP in the 1920s and 1930s to create standard minimum rules for the treatment of prisoners, urged the British government in 1935 to

take the lead at Geneva in proposing a Convention on the lines of the Standard Minimum Rules which have been prepared by the International Penal and Penitentiary Commission and twice circulated to Governments by resolution of the Assembly. Such a convention should apply to the treatment of all persons deprived of their liberty for any offence, suspected or proved, political or non-political, and to all places where such prisoners are detained, whether police cells, prisons, concentration camps or other places of detention.<sup>91</sup>

The Howard League also stated that even if the terrorism convention were passed, some states would refuse to extradite suspects, which would still cause international friction, the very problem that the convention aimed to solve.

Emily Balch, a feminist-pacifist who helped found the Women's International League for Peace and Freedom ('WILPF'), presented a different set of liberal concerns. The WILPF was a radical anti-war organisation that grew out of the International Conference of Women at The Hague, held in 1915. In 1935 Balch wrote to Mussolini and the Secretary-General of the League of Nations to recommend that the terrorism convention frame

the suggested provisions in such a way that they cannot be misused to prevent legitimate movements of political protest. It appears to the W.I.L.P.F. important to do nothing that might increase the present tendency of governments to as-

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<sup>90</sup> On the origin of the Soviet camp system, see Anne Applebaum, *Gulag: A History*, Anchor Books, New York, 2004, pp. 3–57.

<sup>91</sup> Craven to Secretary of State for Foreign Affairs, 27 March 1935, League of Nations Archives (Geneva), R. 3758/15085/15105 ('LNA').

sume that the maintenance of order and stability is possible only under a regime of suppression of liberty and normal human rights.<sup>92</sup>

The British government also opposed the convention on liberal grounds, expressing opposition to the requirement for extradition as well as a proposal to criminalise “private incitement” to commit terrorist acts. According to British delegate Sir John Fischer Williams, this “had an air of prying into private life and confidential communications. Moreover, private incitement was extremely difficult to prove, and any attempt to prove it probably meant using tainted evidence”.<sup>93</sup> Pella’s solution to this question was to drop the word “private” and only criminalise incitement if it was successful.<sup>94</sup>

The terrorism convention was signed by a number of dictatorial Eastern European, Caribbean and Latin American states,<sup>95</sup> suggesting that they saw value in an international system that would require the prosecution or extradition of persons who attacked their government officials and infrastructure. Advocates of strong state security found much to like in a system where all signatories would have to criminalise terrorist conspiracies and tighten their passport regulations.

### 15.7. Criticism of Authoritarian Systems

Those types of measures, as well as eliminating asylum for political criminals and creating an international legal system that states of all ideological stripes could take advantage of, may indeed seem illiberal. Yet during the same period of the 1930s, Donnedieu de Vabres and Pella, two of the AIDP’s leading lights, criticised authoritarian measures in several settings. Nazi Germany in 1933 began requiring the sterilisation of the “hereditarily ill” according to a new law, and while this did not originally cover criminals or persons the Reich defined as “asocial”, special health

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<sup>92</sup> Balch to the Committee for the International Repression of Terrorism, the Secretary-General, and Mussolini, 30 April 1935, LNA/R. 3758/15085/17788.

<sup>93</sup> League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, p. 90, see *supra* note 82.

<sup>94</sup> *Ibid.*, p. 91.

<sup>95</sup> By 1938 the anti-terrorism convention was signed by Albania, the Argentine Republic, Belgium, India, Bulgaria, Cuba, the Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, Norway, the Netherlands, Peru, Romania, Czechoslovakia, Turkey, the Soviet Union, Venezuela and Yugoslavia.

courts invented a loophole to include them.<sup>96</sup> Donnedieu de Vabres, however, opposed this measure for France. In a 1935 article that he published in the IKV's German journal, he took several liberal positions: the sterilisation of criminals should not be included in a new French penal code (despite the fact that some French medical societies wanted to include it); the mentally insane should not be given terms of confinement of an indeterminate length; and a doctor who hurt a patient due to negligence should be held criminally liable.<sup>97</sup> He opposed sterilisation because, he wrote, American and German use had not been proven effective in reducing crime, the procedure was not innocuous "from a physiological and psychological point of view, [and] its necessity in the struggle against hereditary criminality evoke too many doubts".<sup>98</sup>

Pella was strongly opposed to the unlimited detention of political prisoners. As he told the League Assembly in 1935, while the League was considering whether it should pass a standard set of rules for the treatment of prisoners (a project that had been blocked by the French and German governments since 1930),<sup>99</sup>

[t]o deprive individuals of their liberty without informing them of the reasons for such action, without enabling them to plead not guilty, to leave them to perish morally and physically in prison cells, and even to forget their existence, was neither humanitarian nor was it elementary criminal justice.<sup>100</sup>

He also spoke out at the same time about the need for standard rules for prisoners to prevent abuses. At the time, violence was used to extract confessions from prisoners: female detainees were supervised by men, not women; prisoners were overworked and undernourished. He strongly defended the right to defend oneself against criminal charges:

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<sup>96</sup> Michael Burleigh and Wolfgang Ippermann, *The Racial State: Germany 1933–1945*, Cambridge University Press, New York, 1991, pp. 135–40, 167–68.

<sup>97</sup> H. Donnedieu de Vabres, "Les Médecins et la réforme du Code pénal", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1935, vol. 55, pp. 354–83.

<sup>98</sup> *Ibid.*, p. 365.

<sup>99</sup> Dubin, 1991, pp. 28–29, see *supra* note 16.

<sup>100</sup> See Pella's statement in Penal and Penitentiary Questions: Report of the Fifth Committee to the Assembly, in League of Nations, *Official Journal. Special Supplement No. 142. Records of the Sixteenth Ordinary Session of the Assembly. Meetings of the Committees. Minutes of the Fifth Committee (Humanitarian and General Questions)*, Geneva, 1935, p. 51.

In any social organisation, whether based on liberalism, regarding the individual or mankind as the starting-point of its institutions, or whether it favoured the conception of a national state or simply the organic conception of the people, one fact was certain- namely, that, unless minimum guarantees were set up for the exercise of the right of defence, the idea of criminal justice was inconceivable.<sup>101</sup>

Here he was referring to the three dominant political ideologies at the time: the liberal state, based on individual freedom and rights; the fascist state, based on the dominance of the nation-state; and the *völkisch* Nazi state, based on the “organic” community of the people.

Donnedieu de Vabres took similar positions when he gave a series of lectures about the criminal policies of authoritarian states (fascist Italy, Nazi Germany and the Soviet Union) at the University of Damascus in 1937, which he rewrote and published in 1938. These three penal systems were anti-liberal he said, and all their underlying ideologies had rejected the nineteenth-century liberal state. He criticised the Italian system for increasing the types of political crimes that were prosecuted, which was based on the fascist Italian concept that the individual was insignificant and had to serve the state. He noted that the Nazi penal system did not judge people according to their objective acts but also according to their psychological intentions, and he further noted that the Nazis had legalised the forced sterilisation of socially undesirables and the mentally ill, all in the name of protecting the German race. The Soviet system, he argued, rejected “bourgeois” liberalism in the name of “revolutionary legality”, so criminal proceedings were used to attack class enemies and protect the nationalisation of property. He roundly defended the French system of criminal justice that emerged under the constitutional phase of the French Revolution, stating that it had introduced three important concepts to criminal law: equality before the law, the use of jury trials and the principle that prosecutions had to be based on positive law.<sup>102</sup> Donnedieu de Vabres and Pella in the 1930s, therefore, clearly stated their opposition to penal systems that denied individual rights.

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<sup>101</sup> *Ibid.*

<sup>102</sup> Henri Donnedieu de Vabres, *La Crise moderne du droit pénal. La Politique criminelle des États autoritaires. Conférences faites à l'Université syrienne de Damas au mois de novembre 1937* [The Modern Crisis of Criminal Law. The Criminal Policy of Authoritarian States. Conferences Held at the Syrian University of Damascus in November 1937], Librairie du Recueil Sirey, Paris, 1938, pp. 3–19.

### 15.8. Rapprochement with Nazi Jurists

Yet the history of the International Bureau for the Unification of Penal Law, founded as an offshoot of the AIDP in 1928 and led by Pella and Carton de Wiart, raises the question of whether the organisation failed to defend those principles in actuality. In the 1930s the Bureau drew closer to Nazi jurists and wanted to work with them to develop common definitions of political crimes and improve transborder extradition procedures. The Bureau was founded in 1928 at a conference for the unification of criminal law held in Rome, where the AIDP member and President of the Court of Cassation in fascist Italy, Mariano D'Amelio, proposed the creation of the Bureau to prepare for future conferences to discuss unifying criminal legislation.<sup>103</sup> Initially the Bureau comprised mainly AIDP jurists. It intended to prepare draft criminal laws that could serve as models for states; the underlying goal was to unify states' criminal codes in the belief that this would allow more effective repression of criminality around the world. In September 1932 the Bureau reorganised after the League got involved in reforming penitentiaries and discussed minimum conditions for prisoners. The Bureau now intended to write legislative proposals based on resolutions passed by various penal reform congresses, including those held by the AIDP and the most prominent non-government organisation in this area, the International Penal and Penitentiary Commission.<sup>104</sup> In essence, it was to serve as a lobbying group so that criminological and penal reform organisations could have greater impact in the League.<sup>105</sup>

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<sup>103</sup> Bureau International pour l'Unification du Droit Pénal, *Xe Anniversaire, 1928–1938* [International Bureau for the Unification of Penal Law, Tenth Anniversarary, 1928–1938], Editions A. Pedone, Paris, 1938, p. 6. Pella also mentions he established contact with the German jurists in a transcript from the Bureau's 1938 Congress in The Hague. See Assemblée générale, Bureau International pour l'Unification du Droit Pénal [General Assembly, International Bureau for the Unification of Penal Law], 27 December 1938, in LNA/3754/Jacket No. 2, 36272/5218, p. 8.

<sup>104</sup> Martina Henze, "Transnational Cooperation and Criminal Policy: The Prison Reform Movement, 1820s–1950s", in Davide Rodogno, Bernhard Stuck and Jakob Vogel (eds.), *Shaping the Transnational Sphere: Experts, Networks and Issues from the 1840s to the 1930s*, Berghahn, New York, 2015, pp. 203–6.

<sup>105</sup> Ernst Delaquais, "Internationale Zusammenarbeit auf dem Gebiete des Strafrechts" [International Co-operation in the Sphere of Penal Law], in *Schweizerische Zeitschrift für Strafrecht* [Swiss Journal for Penal Law], 1932, vol. 4, p. 414, in League of Nations Archive (Geneva), Brochure and Pamphlet Collection: Droit International- Criminal, Location: B 65/shelf 10, Box 4/folder 15, pamphlet #252.

The Bureau's executive committee was expanded in 1932 to include AIDP jurists (including D'Amelio, Roux, Rappaport, Givanovitch and Caloyanni) and key jurists from the German *Landesgruppe* of the IKV, Eduard Kohlrausch (Rector of Berlin University), Ernst Delaquis (Hamburg University), and Graf Wenzel von Gleispach (University of Vienna).<sup>106</sup> Von Gleispach supported Nazi ideology, while Delaquis, who left Germany in 1934, probably did not, though reportedly never took a public stand against it.<sup>107</sup> In fact, Kohlrausch and Delaquis, along with 15 other jurists, signed a statement on 10 June 1933, issued by the German *Landesgruppe* of the IKV, pledging that the "centralisation of political thought and will into a unified state concept of National Socialism has advanced the possibility of a systematic and effective struggle against crime, as the German *Landesgruppe* of the IKV has authoritatively demanded for decades".<sup>108</sup> According to the rest of the statement, they welcomed the fact that under the Nazi system the judge would employ strong punishment on behalf of the state and the consciousness of the people. State power would be able to pursue the "ruthless eradication" of career and professional criminals. The group stated this philosophy would totally vanquish "useless" efforts to rehabilitate people, instead imposing work as a way to make criminals conscious of their responsibility "to the people" and win them back over to the racial community (*Volksgemeinschaft*.) The IKV considered the establishment of a new German criminal code in accordance with these goals to be its foremost task.<sup>109</sup>

One can obtain further insight into the Nazi position on extradition and asylum from an article that von Gleispach wrote in 1935. He explained that Nazi criminal law asserted extraterritorial jurisdiction over German citizens, even if they committed an action abroad that was not considered a crime there but was considered to be one in Germany. He attacked the liberal concept of giving a person asylum for a political

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<sup>106</sup> Letter to the Secretary-General of the League of Nations from the Executive Committee of the International Bureau for the Unification of Penal Law, 28 September 1932, Annex 1, League of Nations, *Official Journal. Special Supplement No. 108. Records of the Thirteenth Ordinary Session of the Assembly. Minutes of the Fifth Committee*, Geneva, 1932, pp. 39–40.

<sup>107</sup> Henze, 2015, p. 208, see *supra* note 104.

<sup>108</sup> "Der Vorstand der deutschen Landesgruppe der Internationalen Kriminalistischen Vereinigung" [The Board of Directors of the German Group of the International Union of Penal Law], in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1933, vol. 52, p. 347.

<sup>109</sup> *Ibid.*

crime, arguing that asylum should be eliminated. “The political offence, which Liberalism indeed allows as a foremost exception, is the worst and most dishonourable crime, because it injures the highest duty of the German, the duty to remain true to his *Volk*”.<sup>110</sup> He stated that future extradition treaties would have to work within the framework of German extradition laws, and it appeared he expected that other states would extradite Reich citizens as well as foreigners back to Germany.

During the 1930s Pella gradually increased contacts between the Bureau and the Nazi legal bureaucracy.<sup>111</sup> He had already established relationships with German jurists in 1932, but he went further in 1935, meeting with senior members of the Reich Ministry of Justice, including Roland Freisler, a radical Nazi who was put in charge of the Reich’s criminal law departments in order to extend the death penalty and impose more rigorous criminal law procedures. Apparently Pella believed he could extend the Bureau’s work to make it more universal, but this seems extremely illusory when dealing with the Reich, which already had 27,000 political prisoners in July 1933<sup>112</sup> and then instituted the Nuremberg racial laws in 1935. It is possible that Pella was taken in by the idea, held by the Reich Justice Ministry, that it intended to pursue a complete reform of the German penal code. But this turned out to run counter to what the Nazi political leadership preferred – the exercise of power to protect the state and “racial community” without being hampered by laws and procedures.<sup>113</sup>

In March 1938 a Reich ministerial director in the Justice Ministry, Leopold Schäfer, whom Pella had met several years before, wrote him to ask whether Germany could join the Bureau and sit on the executive board. The Germans were possibly interested in getting control of interna-

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<sup>110</sup> Wenzel Graf Gleispach, “Das internationale Strafrecht nach dem deutschen Strafgesetzentwurf” [International Criminal Law According to the Proposed German Criminal Code], in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1935, vol. 55, p. 404.

<sup>111</sup> The general outline of the events leading to the entrance of Germany into the Bureau comes from a speech Pella made at the Bureau’s conference in December 1938 in The Hague. See LNA/3754/Jacket No. 2, 36272/5218, pp. 8–11.

<sup>112</sup> Heinrich August Winkler, *Germany: The Long Road West*, vol. 2: 1933–1990, trans. Alexander J. Sager, Oxford University Press, New York, 2007, p. 12.

<sup>113</sup> Diemut Majer, “Non-Germans” under the Third Reich: *The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939–45*, trans. Peter Thomas Hill, Edward Vance Humphrey and Brian Levin, Johns Hopkins University Press, Baltimore, 2003, pp. 325–28.

tional organisations involved in criminal law and policing; they pursued this goal in 1938 with the International Criminal Police Commission, an international organisation in which national police bureaus exchanged information about criminals through a central office in Vienna.<sup>114</sup> The Bureau's executive committee agreed in March 1938 to allow Germany to join and gave Schäfer a vice presidency. Shockingly, the Bureau was prepared to collaborate fully with the Germans at the Bureau's conference in The Hague, held in December 1938. By this point, the Nazi government had annexed Austria, seized the Sudetenland and had co-ordinated the destruction of hundreds of synagogues and Jewish businesses during *Kristallnacht* in November 1938. On the one hand, there do not seem to have been any real decisions taken by the Bureau which involved the Nazis – a yearly conference, scheduled for Brussels in 1939, was cancelled due to the war.<sup>115</sup> On the other, the willingness to work with Nazi jurists reflects a complete lack of judgment on the part of the AIDP jurists involved in the Bureau, if they believed that the pursuit of universality could include such extremists. It certainly must go in the column of events reflecting the jurists' conservative, pro-state security ideology during the 1930s. It corresponds to a point that Radzinowicz had made in his study of the IKV: social defence, protective custody and the discretion of the judge, when pushed to the limit, were extremely dangerous.<sup>116</sup>

### **15.9. The AIDP's Position on Minority Rights in the Interwar Period**

The final pre-Second World War issue that weighs on the question of whether the AIDP was liberal or conservative was its position on minority rights and the creation of international criminal laws intended to prevent attacks against them, an issue that went right to the heart of the sovereignty of the modern nation-state. The AIDP took no official position on this

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<sup>114</sup> Cyrille Fijnaut, "The International Criminal Police Commission and the Fight Against Communism, 1923–1945", in Mark Mazower (ed.), *The Policing of Politics in the Twentieth Century: Historical Perspectives*, Berghahn Books, Providence, RI, 1997, pp. 105–28.

<sup>115</sup> "Unification du Droit pénal, Bruxelles, 27–30 décembre 1939" [Unification of Penal Law, Brussels, 27–30 December 1939], LNA/3754/38570/5218; "Compte-rendu de Mission Par Emile Giraud. Réunion du Bureau International pour l'Unification du Droit Pénal à Paris les 27 et 28 décembre 1938" [Summary of Mission by Emile Giraud. Meeting of the International Bureau for the Unification of Penal Law in Paris, 27 and 28 December 1938], 27 March 1939, LNA/3754/Jacket No. 1, 36272/5218.

<sup>116</sup> Radzinowicz, 1991, p. 91, see *supra* note 13.



issue until 1946–1947, though Donnedieu de Vabres had described the Nazis’ racial philosophy and criminal law system in detail in his 1937 Damascus lectures.<sup>117</sup> But officially, in its conferences and resolutions, the AIDP had not drawn from the lessons of the Armenian massacres of 1915–1916 when building new types of international criminal laws in the interwar period. It had not taken notice of pogroms against Jews in Ukraine and Poland at the end of the First World War, or similar events in Romania and Poland during the 1930s, even though two of its main jurists, Pella and Rappaport, were from there.

AIDP jurists had taken various intellectual positions on whether an international criminal court should have jurisdiction over “crimes against humanity”, a concept that first appeared in an Allied note to the Ottoman government, demanding a halt to the massacre of Armenian Christians in 1915. Saldaña in 1924 had proposed that massacres of races were “attacks on humanity” and collective social crimes. They should therefore fall under the jurisdiction of an international criminal court.<sup>118</sup> Donnedieu de Vabres in 1924 was uncomfortable with the idea, writing: “But individual responsibility in play would hardly seem reconcilable to us with the necessary respect for the independence and international sovereignty of States”.<sup>119</sup> In his view, individuals could not be held criminally liable under international law, but states could be held criminally liable for aggression. Pella, however, supported the idea that the extermination of races could be considered an international crime incurring both state and individual liability. In his 1925 book outlining his ideas for an international criminal court, he stated that international repression should not interfere with the state’s internal government in principle, but when the state fails to respect the life and liberty of its citizens, as in the case of massacring races, intervention is justified.<sup>120</sup> Still, this issue was never the subject of an AIDP resolution. During discussions in 1930 about drafting the international penal code, Pella recommended that “attempts to denationalise the inhabitants of an occupied territory” (a concept mentioned in memos

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<sup>117</sup> Donnedieu de Vabres, 1938, pp. 76–92, see *supra* note 102.

<sup>118</sup> Quintiliano Saldaña, *La défense sociale universelle, conférence donnée à la Faculté de droit de l’Université de Paris le 29 mars 1924* [Universal Social Defence, Meeting Held at the Law Department of the University of Paris on 29 March 1924], Cahors (Institut d’études hispaniques de l’Université de Paris), 1924, p. 24.

<sup>119</sup> Donnedieu de Vabres, 1924, p. 184, see *supra* note 35.

<sup>120</sup> Pella, 1925, pp. 145–46, see *supra* note 35.

to the Paris Peace Conference in 1919)<sup>121</sup> be included in the list of state crimes, but this did not appear in his 1935 version.<sup>122</sup>

The idea of an international criminal law to protect groups against attacks organised or condoned by their own government (and not merely by an occupying army) only emerged from the margins of the movement, and it did not become integral to it. In 1933, during a period when the League of Nations' supervision of the Minorities Treaties was breaking down, and an extreme right-wing nationalist party in Poland organised pogroms,<sup>123</sup> a Polish-Jewish prosecutor named Raphael Lemkin submitted a paper to the International Bureau for the Unification of Criminal Law's conference in 1933, to be held in Madrid. Lemkin had participated in the Bureau's debates about various definitions of terrorism (whether it was an international crime because it caused a common danger or whether it was a crime against the law of nations because its effects exceeded the locus where the offence occurred).<sup>124</sup> In 1933 he proposed that just like interna-

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<sup>121</sup> “Mémoire de la délégation serbe déposé le 24 février 1919. Rapport de la Commission Interalliée sur les violations des Conventions de la Haye et du droit international en général commises de 1915 à 1918 par les Bulgares en Serbie occupée” [Memo of the Serbian Delegation Submitted 24 February 1919. Report of the Inter-allied Commission on the Violations of the Hague Conventions and of International Law Generally Committed from 1915 to 1918 by the Bulgarians in Occupied Serbia]; “Mémoire de la délégation hellénique déposé le 26 février 1919. Note sur les crimes commis par les Bulgares, les Turcs et les Allemands contre les populations helléniques” [Memo of the Greek Delegation Submitted 26 February 1919. Note on the Crimes Committed by the Bulgarians, Turks, and Germans against the Greek Populations]; “Mémoire de la délégation nationale arménienne déposé par la délégation hellénique le 13 mars 1919. Note sur les auteurs responsables des massacres des Arméniens” [Memo of the Armenian National Delegation Submitted by the Greek Delegation on 13 March 1919. Note on the Authors Responsible for the Massacres of Armenians]; in Albert de Lapradelle (ed.), *La Documentation Internationale, La Paix de Versailles. Responsabilités des auteurs de la guerre et sanctions* [International Documentation, The Peace of Versailles. Responsibilities of the Authors of the War and Penalties], Paris, Les Éditions Internationales, 1930, vol. 3, pp. 95–136, 223–25.

<sup>122</sup> Procès-Verbaux de la Commission chargée de la rédaction d'un projet de code répressif international [Meetings of 11 and 13 January 1930], 1930, p. 301, see *supra* note 52.

<sup>123</sup> Fink, 2004, pp. 337–343, see *supra* note 7; Ivan T. Berend, *Decades of Crisis: Central and Eastern Europe before World War II*, University of California Press, Berkeley, 1998, p. 315.

<sup>124</sup> Raphael Lemkin, *Faut-il créer un nouveau délit de droit des gens, nommé terrorisme?, Rapport spécial présenté à la Ve Conférence pour l'Unification de Droit Pénal à Madrid* [Is It Necessary to Create a New Offence against the Law of Nations Called Terrorism? Special Report Presented at the Fifth Conference for the Unification of Penal Law at Madrid], Imprinta de Galo Saex, Madrid, 1933, pp. 6–7.

tional terrorism, “acts of barbarism”, defined as massacres, pogroms or collective cruelties against women and children, systematically organised against a “certain collectivity”, were crimes against the law of nations that states should repress, wherever they occur. While acts of terrorism, he said, disrupt international relations, “acts of barbarism” shock the conscience of all civilised humanity”.<sup>125</sup> Therefore, these acts should be prosecuted by all states, in the same way that international conventions had called for the prosecution of slave traders, drug traffickers, and “white slave” traders. The concept of “acts of barbarism” was Lemkin’s early formulation of the concept of genocide, a problem which had exercised him since his youth after the First World War, but which he only defined with the new word genocide in 1944.<sup>126</sup> However, for anti-Semitic reasons, the Polish government denied giving Lemkin a passport to travel to Madrid to present his paper, so his concept was not discussed by the Bureau.<sup>127</sup> After 1933 the Bureau and the AIDP worked on the terrorism convention, the definition of political offences, ways to improve police and judicial requests for information about criminals in other states, and domestic laws that states could use to repress pro-war propaganda. This shows that in the international arena, their dominant concerns were the prevention of aggressive war and state security against criminals, not the protection of minorities. Thus, there was a major blind spot in the work of these legal organisations in the interwar era.

#### **15.10. Inactivity during the Second World War and the Renewed Call for an International Criminal Jurisdiction after the War**

The AIDP became inactive during the Second World War, partly because communication with cities under Nazi occupation was virtually impossible, and war zones made travel to conferences unthinkable. Certain AIDP

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<sup>125</sup> *Ibid.*, pp. 15–16.

<sup>126</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government: Proposals for Redress*, Carnegie Endowment for International Peace, Washington, DC, 1944, p. 79.

<sup>127</sup> Donna-Lee Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin*, Yale University Press, New Haven, CT, 2013, p. 23. Lemkin claimed in his autobiography that his proposal was tabled; in fact, it was just never discussed. See Luis Jiménez de Asúa, Vespasien Pella and Manuel López-Rey Arroyo (eds.), *Ve Conférence internationale pour l’unification du droit pénal: actes de la Conférence Madrid, 14–20 octobre 1933* [Fifth International Conference for the Unification of Penal Law, Records of the Madrid Conference, 14–20 October 1933], Editions A. Pedone, Paris, 1935.

jurists because refugees; others lost family members in the war or became ill.<sup>128</sup> When the war ended in 1945 and the AIDP began publishing its journal again in 1946, the group asserted that it had stopped working during the war as an act of refusal. “It is voluntary that [the Association] had stopped during these years of mourning where the dignity of man and the respect for humanity were unknown and outrageously violated”, Roux stated in an editorial appearing in the AIDP’s first post-war journal. “Although it had been solicited many times, it constantly refused to give a barbarous conqueror the support of its reputation and its prestige in the world of jurists”. Now in 1946, he said, the AIDP intended to reassert itself inside and outside Europe “in the same spirit of enlightened liberalism which, before this war, had earned it the adhesion of a very large number of criminalists”.<sup>129</sup> The reference to liberalism was true in certain respects – the attempt to lessen severe punishment with probation and the support for a defendant’s right to a fair trial. But in the realm of international criminal law, enlightened liberalism applied more to the AIDP’s work to oppose aggressive war in the 1920s than to its advocacy of the terrorism convention in the 1930s or to Pella’s overtures to Nazi jurists in 1938.

The AIDP’s non-existence during the war meant that it had not been a centre of intellectual resistance to fascism, nor had it collected evidence of war crimes, as other legal organisations did. In 1944–1945 it did not directly influence governments to hold post-war trials (as the United

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<sup>128</sup> Rappaport was held captive in Warsaw, which was destroyed by the Germans. After the war he fled to Łódź, where Poland’s Supreme Court was transferred. Simon Sasserath, who headed the Belgian national group of the AIDP, had lost a son during the war, while Roux had lost a daughter. Caloyanni at the end of 1945 was recovering from an illness. Donnedieu de Vabres’ son-in-law, who was in the French Resistance, was killed in 1944, while Donnedieu de Vabres himself remained inside Vichy France. Lemkin fled Poland in October 1939 and went to Lithuania, Latvia, Sweden, and then the US in 1941. Pella remained a Romanian diplomat in Switzerland until October 1944 and then stayed in the country through 1946. See Henri Donnedieu de Vabres to Lemkin, 28 December 1945, Raphael Lemkin Collection, P-154, Box 1/Folder 18, Collection of the American Jewish History Society, Newton Center, MA, and New York, NY; Emil Stanisław Rappaport, “Vingt ans après”, in *Revue internationale de droit pénal*, 1946, nos. 1–2, pp. 4–5; “Procès-verbal de la réunion de l’AIDP siège du Tribunal Militaire International (Nuremberg) 18 mai 1946” [Minutes of the Meeting of the AIDP sitting at the International Military Tribunal (Nuremberg) 18 May 1946], in *Revue internationale de droit pénal*, 2002, vol. 73, no. 1–2, p. 322; Frieze, 2013, pp. 29, 60, 62–3, 79, see *supra* note 127; Lewis, 2014, pp. 193–4, see *supra* note 2.

<sup>129</sup> J.-A. Roux, “Editorial”, in *Revue internationale de droit pénal*, 1946, nos. 1–2, pp. 1–2.

Nations War Crimes Commission did), nor did its jurists advise the four victorious Allied powers that negotiated the London Agreement and Nuremberg Charter in 1945.<sup>130</sup> Thus, it would be difficult to argue that the AIDP's 1928 court statute or its 1935 draft penal code influenced the victor powers to stage a post-war international tribunal for alleged war criminals whose crimes extended across multiple countries. The basic concept of an international trial in which Nazi government leaders and chief members of the SA, SS and Gestapo would be tried for "conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violations of the laws of War" was an American plan invented by Murray Bernays, the chief of the US War Department's Special Projects Office.<sup>131</sup> The concept of "crimes against the peace" came from Aron Trainin, a Soviet professor of criminal law; however, his 1944 work *The Criminal Responsibility of the Hitlerites* seemed to borrow many of the component crimes of aggression that the AIDP had developed in the 1930s.<sup>132</sup> The term "crimes against humanity", used at trial to denote systematic racial and religious persecution and extermination, was suggested by Hersch Lauterpacht, the British international law scholar.<sup>133</sup> Moreover, the court's procedure, using elements of both the continental system (practised by France and the Soviet Union) and the Anglo-American system, was not foreseen by any AIDP plan.<sup>134</sup>

The Nuremberg trial, which opened in November 1945, elevated the importance of British, American and Soviet legal principles (and politics) in an international proceeding in ways that the AIDP had not foreseen in the interwar period, since its concepts were largely continental European, especially coming from the Latin/Roman tradition. Still, the

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<sup>130</sup> On the role of the United Nations War Crimes Commission, see Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, NC, 1998. The French delegate to the UNWCC, André Gros, played a leading role in advising the French government during the Nuremberg Charter negotiations; see Tusa and Tusa, 1986, pp. 74, 76–77, see *supra* note 1.

<sup>131</sup> Quoted in Bradley F. Smith, *The Road to Nuremberg*, Basic Books, New York, 1981, pp. 50–53.

<sup>132</sup> Hirsch, 2008, pp. 706–8, see *supra* note 1.

<sup>133</sup> Tusa and Tusa, 1986, p. 87, see *supra* note 1.

<sup>134</sup> For the Soviet perspective on this hybrid, see A.N. Trainin [Trainin], "Le Tribunal militaire international et le process de Nuremberg" [The International Military Tribunal and the Nuremberg Trial], in *Revue internationale de droit pénal*, 1946, nos. 3–4, pp. 267–69.

fact that Donnedieu de Vabres was France's chief judge at Nuremberg gave the AIDP an important connection – not in directly influencing the judgment, but to begin reorganising the group. In May 1946, during the defence phase of the trial, Donnedieu de Vabres organised a meeting in Nuremberg (symbolically in the same audience chamber used for the trial) to discuss the reconstitution of the AIDP.<sup>135</sup> Chaired by Francis Biddle, the US Chief Judge at Nuremberg, the meeting was attended by major Nuremberg figures: Sir David Maxwell-Fyfe (Britain's chief prosecutor for the trial), Aron Trainin (now the Soviet chief prosecutor) and Iona Nikitchenko (the Soviet chief judge). Donnedieu de Vabres asked important questions: Should Paris remain the seat of the organisation? Should its primary language still be French in an era when simultaneous translation (through the type of system used at the Nuremberg trial) was now a reality? Shouldn't the AIDP really be concerned with worldwide developments in criminology, not just continental Europe, and therefore expand the fertile exchange of ideas that the Nuremberg trial had sparked?<sup>136</sup> Should German and Italian jurists be allowed into the organisation? These major issues, however, were only lightly discussed and left to a subcommittee to decide.<sup>137</sup> And in July 1947, when the AIDP held its first post-Second World War conference, much about the event rekindled the past. The conference was held at the University of Geneva; the city was the home of the old League of Nations, which was being replaced by the new United Nations Organisation. (The United Nations Legal Department did send a representative to the conference, who praised the AIDP's past work with the League and hoped it would help the United Nations codify the Nuremberg principles.)<sup>138</sup> In any case, the AIDP's conference was organised by a committee that was predominantly Swiss and did not reflect the global aspirations voiced in 1946. The primary topics – the use of domestic criminal law to maintain international peace, the issue of whether punishment should be purely retaliatory or use social defence methods,

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<sup>135</sup> Procès-verbal de la réunion de l'AIDP siège du Tribunal Militaire International (Nuremberg) 18 mai 1946, 2002, pp. 321–35, see *supra* note 128.

<sup>136</sup> *Ibid.*, p. 323.

<sup>137</sup> *Ibid.*, pp. 329–30.

<sup>138</sup> For a provisional report about this conference, see Jean Graven, "Le Ve Congrès international de droit pénal (28–30 juillet 1947)" [The Fifth International Conference of Penal Law (28–30 July 1947)], in *Revue internationale de droit pénal*, 1947, Numéro spécial, pp. 1–67. A short summary of the remarks of Schreiber, the United Nations legal counsellor, can be found on pp. 10–11.

and the repression of juvenile crime – were all old subjects for the AIDP.<sup>139</sup>

There was an attempt to open the doors to new ideas, though this showed the split between the continental, criminological approach and an American approach, based largely on prosecuting war crimes. The AIDP invited Telford Taylor, then the chief counsel for the US Military Tribunals at Nuremberg, to the 1947 conference, where he gave a speech calling for the codification of international criminal law based on the London Agreement that established the International Military Tribunal ('IMT').<sup>140</sup> Yet Taylor's vision was different from the AIDP's in two key ways. Donnedieu de Vabres, France's chief judge at Nuremberg, held that when the IMT had prosecuted individuals for ordering violations of the laws of war, the laws themselves were well established. The only real innovation, Donnedieu de Vabres said, was that the court prosecuted instigators rather than the immediate criminals who killed and tortured with their own hands.<sup>141</sup> Throughout the interwar period, the AIDP had not paid much attention to whether the laws of war needed to be improved in light of changing technologies of war. Taylor, however, mentioned that the Second World War had shown that aerial and submarine warfare had totally outstripped the rules in The Hague and Geneva Conventions. (What types of bombing were legal? What was the exact definition of an undefended city? Did a submarine crew have to save all survivors of a torpedoed vessel if it was going to come under aerial attack while doing so?) The rules governing the treatment of hostages had to be hammered out too, since some military codes allowed armies to execute them but did not specify

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<sup>139</sup> Programme du Vme Congrès international de droit pénal convoqué à Genève (Suisse) par l'Association internationale de Droit pénal sous le haut patronage du Gouvernement de la Confédération Suisse, 28 au 31 juillet 1947 [Program of the Fifth International Conference of Penal Law Held in Geneva (Switzerland) by the International Association of Penal Law under the High Patronage of the Swiss Government], Geneva, 1947, pp. 5–8, in Telford Taylor Papers, Box 148, Folder 10–0–1–5, Rare Book and Manuscript Library, Columbia University Library ('TTP').

<sup>140</sup> For Graven's summary of the speech, see Graven, 1947, pp. 13–17, see *supra* note 138. For Taylor's original French and English texts, see "Le Droit interne et la préservation de la paix" and "Domestic Law and the Preservation of Peace", TTP/148/10–0–1–5 and TTP/148/10–0–1–6. He delivered the speech in French.

<sup>141</sup> Henri Donnedieu de Vabres, "The Nuremberg Trial and the Modern Principles of International Criminal Law", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trials*, Oxford University Press, Oxford, 2008, p. 232.

the precise rules.<sup>142</sup> A second major difference was that Taylor supported an international criminal jurisdiction for the control of narcotics, violations of the laws of war and genocide, wishing to begin with these rather than the more prickly political definition of aggression. “[I]t will be wise to proceed cautiously rather than over-ambitiously, lest the whole project founder on the rocks of political controversy before it is fairly launched.”<sup>143</sup>

Aside from these intellectual differences, several AIDP jurists took the Nuremberg Judgment to be a watershed in establishing individual criminal liability for aggression and for expanding criminal liability to include organisations. Still, they believed there was much work ahead. Caloyanni noted with some disappointment that the preparatory conference to establish the new United Nations Organisation did not foresee an international system with an enforceable international criminal code covering both individuals and states.<sup>144</sup> Pella, too, stated that a system that did not hold states criminally liable would remain incomplete. A state that is only defeated military will pursue revenge, he argued, while a state prosecuted, found guilty and punished fairly would not. Furthermore, he claimed that the past 25 years of totalitarian states had proved that if one ignored the criminal liability of states, they would hyperextend their sovereignty, surpass legal limits and start wars.<sup>145</sup> Thus, although the Nuremberg and the Tokyo Tribunals were partial steps, Pella looked back to the AIDP’s earlier concepts of an international criminal jurisdiction with two-track criminal liability (for individuals and states) and the 1935 draft penal code as the correct directions for the future.

All was not backward-looking, however. Pella now took a much stronger position against state-sponsored crimes committed against groups than he had in the interwar period. He had not totally neglected them in his own work, but now, in 1946–1947, he defended Lemkin’s concept of genocide and similar concepts developed by Eugène Aronéanu, Saldaña

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<sup>142</sup> Taylor, “Le Droit interne et la préservation de la paix”, pp. 6–8, see *supra* note 139.

<sup>143</sup> I have taken the quote from the English version on p. 10, which accurately translates the French on p. 13.

<sup>144</sup> Mégalos A. Caloyanni, “La guerre-crime et les criminels de guerre” [War Crime and War Criminals], in *Revue internationale de droit pénal*, 1946, nos. 1–2, p. 8.

<sup>145</sup> V.V. Pella, “L’Association internationale de droit pénal et la protection de la paix” [The International Association of Penal Law and the Protection of Peace], in *Revue internationale de droit pénal*, 1946, nos. 3–4, pp. 207–9.



and himself.<sup>146</sup> “To kill, persecute, or enslave a man or a collectivity due to their race, their nationality, their religion, or the opinions that they profess is to attack the fundamental principle of the diversity that belongs to the constitution of the human universe”, he stated,<sup>147</sup> using the type of cultural diversity argument that was a keystone of Lemkin’s post-war politics. Pella in 1946 went much further than Donnedieu de Vabres, who, in his 1947 analysis of the Nuremberg Judgment, defended the way crimes against humanity had been heavily limited by the judges.<sup>148</sup> Pella, though, viewed crimes against humanity as independent crimes in their own right, not simply large-scale common crimes covered by domestic law, as Donnedieu de Vabres did. They had to be prosecuted by all states, wherever they occurred. However, if they were committed by state agents, and in accordance with a state’s laws, Pella said they had to be referred to an international criminal court for prosecution. Therefore, when the plenary assembly of the Bureau for the Unification of Criminal Law met at the end of December 1946 in Paris, it decided that the Bureau’s next conference should formulate a legal definition of crimes against humanity, which it did in Brussels in 1947.<sup>149</sup>

Thus it would be unfair to call the AIDP excessively utopian or nostalgic, merely trying to recreate its interwar ideas for the post-Second World War period. Jurists such as Caloyanni, Pella and Donnedieu de Vabres felt that in the interwar period the AIDP had been avant-garde, while the political system had remained behind, pinned down by fears and over-reliance on state sovereignty. After the war, many AIDP jurists supported a project in the United Nations to codify both the Nuremberg Charter and Judgment and turn them into a statute for a permanent international criminal court. Pella in particular stated that he hoped the United Nations would not ignore the AIDP, as the League of Nations had supposedly done.<sup>150</sup> However, one cannot ignore the fact that Pella believed that in order to ensure international peace, states needed to imitate controversial laws in Romania and Poland, which had criminalised pro-war propaganda

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<sup>146</sup> *Ibid.*, p. 220.

<sup>147</sup> *Ibid.*, p. 221.

<sup>148</sup> Donnedieu de Vabres, 2008, pp. 240–42, see *supra* note 141.

<sup>149</sup> Pella, 1946, p. 222, see *supra* note 145; Donnedieu de Vabres, 2008, p. 239 n 69, see *supra* note 141.

<sup>150</sup> Pella, 1946, p. 212, see *supra* note 145.

in the interwar period.<sup>151</sup> The basis for those laws was a French law from 1881, which criminalised publishing or disseminating “false news or articles that are fabricated, falsified, or falsely attributed to third parties, when, committed from bad faith, it would trouble the public peace or would be susceptible to trouble it”.<sup>152</sup> Pella steadfastly maintained that states needed to join together and pass similar domestic legislation to maintain collective peace.

[C]riminal law is a supreme instrument for the defense of the social order and international order, and that the more the criminal- the individual or nation- occupies an elevated position in national life or international life, the more the punishment must be exemplary and intimidating.<sup>153</sup>

Sceptics outside the AIDP contended that the regulation of international relations through criminal law did not work in the 1920s and 1930s and could not work after the Second World War either. In a review of Pella’s 1946 book, *La guerre-crime et les criminels de guerre. Réflexions sur la justice pénale internationale, ce qu’elle est et ce qu’elle devrait être* [War Crime and War Criminals. Reflections on International Criminal Justice, What It Is and What It Should Be],<sup>154</sup> international lawyer Jacob Robinson, who had advised US prosecutors at Nuremberg on behalf of the Institute of Jewish Affairs, stated:

It is difficult to agree with the implicit assumption of the author of the thesis that an International Criminal Court would have survived the war untouched. Why should this Court have fared better than the Permanent Court of International Justice or the League of Nations?<sup>155</sup>

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<sup>151</sup> V.V. Pella, “Plan for a World Criminal Code”, in *Revue internationale de droit pénal*, 1946, nos. 3–4, p. 256, fn. 2.

<sup>152</sup> See Loi sur la liberté de la presse du 29 juillet 1881 [Law on the Freedom of the Press of 29 July 1881], Art. 27 (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119>). From 1881 to 1994, the law called for imprisonment and a fine; the prison term and fines were increased in 1994, but prison time was eliminated in 2000.

<sup>153</sup> Pella, 1946, p. 224, see *supra* note 145.

<sup>154</sup> Vespasien V. Pella, *La guerre-crime et les criminels de guerre Réflexions sur la justice pénale internationale, ce qu’elle est et ce qu’elle devrait être* [War Crime and War Criminals, Reflections on International Criminal Justice, What It Is and What It Should Be], *Revue de droit international de sciences diplomatiques et politiques*, Geneva, 1946.

<sup>155</sup> Jacob Robinson, “La Guerre-Crime et Les Criminels de Guerre (Review)”, in *American Journal of International Law*, 1946, vol. 40, no. 3, pp. 682–83.

Neither of those institutions had prevented the war, and it did not appear to Robinson that the world was ready for a permanent international criminal court, given that the statute for creating the terrorism court in 1937 never came into force.

### **15.11. The Impact of Cold War Ideologies on the Attempt to Draft an International Penal Code after the Second World War**

The Nuremberg codification project got off the ground – and then came crashing down, attacked by jurists as unrealistic or dangerous to state sovereignty, and by Western governments that thought it would limit their policies in the confrontation between Western capitalist democracy and Soviet communism. Consequently, the AIDP was thrust into the Cold War. Donnedieu de Vabres initially worked on the codification of the Nuremberg principles in 1947, but the United Nations then transferred the project to the International Law Commission (‘ILC’), a group of international jurists, selected by the General Assembly, who were technically supposed to act in a “private capacity”, rather than as representatives of their governments. The ILC turned the project into an effort to write a global penal code, called the Draft Code of Offences against the Peace and Security of Mankind. The Draft Code was the descendant of the AIDP’s 1935 code; it enumerated a set of crimes revolving around state aggression, state-sponsored terrorism, territorial annexations contrary to international law, and coercive economic and political measures, all crimes that the interwar jurists had discussed.<sup>156</sup> The post-Second World War plan was that after the ILC defined these crimes in a code, it would create a statute for an international criminal court that would have jurisdiction over these crimes in certain circumstances. Pella, who became AIDP President in 1946 after Carton de Wiart retired, came to New York in 1947 and worked on the code behind the scenes as a special adviser to the UN Secretary-General.<sup>157</sup>

There were two key differences between the AIDP’s 1935 code and an ILC draft completed in 1951, however. In the ILC’s Draft Code, only

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<sup>156</sup> “Report of the International Law Commission to the General Assembly”, in *Yearbook of the International Law Commission 1951*, vol. 2, United Nations, New York, 1951, pp. 131–37.

<sup>157</sup> John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave Macmillan, New York, 2008, pp. 218–22.

individuals, not states, were to be held criminally liable, and the various components of crimes of genocide (taken directly from the 1948 Genocide Convention) were included. (The 1935 draft did not include such crimes.) However, several jurists on the ILC disagreed about the definition of aggression or did not think an international criminal court was necessary. During the early 1950s the US government started opposing the Draft Code because it believed the provisions regarding terrorism would prevent it from supporting the Voice of America, an anti-communist information service in Eastern Europe, and interfere with US financial support for anti-communist groups behind the Iron Curtain. The legal and political problems with the Code quashed the idea of an international criminal court with jurisdiction over aggression and other assorted crimes for much of the Cold War.<sup>158</sup>

Although the AIDP during the interwar period did not develop or vote on an international criminal law designed to protect group rights for minorities, three AIDP jurists – Lemkin, Pella and Donnedieu de Vabres – were selected by the UN Secretariat’s Legal Department and Human Rights Department to write the first draft of the Genocide Convention in 1947.<sup>159</sup> On the surface, it would appear that the AIDP was again getting a unique opportunity to influence directly an international criminal law project, as it had done with the counterfeiting and terrorism conventions. In fact, there were similarities in how all three of these conventions, in their initial drafts, would require states to prosecute or extradite the accused (and prohibit them from giving suspects asylum on political grounds). All three draft conventions also proposed that states should create national warning bureaus which would then exchange information through an international office, which actually was only implemented in the counterfeiting convention. Yet the first draft of the Genocide Convention did not represent a united “AIDP front”, as personal, legal and political differ-

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<sup>158</sup> Lewis, 2014, pp. 278–82, see *supra* note 2.

<sup>159</sup> Lemkin was recommended because he was, “if not the godfather of the idea, at least the inventor of the word ‘genocide’”. Donnedieu de Vabres was brought in because he was France’s representative on the General Assembly’s Committee on the Development and Codification of International Law, a committee that was supposed to be consulted by the main United Nations committee (the Economic and Social Committee) working on the convention. The United Nations Archives do not state precisely why Pella was chosen, but it was probably because of his reputation, knowledge, and the fact that he was president of the AIDP. See Humphrey to Laugier, 13 May 1947, UN Archives, Geneva, SOA/318/1/01 (1)A; Laugier to Pella, 21 May 1947, UN Archives, SOA 318/1/01 (4).

ences separated the three jurists. During the war, Lemkin had become a refugee and later learned his most of family had been exterminated by the Nazis in Poland, while Pella had remained a Romanian diplomat under the Antonescu military dictatorship, which had definite responsibility for the murder of Jews and Roma in Transnistria. However, Pella claimed that he did what he could to play a mitigating role and declared he had tried to negotiate Romania's exit from the war.<sup>160</sup> A Swiss diplomatic report about his appointment to become Romania's Minister to Berne in August 1943 states that he opposed Romania's fascist party, the Iron Guard.<sup>161</sup>

The trio was very divided in 1947 about whether a genocide law should prohibit attacks against political groups as well as racial, religious and national ones. Donnedieu de Vabres, fearing communist attacks against the bourgeoisie, thought it should, but Lemkin, who thought political groups did not have a permanent identity, disagreed. They also differed about the type of court that should be used to repress genocide. Lemkin foresaw that genocide would be an international crime that any state could prosecute, regardless of where it occurred; he only supported an *ad hoc* international court for prosecuting state officials and heads of organisations (similar to the Nuremberg model). Pella supported an international criminal court for genocide, using the AIDP's 1928 statute.<sup>162</sup> Additionally, the trio disagreed about whether genocide could be construed to mean the destruction of a group's culture, such as its religious sites and educational institutions, not just the murder of the group. Lemkin believed that such cultural suppression could be used to eliminate a group, even if it was not physically destroyed, but Donnedieu de Vabres and Pella believed that this problem was a civil one, not a criminal one – an issue that the interwar Minorities Treaties covered. The problem, however, was that several Great Powers did not want to maintain them after the war, fearing that if they were expanded into “human rights” instruments, they would interfere with their colonial policies.<sup>163</sup> The trio, then,

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<sup>160</sup> Lewis, 2014, pp. 192–95, see *supra* note 2.

<sup>161</sup> Swiss ambassador in Romania to Pilet-Golaz, 20 July 1943, Swiss Federal Archive (Berne), E4001C#1000/1571 BD: 42, Folder: B.22.21.Ro., Pella, Vespasien. Ministre plénipotentiaire, Chargé de mission. Berne.

<sup>162</sup> Lewis, 2014, pp. 195–99, see *supra* note 2.

<sup>163</sup> Mark Mazower, “The Strange Triumph of Human Rights, 1933–1950”, in *Historical Journal*, 2004, vol. 47, no. 2, pp. 379–98.

handed the United Nations a draft that did not solve several major issues. Many were worked out during ruthless political negotiations over the next 18 months in the United Nations, leading to a convention that did not protect political groups and did not require the use of an international criminal court. Instead, such a court could be used if it were ever created, and signatories recognised its jurisdiction.<sup>164</sup>

During 1948 and the years that followed, Lemkin took an increasingly hostile position towards the ILC, which he believed wanted to roll up the Genocide Convention into the Draft Code and thereby neutralise it, and towards Pella, whom he saw as the *éminence grise* behind the Draft Code. Lemkin feared that the more narrowly focused Genocide Convention, passed by the United Nations in December 1948 and then implemented with the ratification of 20 states in October 1950, would be quashed if the Draft Code included genocide. He claimed that advocates of the Draft Code, including Pella, intended either to subordinate it to crimes against humanity or attach it to aggressive war.<sup>165</sup> Pella, however, protested to Lemkin in a long letter from November 1950, explaining all the numerous steps he had taken to support the Genocide Convention. For example, at a 1949 meeting of non-governmental organisations with consultative status with the United Nations, Pella, as President of the AIDP, had introduced a motion calling on these NGOs to do everything possible to ensure the ratification of the Genocide Convention. This passed 38 to three.<sup>166</sup>

Another aspect of Lemkin's growing antipathy toward Pella was his incorrect appraisal that Pella was working with the Soviet Union. Lemkin had grown close to groups of anti-communist Eastern European refugees in the United States, believing in 1949 that the Soviet Union was committing genocide by deporting Lithuanian intellectuals and priests to Siberia.

I saw Soviet instructions to deport husbands and wives in different trains and in different directions, allegedly for sanitary reasons. The real purpose of this separation is to stop procreation within this Catholic nation so that it will finally die out [...].

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<sup>164</sup> Lewis, 2014, pp. 199–228, see *supra* note 2.

<sup>165</sup> Cooper, 2008, p. 187, 209–22, see *supra* note 157.

<sup>166</sup> Pella to Lemkin, 2 November 1950, Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati Campus, Hebrew Union College, Jewish Institute of Religion, Raphael Lemkin Papers, Manuscript Collection No. 60, Box 2/Folder 11 ('Lemkin-AJA').

Lemkin said the above in a 1949 letter to Cardinal Francis Spellman in New York.<sup>167</sup> Lemkin began working with Lithuanian and Polish associations in the United States to lobby the US Senate and federal government to oppose the Draft Code, arguing that it would only make genocide punishable when connected with aggressive war (which was not required under the Genocide Convention), as well as outlaw underground anti-communist groups.<sup>168</sup> The associations, assisted by Lemkin, sent protest letters to the US Joint Chiefs of Staff and the US Congress, attacking the Draft Code and claiming that Pella was working on behalf of the Romanian Communist Party and the Soviet Union. In a front-page article, the *New York Times* in September 1951 reported on the associations' letters under the headline "Proposed U.N. Code Criticized As Bar to Anti-Red Undergrounds". In the article, Pella defended the code, stating that the provision against state support for armed groups practising terrorism was not supposed to harm liberation movements, but "was a reflection of General Assembly resolutions denouncing attempts to stir up civil war, as in the case of Greece".<sup>169</sup> Pella followed this up with an editorial to the *New York Times*, published in October 1951. Signing the article as the President of the AIDP, he stated: "It should be obvious that it is states of the free world which are menaced by the actions of fifth columns and that these provisions of the draft code were directed at that threat alone". He added that he had actually authored Romanian legislation in 1924 (when he was a Romanian deputy in Parliament) outlawing the communist party, and that subsequently, after the Second World War, he had been stripped out his Romanian citizenship and feared he would be sentenced to death if he returned to Romania. As for the Genocide Convention, he stated he had always favoured its ratification and maintained that "the autonomy and individuality of that convention should be assured".<sup>170</sup> In this way, the AIDP's President was thrust into the middle of the ideological conflict

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<sup>167</sup> Lemkin to Spellman, 13 September 1949, Lemkin-AJA/1/14. See also Anton Weiss-Wendt, "Hostage of Politics: Raphael Lemkin on 'Soviet Genocide'", in *Journal of Genocide Research*, 2005, vol. 7, no. 4, pp. 551–59.

<sup>168</sup> Memorandum on Genocide, calling for opposition to the Draft Code and to Article 3 of the "Draft Covenant on Human Rights", Lemkin to Rozmarek, 23 May 1952, Lemkin-AJA/2/12, see *supra* note 166.

<sup>169</sup> A.M. Rosenthal, "Proposed U.N. Code Criticized As Bar to Anti-Red Undergrounds", in *New York Times*, 23 September 1951, p. 1.

<sup>170</sup> Vespasien V. Pella, "Letters to the Times: Proposed U.N. Code: Provisions Said to Be Directed at Threat of Fifth Column", in *New York Times*, 3 October 1951, p. 32.

between Western capitalist democracy and Eastern socialist “people’s republics”.

The late 1940s and early 1950s saw both the AIDP and the Bureau for the Unification of Criminal Law trying to reassert some of their liberal ideas from the interwar period. In late 1949 the United Nations Human Rights Division asked the Bureau whether it could contribute some studies for a United Nations report on the condition of women suspects and prisoners, continuing the penal reform projects that the League had pursued. The United Nations specifically wanted to know whether women got the same legal protection as men when it came to gathering proof before arresting them; whether pregnant women obtained health care in prisons; and whether women prisoners who were forced to work obtained jobs that had some type of professional utility after they were released. The Bureau arranged for Zara Algardi, an attorney for the Court of Cassation in Rome, and a female Swiss doctoral student named Dado-Péquignot to produce reports that were submitted to the United Nations.<sup>171</sup>

However, in 1950 the AIDP and Bureau were experiencing fairly serious problems in their finances, leadership and communications. Pella had written some materials about the AIDP and the Bureau’s past and present work in which he only mentioned himself and neglected the contributions of several important people – Carton de Wiart (the former AIDP president), Donnedieu de Vabres (one of the founders), Sasserath (a co-founder of the Bureau and one of its vice presidents) and others. Donnedieu de Vabres and Sasserath were “insulted or flabbergasted” by these omissions, accusing Pella of being too “authoritarian” and “dictatorial” in his leadership style.<sup>172</sup> Jean Graven, a Swiss criminal law scholar who was the Bureau’s assistant secretary-general after the Second World War, painted a grim picture of the AIDP and Bureau in 1950. Pella was busy in New York, while the European directors did not know what the AIDP or the Bureau’s future plans were. The Bureau was supposed to have a conference in Paris in 1950, but apparently nothing had been planned. Caloyanni, the Bureau’s treasurer, had died, but the group’s accounts were in disarray, and it had no regular budget. Graven urged Pella, whom he considered the “soul” of the organisation, to come to Europe

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<sup>171</sup> Humphrey to Bureau, 20 December 1949; Graven to Pella, 13 January 1950; Algardi to Graven, 1 February 1950, Archives de l’Etat du Valais (Sion, Switzerland), CH AEV, Jean Graven, 292. All further references come from this archive unless stated otherwise.

<sup>172</sup> Graven to Pella, 20 May 1950.



and sort out the mess.<sup>173</sup> That never happened, however, because Pella died in 1952, and so did Donnedieu de Vabres. Carton de Wiart had died the previous year and Paul Cornil, Belgium's Secretary-General in the Justice Ministry, took over the AIDP presidency, putting it in Belgian hands again.

The question of the Bureau, however, was pricklier. Graven, based in Switzerland, wanted it to continue under a new president. The group had consultative status with the United Nations, and he believed that if it disappeared, the jurists and social activists involved with it would lose their role in advising the United Nations on the treatment of women in the criminal justice system and would not be able to continue working on a United Nations general plan to deal with juvenile delinquency. Graven discussed whether Léon Cornil, the Belgian Prosecutor General and uncle of Paul, would be willing to take over the presidency of the Bureau, but Léon refused, citing poor health.<sup>174</sup> Graven solicited Sasserath next, who at first agreed on the condition that Graven find a French or Swiss treasurer, but after Graven and Sasserath got into a disagreement about who had the power to communicate with United Nations officials about attending a conference on juvenile delinquency in late 1952, the relationship soured.<sup>175</sup> In June 1953, at a meeting of the AIDP's Board of Directors, Sasserath declared that the Bureau no longer existed, a decision that Graven said was "absolutely unjust, false, and inopportune".<sup>176</sup> At the AIDP's conference in Rome in September 1953, the Board discussed whether it could take over the Bureau, but Paul Cornil said this was impossible, because the Bureau was totally independent of the AIDP and had its own statute. It was then officially disbanded, which made Graven quite bitter.<sup>177</sup> As he told two of his close collaborators on the Bureau, the lawyer Max Habicht and children's advocate Hélène Romniciano:

The President (Carton de Wiart), the treasurer (Caloyanni), the Secretary-General (Pella) were not replaced; one of the vice presidents (Rappaport) no longer gives signs of life; the other, serving as President (Sasserath) condemned the Bu-

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<sup>173</sup> *Ibid.*

<sup>174</sup> Graven to Léon Cornil, 4 September 1952; Léon Cornil to Graven, 11 September 1952.

<sup>175</sup> Sasserath to Graven, 12 September 1952; Sasserath to Graven, 17 November 1952; Graven to Sasserath, 21 November 1952.

<sup>176</sup> Graven to Romniciano and Habicht, 27 December 1953.

<sup>177</sup> Graven to Paul Cornil, 27 December 1953; Graven to Sasserath, 27 December 1953.

reau and prevents all attempts to transform it. The assistant Secretary-General (myself) is leaving Geneva and the Bureau will no longer have an address. This is the liquidation, therefore, which is imposed on us, and this decision fills me with confusion and regret. It would discourage our master and our friend Pella, the soul of the Bureau.<sup>178</sup>

The AIDP continued and had to confront other problems besides Cold War politics and personal disagreements. One was an ideological trend coming from the new breed of “realist” international lawyers who claimed that political order was based on hegemony and power, and states simply used law to support their own interests.<sup>179</sup> This posed a challenge to the interwar criminological internationalism of the AIDP,<sup>180</sup> which had believed world peace could be assured if an enforceable system of international criminal law could be erected. Why did AIDP jurists believe this system was still possible after the Second World War, when League efforts to create one had come to naught, and the League collective security system had not stopped Japanese aggression in Manchuria, Italian aggression in Ethiopia or Nazism in Europe? They believed that the interwar period’s error was that it had *not* created a strict enforcement system; it had only been based on collective security. If a true international criminal court system with the power to sentence individuals and states had been established, the argument went, the threats of sanctions and penalties would have kept aggressive states, militarist parties and dictators in check. They really had no answer to mass movements such as Nazism, as well as its Eastern European analogues, that rejected internationalism and were not afraid to act without restraint. Another problem with the AIDP’s theory of peace through international criminal law was that the jurists assumed that an international criminal jurisdiction could truly operate free of politics, that there would be no back-room deals, but merely automatic commitments in line with court rulings.

There was another ideology that the AIDP was going to have to contend with as well: national liberation movements directed against colonial rulers. The draft international criminal court and penal code of the

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<sup>178</sup> Graven to Romniciano and Habicht, 27 December 1953.

<sup>179</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 457–61.

<sup>180</sup> By way of analogy, see Koskenniemi’s analysis of post-First World War liberalism, *ibid.*, pp. 407–11.

interwar period had provisions to criminalise state support for foreign-armed bands and prevent intervention in foreign states; these laws were directed at states that supported paramilitaries and nationalist separatists in the 1930s. After the Second World War Pella's comments about the Draft Code provision on terrorism suggested that it was directed against "fifth column" communists in Greece. How far was the AIDP willing to go in erecting international legislation to repress anti-colonial insurgencies? This question demands further research, particularly an investigation of the criminological jurists' attitudes toward colonialism in the 1920s and 1930s, whether these influenced their post-Second World War ideas, and, following a generational change in the AIDP in the 1950s, how the organisation dealt with the rise of anti-colonial movements that claimed violence was legitimate.

#### **15.12. Conclusion: Phases of Liberalism and Conservatism**

The AIDP was neither wholly liberal nor wholly conservative in the area of international criminal law from its founding in 1924 through the early Cold War. Its 1926 resolution for an international criminal jurisdiction, which included a concept of state criminality, and its 1928 statute for an international criminal court, represented a criminological liberal internationalism whereby an international criminal court could resolve interstate conflicts through prosecution and judgment. Still, the AIDP would have given control over prosecutions to the Great Powers sitting on the League Council. The 1930s – a decade of economic collapse, the retreat into economic and political nationalism, terrorist incidents aimed at overthrowing the Paris Peace Treaties and violations of the League Charter – produced an ideological change: more emphasis on state security, more efforts to eliminate political asylum, more willingness to work with authoritarian states, including the Nazis. During the Second World War, the organisation was inactive, which it said was a refusal to work with the Nazi overlords. While this was probably true, the group did not develop an active centre in Geneva, London, New York or Washington, where it might have been able to shape war crimes trials and the new United Nations Organisation. Rebuilding in the late 1940s, the organisation returned to its criminological liberal internationalism of the 1920s, despite questions about whether this could actually be effective against highly aggressive states with no intention of obeying international law. Its jurists worked on several important projects – the Nuremberg Judgment, the Genocide Conven-

tion and the Draft Code – all showing an evolution in the individual jurists’ philosophies, as they attempted to rework interwar ideas to confront Nazi criminality. At the same time, they had to adjust to the fact that a strong defence of the state in the interest of international peace had to be balanced by greater consideration for the legal rights of the accused and the protection of minorities. The Draft Code project can be traced to the AIDP’s 1935 sketch of a world penal code, but in the early 1950s, it ran aground on the shoals of Cold War political conflicts, specifically the controversy over whether state support for political partisans was a form of criminal intervention (that is, support for terrorism). The AIDP’s most ambitious project, then, the creation of a permanent international criminal jurisdiction covering both state aggression and international crimes committed by individuals, was not realised, showing that state governments still feared this idea. The crisis and collapse of the international system prior to the Second World War led to a post-war reconstruction of a system that actually reinforced sovereignty and rejected permanent enforcement based on penal law.

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## China and the War Crimes Far Eastern and Pacific Sub-Commission

Marquise Lee Houle\*

### 16.1. Context for the Creation of the Far Eastern and Pacific Sub-Commission

#### 16.1.1. Creation of the United Nations War Crimes Commission

Before the Second World War had ended the Allied nations were already beginning preparations for the prosecution and punishment of crimes committed by enemy combatants. As early as January of 1942, a group of nine countries made the first multilateral statement as a judicial response to Nazi atrocities. This joint statement was made at St. James's Palace in London by Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway, Poland and Yugoslavia, and focused on the goal of punishing war crimes. It was promptly endorsed by China.<sup>1</sup>

Almost two years later, in October 1943, 17 Allied governments met at the UK Foreign Office in London to create a multilateral organisation that would “mobilize international retributive justice”.<sup>2</sup> They did so in preparation for the end of the war that still raged in both Europe and Asia. They knew that to effectively capture and prosecute perpetrators of war crimes they would need to be ready. The new organisation was called the United Nations War Crimes Commission (‘UNWCC’). “States parties to the UNWCC accorded it diplomatic status and paid jointly for its oper-

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<sup>1</sup> Dan Plesch and Shanti Sattler, “A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and its Associated Courts and Tribunals”, in *Criminal Law Forum*, 2014, vol. 25, no. 1, pp. 21–22.

<sup>2</sup> *Ibid.*, p. 17.

ations, including an international secretariat”.<sup>3</sup> The UNWCC member states were Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the United Kingdom, the United States and Yugoslavia.<sup>4</sup> The seventeenth member of the UNWCC, Denmark, officially joined in July 1945.<sup>5</sup>

The legal authorities cited most often by the preparatory Commission in their meetings were the Hague Conventions of 1899 and 1907 and the Paris Peace Conference of 1919.<sup>6</sup> The Hague Conventions provided the first modern codification of actions that member states considered should be made illegal during warfare.<sup>7</sup> This co-operation concerning modern standards for the laws of war indicated significant progress that could be used as the legal foundations for the discussions of the UNWCC, as well as the future creation of international law and courts.

Once the UNWCC was created, all National Offices reported directly to the main UNWCC headquarters in London “as they conducted investigations and constructed lists of suspected war criminals for review”.<sup>8</sup> The creation of war criminal lists took place from 1944 to the end of 1947. The UNWCC was organised into three main committees that met weekly: Committee I dealt with facts and evidence; Committee II dealt with matters of enforcement; and Committee III was a forum for dialogue on legal affairs. Member states only submitted cases of individuals that they wished to include on the lists of accused persons, suspected war criminals and material witnesses.

#### **16.1.2. China Joining the United Nations War Crimes Commission**

V.K. Wellington KOO was selected as China’s representative to the UNWCC. KOO was a graduate of Columbia University in the United States and China’s delegate to the Paris Peace Conference, as well as ambassador to France, the United Kingdom and, for 10 years, the United

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<sup>3</sup> Dan Plesch and Shanti Sattler, “Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943–1948”, in *International Community Law Review*, 2013, vol. 15, no. 2, p. 211.

<sup>4</sup> Plesch and Sattler, 2014, p. 24, see *supra* note 1.

<sup>5</sup> *Ibid.*, pp. 24–25.

<sup>6</sup> *Ibid.*, pp. 19–20.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 25.

States. He was the youngest diplomat to ever be assigned to the United States and played a major role in expanding foreign relations between China and the West. He was also China's acting prime minister in 1926–1927. KOO has been credited with China's participation in founding the United Nations ('UN'), serving as his country's signatory to the UN charter.<sup>9</sup>

According to KOO, China joined the UNWCC for two main reasons. First, because of her interests with regard to international solidarity China wished to have the co-operation of other nations in dealing with war crimes. Second, China desired that all war crimes should be treated equally and in the same manner by different states.<sup>10</sup> During the early stages of the discussions for planning the creation of the UNWCC, the British government lobbied strongly for China to join. By late November 1942, "the Chinese Foreign Ministry replied that the Chinese government had agreed in principle" but that they were proposing some minor changes based on the attitude of the Chinese government towards the treatment of war criminals. These included: 1) "that neutral countries be warned not to afford asylum to any war criminal, whether enemy or puppet"; 2) "that provision be made for the surrender of wanted war criminals who take refuge in enemy territory"; and 3) "that war criminals should include all persons who have perpetrated atrocities in the territory since September 18th, 1931".<sup>11</sup> It was very important to China that war crimes perpetrated by the Japanese before the war in Europe started should also be prosecuted. This was often a source of debate between government representatives, as well as lawyers.

KOO used the UNWCC as a means to make sure that Japanese aggression did not go unpunished.<sup>12</sup> At the inaugural meeting of the UNWCC in October 1943 KOO raised the Chinese desire to set up a separate panel for Japanese atrocities in Chungking, China.<sup>13</sup> Herbert Pell, the US

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<sup>9</sup> Stephen G. Craft, *V.K. Wellington Koo and the Emergence of Modern China*, University Press of Kentucky, Lexington, 2004, pp. 190 ff.

<sup>10</sup> United Nations War Crimes Commission ('UNWCC'), Minutes of the Eighteenth Meeting held on May 16th, 1944, M.18, p. 3 (<https://www.legal-tools.org/doc/f2acc0/>).

<sup>11</sup> Wen-Wei Lai, "China, the Chinese Representative, and the Use of International Law to Counter Japanese Acts of Aggression: China's Standpoint on UNWCC Jurisdiction," in *Criminal Law Forum*, 2014, vol. 25, no. 1, p. 113.

<sup>12</sup> *Ibid.*, p. 120.

<sup>13</sup> *Ibid.*, p. 122; Chungking is the old Romanization for the Chinese city of Chongqing.

representative to the UNWCC, wrote in his diary that it was “manifestly impossible to handle the Japanese affair except separately”.<sup>14</sup> A formal Chinese suggestion was made at the meeting of 25 April 1944 which read: “[i]t is proposed that the War Crimes Commission take up immediately the question of the establishment of the Far Eastern Panel or Branch and appoint a special committee to consider and report on the subject”.<sup>15</sup> In his statement, KOO mentioned that the new Commission would adopt the general principles of the UNWCC already established, subject to any necessary changes that may be deemed appropriate due to differing local conditions. He also affirmed that local panels should be allowed to exercise discretionary power in making these modifications, provided that they were not in contravention of the general principles of the UNWCC.<sup>16</sup>

### **16.1.3. Establishment of the Far Eastern and Pacific Sub-Commission**

In April 1944 the Chinese representation to the UNWCC proposed that the war crimes commission take up the question of establishing a Far Eastern branch to deal with Japanese crimes. This was reported as ideal due to the “increasingly large number of war crimes committed by the Japanese in the Far East” that would require “early investigation and examination by the common action of the United Nations concerned”.<sup>17</sup>

It was ultimately decided that this new body to deal with the identification of Japanese war criminals would be a Sub-Commission of the primary Commission in London. The UNWCC, while debating on how to set up this new Sub-Commission, decided on two options for financing it. First, they assumed that “the expenses of the Sub-Commission should be met in the same manner and out of the same budget as those of the Commission”. As an alternative, they also considered that only the governments directly affected by Japanese war crimes could be required to contribute to the Sub-Commission.<sup>18</sup> Ultimately they unanimously decided on

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<sup>14</sup> *Ibid.*, p. 123.

<sup>15</sup> *Ibid.*

<sup>16</sup> UNWCC, Minutes of Fifteenth Meeting held on 25 April 1944, M.15, p. 1 (“UNWCC, M.15”) (<https://www.legal-tools.org/doc/14221b/>).

<sup>17</sup> UNWCC, Establishment of a Far Eastern Panel or Branch of the Commission, Proposal by the Chinese Representative, 21 April 1944, C.13 (<https://www.legal-tools.org/doc/b1a1c3/>).

<sup>18</sup> UNWCC, Establishment of a Far Eastern and Pacific Sub-Commission, Report of the Finance Committee, 20 May 1944, C.22, p. 1 (<https://www.legal-tools.org/doc/7cf1b2/>).



the first choice, judging that they did not anticipate the Sub-Commission would create an undue financial burden on any one state party (especially considering some were still under partial occupation).<sup>19</sup> This choice, to treat the Sub-Commission equally with regard to financing, they asserted, “would be a practical demonstration of the fact that it is the common policy of all the nations represented on the Commission to punish all war crimes, whether committed in the Western or in the Eastern hemisphere”.<sup>20</sup>

On 15 August 1945 an *ad hoc* committee was convened, comprising representatives from the United States, Australia, Canada, China, France, the United Kingdom, India, the Netherlands and New Zealand, in order to discuss the procedure for securing the punishment of Japanese war criminals.<sup>21</sup> KOO expressed the hope that as many governments as possible interested in the Pacific War would participate in the work of the Sub-Commission, “in order to obtain the maximum of uniformity in the treatment of Japanese war crimes”.<sup>22</sup> One major supporter of the Sub-Commission was the United States which was “more directly interested in war crimes committed in the Far East than in those committed in Europe”.<sup>23</sup>

There were regular communications back and forth between the Sub-Commission and the UNWCC in London. These consisted of regular updates, the sending of lists of war crimes perpetrators or suspects, and also the occasional clarification question or request. At the meetings held in both London and Chungking, the UNWCC as a whole “considered both what law and judicial processes existed and what needed to be developed. The UNWCC made detailed proposals for a range of judicial processes in addition to those it conducted itself directly”. These recommendations included how to develop national tribunals, war crimes offices in enemy territory, mixed military tribunals and even an international criminal

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> UNWCC, Minutes of Seventy-Fourth Meeting held on August 8th, 1945, M.74, p. 5 (<https://www.legal-tools.org/doc/44a1ef/>).

<sup>22</sup> UNWCC, Report of Dr. Wellington Koo, Chairman of the Committee on the Establishment of a Far Eastern and Pacific Sub-Commission, 15 May 1944, C.19 (‘UNWCC, C.19’) (<https://www.legal-tools.org/doc/dd34cd/>).

<sup>23</sup> UNWCC, M.15, p. 2, see *supra* note 16.

court.<sup>24</sup> This was the true beginning of concrete discussion of the development of practical international criminal law.

## **16.2. Legal Basis and Mandate of the Far Eastern and Pacific Sub-Commission**

The Sub-Commission's legal mandate and purpose stemmed directly from its creation by the UNWCC in London: "Whereas the United Nations War Crimes Commission, at a meeting on May 16th, 1944, decided to set up a Far Eastern and Pacific Sub-Commission to deal with war crimes committed by Japan".<sup>25</sup> The Sub-Commission was created in June of that year, and its inaugural meeting was held on 29 November 1944 in Chungking, China's wartime capital. It has been estimated in the final report of the Sub-Commission that approximately 90 per cent of the cases presented to it came from the Chinese National Office.<sup>26</sup>

### **16.2.1. Function**

The function of the Sub-Commission was to deal with the war crimes committed by Japan.<sup>27</sup> As stated in the draft letter to the governments submitted by the Committee on the Establishment of a Far Eastern and Pacific Sub-Commission: "The first task of the Far Eastern and Pacific Sub-Commission [was] to study the numerous Japanese war crimes which some Governments are understood to desire to bring before it".<sup>28</sup> But the UNWCC and its Sub-Commission did not themselves carry out the investigations. They relied on the information provided to them by national authorities, which would report their findings to the UN Commissions. With the information given them by different countries, they would then

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<sup>24</sup> Plesch and Sattler, 2013, p. 204, see *supra* note 3.

<sup>25</sup> UNWCC, Minutes of the Thirty-eighth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 4 March 1947, SM.38, p. 1 (<https://www.legal-tools.org/doc/25c73f/>).

<sup>26</sup> UNWCC, Final Report of the Far Eastern and Pacific Sub Commission of the United Nations War Crimes Commission, 17 September 1947, Misc.109, p. 3 ('UNWCC, Misc.109') (<https://www.legal-tools.org/doc/5016fa/>).

<sup>27</sup> UNWCC, C.19, see *supra* note 22.

<sup>28</sup> UNWCC, Establishment of a Far Eastern and Pacific Sub-Commission, Draft Letter to the Governments Submitted by the Committee on the Establishment of a Far Eastern and Pacific Sub-Commission, 2 June 1944, C.25, p. 2 (<https://www.legal-tools.org/doc/91355a/>).

verify the quality and validity of claims, assess and finally categorise war criminals into groupings based on the seriousness of the allegations.

In China a National Office was established to investigate cases, reporting to the Chungking Sub-Commission. It started as early as February 1944 as an investigative unit, but was only given its full powers later in July 1945 when it grew into an office capable of dealing with arrests and extraditions as well.<sup>29</sup> This Chinese National Office was under the direct control of the Executive Yuan. It was organised in the form of a commission, “whose membership includes representatives of the Ministry of Justice, the Ministry of War, the Ministry of Foreign Affairs, and the Ministry of the Interior”.<sup>30</sup> The Chinese National Office had a standing committee of three people, one of whom was the Minister of Justice. Under the standing committee were three groups in charge of 1) investigating war criminals, 2) compiling lists of war criminals, and 3) translating cases of war crimes into foreign languages and maintaining contact with international agencies (such as the UNWCC’s Sub-Commission).<sup>31</sup>

The cases from China were first prepared by the Ministry of Justice, then verified by the Ministry of Defence, and lastly translated into English by the Ministry of Foreign Affairs so that they could be passed along to the Secretariat of the Sub-Commission, who would then relay the cases to the Sub-Committee on Facts and Evidence.<sup>32</sup>

It was pointed out during the fourth meeting of the Sub-Commission by George Kitson of the UK Foreign Office that the War Crimes Commission functioned “in much the same way as a magistrate’s court in the United Kingdom committing a person for trial for a serious crime”.<sup>33</sup> Before committing any one person to trial, a *prima facie* case would be made. In the cases of war crimes trials, he claimed that the evi-

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<sup>29</sup> Matthias Vanhullebusch, “The Right to Truth and the Legacies of World War II: A Way Forward for China?”, in Setsuo Miyazawa, Weidong Ji, Hiroshi Fukurai, Kay-Wah Chan and Matthias Vanhullebusch (eds.), *East Asia’s Renewed Respect for the Rule of Law in the 21st Century: The Future of Legal and Judicial Landscapes in Asia*, Brill Nijhoff, Leiden, 2015, p. 91.

<sup>30</sup> UNWCC, Annex II, Information Supplied by the National Offices as to their Organization and Operation, 22 May 1945, Noc. 2, p. 2.

<sup>31</sup> *Ibid.*

<sup>32</sup> UNWCC, Misc.109, p. 3, see *supra* note 26.

<sup>33</sup> UNWCC, Minutes of the Fourth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 23 February 1945, SM4, p. 1 (<https://www.legal-tools.org/d8a3e5/>).

dence had to be fairly convincing.<sup>34</sup> “Sir Cecil Hurst [chairman of the UNWCC] pointed out that it was not the task of the Commission to collect evidence in the technical sense of the term, but to obtain information” that would determine “whether ‘X’ should be put on trial”.<sup>35</sup> With regards to collecting evidence, KOO further pointed out that the Sub-Commission had to collect the appropriate quantity of proof, but did not need to bind itself to any one system of jurisprudence while doing so.<sup>36</sup> Once proof was collected and reviewed by the Sub-Commission, it was possible to ascertain which names would make the lists of indictable war criminals. Members were reminded that minutes from the Sub-Commission’s meetings were strictly confidential.<sup>37</sup>

### 16.2.2. Jurisdiction

The representatives of nations at the UNWCC had no doubt that there was need for a separate panel in Chungking, but there was disagreement as to the level of this panel’s authority. For example, David B. Meek, the Indian representative, believed that the panel should be a sub-division of the UNWCC’s Committee on Facts and Evidence. The Dutch representative, J.M. de Moor, agreed that the main work of the panel should be fact-finding, but felt that the panel should also “accept the opinion of the London Commission on legal and enforcement issues”.<sup>38</sup> KOO, however, had other plans. He wanted the authority of the panel to be greater than that of an evidence collector for the UNWCC. Eventually the suggestion made by Pell that the panel should be a Sub-Commission was accepted and it was therefore granted a little more distance from its parent body.<sup>39</sup>

The conflict remained about whether states should primarily deal with the Sub-Commission with regard to Far Eastern matters or with the main Commission as well. KOO suggested that most of these cases

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<sup>34</sup> *Ibid.*

<sup>35</sup> UNWCC, Minutes of the Third Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 2 February 1945, SM3, p. 2 (‘UNWCC, SM3’) (<https://www.legal-tools.org/doc/d75802/>).

<sup>36</sup> *Ibid.*, p. 3.

<sup>37</sup> UNWCC, Minutes of the Inaugural Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 29 November 1944, p. 3 (‘UNWCC, Inaugural Meeting’) (<https://www.legal-tools.org/doc/b7f069/>).

<sup>38</sup> Lai, 2014, p. 124, see *supra* note 11.

<sup>39</sup> *Ibid.*

should go to the Sub-Commission. He also argued that if Far Eastern cases were to be reported to the UNWCC, the Sub-Commission had to at least be notified of the case.<sup>40</sup> The representatives of New Zealand and India, however, suggested that each state be free to report cases to whichever of the two bodies they preferred.<sup>41</sup> This issue was never fully resolved by the Sub-Committee.

It was decided that the Sub-Commission would sit in Chungking, but could sit elsewhere if required.<sup>42</sup> In June 1946, when the Chinese government relocated from Chungking back to its legal capital, Nanking (Nanjing), the Sub-Commission moved as well.<sup>43</sup> The existence of the Sub-Commission did not preclude the establishment of other branches of the main Commission, however, in the end, no other such branches were ever created.<sup>44</sup>

The subject-matter jurisdiction of the Sub-Commission was clear, but its powers were in reality quite narrow. The panel had no power of initiation, but was required to deal only with the cases that were referred to it by foreign governments.<sup>45</sup> The Sub-Commission's limited powers "did not include the executive capacity to prosecute war criminals directly", leading to a reliance on different governments to execute the trials. The Sub-Commission's lack of juridical jurisdiction is blamed for non-uniform and inconsistent practices between nations, the exact aspect KOO was trying to avoid by inviting every interested Allied nation to join in the Sub-Commission's work. This is perhaps "the most significant criticism" that can be made concerning the Far Eastern Sub-Commission.<sup>46</sup>

### 16.2.3. Language

The language of Sub-Commission meetings was English. Despite the fact that the majority of data was coming to them from China, the Chinese

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> UNWCC, Minutes of the Second Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 5 January 1945, SM2, p. 6 ('UNWCC, SM2') (<https://www.legal-tools.org/doc/a2a2fd/>).

<sup>43</sup> Lai, 2014, p. 127, see *supra* note 11.

<sup>44</sup> UNWCC, Minutes of Forty-Seventh Meeting held on 7th February, 1945, M47, p. 2a (<https://www.legal-tools.org/doc/66e945/>).

<sup>45</sup> UNWCC, SM3, p. 2, see *supra* note 35.

<sup>46</sup> Plesch and Sattler, 2014, p. 38, see *supra* note 1.

government was required to provide English translations for every document that they submitted.<sup>47</sup> As soon as the Sub-Commission was inaugurated, the Chinese National Office began translating so that they could quickly transmit cases.<sup>48</sup> Unfortunately, they experienced a setback when it was realised that the format for translation and submission of documents they had been using was not in the same style as used by the UNWCC in London. “As it was the policy of the Chinese Government to follow strictly all the rules and requirements laid down by the Main Commission”, they started afresh, redoing their work with the correct template.<sup>49</sup>

#### **16.2.4. Limitations**

The limitations of the Sub-Commission that should be mentioned are as follows: 1) any recommendations they wished to make to the governments of nations had to be made through the UNWCC, acting as intermediary;<sup>50</sup> 2) any modification of UNWCC rules that the Sub-Commission wished to make had to be reported to the main Commission for its approval; 3) questions concerning the competence of the Sub-Commission to deal with certain issues had to be directed to the main Commission;<sup>51</sup> and, 4) as mentioned above, the Sub-Commission and even the main Commission were not given the task of prosecution, but merely laying the foundation for tribunals to be established or national governments to take up prosecution of war criminals.

#### **16.3. Composition of the Sub-Commission**

The inaugural meeting of the Far Eastern and Pacific Sub-Commission was held at 16:00 on Wednesday 29 November 1944 in Chungking.<sup>52</sup> It lasted one hour and 10 minutes. The nations in attendance were Belgium,

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<sup>47</sup> UNWCC, Inaugural Meeting, p. 4, see *supra* note 37.

<sup>48</sup> UNWCC, National Offices Conference, May 31st–June 2nd, 1945, Kings Bench Court, No. 5, Royal Courts of Justice, London W.C.2, Lord Wright, Chairman of the Commission in the Chair, First Session, Thursday May 31st, at 11:30 a.m., p. 9 (‘UNWCC, First Session’).

<sup>49</sup> *Ibid.*, p. 9.

<sup>50</sup> UNWCC, C.19, see *supra* note 22; UNWCC, SM2, p. 6, see *supra* note 42.

<sup>51</sup> UNWCC, Inaugural Meeting, p. 2, see *supra* note 37.

<sup>52</sup> *Ibid.*, p. 1.

the United States, Australia, China, Czechoslovakia, the Netherlands, the United Kingdom, India, Poland, France and Luxembourg. More nations were invited; in fact all the UNWCC state participants were welcome, but they chose not to become involved. Of the participating nations, the Luxembourg representative did not attend any of the subsequent Sub-Commission meetings.<sup>53</sup> In the early stages of the Sub-Commission, the Chinese government provided premises in Chungking at 305 Chung San Road.<sup>54</sup> The Chinese government appointed Dr. WANG Chung-hui as the Chinese representative for the meetings of the Sub-Commission.<sup>55</sup>

### 16.3.1. The Chairman

During the discussion of suitable candidates to be elected Chairman of the Sub-Commission, Sir Horace Seymour of the United Kingdom put forth WANG as the obvious choice stating: “the Sub-Commission [is] very fortunate in having as one of its members the Chinese representative who is a gentleman very well known, in wisdom and experience in the kind of work which the Sub-Commission [is] called upon to do”. Further, Seymour believed that he was expressing the wishes of all in attendance that WANG should be elected as Chairman of the Sub-Commission.<sup>56</sup>

While KOO, China’s representative to the UNWCC, was China’s “foremost diplomat of the period” and would go on to serve as a member of the International Court of Justice (‘ICJ’) between 1957 and 1967, Wang was “the country’s foremost jurist”.<sup>57</sup> WANG had already served as Chief Justice of the Chinese Supreme Court in 1920–1921, and as a deputy judge of the ICJ’s predecessor, the Permanent Court of International Justice (1922–36), to which he was the first Chinese member.<sup>58</sup> He was also called to the Bar in London (1907) and had received a doctorate in civil law from Yale University.<sup>59</sup> WANG was a clever man, who was

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<sup>53</sup> UNWCC, Misc.109, p. 1, see *supra* note 26.

<sup>54</sup> UNWCC, SM2, p. 7, see *supra* note 42.

<sup>55</sup> UNWCC, Establishment of the Far Eastern and Pacific Sub-Commission, Letter from the Chinese Ambassador to the Chairman of the Commission, dated 25th July, 1944, 26th July 1944, C.38 (<https://www.legal-tools.org/doc/24ebdb/>).

<sup>56</sup> UNWCC, Inaugural Meeting, p. 1, see *supra* note 37.

<sup>57</sup> Ole Spiermann, “Judge Wang Chung-hui at the Permanent Court of International Justice”, in *Chinese Journal of International Law*, 2006, vol. 5, no.1, p. 116.

<sup>58</sup> *Ibid.*, p. 115.

<sup>59</sup> *Ibid.*, p. 117.

greatly missed upon leaving the Permanent Court. When being told of WANG's resignation in January 1936, Åke Hammarskjöld, the first Registrar of the Court, "frankly admitted that Judge Wang was 'the last useful judge'".<sup>60</sup> John Bassett Moore, a prominent judge in the early years of the Permanent Court stated that "[t]he loss to the Court probably is irreparable".<sup>61</sup> The motion to elect WANG as Chairman for the Sub-Commission was unanimously carried out<sup>62</sup> on 29 November 1944.<sup>63</sup> WANG served until 14 June 1946 when he resigned and was replaced by Dr. LIU Chieh, Vice Minister of Foreign Affairs who was elected to take his place.<sup>64</sup>

### 16.3.2. The Secretariat

The organisation of the Secretariat, at the suggestion of WANG, was composed of four people: a Secretary-General, a secretary, an assistant secretary and a shorthand typist. This was to be increased in the event that the work required it.<sup>65</sup> For example, a second assistant secretary was added in August 1945 due to the workload (CHEN Shih-chang). For the position of Secretary-General, George Atcheson from the United States argued that the post should be filled by "a person of broad experience, of very considerable intelligence and with a good knowledge of the Chinese and foreign languages".<sup>66</sup> He himself proposed P.H. CHANG, Counsellor of the Executive Yuan, which was approved by the Committee. The Chairman and Secretary-General were charged with hiring the other two individuals of the Sub-Commission.<sup>67</sup> CHANG resigned in February 1946 to take a position as Consul-General in New York, and was replaced by

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<sup>60</sup> Spiermann, 2006, p. 116, see *supra* note 57. See also Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, 16 June–24 July 1920, with Annexes (The Hague, 1920), pp. 695 and 707.

<sup>61</sup> Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, Cambridge University Press, Cambridge 2005, p. 369.

<sup>62</sup> UNWCC, Inaugural Meeting, p. 1, see *supra* note 37.

<sup>63</sup> UNWCC, Misc.109, p. 2, see *supra* note 26.

<sup>64</sup> *Ibid.*, p. 2.

<sup>65</sup> UNWCC, Inaugural Meeting, p. 2, see *supra* note 37.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*



Dr. WANG Hua-Cheng (elected), Director of the Treaty Department of the Ministry of Foreign Affairs.<sup>68</sup>

### 16.3.3. Finance Committee

The Finance Committee of the Sub-Commission elected its own Chairman. The Committee's mandate was to review the salaries of those involved in the Sub-Commission. As was common within the Sub-Commission, the order of things followed the London structure and WANG Chung-hui explained the procedures of the London Finance Committee for their benefit. These procedures were used to appoint Seymour, Acheson and the Dutch Ambassador A.H.J. Lovink to the committee.

In the meetings of the Finance Committee salaries were established as well as budgets for materials. The expenses for the first year (in Chinese renminbi) from its establishment to 31 March 1945 were as follows: 20,000 monthly salary for a full-time typist, 30,000 for a secretary, 12,500 for a part-time employee, monthly allowance for the Secretary-General of 40,000, a 150,000 budget for stationary and printing, and an additional 425 rupees for the purchase of stencil paper from India. This made a total of 590,000 renminbi for the yearly budget.<sup>69</sup> All these numbers were open to review and adjustment after the first year.

Advances for the spending costs were made by the British embassy. At the end of each quarter, vouchers would then be submitted to the Foreign Office who in turn would present them to the UNWCC for settlement of the expenses.<sup>70</sup> Impressive, perhaps, is the fact that in the span of 13 months between December 1944 and the end of 1945, the Sub-Commission actually only spent less than a quarter of its budget.<sup>71</sup> This was reported as due to the favourable rates of exchange and sound economic management.<sup>72</sup>

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<sup>68</sup> UNWCC, Misc.109, p. 2, see *supra* note 26.

<sup>69</sup> UNWCC, SM2, p. 3-4, see *supra* note 42.

<sup>70</sup> UNWCC, Minutes of the Twenty-third Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 5 April 1946, SM.23, p. 2 ('UNWCC, SM.23') (<https://www.legal-tools.org/doc/06e2db/>).

<sup>71</sup> UNWCC, Minutes of the Nineteenth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 4 January 1946, SM19, p. 1 (<https://www.legal-tools.org/doc/69232a/>).

<sup>72</sup> *Ibid.*, p. 2.

Apart from the amounts allotted by the Finance Committee, it was up to the individual governments to pay for their nationals and the costs of transmitting cases to the Sub-Commission.

#### 16.3.4 The Sub-Committee of Facts and Evidence

The Sub-Committee of Facts and Evidence, set up to evaluate the evidence presented to the Sub-Commission, met for the first time on 15 February 1945 at the Dutch embassy in Chungking. The Sub-Committee was composed of Lovink (Chairman), Kitson of the British embassy, WANG Hua-Cheng of the Ministry of Foreign Affairs and Captain W. West of the US Judge Advocate's Office.<sup>73</sup>

It was the Sub-Committee's task to determine whether there was enough evidence for a given case. In making this determination, the Sub-Committee considered 1) whether there was reason to believe that a "war crime of reasonable importance [had] been committed" based on the evidence, and 2) whether there was good enough reason to think that the alleged offender, if and when put on trial, would be convicted.<sup>74</sup> It was not "essential" that the name of the accused be known. However, the Sub-Committee had to be "reasonably certain" that they could obtain it "in due course". It was also not essential that the evidence submitted be complete, as long as it was clear further evidence would be available when the location of the crime was eventually liberated from occupation or conflict.<sup>75</sup>

The evidentiary standard, as submitted by the Americans, was "anything 'which [had] probative value to a reasonable man'".<sup>76</sup> This interpretation shocked some legal experts, but the Sub-Commission was inclined to accept it as a suitable "guiding principle" for most cases.<sup>77</sup>

The first 12 charges were classified during the fifth meeting on 5 July 1945, after which the caseload as provided by the National Office was enough that weekly meetings could be held.<sup>78</sup> The Sub-Committee would classify the cases if satisfied by the evidence, and then report back to the Sub-Commission with their progress. An example of this is provid-

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<sup>73</sup> UNWCC, SM3, p. 3, see *supra* note 35.

<sup>74</sup> UNWCC, Progress Report: Adopted by the Commission on 19 September 1944, C48(1), p. 2.

<sup>75</sup> *Ibid.*

<sup>76</sup> UNWCC, SM3, p. 3, see *supra* note 35.

<sup>77</sup> *Ibid.*

<sup>78</sup> UNWCC, Misc.109, p. 6, see *supra* note 26.

ed in the meeting minutes for the seventh meeting of the Sub-Commission. The Sub-Committee had received 108 charges from the Chinese National Office, and by that time 84 had been adjudged war criminals, 72 had been examined and classified, one case had been ruled not a criminal offence, and six cases were labelled class C war crimes.<sup>79</sup> In some instances, cases were referred back to the National Office because of a lack of evidence or unclear evidence. This was the situation with case 468, where it was not clearly stated “whether the 38 Japanese officers mentioned were in Nanking at the time of the atrocities described, and if so, in what way they participated therein”.<sup>80</sup>

All Sub-Commission members were permitted to attend any of the Sub-Committee meetings and take part in the discussions as conducted for the analysis and processing of the evidence (Article III, Rule II).<sup>81</sup>

The work of the Sub-Committee took place in Chungking until 25 March 1946 after which it was in Nanking due to the transfer of the Chinese government there. The move created a considerable interruption in the Sub-Committee’s work and it could not meet for a period of over two months.<sup>82</sup> In total, the Sub-Committee held 38 meetings, “during which it was always composed of an American, British, Chinese and Netherlands representative”.<sup>83</sup>

#### 16.4. Work of the Sub-Commission

The first meeting of the Sub-Commission took place on 29 November 1944. Five more meetings took place before the middle of June 1944, but the Sub-Commission was not in full swing until July 1945 once cases starting flooding in from the Chinese National Office.<sup>84</sup>

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<sup>79</sup> UNWCC, Minutes of the Seventh Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 27 July 1945, SM7, p. 2 (‘UNWCC, SM7’) (<https://www.legal-tools.org/doc/a236c3/>).

<sup>80</sup> UNWCC, Minutes of the Eighteenth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 21 December 1945, SM18, p. 1 (<https://www.legal-tools.org/doc/92730c/>).

<sup>81</sup> UNWCC, Inaugural Meeting, p. 3, see *supra* note 37.

<sup>82</sup> UNWCC, Misc.109, p. 5, see *supra* note 26.

<sup>83</sup> *Ibid.*

<sup>84</sup> UNWCC, Far Eastern and Pacific Sub-Commission – Chungking First Progress Report, Dated February 15th 1946, 17 April 1946, C.119 (<https://www.legal-tools.org/doc/97f5c1/>).

The Sub-Commission usually met once every two or three weeks, except during the relocation from Chungking to Nanking in spring of 1946.<sup>85</sup> The work of the Sub-Commission was to process data. These data were ideally to lead to the prosecution of various war criminals that had devastated the Far East and Pacific area. The summary recommendations concerning the Japanese war crimes and atrocities dated 29 August 1945 provided a strong condemnation for the acts of the Japanese:

These crimes and atrocities [of the Japanese] consist not alone of individual outrages. They are crimes and brutalities deliberately planned and systematically perpetrated throughout the Far East and Pacific area. In consummation of their evil plan, the Japanese treacherously launched wars of aggression without ultimatum or declaration. They openly and flagrantly violated the solemn obligations which States, including their own, had undertaken by treaty or custom. They refused the ordinary protection of the law to the inhabitants of the countries they invaded. They did not respect family honour, the lives of persons, as well as religious convictions and practices. Inhabitants of countries which they overran have been ruthlessly tortured, murdered and massacred in cold blood; rape, torture, pillage, and other barbarities have occurred where their forces have operated; and cities have been wantonly destroyed and entire countrysides devastated for no military purpose. Despite the laws and customs of war and their own assurances, prisoners-of-war and other nationals of the United Nations have been systematically subjected to brutal treatment and horrible outrages calculated to exterminate them. These barbarities include massacre, murder, torture, starvation and other ruthless oppressions.<sup>86</sup>

In order to strive for justice in the aftermath of such atrocities, the Sub-Commission recommended the following measures. First, that the Japanese individuals responsible for the plans or policies which resulted in the crimes, to be surrendered to or apprehended by the UN so that they may be put on trial before an international military tribunal.<sup>87</sup> The recommendation suggested that the focus be on perpetrators in authority

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<sup>85</sup> UNWCC, Misc.109, p. 3, see *supra* note 26.

<sup>86</sup> UNWCC, Summary Recommendations Concerning Japanese War Crimes and Atrocities, Adopted by the Commission on 29th August 1945, p. 1.

<sup>87</sup> *Ibid.*

within the government, military and police that could reasonably be proven were complicit in the war crimes. Oddly, they also noted to include individuals from “secret societies”, criminal associations, and financial and economic affairs. All perpetrators from these groups were individuals who would have “devised, set in motion and carried out the criminal plans” which resulted in the acts of aggression and mass killings. It was further argued and recommended that those found guilty of participating in the formulation or execution of criminal plans that comprised multiple crimes should be liable for each of the separate offences committed in furtherance of the ultimate goal, and for the acts committed by their co-conspirators.<sup>88</sup>

The second recommendation made by the Sub-Commission was that Japanese individuals “holding key-positions in the civil, military or economic life of Japan” who did not devise or set in motion the plans, but nonetheless “directed the carrying out of such plans within Japan or in the territories of more than one of the United Nations”, should also be surrendered or apprehended by the UN for trial.<sup>89</sup> This category of persons would include those in command of prisoners of war and civilian internment camps where people were starved, tortured, maltreated or murdered.<sup>90</sup> Although it was not their plan to commit the atrocities that occurred there, they nonetheless contributed to their commission by acquiescence. They had the power to prevent the war crimes, but did not do so.

Third, it was recommended that the perpetrators be sent back to the countries where they committed their crimes, so that they might be judged in the courts of those nations.<sup>91</sup>

Fourth, it was advised that there be a Central War Crimes Agency established in Japan by military authority, to be staffed with investigators, detectives, lawyers and other technicians selected from the UN, in order to complete the following tasks: 1) the investigation of war crimes as planned, directed and perpetrated in Japanese territory; 2) the gathering of evidence inside Japanese territory relating to Japanese war crimes and atrocities; 3) the transmitting to the UNWCC or its sub-committees of evidence of war crimes discovered by the agency, evidence of persons not

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<sup>88</sup> *Ibid.*, p. 2.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

yet included on a list of perpetrators, or “evidence of crimes pointing to [the] existence of a general enterprise or pattern”; 4) the creating or maintaining of a consolidated list of all Japanese war criminals that were both wanted or already apprehended by the UN. Each nation would have the responsibility of sending to a registrar their country’s list of wanted, captured and tried criminals. The recommendation specifically noted that the “register should be similar to that maintained by the Central Recording Office of War Criminals and Security Suspects in the European Theatre of Operations”; 5) the establishment of a Central War Crimes Evidence Centre, where all evidence of war crimes should be secured. This evidence, according to the recommendation should be indexed and open to the examination of any interested UN member state; 6) to organise for the locating and capturing of all Japanese war criminals in Japan who were identified by the UNWCC, Sub-Commission or any UN member government as perpetrators; 7) the notification of the UNWCC and its Sub-Commissions and the governments of participating nations, of any war criminals that were apprehended; 8) to arrange for the surrender of Japanese war criminals who were apprehended in Japan, to interested governments in relation to the third recommendation stated above. In the event that two or more governments desired to try the perpetrator, the agency was to have been given the power to decide the terms of surrender; 9) to co-operate with the UNWCC and its Sub-Commissions, as well as all interested UN member states; 10) the maintaining of branch offices throughout the Far East and Pacific areas, in order to receive evidence of the commission of war crimes and to co-ordinate its work with the National War Crimes Offices. Representatives from each National Office should endeavour to investigate. It was also pointed out that representatives from each of the National Offices could, and should if they wished to do so, be attached to the Central War Crimes Agency as liaisons to aid in the investigation of the war criminals that committed crimes against their nationals. In addition, “[a]ll of the military forces and other agencies of the Governments should co-operate with and assist the Central War Crimes Agency in the discharge of its duties”.<sup>92</sup>

The fifth recommendation was that a Central War Crimes Prosecution Office be established in Japan, with staff to file charges, prepare cas-

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<sup>92</sup> *Ibid.*, pp. 2–3.

es, and sort the evidence in preparation for presentation to the International Military Tribunal.<sup>93</sup>

Sixth, it was recommended that “the Supreme Commander of the UN military forces or any Control Council should appoint one or more International Military Tribunals for the trial of the war criminals mentioned under I and II above”.<sup>94</sup> The following guidelines were suggested for the creation of these International Military Tribunals: 1) it or they should be composed of five members chosen from a list of recommended and government-approved individuals from the military forces of “Australia, Canada, China, France, India, the Netherlands, New Zealand, the Union of Soviet Socialist Republics, the United Kingdom and the United States”; 2) the appointing authority should adopt the procedural rules; 3) the tribunal must have the jurisdiction to try any of the war criminals as mentioned in the first two recommendations; (d) the applicable law is the laws and customs of war and the law of crimes against peace and crimes against humanity as they were defined in the Inter-Allied Agreement of 8 August 1945.<sup>95</sup>

The seventh recommendation was that upon apprehending war criminals, they would be “promptly” surrendered to the countries that wished to try them, unless they were first to act as a witness in another trial. This could be done before effectuating his surrender to the nation wishing his prosecution.<sup>96</sup>

Lastly, it was recommended that the UK Foreign Minister be “requested to convene as soon as possible a conference to carry out” any of the previous recommendations that required implementation.<sup>97</sup>

#### 16.4.1. Secrecy

There was a great deal of secrecy surrounding the preliminary plans and meetings of the Sub-Commission. When they began preparations, the war was not yet over, and it was believed that “the appearance in the Press of photographs of the Commission might endanger the safety of persons

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<sup>93</sup> *Ibid.*, p. 3.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, pp. 3–4.

<sup>96</sup> *Ibid.*, p. 4.

<sup>97</sup> *Ibid.*

connected with some of the members [of the Commission]”.<sup>98</sup> The proceedings were thus confidential and the meeting minutes marked as secret. According to Article III, Rule 14 of the Sub-Committee concerning publicity, the Sub-Commission was to treat all documents as “strictly confidential”.<sup>99</sup> No news was to be given to the press without the authorisation of the Sub-Commission; however, statements were made public about the Sub-Commission’s inauguration and the names of the elected Chairman (WANG Chung-hui) and Secretary-General (P.H. CHANG).<sup>100</sup>

Apart from secrecy concerning the identity of Sub-Commission members, the cases themselves were regarded as sensitive. Cases transmitted to the Sub-Commission were deemed for the examination and consideration of the Commission alone and its staff.<sup>101</sup> The governments of the individual nations as represented by the different participating members of the Sub-Commission were not to receive the case information that it was reviewing. This created a level of secrecy between individuals of the Sub-Commission and their governments who were supporting the institution’s goal of investigating and preparing files for the prosecution of war crimes. The Sub-Commission was so secretive that upon discovering a number of members had been sending copies of the meeting minutes to their governments, a resolution was passed that no details concerning cases for examination were to be recorded in the minutes.<sup>102</sup> This is one of the reasons that such limited information is provided in the meeting minutes. In fact, there are many case facts and details in the minutes of the UNWCC, especially its Facts and Evidence Committee. This is not the case with the Sub-Commission. Occasionally an update would be provided within them to the effect: “[t]he committee heard a reading aloud of the headings of the new 35 charges, rank, unit, nature for crime, when and where committed”.<sup>103</sup> Lists of names of the perpetrators were, during the most secretive months of preparation, not even left to the Sub-

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<sup>98</sup> UNWCC, Notes of Third (Unofficial) Meeting Held on 4th January, 1944, M.3, p. 2 (<https://www.legal-tools.org/doc/4cecd9/>).

<sup>99</sup> UNWCC, Inaugural Meeting, p. 3, see *supra* note 37.

<sup>100</sup> *Ibid.*

<sup>101</sup> UNWCC, SM3, p. 2, see *supra* note 35.

<sup>102</sup> *Ibid.*

<sup>103</sup> UNWCC, Minutes of the Eighth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 3 August 1945, SM8, p. 2 (<https://www.legal-tools.org/doc/713ede/>).



Commission members but held by the Secretary-General had anyone wished to consult them.<sup>104</sup> An example of this is in Sub-Commission's fifth meeting where London had sent two lists of German and Italian names. Claiming "extreme secrecy had to be observed", the lists were only passed around to members during the meeting for their consultation and taken back by the Secretary-General immediately after.<sup>105</sup>

The Sub-Commission's secretiveness and perhaps lack of transparency in reviewing cases stemmed from "security issues concerning the timing and scale of its work", but it was nonetheless one of the general criticisms of their legacy.<sup>106</sup>

#### **16.4.2. The Starting Date of Japanese Aggression**

The debate over the starting date of Japanese aggression in Asia had an important impact on who could be prosecuted and for what crimes. By January 1945 the Sub-Commission, as can be seen in its second meeting minutes, had already received documents from the Chinese War Crimes Investigation Committee with regard to Japanese atrocities committed against China. These allegations, however, dated to before the attack on Pearl Harbor, and so it was deemed that the Sub-Commission should not discuss such cases until the UNWCC in London ruled on the question of the war's starting date (for the purposes of investigation and prosecution).<sup>107</sup> As far as China was concerned, most of the atrocities committed by the Japanese against Chinese citizens had occurred before Pearl Harbor, making the start date of 7 December 1941 unacceptable. China stated on record in London that it wished to set the date as far back as September 1931, when Japan invaded Manchuria and established a puppet government in north-eastern China, but this was rejected.<sup>108</sup> WANG Chung-hui countered that they must at least go as far back as 7 July 1937, when the

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<sup>104</sup> UNWCC, Minutes of the Fifth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 16 March 1945, SM5, p. 2 (<https://www.legal-tools.org/doc/3494b3/>).

<sup>105</sup> *Ibid.*

<sup>106</sup> Plesch and Sattler, 2014, p. 38, see *supra* note 1.

<sup>107</sup> UNWCC, SM2, p. 2, see *supra* note 42.

<sup>108</sup> *Ibid.*

Marco Polo Bridge Incident occurred, and the frequently used starting date of the Second Sino-Japanese War (1937–45).<sup>109</sup>

At the inaugural meeting of the UNWCC, KOO argued that China “had suffered the consequences of enemy invasion for a much longer time than had any other country represented in the meeting”.<sup>110</sup> Despite the fact that the inaugural meeting did not address this issue, it was one of China’s primary concerns from before the establishment of the UNWCC right through to the commencement of the Tokyo Trials in mid-1946. The inaugural meeting was also not the first time that China had argued for an earlier starting date than recognised by its Western and European allies. In response to London’s invitation to join the UNWCC in October 1942, China had expressed its desire to include the war criminals responsible for atrocities since 18 September 1931.

The Sub-Commission, with its almost parent–child relationship to the main Commission, waited for a reply from London as to the official starting date to be used for prosecution of war crimes. The US representative Acheson offered to send a telegram to Washington urging a quick decision on this matter, but also putting forward his recommendation for the 1937 date.<sup>111</sup> This was in harmony with the opinion of Pell, the US representative in the UNWCC, who was initially instructed by the US Secretary of State to support the 1937 date. The Belgian government, on the other hand, had no objection at all to covering what the committee members called the pre-war period. To end the impasse on the Chinese submission of cases, the Sub-Commission agreed on 5 January 1945 to send a telegram to London to request a speedy decision on the matter.<sup>112</sup>

The Australian government was more extreme in their proposal. In their opinion, all events in China occurring before December 1941 should be dealt with by a separate commission examining only “the China incident” and separate from the United Nations Commission for the Investigation of War Crimes.<sup>113</sup> The London Commission took note of this ar-

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<sup>109</sup> *Ibid.*

<sup>110</sup> Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Durham, NC, 1998, p. 55.

<sup>111</sup> UNWCC, SM2, p. 2, see *supra* note 42.

<sup>112</sup> *Ibid.*

<sup>113</sup> UNWCC, Misc.109, p. 3, see *supra* note 26.

gument but saw no reasonable objection to dealing with pre-1941 Japanese war crimes.<sup>114</sup>

On 7 February 1945 the UNWCC in London informed the Sub-Commission that in its view

neither the Commission nor the Sub-Commission are restricted in the scope of their work or their power of initiative and that the Sub-Commission should not limit its investigation to war crimes committed after a particular date but it should consider each case on its own merits.<sup>115</sup>

This essentially allowed the inclusion of cases back to 18 September 1931, when Japan invaded Manchuria. This did not, however, end the debate on the issue of a starting date of aggression altogether. Because the International Military Tribunal for the Far East ('IMTFE') did not specifically stipulate the period covered by its jurisdiction, the International Prosecution Division (the IMTFE's prosecution branch) had to decide what year to put on the indictment of Japanese war criminals as well as the dates they would argue in court.<sup>116</sup> This was to be a debate *de novo* between prosecution and defence attorneys during trial. In this particular case, the prosecution won their arguments to institute 1 January 1928 as the starting date, earlier than was even debated within the UNWCC and Sub-Commission. "Hsiang represented China as its lead Prosecutor with the goal of proving that, since 1928, the many separate acts of aggression committed over the years by the Japanese had all been part of a larger conspiracy".<sup>117</sup> Due to the nature of the Japanese aggression, it was clear to the court that even though they had not formally declared war on 1 January 1928 or for years following this date, the laws of war should apply to their actions.<sup>118</sup> This allowed for a prosecution of crimes that were committed for a total of more than 16 years.

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<sup>114</sup> *Ibid.*

<sup>115</sup> UNWCC, M47, p. 2a, see *supra* note 44.

<sup>116</sup> Lai, 2014, p. 130, see *supra* note 11.

<sup>117</sup> XIANG Longwan and Marquise Lee Houle, "In Search of Justice for China: The Contributions of Judge Hsiang Che-chun to the Prosecution of Japanese War Criminals at the Tokyo Trial", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law*, vol. 2, Torkel Opsahl Academic EPublisher, Brussels, 2014, p. 145.

<sup>118</sup> *Ibid.*, p. 162.

Even the Chinese government was not as demanding and ambitious in their starting date for aggression and adopted 18 September 1931 as the start of temporal jurisdiction for their military tribunals.<sup>119</sup>

### 16.4.3. The Rush to Compile Lists of Names

By 27 July 1945 there was concern that the war could end abruptly and that the Sub-Commission would not yet be prepared to supply a tribunal with the list of high-ranking “arch criminals”.<sup>120</sup> By this time, the Sub-Commission had compiled what appeared to be a list of only lower-ranking individuals with the exception of a few senior commanders. As a group, they were concerned that the Sub-Commission would be justifiably criticised for failing to promptly name the “arch criminals”.<sup>121</sup> With this in mind they tried to hurry along the Chinese to produce evidence and lists at a faster pace.<sup>122</sup>

The Sub-Commission wanted to be ready in the event of an end to the war. By 16 March 1945 the London office had two lists ready and they felt that they were falling behind. They urged their members to hasten in their efforts to find witnesses and establish lists of individuals.<sup>123</sup> By 17 August 1945, the ninth official Sub-Commission meeting, the first list of Japanese war criminals was completed, containing 127 names.<sup>124</sup> The list was printed and one copy was given to each member present at the meeting. Copies were also given to the Chinese, Soviet and US high command. Congratulations were extended to Captain West and Colonel Edward H. Young at the release of the first list for their dedicated work. Colleagues claimed it was thanks to them this first list was ready so soon.<sup>125</sup>

Despite the rush to get out finalised lists of accused perpetrators, it was the case that if the Committee felt there was not enough evidence to

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<sup>119</sup> Lai, 2014, p. 130, see *supra* note 11.

<sup>120</sup> UNWCC, SM7, p. 4, see *supra* note 79.

<sup>121</sup> UNWCC, SM5, p. 2, see *supra* note 104.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> UNWCC, Minutes of the Ninth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 17 August 1945, SM9, p. 1 (<https://www.legal-tools.org/doc/41e39b/>).

<sup>125</sup> *Ibid.*

classify the accused individuals they would hold off adding the names and ask for more investigation into the case.<sup>126</sup> An example of this was at the fifteenth meeting when it was decided that charges against 45 individuals were too general in nature. They were temporarily kept off the list until further and more adequate information could be provided.

The Secretary-General reported that the Chinese war crimes authorities had approximately 160,000 complaints of Japanese atrocities. Some 30,000 of these were considered “serious complaints” and were used as part of the evidence for charges against the war criminals.<sup>127</sup> The Chinese authorities dealt with 70,000 complaints of a less serious nature directly. By 29 October 1946 there remained 60,000 allegations still under investigation by the Chinese Bureau.<sup>128</sup> Their goal was to complete this and submit the remaining cases to the Sub-Commission by June 1947.

#### 16.4.4. What Is a War Crime?

The issue of what acts constituted a war crime arose to some extent in the discussions of the Sub-Commission. In order to determine the answer to this question, they deferred to the UNWCC’s opinions and advice. The Chairman directed the group to refer to the UNWCC’s Annex I, which contained the list of war crimes as drawn up by the Paris Peace Conference in 1919.<sup>129</sup> However, while the cases as presented by the different National Offices to the London Commission were being classified according to this list, it was not meant to be exhaustive. The UNWCC had quite a debate on the nature of war crimes on 28 July 1944,<sup>130</sup> but the Sub-Commission in deferring to the decisions of the main Commission did not have to undergo the same depth of analysis.

There was an issue with regard to cases of deliberate bombardment of undefended areas in China by Japanese planes. The Sub-Commission

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<sup>126</sup> UNWCC, Minutes of the Fifteenth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 26 October 1945, SM15, p. 1 (‘UNWCC, SM15’) (<https://www.legal-tools.org/doc/bd5bac/>).

<sup>127</sup> UNWCC, Minutes of the Thirty-third Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 29 October 1946, SM33 (<https://www.legal-tools.org/doc/ebf25e/>).

<sup>128</sup> *Ibid.*

<sup>129</sup> UNWCC, SM3, p. 3, see *supra* note 35.

<sup>130</sup> UNWCC, Note on the Use of the Expression “War Crimes” by M. de Baer, 28 July 1944, C.39 (<https://www.legal-tools.org/doc/24ebdb/>).

sent out a letter dated 24 December 1946 to ask for guidance on the matter. The main questions that the Sub-Commission sought advice on from London were: 1) What constituted deliberate bombardment? 2) On whom rested the burden of proof? 3) What constituted an undefended location? 4) What evidence was required to establish a finding that a location is undefended? 5) What procedures had been followed in similar cases in Europe by the main Commission?<sup>131</sup>

Although it would be hard to prove who the pilot was in each instance, the commanders were deemed responsible for ordering and orchestrating such attacks. In view of this, it was decided by the Sub-Commission that the Committee on Facts and Evidence should keep and organise all the major cases of bombardment, but not the “less significant” ones.<sup>132</sup> The London Commission completed a 10-page preliminary report on this question on 19 February 1947 with the following conclusions or tentative proposals:

Regarding (a): “Deliberate Bombardment of Undefended Places” means the intentional bombardment of places with the knowledge that they are undefended (whatever the latter expression may mean).

According to general principles of criminal law, the burden of proof rests on the prosecution. This does not exclude, of course, that the intention to bombard the undefended place may be inferred from actions taken by the accused persons.

Regarding (b): There is no indication either in conventional law or in the opinion of legal writers or in actual state practice what “undefended place” means. It will, however, be sounder to replace the term “undefended place” by “place containing no military objective” and to state that the intentional bombardment of such a place is a violation of the laws and customs of war.<sup>133</sup>

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<sup>131</sup> UNWCC, Minutes of the Thirty-fifth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 10 December 1946, SM35 (<https://www.legal-tools.org/doc/234ffd/>).

<sup>132</sup> UNWCC, Minutes of the Thirty-fourth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 19 November 1946, SM34 (<https://www.legal-tools.org/doc/653ea6/>).

<sup>133</sup> UNWCC, Deliberate Bombardment of Undefended Places, Preliminary Report by Egon Schwelb, Legal Officer, 19 February 1947, III/78, pp. 9–10.

The report states that there was an intention to include aerial bombardment in Article 25 of the Hague Regulations (Convention IV) when the parties involved inserted the term “by whatever means” to its restriction on bombardment. This is the only phrase that can be used as indication of intention to include aerial bombing within the forbidden acts.<sup>134</sup> Article 25 states: “The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited”.<sup>135</sup> This can be used to mean an attack by land, air or sea. Not only this, but the UNWCC was of the opinion that at the beginning of Japanese–Chinese hostilities, the legal position was already that air warfare was naturally subject to the same restrictions as warfare on land and on sea because it would naturally be a part of the prohibition against direct attack of non-combatants, the most fundamental underlying precept of the laws of war.<sup>136</sup>

The Sub-Commission did make its own determination with regard to the qualification of the use of tear gas and sneezing gas as a war crime. Due to the use of these substances by the police in times of peace, all members of the Committee of Facts and Evidence agreed that it would not be categorised as one.<sup>137</sup>

#### **16.4.5. Classification Conflict between the UNWCC and the Sub-Commission**

The manner of classification of the alleged war criminals according to the procedures of the Sub-Commission were as follows: 1) category A-1 were “cases against named individuals where evidence [was] sufficiently complete to charge them as actual perpetrators of war crimes”; 2) category A-2 were “cases against enemy military and civilian personnel where evidence [was] sufficiently complete to charge them as having been con-

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<sup>134</sup> *Ibid.*, p. 5.

<sup>135</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (emphasis added) (<https://www.legal-tools.org/doc/fa0161/>).

<sup>136</sup> UNWCC, Deliberate Bombardment of Undefined Places, Draft Report by Committee III Summarising Documents III/78 and I/82 and embodying the results of the discussion in Committee III meeting of 26th February, 1947, III/79, p. 2.

<sup>137</sup> UNWCC, Minutes of the Seventeenth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 30 November 1945, SM17, p. 1 (‘UNWCC, SM17’) (<https://www.legal-tools.org/doc/b9c6ae/>).

cerned in the commission of war crimes”, either by having encouraged them, condoned them, or in any way shown responsibility for them; 3) category B were cases not falling under either A-1 or A-2, but that were nonetheless named enemies, whether military or civilian, in authoritative positions that should be held for interrogation as material witnesses upon the cessation of hostilities;<sup>138</sup> and 4) category C which were cases where the evidence was insufficient to justify classification under A or B.<sup>139</sup>

After this method of categorisation was already in effect for the Sub-Commission, a legal officer from the main UNWCC wrote a memo in November 1945 notifying them that they had put in place a classification system different from the main Commission and outlining how it should have been organised.<sup>140</sup> In effect, the Sub-Commission’s A-1 and A-2 categories combined corresponded to the UNWCC’s section A, and category B of the Sub-Commission was the same as their W classification. Rather authoritatively, the notification from the London office stated: “I submit for consideration that the proceedings of the main Commission and of the Far-Eastern and Pacific Sub-Commission be brought into line”.<sup>141</sup>

The Sub-Commission justified that they did not have the necessary information at their disposal on how the London Commission was doing their classifications when they started out their work. Lovink replied in a rather bold response that there was no evidence provided for why the Sub-Commission had to change their procedures, and that the system in use, apart from being “different” from the main Commission, worked perfectly for them. He further stated that the Committee of Facts and Evidence “is of the opinion, that it would be extremely difficult to change” at this point, when it had been in use since the very beginning of their Committee’s establishment.<sup>142</sup>

#### **16.4.6. Key Japanese Arch Criminals**

There was often a pressure on the Chinese National Office to hurry along their investigations. The pressure was due to the fear that the war would

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<sup>138</sup> UNWCC, SM15, p. 3, see *supra* note 126.

<sup>139</sup> UNWCC, Misc.109, p. 6, see *supra* note 26.

<sup>140</sup> *Ibid.*; UNWCC, SM15, p. 3, see *supra* note 126.

<sup>141</sup> UNWCC, SM15, p. 3, see *supra* note 126.

<sup>142</sup> UNWCC, SM17, p. 2, see *supra* note 137.



end and that the Allies would neither be ready to capture those to be put on trial nor have the evidence to begin prosecution of the alleged perpetrators. The Sub-Commission wanted to be ready for the cessation of hostilities.

Colonel Young had proposed that the Chinese National Office make studies and prepare files against the key Japanese individuals who, whether or not they were civilian or military, should be considered guilty because of their positions of power in the government at the time of the atrocities.<sup>143</sup>

At the beginning all evidence was based on eyewitnesses because there was a struggle to find other kinds of evidence. Lists were created on the basis of the account of Chinese soldiers, with the hope that this would lead to the finding of more concrete evidence. They were hoping that by finding witnesses against Japanese soldiers, the evidence would slowly lead back to the high up officials that had commanded them.<sup>144</sup> The reality was that it was better to have a lot of evidence against the lower-ranking soldiers than a theoretical case against high-ranking officials the prosecution could not yet touch. And so the Sub-Commission first tried to focus on building evidence of guilt against a number of “middle-men of varying ranks”.<sup>145</sup> Once this done, the aim was to somehow link these officers against whom they had much evidence to their commanding officers who were responsible for them. These more senior officials either ordered the illegal behaviour or allowed it to occur.<sup>146</sup> The Chinese government liked this idea from the Sub-Commission and acted on it in their search for evidence and perpetrators.

This concept of “extended responsibility”, as they referred to it, actually was in line with the “Japanese conception of justice responsibility” and interestingly the Sub-Commission discussed this as justification for using the legal principle.<sup>147</sup> Acts committed by subordinates, in this type of responsibility, would *ipso facto* be linked back to the commanding of-

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<sup>143</sup> UNWCC, SM7, p. 2, see *supra* note 79.

<sup>144</sup> *Ibid.*, p. 3.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> UNWCC, Minutes of the First Meeting of the Sub-committee of Facts and Evidence of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 8 February 1945, D6, p. 3 (‘UNWCC, D6’) (<https://www.legal-tools.org/doc/9b0d9b/>).

ficer who may have prevented their occurrence with a proper intervention.<sup>148</sup> The treatment of people in captured areas seems to have depended on the commanding officer. According to the Sub-Commission, “[f]ortunate’ indeed [were] those conquered people where the officers set a high standard for their men”.<sup>149</sup> For the Sub-Commission, this

Japanese point of view [was] of great importance since the punishment of war crimes not only [would take] place in retribution for misdeeds according to [the victor’s] standards of justice and equity, but it also intended to [act] as a warning to the Japanese army and people as a whole for the future.<sup>150</sup>

The Sub-Commission kept London updated on their progress concerning the creation of the major war criminals list. By the tenth meeting there were 100 names provided by the Chinese for the list of major war criminals. This was distributed within the Sub-Commission so that members could study them in preparation for later meetings and discussions.<sup>151</sup> During the distribution of this list, the Facts and Evidence Committee were still working hard to categorise the new incoming cases received.<sup>152</sup> At the eleventh meeting, it was decided that only 12 of the 100 names could not be included on the permanent list.<sup>153</sup> These cases were returned to the Chinese for further fact-finding or inclusion in the regular list of perpetrators.

The Americans also brought a list of the Japanese war criminals they wished to include. Oddly, these names passed “verification” without classification into any specific category.<sup>154</sup> On top of this, the British member of the Sub-Commission presented a list of 43 Japanese war criminals that his government wanted prosecuted, which was also allowed adoption as a permanent list (list No. 12) without verification of the evi-

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<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> UNWCC, Minutes of the Tenth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 31 August 1945, SM10, p. 1 (<https://www.legal-tools.org/doc/d679b5/>).

<sup>152</sup> *Ibid.*

<sup>153</sup> UNWCC, Minutes of the Eleventh Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 7 September 1945, SM11, p. 1 (<https://www.legal-tools.org/doc/c1e688/>).

<sup>154</sup> UNWCC, SM15, p. 2, see *supra* note 126.

dence by the Committee on Facts and Evidence.<sup>155</sup> This is an interesting point of discrimination when considering the way alleged perpetrators introduced by the Chinese were required to be put through a checking process.

By the twentieth meeting the Australians had compiled a list of 64 names which included the Japanese Emperor Hirohito.<sup>156</sup> As history makes clear, however, one of the greatest disappointments to some nations, especially the Chinese, is the manner in which the Americans shielded the royal family from prosecution. So much time was spent on weighing evidence and classifying the perpetrators on the lower rungs of the ladder, but when it came to the pinnacle of the command structure so much was lacking.

#### **16.4.7. Material Witness versus Perpetrator**

There was a debate concerning whether certain Japanese commanders and officials present at the locations of atrocities were to be surrendered as material witnesses to give an account of the soldiers' behaviour, or whether they should also be held for trial as accessories to the crimes.<sup>157</sup> This was an issue in great need of serious consideration in Chungking.

The reality was that in the East Asian countries where Japanese soldiers committed tens of thousands of war crimes against civilian populations, very few of the soldiers could be identified so clearly and so quickly as to guarantee their quick apprehension at the end of the war. Locating these specific men, extradition and trial were expected to be difficult. However, it was clearer and quicker to obtain information of who the commanding officers were in the locations of these crimes.<sup>158</sup> It was therefore easier not only to find but in all simplicity to know who the perpetrator was at the higher level of command.

The Sub-Committee recommended that lists be made of the persons in authoritative positions from each occupied region so that they could at the very least be located as material witnesses, but also in connection with

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<sup>155</sup> UNWCC, SM23, p.3, see *supra* note 70.

<sup>156</sup> UNWCC, Minutes of the Twentieth Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 25 January 1946, SM20, p. 1 (<https://www.legal-tools.org/doc/b2db70/>).

<sup>157</sup> UNWCC, D6, see *supra* note 147.

<sup>158</sup> *Ibid.*

a potential future charge against them for war crimes. Some individuals originally named by the Chinese National Office as witnesses were listed by the Sub-Commission as accused individuals.<sup>159</sup> This is because some Japanese prisoners of war named by the Chinese National Office as witnesses had incriminated themselves in their testimony against others and their status was then changed from witness to perpetrator.<sup>160</sup> These findings of the Sub-Commission were only recommendations, but a written explanation in such cases was allowed to be made for the Chinese concerning these witnesses.<sup>161</sup>

#### **16.4.8. Important Advances in the Fight against Sexual Violence**

In a novel way at the time, the UNWCC was the “first initiative of international criminal law to actively pursue prosecutions for crimes of sexual violence”.<sup>162</sup> These crimes were successfully prosecuted in the European and Asian UNWCC-supported national trials. Countries that prosecuted cases of sexual and gender-based crimes before national or military tribunals included Australia, Belgium, China, Denmark, Italy, France, Greece, Poland, Yugoslavia and the United States.<sup>163</sup> “The UNWCC directly authorized the prosecution of these trials on the grounds of recognizing incidences of rape and forced prostitution as war crimes”.<sup>164</sup> The legal basis for crimes of sexual violence was that rape had been included as a crime in the list prepared at Versailles. The UNWCC also referenced Article 46 of the Hague Regulations in cases involving rape and sexual violence.<sup>165</sup> “The UNWCC was the first multinational criminal law organization to explicitly endorse SGBV [sexual and gender based violence] crimes as international crimes”.<sup>166</sup>

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<sup>159</sup> UNWCC, Minutes of the Twenty-seventh Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 6 August 1946, SM27, p. 2 (<https://www.legal-tools.org/doc/28ee00/>).

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> Plesch and Sattler, 2013, p. 220, see *supra* note 3.

<sup>163</sup> Dan Plesch, Susana Sácouto and Chante Lasco, “The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today”, *Criminal Law Forum*, 2014, vol. 25, no. 1, pp. 349–81.

<sup>164</sup> Plesch and Sattler, 2013, p. 220, see *supra* note 3.

<sup>165</sup> *Ibid.*

<sup>166</sup> Plesch *et al.*, 2014, p. 350, see *supra* note 163.

Although it has been unclear in historic records whether the different tribunals adjudicating post-Second World War cases considered rape to constitute either a war crime, a crime against humanity, or both, “the fact that rape occurring in the context of conflict and/or mass violence was prosecuted with such frequency lends support to the argument that rape was clearly recognized as a serious crime in the post-World War II era”.<sup>167</sup>

In the realm of Asian prosecutions, the 12 July 1946 trial in the Australian Military Court of Tanaka Chuichi and two others, as well as the 29 August 1946 trial of Sakai Takashi in front of a Chinese War Crimes Military Tribunal of the Ministry of National Defence, included charges of rape.<sup>168</sup> Sakai, who was sentenced to death for his crimes, was prosecuted for, among other offences, “inciting or permitting his subordinates to rape civilians”.<sup>169</sup> Yaki Yoshio was also convicted of rape and torture and sentenced to death.<sup>170</sup>

#### **16.4.9. The Difficulties of Collecting Evidence**

There were great difficulties collecting evidence in the Far East. In the cases of prisoners of war, evidence could not be obtained because the Japanese did not allow visitors from the “protecting power” into the camps. There was a lot of maltreatment in these cases.<sup>171</sup> In the spring of 1944 the Chinese National Office was formed by the Executive Yuan and charged with investigating war crimes. Dr. C.T. WANG, former Minister of Foreign Affairs and once Chinese Ambassador to the United States acted as its Chairman.<sup>172</sup> They began investigations by requesting victims and eyewitnesses to report to the National Office. Notices were published with this request in popular newspapers in the provinces of China not under occupation.<sup>173</sup> Forms were also made available to the public so that they could provide information. Despite the publicity, victims and eyewitness-

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<sup>167</sup> *Ibid.*, p. 358.

<sup>168</sup> Plesch and Sattler, 2013, p. 221, see *supra* note 3.

<sup>169</sup> UNWCC, Summary Translation of the Proceedings of the Military Tribunal: Nanking, on the Trial of Takashi Sakai, Judgment passed by the War Crimes Military Tribunal of the Ministry of National Defence, 27 January 1947, Trial and Law Reports Series no. 27, p. 1.

<sup>170</sup> *Ibid.*

<sup>171</sup> UNWCC, M15, p. 4, see *supra* note 16.

<sup>172</sup> UNWCC, First Session, p. 8, see *supra* note 48.

<sup>173</sup> *Ibid.*

es were not keen on making reports for two reasons: first, many victims doubted whether the Japanese perpetrators would ever be caught and brought to justice; and second, many individuals were either still in occupied regions or had family in occupied regions.<sup>174</sup> It was clear that more evidence could only be acquired after liberation. Orders were nonetheless sent to all local governments to collect evidence of Japanese war crimes. Three thousand cases were under investigation by June 1945.<sup>175</sup>

After liberation there were still significant difficulties in obtaining evidence due to the political conflicts within China that quickly turned into civil war. The government's main preoccupation could not be the prosecution of criminals from a war that was over, not when the country was plunged into another war that threatened to overturn the government. Poor transportation conditions also exacerbated the difficulties with investigation.<sup>176</sup> "Although China had been the greatest victim of Japanese aggression and expansion, they were faced with a disappointing lack of evidence and limited time".<sup>177</sup> It became clear that better evidence was to be found in Japan where investigators might be lucky to find reports boasting of atrocities.

On 15 August 1945 Wellington KOO sent a letter to the UNWCC:

I beg to inform you that I have just received a cable from the Far Eastern and Pacific Sub-Commission in Chungking requesting me to inform the Commission that the Sub-Commission cordially endorses the proposal set forth in Document C.122 of the Commission regarding the establishment of War Crimes Agencies inside Japanese territory to investigate Japanese war crimes.<sup>178</sup>

This was unanimously adopted.

Beyond the difficulty in obtaining evidence were the problems in locating the accused individuals. Most Japanese military and civilian personnel had been repatriated to Japan after the war. In a meeting of October 1946 the Chinese representative admitted that "only a small number of

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<sup>174</sup> *Ibid.*, p. 9.

<sup>175</sup> *Ibid.*, p. 8.

<sup>176</sup> Longwan Xiang and Yi Sun, *Hsiang Che-chun's Letters, Telegrams and Statements at the Tokyo Trial*, Shanghai Jiao Tong University Press, Shanghai, 2014.

<sup>177</sup> XIANG and Houle, 2014, p. 156, see *supra* note 117.

<sup>178</sup> UNWCC, Minutes of Seventy-fifth Meeting held on August 15th, 1945, M75, p. 3 (<https://www.legal-tools.org/doc/8d895a/>).

Japanese War Criminals on the Sub-Commission's lists [had] been arrested".<sup>179</sup> Even upon location, due to the civil war, the simple matter of transferring an accused from one city to another became problematic.

### 16.5. After the Lists of War Criminals Were Prepared

When the lists were ready for distribution, the Ministry of Military Operations in China distributed copies to the Chinese commanders at various ports to check for Japanese personnel being repatriated, hoping to catch war criminals as they made their escape back to Japan.<sup>180</sup> The US army was also working closely with the Chinese in the furtherance of this goal. An update of 10 February 1946 had the number of captured Japanese war criminals at 111.<sup>181</sup> It was necessary for the Chinese to reach out and obtain help from the Americans in arresting Japanese criminals due to the speedy nature of their flight back to Japan.<sup>182</sup>

The minutes of the Sub-Commission also allude to updates made by the different countries on certain important captures as well as who they anticipated to soon have in their custody. Some updates were made in the manner of "Australian affairs wishes to notify the Sub-Commission that no. 18 on List 3 has been captured".<sup>183</sup>

The work of the Sub-Commission was brought to an end on 31 March 1947. Upon dissolution, its files and records were sent to the UNWCC in London.<sup>184</sup> There were 26 lists of Japanese war criminals, containing 3,147 names.<sup>185</sup> Of these names, the US government brought charges against 218, the Australian government against 18, the French government against 345, the British government against 43 and the Chi-

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<sup>179</sup> UNWCC, SM23, see *supra* note 70.

<sup>180</sup> ZHANG Binxin, "Criminal Justice for World War II Atrocities in China", FICHL Policy Brief Series no. 29, 2014, p. 2; UNWCC, SM19, see *supra* note 71.

<sup>181</sup> *Ibid.*

<sup>182</sup> UNWCC, Minutes of the Twenty-seventh Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 1 October 1946, SM31 (<https://www.legal-tools.org/doc/2752a9/>).

<sup>183</sup> UNWCC, SM19, p. 1, see *supra* note 71.

<sup>184</sup> UNWCC, Minutes of the Thirty-eight Meeting of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission, 4 March 1947, RM38, p. 1 (<https://www.legal-tools.org/doc/25c73f/>).

<sup>185</sup> UNWCC, Misc.109, p. 3, see *supra* note 26.

nese against 2,523.<sup>186</sup> By February 1947, as stated in the final report of the Sub-Commission, 36 Japanese war criminals had already been given the death penalty, 13 were sentenced to life imprisonment and 38 received a range of prison sentences.<sup>187</sup> Forty-five accused were found not guilty. A total of 1,128 were still undergoing investigation and prosecution.<sup>188</sup>

There was interest by the non-Chinese members of the Sub-Commission, after they had completed their work in compiling the lists, to obtain permission to attend some of the national trials of Japanese war criminals in China,<sup>189</sup> perhaps curious to see the legal continuation of their hard work.

### 16.5.1. Did the Lists Really Help?

With the lists made, their distribution complete, and the growing number of war criminals in custody, military tribunals began preparation for trial. Military tribunals were established in Peking (Beijing), Shenyang, Nanjing, Canton (Guangzhou), Jinan, Hankow (Hankou), Taiyuan, Shanghai, Xuzhou and Taipei.<sup>190</sup> And of course more famous still was the Tokyo Trial which was the International Military Tribunal set up for prosecution of high-level war criminals.<sup>191</sup>

WANG Hua-Cheng explained that the apprehension and trial of Japanese war criminals were at this stage in the hands of a committee composed of representatives of various government officials concerned with the investigation and punishment of war crimes. National trials within China, more specifically, began in December 1945.<sup>192</sup> These trials dealt with the class B and C criminals, the persons who directly contributed to the killings rather than those who orchestrated them or allowed them to occur, which was the focus of the IMTFE. The national trials were based on the Chinese legislative enactment, the Law Governing the Trial of War

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<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*, p. 4.

<sup>188</sup> *Ibid.*

<sup>189</sup> UNWCC, SM23, p.3, see *supra* note 70.

<sup>190</sup> ZHANG, 2014, p. 1, see *supra* note 180.

<sup>191</sup> For more on Chinese participation in the prosecution of the Tokyo Trial, see XIANG and Houle, 2014, pp. 143–76, *supra* note 117.

<sup>192</sup> ZHANG, 2014, p. 1, see *supra* note 180.



Criminals of 24 October 1946.<sup>193</sup> Under this law, only alien combatants or non-combatants could be prosecuted. Statutory limitations from the Chinese Criminal Code were also deemed not to apply here. The military tribunals, according to Article 17, were to have five military judges and between one to three prosecutors, subject to increase if necessary. Each trial was to have either three or five judges.<sup>194</sup> Article VIII of the law expressly stated the following four circumstances that could not relieve a perpetrator from criminal liability for war crimes:

- (1) that crimes were committed by order of superior officers;
- (2) that crimes were committed as a result of official duty;
- (3) that crimes were committed in pursuance of the policy of the offender's government; (4) that crimes were committed out of political necessity

(as was commonly the claim of Japanese politicians).<sup>195</sup>

An interesting and perhaps unusual feature of the Chinese war crimes definition is its “emphasis on and express reference to narcotic drugs and poisons” as well as the separate act of “stupefying the mind and controlling the thought” of the Chinese population.<sup>196</sup> These two points are mentioned separately making the second action a description perhaps of psychological control or influence.<sup>197</sup>

“Among 118 Class A war criminals arrested, only 28 were indicted by the International Prosecution Section, the International Military Tribunal for the Far East's (IMTFE) prosecutorial branch.”<sup>198</sup> The others were released by the authority of the Americans. In early 1948, when this news reached Washington, KOO, who by that time had become the Chinese Ambassador to the United States, “telegraphed China to inquire if the issue should be raised in Washington and if any extradition requests should be made”. The Foreign Ministry's response was that “China should not

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<sup>193</sup> UNWCC, Chinese War Crimes Legislation: Law Governing the Trial of War Criminals, October 24th, 1946, 26 August 1947, Misc. No. 105 (<https://www.legal-tools.org/doc/e14da1/>).

<sup>194</sup> *Ibid.*, p. 4.

<sup>195</sup> UNWCC, Annex: Chinese Law Concerning Trials of War Criminals, p. 157 (<https://www.legal-tools.org/doc/94d22f/>).

<sup>196</sup> *Ibid.*, p. 155.

<sup>197</sup> *Ibid.*

<sup>198</sup> Lai, 2014, p. 126, see *supra* note 11.

oppose the American policy of releasing these major war criminals”.<sup>199</sup> To this day there is great disappointment within China for the many Japanese criminals who escaped justice due to the policies put in place by the Americans after the war.

The Chinese national tribunals used the lists prepared by the Sub-Commission to some extent, but did not depend solely on those confirmed names.<sup>200</sup> For example, if someone came to the tribunal claiming they knew of an individual who was involved and had evidence to that effect, then this new person could also be prosecuted. The Peking War Crimes Tribunal prosecuted individuals who were mostly not on these lists. According to George REN, the son of REN Zhongxu, prosecutor for the Peking Military Tribunal, the lists were not of much use to the Chinese in their domestic trials because they did not include most of the names of the individuals who were tried domestically. The lists themselves did not contain many of the class C criminals. George REN stated in an interview that the true purpose of those lists for the Chinese was to publicly inform other nations of the perpetrators who had been responsible for the war. In a sense, they had more of a political purpose. Whereas other countries may not have agreed with certain Japanese individuals the Chinese claimed as war criminals, inclusion of those names on the list made it legitimate and also ensured a higher chance of co-operation for their apprehension. Most of the accused were no longer in China when the lists were circulated. The lists’ purposes, then, also increased awareness with foreign governments of the persons wanted for capture.<sup>201</sup> China had no army overseas; they needed all the help they could get in finding these individuals.

A degree of mystery remains surrounding the trials conducted in the People’s Republic of China years later. These trials occurred in 1956 “in Shenyang and Taiyuan before two *ad hoc* military tribunals of the Supreme People’s Court”.<sup>202</sup> Forty-five Japanese accused were tried. But at that time, there were also “more than 900 additional Japanese internees in China, transferred from the Soviet Union in 1950 as suspected war crimi-

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<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> George Ren, Interview on the Peking Military Tribunal, 13 December 2014.

<sup>202</sup> ZHANG, 2014, p. 2, see *supra* note 180.

nals”.<sup>203</sup> These individuals were declared “exempt from prosecution” and released so they could return to Japan. Of the 45 defendants in the 1956 trials, every single person pleaded guilty, was convicted and then subsequently released and returned to Japan.<sup>204</sup> This was remarkably different from the national trials held soon after the Second World War. The demeanour and attitudes of the war criminals were also diametrically opposite to those only 10 years earlier. Most defendants in the previous trials, “even in the face of irrefutable evidence, denied their guilt”.<sup>205</sup> More interesting still is that after returning to Japan, the released convicted criminals, in collaboration with released interned individuals, set up a pacifist organisation known as the Association of Returnees from China, and devoted the rest of their lives to serving in pacifist movements.<sup>206</sup> It remains unclear if the difference in their reaction to those tried earlier was the result of a different process and attitude of the Tribunal which they were faced, or if their time in prison had simply caused these individuals to come to terms with their participation in mass atrocities. The absence of evidence that any of the prisoners revoked their confession after being released, and the lack of claims made that their confessions had been made under duress, remove to some extent the suspicion that their claims were made only in the hope of a lenient sentence and early release.

For the Chinese government, holding trials in Shenyang was symbolic in its “geographical proximity to the first annexation of Manchuria by Japan”.<sup>207</sup> But the measures taken by the government simultaneously involved the creation of a new beginning for diplomatic relationships between China and Japan. Of the 969 prisoners apprehended by the Soviets in Siberia, only the 45 “most heinous offenders” were subject to a formal legal proceeding.<sup>208</sup> Prison sentences were from eight to 20 years, but due to the sentence’s retroactive application for the 11 years that had already passed, “most prisoners were free within a few years, and none later than

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<sup>203</sup> *Ibid.*

<sup>204</sup> Except one accused who died of illness while in detention.

<sup>205</sup> ZHANG, 2014, p. 2, see *supra* note 180.

<sup>206</sup> *Ibid.*

<sup>207</sup> Vanhullebusch, 2015, p. 94, see *supra* note 29.

<sup>208</sup> Justin Jacobs, “Preparing the People for Mass Clemency: The 1956 Japanese War Crimes Trials in Shenyang and Taiyuan”, *The China Quarterly*, 205, March 2011, pp. 152-172, at p. 153.

1964”.<sup>209</sup> Often viewed as lenient justice in comparison to the Allied war crimes trials in Europe and Japan, scholars have recently attributed this to China’s goal in the 1950s of stabilising relations with Japan in order to pave the way for greater trade relations. Despite the many graphically descriptive confessions made by the accused individuals and their potential importance for the nation’s recovery, it was of greater importance to the government that they keep the details of these confessions secret. While admissions of guilt may have served to assuage the pain and acknowledge the suffering victims or relatives of victims had endured, a publication of the true facts of these crimes would only have riled an already unhappy population. The new government of the 1950s managed to keep these hidden so as to direct the public towards a new path of partnership with the Japanese. “The original confessions, most of which were penned during 1954–55, were published for the first time in 2005”.<sup>210</sup>

“The investigation and prosecution conducted under the KMT government of the Republic of China were accused of serving the interest of imperialism [because] the government [of] that time was siding with Western allies”.<sup>211</sup> The irony is that the trials in the People’s Republic of China in the 1950s can easily be accused of doing exactly the same thing but with a different target, this time using excessive leniency to extend a hand of friendship to Japan as the balance of world power and alliances shifted.

## 16.6. Conclusion

Whatever criticisms may be apparent in hindsight, such as political interference in the organisation and legal process to prosecute war criminals, or the simple fact that the lists did not prove to be as useful or were not utilised as originally intended, China’s trials of Japanese war criminals, and the work undertaken by the Far Eastern and Pacific Sub-Commission

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<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*, p. 158; for these confessions see Zhongyang dang’an guan (ed.), *Riben qin Hua zhanfan bigong* [Confessions of the Japanese War Criminals who Invaded China], 8 vols. Beijing: Zhongguo dang’an guan chubanshe, 2005; Zhongyang dang’an guan, Zhongguo di er lishi dang’an guan, and Hebei sheng shehui kexue yuan (eds.), *Riben qinlüe Huabei zuixing dang’an* [Criminal Documents Concerning the Japanese Invasion of North China], 10 vols. Shijiazhuang: Hebei renmin chubanshe, 2005.

<sup>211</sup> Vanhullebusch, 2015, p. 94, see *supra* note 29.

to formulate lists of perpetrators and procedures for their prosecution, created a stepping stone to the international criminal law that exists today.

In the final report of the Sub-Commission, a list is provided of all contributing representatives from each nation. The Chinese experts were as follows: WANG Chung-hui, K.C. WU, HSIEH Kwan Sheng, LIU Chieh, WANG Hua-Cheng, YANG Yun Chu, HSU Tuen Chang, CHA Liang Chien, Dison POE and C.Y. CHENG.<sup>212</sup> China was a very active participant in both the UNWCC and its Sub-Commission. China took a leading role in the investigation and trial work conducted in the Far East.<sup>213</sup> The UNWCC as a whole is often cited as being “a rare body of legal material developed by states working together in official multilateral fashion to address and develop elements of international law”.<sup>214</sup> The records of their meetings show in detail debates about major issues of international law. But in the meetings of the Sub-Commission it is clear that they, for the most part, followed the lead of the London Commission on matters of legal or philosophical uncertainty. This left them with a much simpler task: sort evidence and create lists of names.

As was made clear by the Sub-Commission’s handling of certain lists of names, as well as China’s handling of the trials, there will always be political motivations and compromises intertwined with the evolution in this field of law. Politics and the interests of nations that hold the most sway will always fuel motivations of what cases to prosecute or not prosecute. We must nonetheless look to the past to understand the origins of the law, especially the work that has been put into international law by those who came before us, and the developments it has already undergone. This will help us to better understand not just the law, but ourselves, as contributors to the law and sometimes unwilling players in the larger political game. As there will never be an international court completely devoid of politics, we should learn from the path we are on and the progress we have hopefully made, to find a better balance between an unwillingness to prosecute and victor’s justice.

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<sup>212</sup> *Ibid.*, p. 1.

<sup>213</sup> Plesch and Sattler, 2013, p. 209, see *supra* note 3.

<sup>214</sup> *Ibid.*, p. 211.



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## Civil Society's Engagement with International Criminal Law: The Role of Peoples' Tribunals

Ustinia Dolgopol\*

### 17.1. Introduction

The subject matter of this chapter may appear to be a bit of an outlier for those immersed in the history and study of international criminal law, as it steps outside the articulation of the crimes to be tried, the rights of defendants and the procedural rules necessary for the efficient and fair operation of an international tribunal. Although the negotiations preceding the adoption of the Rome Statute of the International Criminal Court<sup>1</sup> ('ICC Statute') included debates about the role of victims in the proceedings before the proposed International Criminal Court ('ICC'), the nature of the debates did not allow for consideration of the consequences for victims of crimes when few or no prosecutions take place.<sup>2</sup>

Despite the repeated calls by the international community for the ending of impunity for crimes against humanity and war crimes,<sup>3</sup> the real-

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>2</sup> This is not to suggest that those attending the preliminary meetings of the United Nations Diplomatic Conference of Plenipotentiaries were not aware of these issues, but rather to note that the focus of the debates by necessity had to be on the creation of the ICC.

<sup>3</sup> United Nations General Assembly resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious Violations of International Humanitarian Law, adopted 16 December 2005, UN doc. A/RES/60/147 ('Basic Principles') (<https://www.legal-tools.org/doc/bcf508/>).

ity at present is that many, if not most, of those engaged in the commission of such crimes will not be brought before a court or a truth commission. For those of us working primarily in the field of human rights, this raises questions about the obligation of the international community to find alternative mechanisms to provide some sense of justice for those affected by such crimes. One attempt to deal with this issue has been the holding of Peoples' Tribunals. These are most often arranged by civil society organisations.<sup>4</sup> While aware that the ICC was created to try "the most serious crimes of international concern",<sup>5</sup> and that the principle of complementarity assumes that the majority of prosecutions will take place domestically, it must be noted that the international community has not been able to devise mechanisms that place sufficient pressure on states to hold such trials. In some cases those who perpetrated atrocities remain in power, in other cases countries are reluctant to hold trials that might jeopardise a fragile peace accord and in some situations laws granting impunity have been put in place. It is also the case that in some countries the material and human resources required to hold trials may not be present.<sup>6</sup> Thus the obligation of states to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice [...] irrespective of who may ultimately be the bearer of responsibility for the violation"<sup>7</sup> remains unfulfilled. Similarly the right of individuals to have a remedy has not been and perhaps will inevitably be unfulfilled in situations of mass atrocity.<sup>8</sup>

In addition to their efforts to address the lacunae created by the limited reach of international criminal law, civil society organisations have

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<sup>4</sup> Arthur W. Blaser, "How to Advance Human Rights without Really Trying: An Analysis of Nongovernmental Tribunals", in *Human Rights Quarterly*, 1992, vol. 14, no. 3, pp. 339–70; Gabrielle Simm and Andrew Byrnes, "International Peoples' Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?", in *Asian Journal of International Law*, 2013, vol. 4, no. 1, pp. 103–24.

<sup>5</sup> ICC Statute, see *supra* note 1.

<sup>6</sup> Issues pertaining to individual versus state responsibility or collective responsibility as well as the peace versus justice debate are outside the scope of this chapter.

<sup>7</sup> Basic Principles, para. 3(c), see *supra* note 3.

<sup>8</sup> The concept of remedies encompassed within human rights law is broader than compensation. It encompasses matters such as satisfaction (including restoration of dignity and reputation) and guarantees of non-repetition. For a discussion of this issue see Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2012, pp. 17–43.



also attempted to highlight areas of concern associated with the application of international criminal law. One such issue is the ongoing problem of trying and convicting those who have committed gendered crimes. Despite the progress made in recent years, serious questions remain as to whether or not the law and the systems we have put in place for administering the law serve the needs, rights and interests of women. Although all states and international institutions are obliged to guarantee equality before the law,<sup>9</sup> it is not obvious that this obligation has been given sufficient prominence in the day-to-day workings of our institutions, even though equality is a fundamental tenet of the rule of law.<sup>10</sup>

This has not been an easy chapter to write because it has two essential strands. One premise is the difficulty the international legal system has had, and to some extent continues to have, with respect to the treatment of crimes committed against women. The other strand is the role of Peoples' Tribunals in challenging the operation of international institutions and the manner in which the work of such tribunals has influenced debates about the operation and the content of international law.

The next section of the chapter will focus on the role of Peoples' Tribunals in highlighting issues of ongoing concern to civil society. The third section will then move to a case study – the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery ('Tokyo Women's Tribunal'). The Tokyo Women's Tribunal focused on the crimes committed against the so-called "comfort women" by the Japanese military during the Second World War. Although dealing with matters associated with the government and military of Japan, it is not my

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<sup>9</sup> Charter of the United Nations, 26 June 1945, Art. 1(3); United Nations General Assembly resolution 217A (III), Universal Declaration of Human Rights, Arts. 7 and 10, 10 December 1948, UN doc. A/RES/3/217A (<https://www.legal-tools.org/doc/de5d83/>); Committee on the Elimination of Discrimination against Women ('CEDAW'), *Vertido v. The Philippines*, 16 July 2010, UN doc. CEDAW/C/46/D/18/2008.

<sup>10</sup> The rule of law has been defined as: "a principle of governance in which *all persons, institutions and entities, public and private, including the State itself, are accountable to laws* that are publicly promulgated, equally enforced and independently adjudicated, and which *are consistent with international human rights* norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, *equality before the law*, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency". United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, para. 6, 23 August 2004, UN doc. S/2004/616 (emphasis added).

intention to suggest that there is a particular country that should be singled out when considering the history and development of international criminal law. Rather, my participation in the Tribunal allows for a closer consideration of its operation and its achievements than might be possible if the discussion about Peoples' Tribunals remained at a more general level. The reasons for holding the Tokyo Women's Tribunal are connected to the failures of the international system at the conclusion of the Second World War, and those failures should be considered when thinking about the historical origins of international criminal law. As I have argued elsewhere,<sup>11</sup> the attitudes and oversights that affected the treatment given to the comfort women system in the International Military Tribunal for the Far East ('IMTFE') and the class B trials continued to affect the manner in which the international community dealt with crimes of sexual violence when the Commission of Experts established by the Security Council to investigate the crimes that took place on the territory of the former Yugoslavia<sup>12</sup> was established, and was evident when the warrant of arrest was sought by the Office of the Prosecutor of the ICC in the case of *Thomas Lubanga Dyilo*.<sup>13</sup> The recent adoption by the Office of the Prosecutor of its Policy Paper on Sexual and Gender Based Crimes<sup>14</sup> is evidence of the ongoing challenges faced by those who are victims of crimes of sexual violence as well as the international community in bringing to justice those responsible for such crimes. The executive summary contains the following statement:

In addition to the general challenges to investigations conducted by the Office, such as security issues related to investigations in situations of ongoing conflict, and a lack of co-operation, the investigation of sexual and gender-based

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<sup>11</sup> Ustinia Dolgopol, "Knowledge and Responsibility: The Ongoing Consequences of Failing to Give Sufficient Attention to the Crimes against the Comfort Women in the Tokyo Trial", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, pp. 241–62.

<sup>12</sup> The United Nations Commission of Experts was established pursuant to United Nations Security Council resolution 780, 6 October 1992, UN doc. S/RES/780 (1992).

<sup>13</sup> International Criminal Court ('ICC'), Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution Application for a Warrant of Arrest, ICC-01/04-01/06, 12 January 2006 (<https://www.legal-tools.org/doc/59846f/>). The warrant of arrest was issued under seal by Pre-Trial Chamber I on 10 February 2006, and unsealed on 17 March 2006.

<sup>14</sup> ICC, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

crimes presents its own specific challenges. These include the under- or non-reporting owing to societal, cultural, or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence, owing, *inter alia*, to the passage of time<sup>15</sup> and inadequate or limited support services at the national level.<sup>15</sup>

I would argue that in our efforts to understand the formation of international criminal law we acknowledge its weak points and think carefully about how the challenges with respect to crimes of sexual violence might be handled more effectively. It is worthwhile noting that “to date, there have been no convictions for gender-based crime in the ICC’s three Trial Judgments”.<sup>16</sup>

## 17.2. Peoples’ Tribunals

According to Gabrielle Simm and Andrew Byrnes, over 80 international peoples’ or citizens’ tribunals’ have been held since the 1960s.<sup>17</sup> The scope of the issues covered in these tribunals has varied considerably from the war in Vietnam to water disputes in Latin America to the role of transnational corporations in encouraging or being complicit in violations of human rights.<sup>18</sup> The vast majority of such efforts have included a discussion of and attempts at applying various norms of international law. Some of the tribunals have come about because there is “a perceived gap in official structures of accountability”.<sup>19</sup> They are organised out of a belief that international mechanisms for egregious violations of human rights norms, some of which may amount to crimes against humanity, will

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<sup>15</sup> *Ibid.*, para. 4. See also para. 65: “The Office is mindful that victims of sexual and gender-based crimes may face the additional risks of discrimination, social stigma, exclusion from their family and community, physical harm, or other reprisals. In order to minimise their exposure and possible retraumatisation, the Office will enhance its efforts to collect other types of evidence”.

<sup>16</sup> Statement by the Women’s Initiatives for Gender Justice, “Ground-breaking Case for the ICC Reaches Closing Stages, Closing Oral Statement in the ICC Trial of Jean-Pierre Bemba Gombo, *The Prosecutor v. Jean-Pierre Bemba Gombo*”, 11 November 2014.

<sup>17</sup> Simm and Byrnes, 2014, p. 104, see *supra* note 4.

<sup>18</sup> Craig Borowiak, “The World Tribunal on Iraq: Citizens’ Tribunals and the Struggle for Accountability”, in *New Political Science*, 2008, vol. 30, no. 2, pp. 161–86.

<sup>19</sup> Simm and Byrnes, 2014, p. 103, see *supra* note 4.

not be considered or condemned by the international community.<sup>20</sup> The perception of organisers of such tribunals is that those states either with power or who have close relationships with more powerful states will not be subjected to any of the available international mechanisms.<sup>21</sup>

Certainly one of the most famous tribunals, the Russell Tribunals, would appear to have originated from concerns about the manner in which the United States was conducting warfare in Vietnam,<sup>22</sup> and the belief that government and military officials would not be held accountable either within the United States or by an international tribunal convened through the United Nations. This is also true of the more recent World Tribunal on Iraq.<sup>23</sup> To some onlookers these tribunals might be deemed to have a more “political” bent. Yet it is also the case that they engage with established norms of international humanitarian and human rights law.

Current scholarship in this area has focused on the fact that Peoples’ Tribunals represent an attempt to democratise international law. The vast majority of such tribunals “engage seriously with international legal norms”,<sup>24</sup> which suggests that those who organise and participate in such efforts have a commitment to the rule of law, and wish to contribute to the interpretation of such norms as well as signal areas where international law should become more nuanced or extend its reach.<sup>25</sup> This is not to suggest that we must agree with every interpretation or the suggested reforms. Rather, the point being made is that civil society is more than a group of activists who attempt to work through governments to achieve stated aims within the international system or to influence governments in the cases they might bring before the International Court of Justice. They are also individuals who by their efforts may assist in providing a fuller appreciation of the manner in which international law can be made meaningful to the lives of thousands of individuals around the globe. In addi-

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<sup>20</sup> Borowiak, 2008, pp. 162–65, see *supra* note 18.

<sup>21</sup> *Ibid.* See also Simm and Byrnes, 2014, p. 121, see *supra* note 4.

<sup>22</sup> Andrew Byrnes and Gabrielle Simm, “Peoples’ Tribunals, International Law and the Use of Force”, in *University of New South Wales Law Journal*, 2013, vol. 36, no. 2, pp. 726–27.

<sup>23</sup> Borowiak, 2008, see *supra* note 18; Ayça Çubukçu, “On Cosmopolitan Occupations”, in *Interventions: International Journal of Postcolonial Studies*, 2011, vol. 13, no. 3, pp. 422–42.

<sup>24</sup> Simm and Byrnes, 2014, p. 104, see *supra* note 4.

<sup>25</sup> Borowiak, 2008, p. 161, see *supra* note 18.

tion, some of the tribunals have amassed new information and evidence that would not necessarily have been in the public domain previously<sup>26</sup> and therefore contribute to our understanding of the effect of conflict on affected populations. The Tokyo Women's Tribunal is one such tribunal that has given rise to an ongoing resource,<sup>27</sup> with museums in Tokyo and Seoul providing scholars and interested individuals with access to documents and information about an issue that was not previously researched and discussed with sufficient thoroughness.

The recognition that the ongoing trauma experienced by those who have been subjected to torture or to the relatives of those who have been made to disappear must be addressed publicly and in detail may encourage groups to come forward to organise tribunals and truth commissions. An example of such an effort was the Iran Tribunal held in 2013. The organisers were members of the Iranian diaspora who had been subjected to serious violations of their human rights such as torture, murder and rape as political prisoners in Iran during the 1980s.<sup>28</sup> A substantial effort was made to ensure that families and survivors of political prisoners of all persuasions would participate. Similar to most of the Peoples' Tribunals that have been held thus far, the judges for the Iran Tribunal were selected from internationally respected jurists and lawyers. What distinguishes this Tribunal from other nationally focused tribunals was the decision to continue to work on the importance of civil society efforts in the search for justice by holding a public seminar in London entitled "The Role of Peoples' Tribunals in Empowerment of Civil Societies".<sup>29</sup> This event brought together individuals from Latin America, Asia, Australia and Europe, each of whom had either been a part of or had been a witness at a civil society tribunal.

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<sup>26</sup> Simm and Byrnes, 2014, see *supra* note 4. See also Gabriela Guadrado-Quesada and Gabrielle Simm, "Peoples' Tribunals: a progressive mechanism to achieve justice", in *Human Rights Defender*, 2014, vol. 23, no. 1, p. 21.

<sup>27</sup> Simm and Byrnes, 2014, p. 121, see *supra* note 4 for a reference to this aspect of the work of Peoples' Tribunals.

<sup>28</sup> Information about the Iran Tribunal as well as videos from its proceedings can be accessed at <http://www.irantribunal.com/index.php/en/30-about-us/373-about-iran-tribunal>. See also Shadi Sadr and Shadi Amin, *Crime and Impunity: Sexual Torture of Women in Islamic Republic Prisons*, Aida Book for Justice for Iran, 2012.

<sup>29</sup> The seminar took place on 25–26 October 2014 at the School of Oriental and African Studies, University of London. A video recording of the seminar is available to the public: <https://vimeo.com/groups/299453>. The author participated in the seminar.

In a commentary on the Iran Tribunal, Pardis Shafafi recounted an observation that could apply to many of those whose situations have been considered by Peoples' Tribunals:

[The witnesses'] had learned a painful collective lesson. [...] [T]hey were left feeling abandoned by the law and legal mechanisms. [...] For the participants of the tribunal, the catharsis through testimony was not sufficient. It did not represent an end in itself. [...] [Participants] considered the Iran Tribunal to be a manifestation of justice where justice had for so long been refused to them, by the Iranian government, by their diaspora host states, and by the higher international legal authorities.<sup>30</sup>

Although stated in more emphatic terms than would be utilised by an international lawyer, it is important that those working in the field of international criminal law remind themselves of the feelings and attitudes of those whose cases will never be heard, as their trauma is as ever-present in their lives as those who are able to testify at the ICC or one of the established tribunals. It is a reminder that the search for justice is never complete, an issue that will be explored further in section 17.3. of this chapter.

Exacerbating the problem of limited trials is the concept of partial justice.<sup>31</sup> Everyone working in the field of international criminal law would be aware that the number of international trials that can take place will always be limited by human and material resources. This results in a situation where the horrors endured by numerous victims and survivors will never be part of our collective understanding of human history, nor will those affected by atrocities feel that some form of justice has been provided to them. Elsewhere I have observed that the practical and political limitations inherent in both domestic and international systems should “cause us to reflect upon the reactions of the survivors and the families of victims who have been harmed by perpetrators not brought to trial who are likely to feel further marginalised and isolated by a process that has

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<sup>30</sup> Pardis Shafafi, “The Iran Tribunal: Defying International Silence”, in *Open Democracy*, 12 May 2015.

<sup>31</sup> Gerry J. Simpson, “War Crimes: A Critical Introduction”, in Timothy L.H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches*, Kluwer Law International, The Hague, 1997, p. 1. Simpson also explores this issue in Gerry J. Simpson, “Didactic and Dissident Histories in War Crimes Trials”, in *Albany Law Review*, 1997, vol. 60, no. 3, pp. 801–39.

ignored them".<sup>32</sup> While I am aware that the establishment of truth commissions is one attempt to deal with this issue, it is also the case that only a limited number of commissions have been established and that international politics plays a role in determining which situations will find the necessary funding and resources for such bodies to be established.

Further, although the rules of international humanitarian law and now international criminal law have, in theory, been articulated precisely, one commentator has noted that

post fact accountability for IHL is extremely difficult to establish. Liability for violations of provisions related to proportionality, distinction and other obligations under IHL that involve balancing or a reasonable-commander standard is, in practical terms, usually established only in the most extreme cases of violation.<sup>33</sup>

But those affected by conflict will grieve for the lack of attention paid to the crimes committed against them. The limiting effects of partial justice and international politics on our ability to deliver some form of justice are two of the main reasons that civil society groups come together to establish Peoples' Tribunals.

An area that is outside the scope of this chapter, but nevertheless worthy of further consideration, is the use of such tribunals to explore the conduct of transnational corporations that can affect the rights of peoples in all parts of the world, but particularly in the developing world.<sup>34</sup> Clearly the present state of international law is such that transnational corporations as entities cannot be held responsible for the commission of crimes.<sup>35</sup> Although individuals associated with corporations have been

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<sup>32</sup> Ustinia Dolgopol, "Redressing Partial Justice – A Possible Role for Civil Society", in Ustinia Dolgopol and Judith Gardam (eds.), *The Challenge of Conflict: International Law Responds*, Martinus Nijhoff, Leiden, 2006, p. 480.

<sup>33</sup> Naz K. Modirzadeh, "The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict", in *U.S. Naval War College International Law Studies (Blue Book) Series*, 2010, vol. 86, pp. 349–410.

<sup>34</sup> Borowiak, 2008, p. 170–75, see *supra* note 18.

<sup>35</sup> In 2011 the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights developed by the Special Representative of the Secretary-General, John Ruggie, on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 21 March 2011, UN doc. A/HRC/17/31. The Guiding Principles are set out in United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, United Nations, New York, 2011.

prosecuted, the number of such prosecutions remains small. In addition some of the acts that have been subjected to consideration by various Peoples' Tribunals would fall under the rubric of gross violations of human rights rather than crimes against humanity. Therefore, even expanding the number of prosecutions is unlikely to cover many of the acts that can leave indigenous and more marginalised segments of a population aggrieved. It may be that the efforts of such tribunals will assist the international community to develop a more rigorous regulatory framework than exists at present.<sup>36</sup> A number of the tribunals organised through the Permanent Peoples' Tribunal headquartered in Rome have focused on issues associated with the conduct of transnational corporations.<sup>37</sup>

In concluding this part of the chapter, the essential point I wish to highlight is that even years after an event, individuals will attempt to harness the power of the law in order to demonstrate that what happened to them could have been considered a crime. The reasons why this desire to have an acknowledgement that is legal in nature is important to so many people remain to be fully understood and addressed. But it appears that in reasserting moral order in society there is an intuitive need to ground that call for order in notions of the law. We, as scholars, understand that law and justice are not synonymous terms, but for the lay population there is a belief that law is a conduit for justice. And in a limited sense it is. Those Peoples' Tribunals that do attempt to engage seriously with the principles of law adopted by the international community deserve to be considered as part of the process that has contributed to the establishment of the formal mechanisms of applying international criminal law, and future tribunals deserve to be studied for the manner in which they have interpreted and applied the law. It may be that in a manner similar to the more original arguments that can be raised in *amicus* briefs, which are sometimes accepted by the courts,<sup>38</sup> that the "judgments" rendered by civil society

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<sup>36</sup> This is not to denigrate the work of Ruggie in the development of the Guiding Principles, but the ongoing focus on the conduct of transnational corporations suggests that the present state of play does not address the concerns of local populations and that their ongoing sense of injustice can result in outbreaks of violence including attempts at secession.

<sup>37</sup> The Permanent Peoples' Tribunal was founded in 1979 on the initiative of Senator Lelio Basso and is administered through the Fondazione Lelio e Lisli Basso [Lelio and Lisli Basso Foundation]. See its website at [www.fondazionebasso.it](http://www.fondazionebasso.it).

<sup>38</sup> Naz K. Modirzadeh, "Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance", in *Harvard National Security Journal*, 2014, vol. 5, no. 1, p. 225–304.



efforts may yield insights into the types of arguments that could be utilised by the ICC or regional or specialised tribunals. One such effort that has been and deserves to be the focus of scholarly study is the Tokyo Women's Tribunal.

### 17.3. The Tokyo Women's Tribunal

#### 17.3.1. The Comfort Women and the Desire for Justice

From approximately 1936 until the end of the Second World War, between 150,000 and 200,000 women and girls were taken from various countries in the Asia-Pacific region and placed into military brothels which have euphemistically become known as “comfort stations”. A policy favouring the establishment of comfort stations was adopted sometime between 1936 and 1937.<sup>39</sup> During the 1930s Japan invaded China. The behaviour of its troops in Shanghai and Nanjing (then referred to as Nanking) led to an international outcry. Various government and military officials became concerned about the international condemnation of Japan's behaviour and Chinese reprisals against Japanese soldiers. These concerns were one of the factors that prompted the military to consider the establishment of comfort houses.<sup>40</sup> As the Japanese moved into Southeast Asia, Burma and the Pacific, comfort stations were established in each of the areas they occupied.<sup>41</sup>

In addition to being repeatedly raped, the women were subjected to other forms of torture such as having lit cigarettes placed on their bodies and implements being placed into them. Some were subjected to forced

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<sup>39</sup> It appears that “comfort stations” may have existed prior to this, but on a less extensive scale and without such direct involvement from the military. See Ustinia Dolgopol and Snehal Paranjape, *Comfort Women: An Unfinished Ordeal*, International Commission of Jurists, Geneva, 1994.

<sup>40</sup> Documents detailing the military's involvement are referred to in Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito et al. and the Government of Japan*, Transcript of Oral Judgment, 4 December 2001, PT 2000-1-T, paras. 92–98 (‘Women's International War Crimes Tribunal, Oral Judgment’) (<https://www.legal-tools.org/doc/398052/>).

<sup>41</sup> A brief overview of the Allied documents describing the extensive nature of the comfort women system is set out in Dolgopol, 2011, pp. 252–54, see *supra* note 11. See also Women's International War Crimes Tribunal, Oral Judgment, paras. 99–108, *supra* note 40.

abortions and the vast majority were denied any liberty of movement.<sup>42</sup> Many of the women felt unable to return to their families; the majority of those that did could not discuss their suffering with those close to them and the majority of Korean survivors described lives of utter isolation.<sup>43</sup> The experiences they endured have been devastating for the women's psychological and physical health.<sup>44</sup>

During the early part of the 1990s women began to come forward, often at the urging of women's groups, to identify themselves as survivors of the comfort women system. Activists and scholars began to highlight the evidence collected by Allied nations about the operation of this system as well as the acts of individual soldiers that amounted to war crimes.<sup>45</sup> At the same time, an increasing number of war-related documents were being uncovered in Japan that detailed the military's involvement in the creation and operation of the comfort stations.<sup>46</sup> Public meetings, symposia and other events were held in South Korea, the Philippines and Japan. Despite public support for Japanese accountability within Japan and the repeated calls by the international community<sup>47</sup> for Japan to apologise and to take

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<sup>42</sup> See statements of victims in Dolgopol and Paranjape, 1994, pp. 55–119, *supra* note 39. Extracts of the testimonies of former comfort are interspersed throughout Women's International War Crimes Tribunal, Oral Judgment, see *supra* note 40.

<sup>43</sup> *Ibid.*

<sup>44</sup> Women's International War Crimes Tribunal, Oral Judgment, paras. 312–42, see *supra* note 40.

<sup>45</sup> Yoshiaki Yoshimi, *Comfort Women: Sexual Slavery in the Japanese Military During World War II*, trans. Suzanne O'Brien, Columbia University Press, New York, 2000; Ustintina Dolgopol, "Rape as a War Crime: Mythology and History", in Indai Lourdes Sajor (ed.), *Common Grounds: Violence against Women in War and Armed Conflict*, Asian Center for Women's Human Rights, Quezon City, 1998, pp. 122–47; Dolgopol, 2011, see *supra* note 11.

<sup>46</sup> Yoshimi, 2000, see *supra* note 45.

<sup>47</sup> The report of the International Commission of Jurists (Dolgopol and Paranjape, 1994, see *supra* note 39) received a significant amount of media attention and was referred to extensively in the reports to the then UN Commission on Human Rights. United Nations Economic and Social Council, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45 and Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime, 4 January 1996, UN doc. E/CN.4/1996/53/Add.1; and its then Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations Economic and Social Council, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Appendix: An Analysis of the Legal Liability of the Government of Japan

other affirmative steps towards making restitution, a view developed among those individuals and civil society organisations that the government would never deal adequately with the harms the women had suffered. This included a concern that the government would not publicly acknowledge the extent of the system or assist in bringing to light the “truth” about what had taken place.<sup>48</sup> This combination of factors culminated in the decision to establish the Tokyo Women’s Tribunal.<sup>49</sup>

From my first engagement with the women who became known as the comfort women, three things were clear to me. Their lives, even for those who had been able to build some semblance of what to us would appear to be a normal life, had been profoundly coloured by the attack on their dignity and on their very humanness by the acts committed against them. None of the women had been able to recover. For some the physical injuries were a constant reminder of what had taken place and for all of them the psychological trauma had never fully abated. The second was the ongoing sorrow they felt for what they had lost – their childhoods, their aspirations, and their sense of their place in the world. During November 2014 a radio broadcaster discussing the reaction of relatives of Australian soldiers killed during the First World War used the phrase “never-ending grief” to describe how a number of parents and siblings coped (or not). That phrase is apt when describing the feelings of the comfort women I have met. There is a connection between their grief and the fact that no one has been made answerable for the crimes committed against them. In addition, the vast majority of the women had to maintain a silence about their experiences because they lived in fear of being shunned by their families and communities. The ongoing effect of the comfort women system on the lives of those brought within its grasp was the reason that Snehal Paranjape and I entitled our report for the International Commission of Jurists, *Comfort Women: An Unfinished Ordeal*.<sup>50</sup>

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for “Comfort Women Stations” Established during the Second World War, 22 June 1998, UN doc. E/CN.4/Sub.2/1998/13.

<sup>48</sup> Despite the efforts of Yoshimi, 2000, see *supra* note 45, there were concerns that more documents existed and that the government was not putting them into public domain.

<sup>49</sup> The author was present in Rome during the negotiations that culminated in the creation of the International Criminal Court as part of the Women’s Caucus for Gender Justice. The decision to organise a Tribunal was taken at this time. The material in this section is based on the author’s participation in the organising committee and her observations of the process that culminated in the holding of the Tokyo Women’s Tribunal.

<sup>50</sup> Dolgopol and Paranjape, 1994, see *supra* note 39.

The third aspect of this tragedy that struck me at the time I first met with the women, and I think what has inspired many of us who have worked with the women, was their commitment to attaining justice, not only for themselves, but for women worldwide. The prompt for many of them to speak out was the effect the war in the former Yugoslavia was having on the lives of women. It was unthinkable to the women we spoke with that this was happening again in their lifetime. Their search for justice in its larger sense – of wanting the international community to respond to these crimes and to find ways of decreasing their prevalence – is an indication of the human need for outward vindication of their sense of morality. That search for a more responsive legal and political order is what influenced many of the groups working on the comfort women issue to come together and organise the Tokyo Women’s Tribunal. The constant questioning of the women about the manner in which they could attain recognition for what they had endured and how the international community could be made aware of the acts of the Japanese military were the prompts for many of us to think of a mechanism that went beyond the public hearings and conferences that were held throughout the 1990s.

### **17.3.2. The Holding of the Tribunal**

As many commentators have noted, the organisers decided to adopt a court-like approach to the taking of evidence and to the actual conduct of proceedings. This was, in part, due to the ongoing discussions with the women and a reflection of their desire to be listened to, to have the full story explained and for an outside body to reach a decision about the legal implications of what had taken place. As an aside, many of the women believed, and for the most part rightly, that the IMTFE had not considered the crimes that could have been charged in relation to the comfort stations. They were unaware that evidence before the IMTFE included information about the treatment of Chinese women and Filipinas. That information was used in a general sense to demonstrate the widespread nature of the commission of crimes against humanity. I note this because I will not have time to explore the manner in which official tribunals become part of the historical record and, if limited in scope, can create what Nicola Henry has described as a “memory of an injustice”.<sup>51</sup>

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<sup>51</sup> Nicola Henry, “Memory of an Injustice: the ‘Comfort Women’ and the Legacy of the Tokyo Trial”, in *Asian Studies Review*, 2013, vol. 37, no. 3, p. 362.

The suggestion that a tribunal be held, and that specific military figures be named, was first put forward at a seminar on violence against women held in Tokyo in October–November 1997.<sup>52</sup> All of those present agreed that the format should differ from the various public hearings and seminars that had taken place in Tokyo and Seoul until that point in time. Most of those consisted of a few women coming forward to tell their stories and academic and activist comment on the situation. The work being undertaken on the ICC Statute influenced the manner in which the Tribunal was approached, that is that there should be evidence which would establish the responsibility of individual military officials for the crimes committed against the women and that findings should be made with respect to the obligation of the government of Japan to make reparations to the women. The organisations that took on the co-ordinating role were the Korean Council for Women Drafted into Military Sexual Slavery, the Asian Center for Women's Human Rights in the Philippines and Violence Against Women in War-Network Japan (VAW-Net Japan). (Only the Korean Council remains in existence at this point in time.) Representatives from China, Indonesia, North Korea and Taiwan quickly joined the steering committee and in mid-2000 representatives from East Timor began to participate in the organisation of the Tribunal. Eventually the situation of Malaysian and Dutch women was included in the list of issues to be addressed by the Tribunal.

I would like to acknowledge here the extraordinary efforts that were undertaken by each of the national groups to find documentary evidence that would identify particular commanders and the location of the former comfort stations. Hundreds of pages of documents were collected, including those located by Japanese academics. In addition, the national groups worked with the women who would testify, providing them with emotional support and assisting in the taking their testimony via video so that the women would not have to testify extensively at the actual tribunal hearings. (The size of the hall meant that 1,500 attendees could be expected and it was believed that this could be intimidating for some of the women.) The Tribunal was held on 8–10 December 2000 in Kudan Kaikan Hall in Tokyo. Each day the third tier of the hall was filled with media personnel and throughout the Tribunal print, radio and television journal-

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<sup>52</sup> International Conference on Violence Against Women in War and Armed Conflict Situations, Tokyo, 31 October–3 November 1997.

ists interviewed many of the women. I believe that one of the reasons the Tribunal received such an extensive amount of publicity was the evidence that was being introduced and the solemnity with which the proceedings were taking place.

The Tribunal also took evidence from a number of expert witnesses. Their evidence covered issues such as the organisation of the Japanese military; the content of documents concerning the comfort system found in government archives; the structure of the Japanese government during the war, including the powers exercised by the Emperor; the incidence and effect of trauma on victims of mass rape; and the applicable rules of international law applying at the close of the Second World War, including the possibility of compensation for harm. Two former Japanese soldiers agreed to come forward to tell of their involvement in and experiences of the comfort system.

One of the criticisms often lodged against Peoples' Tribunals is that they are biased, that is, those who participate have reached a conclusion about the major issues being litigated prior the holding of the particular Tribunal.<sup>53</sup> This, however, was not a criticism that had serious foundation with respect to the Tokyo Women's Tribunal as the government of Japan had acknowledged its responsibility for the commission of atrocities in the San Francisco Peace Treaty.<sup>54</sup>

### **17.3.3. The Judgment of the Tokyo Women's Tribunal**

There is insufficient space to give a detailed account of the Judgment issued by the Tokyo Women's Tribunal, which is over 300 pages in length and encompasses a discussion of both the criminal responsibility of various military officials including the wartime Emperor, as well as the state responsibility of Japan. As noted earlier, the purpose of this chapter is not to focus on the crimes committed by the military of a particular country, but rather to highlight the importance of considering the work of Peoples' Tribunals when thinking about the development of international criminal law and the manner in which its underlying purposes might be enhanced in the future. In light of this, neither a detailed examination of the evidence introduced nor an overview of the findings against the individual defendants is warranted. What is crucial to an understanding of the seri-

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<sup>53</sup> Borowiak, 2008, see *supra* note 18.

<sup>54</sup> San Francisco Peace Treaty, 8 September 1951, 136 UNTS 45, Art. 11.

ous work of such Tribunals is the nature of the evidence that was placed before the judges as this is connected to the historical record it contains and the possibilities it has created for furthering our understanding of the consequences of armed conflict on women.

In addition to the 35 woman who gave sworn testimony, evidence included military records, diaries of officers and ordinary soldiers, reports compiled by the Allied Intelligence Unit, reports of interrogations of prisoners of war as well as women liberated by Allied forces, official statements and reports issued by the government of Japan, the judgments rendered by the IMTFE, expert witnesses from Japan outlining the role of the Emperor, the operation of the Japanese military during the relevant time frame and the creation of the comfort women system, expert witnesses on the right to redress under international humanitarian law, and international and South Korean experts in the field of trauma, particularly trauma induced by sexual violence.

It is important to note that the Tribunal was conscious that these events were taking place far after the time when the original crimes were committed, and considered a range of arguments as to why instituting a procedure so far removed in time might violate principles of international law, including lack of due process and lack of jurisdiction. However, in light of the ongoing failure of Japan to take serious steps to confront the crimes committed against the women and the importance of issues associated with crimes of sexual violence the judges determined that they had an obligation to proceed. In keeping with their desire to act within the formal structures of the law, the judges decided to consider the legal position of the defendants as if the IMTFE were being reopened<sup>55</sup> and utilised the provisions of the IMTFE Charter to determine the scope of the applicable law.<sup>56</sup>

This is not the place to explore the failure of the Allied nations to put before the IMTFE the evidence available to them about the comfort women system. However, it is important in the context of a discussion about the Tokyo Women's Tribunal's utilisation of the findings of the IMTFE and the law applied by that body to note that had charges associated with the comfort stations been included, the law at the time would

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<sup>55</sup> Women's International War Crimes Tribunal, Oral Judgment, paras. 81–82, see *supra* note 40.

<sup>56</sup> *Ibid.*, para. 82.

have sustained a finding of guilt. The list of possible war crimes utilised by countries such as Australia as a result of the efforts of the United Nations War Crimes Commission established in 1943 included enforced prostitution.<sup>57</sup> This list was based on the series of crimes enumerated by the Commission on the Responsibility of the Authors of War at the Paris Peace Conference in 1919,<sup>58</sup> as both Italy and Japan were signatories to the list and no objections to it had been voiced by Germany.<sup>59</sup> The sixth crime on that list was the “[a]bduction of girls and women for the purposes of enforced prostitution”.<sup>60</sup> As noted in the Tokyo Women’s Tribunal Judgment, the failure to address this issue was unconscionable and discriminatory.<sup>61</sup> For those wishing to gain some appreciation of the material available to and held by the Allies, paragraphs 99–108 of the Judgment canvas some of the documents created by the Allies as well as Japanese documents they obtained during and after the war. In addition, extracts from various documents have been included in my previous publications including the 1994 report of the International Commission of Jurists.<sup>62</sup>

Given the theme of this chapter, the importance of Peoples’ Tribunals to the development of international law including international criminal law, a few words about the attitude of the judges to Peoples’ Tribunals is warranted. At paragraphs 63–69 of the Judgment there is a discussion of the role of Peoples’ Tribunals and their connection to the concept of sovereignty. In their discussion, the judges highlight the importance of remembering that sovereignty is not an attribute belonging to a state alone, but that it is connected to the sovereign will of the people and that states have obligations to their populations as well as to the international community at large to take steps to rectify past wrongs. The judges accepted the argument of the prosecutors that “sovereignty ultimately resides in the people of each state and territory”, and therefore bringing pro-

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<sup>57</sup> United Nations War Crimes Commission (‘UNWCC’), *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty’s Stationery Office, London, 1948.

<sup>58</sup> Commission on the Responsibility of the Authors of War, “Report of Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties”, in *American Journal of International Law*, 1920, vol. 14, p. 114.

<sup>59</sup> UNWCC, 1948, p. 478, see *supra* note 57.

<sup>60</sup> *Ibid.*, p. 477.

<sup>61</sup> Women’s International War Crimes Tribunal, Oral Judgment, para. 4, see *supra* note 40.

<sup>62</sup> Dolgopol and Paranjape, 1994, see *supra* note 39; Dolgopol, 2011, pp. 252–54, see *supra* note 11; Dolgopol, 1998, see *supra* note 45.



ceedings in the name of the Prosecutors and the Peoples of the Asia-Pacific Region was justified.<sup>63</sup> They then went on to observe:

[t]he People as holders of this sovereignty have the right to require states to adhere, at the least to their international obligations, particularly those that relate to the protection of the individual and concern breaches of international humanitarian law, international human rights law and customary norms of international law.<sup>64</sup>

In further support of their decision the judges highlighted the justifications given for the establishment of the Nuremberg Tribunal and Tokyo Tribunals, in particular the Allies reference to the necessity of vindicating victim states and individuals “affected by crimes committed during the Second World War”.<sup>65</sup> The Moscow Declaration contained the following statement:

Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by *the peoples whom they have outraged*.<sup>66</sup>

Turning to the substantive development of the law, a section of the Judgment was devoted to the consideration of the terminology utilised to describe one of the crimes committed against the comfort women. Over the years, the comfort women objected to the term “enforced prostitution” as they believed the use of the term was denigrating to them and their experiences. Many of the women had referred to themselves as slaves and

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<sup>63</sup> Women's International War Crimes Tribunal, Oral Judgment, paras. 63–74, see *supra* note 40. Questions about the manner in which attitudes towards women may have affected the proceedings of the IMTFE were raised in the report of the International Commission of Jurists in 1994, see Dolgopol and Paranjape, 1994, see *supra* note 39.

<sup>64</sup> Women's International War Crimes Tribunal, Judgment, 4 December 2001, para. 73 ([http://vawwrrac.org/judgement\\_e02.pdf](http://vawwrrac.org/judgement_e02.pdf)).

<sup>65</sup> *Ibid.*, para. 77.

<sup>66</sup> Declaration of German Atrocities, Secret Protocol, Annex 10, Moscow Conference of Foreign Secretaries, Signed by the United Kingdom, the United States and the Soviet Union, 30 October 1943 (emphasis added) ('Moscow Declaration') (<https://www.legal-tools.org/doc/3c6e23/>).

referred to their experiences as sexual slavery.<sup>67</sup> As both terms are contained in Articles 7(1)(g) and 8(2)(b)(xxii) of the ICC Statute, a brief mention of the reasons the Tokyo Women’s Tribunal determined the term sexual slavery was the more apt is warranted.<sup>68</sup> In large part the objections of the women and many women’s rights organisations stem from the associations connected to the term prostitution. For millennia it has been used to suggest immoral conduct and is associated with pejorative terms often used against women. Historically, despite awareness that women were taken and placed into houses of prostitution against their will, this has been one of the crimes where the victim has been stigmatised by society for the very crimes that have been committed against them. Slavery, in contrast, has been recognised as a crime of egregious proportions from early in the twentieth century. The crime of slavery is considered to be an affront to the very notion of human dignity, as it depends on the complete subjugation of the human personality. Working their way through the conceptual underpinnings of each crime the judges concluded that the phrase “sexual slavery” was preferable to the term “enforced prostitution”. In the author’s view, this is one of the many parts of the Judgment that has the potential to influence our understanding of international law.

In section 17.2. I outlined the role Peoples’ Tribunals could play in assisting those who have been marginalised by formal legal structures to understand that the international community is aware of the harms they have suffered and accepts that those harms are crimes for which an offender should have been held accountable and for which a state should accept responsibility. Although the judgments of such initiatives cannot be enforced, they do serve a purpose similar to the conclusions reached by Special Rapporteurs of the UN human rights system and by other fact-

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<sup>67</sup> One of the organisations working with the former comfort women has utilised the term “sexual slavery” in its name: the Korean Council for the Women Drafted for Military Sexual Slavery by Japan.

<sup>68</sup> This issue is considered in Women’s International War Crimes Tribunal, Oral Judgment, paras. 634–38, see *supra* note 40. Also worth noting is the discussion at paras. 619–638 concerning the crime of sexual slavery as defined in the non-binding Elements of Crime Annex and the reasons why that definition is inconsistent with the 1926 Slavery Convention. The judges highlight the differences between the definition in the Elements of Crime Annex and the *Kunarać* Judgment of the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dragoljub Kunarać, Radomir Kovač and Zoran Vuković*, Trial Chamber, Judgment, IT-96-23-T and IT-9623/IT, 22 February 2001 (<https://www.legal-tools.org/doc/fd881d/>).

finding bodies, that is, they bring together the evidence of violations and name and shame the perpetrators. The publicity attached to the Tokyo Women's Tribunal has contributed to the international acceptance of the view that Japan should make various forms of reparations to the comfort women.<sup>69</sup> Again, it has to be stated that this is not about the wrongs committed by one nation state, but rather about the manner in which the issues raised by civil society in a given context can influence international debates about a particular issue. There is a connection between the work of the Tribunal, the ongoing efforts of organisations in the Asia-Pacific and the discussion of redress for mass atrocities. The section below highlights some of the specific issues that arise when women seek reparations for the harms committed against them.

#### **17.3.4. The Tokyo Women's Tribunal and the Issue of Redress**

Although the focus of this volume is the historical origins of international criminal law, there is a strong overlap between international human rights law and international criminal law in discussions surrounding the need to end impunity and offer redress to victims of mass atrocities. Therefore, a brief reference to the modern discussion of redress and its connection to the issue of the comfort women is warranted. In a recent publication Christine Evans notes the publicity given to the requirement in international humanitarian law that individuals be given access to reparations during the holding of the Tokyo Women's Tribunal contributed to the debate on the "reinterpretation of Article 91" of Additional Protocol I to the Geneva Conventions.<sup>70</sup>

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<sup>69</sup> The Women's Active Museum of War and Peace has submitted numerous documents to the UN treaty bodies setting out the text of the resolutions and recommendations from the UN treaty bodies, the Human Rights Council, the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities and Special Rapporteurs of the former UN Commission on Human Rights as well as Special Rapporteurs of the UN Human Rights Council. The 2013 compilation is contained in Women's Active Museum of War and Peace, "Japan: Alternative Report, Issues Concerning Japan's Military Sexual Slavery (The 'Comfort Women' Issue)", 15 September 2011. Most recently, the UN Human Rights Committee noted that the failure to make adequate reparations constituted an ongoing violation of the women's human rights and set out a series of recommendations for Japan. See United Nations Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Japan, 20 August 2014, UN doc. CCPR/C/JPN/CO/6.

<sup>70</sup> Evans, 2012, p. 32, see *supra* note 8.

Although “a coherent theory and practice for remedies for victims of human rights violations does not yet exist under international law [...] [t]he legal basis for a right to a remedy [...] has [...] become firmly enshrined in the corpus of international human rights and humanitarian instruments.”<sup>71</sup> While noting the contribution made by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (‘Basic Principles’),<sup>72</sup> the Special Rapporteur on Violence against Women, Rashida Manjoo, observes that insufficient attention had been given to the gendered aspects of reparations and that women’s voices about the nature of reparations and the priority to be given to collective versus individual forms of restitution as well as the nature of support programmes for victims have been absent from international discussions until recently.<sup>73</sup> The example she uses of the “traditional neglect of women in the reparations domain” is “the largely unsuccessful movement for reparations for the so-called ‘comfort women’”.<sup>74</sup> Manjoo’s reference to this issue is connected to the surprising paucity of attention to the matter, given that women are often the targets of violence during conflict and often “bear the brunt of the consequences of violence” to their communities.<sup>75</sup> She then goes on to note that in addition to academic commentaries, civil society has been crucial to the emerging focus on gender and reparations.<sup>76</sup> Many of her observations about the necessity of reaching out to women, instilling a sense of agency in women affected by conflict, the procedural aspects associated with reparations and the necessity of linking reparations to community education “including attempts to subvert cultural understandings around the value of women’s purity and sexuality”<sup>77</sup> mirror the consideration of the reparations issue in the Judgment of the Tokyo Women’s Tribunal.

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<sup>71</sup> United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo, 23 April 2010, UN doc. A/HRC/14/22, para. 13 (‘Report on Violence against Women’).

<sup>72</sup> Basic Principles, see *supra* note 3.

<sup>73</sup> Report on Violence against Women, paras. 22–32, see *supra* note 71.

<sup>74</sup> *Ibid.*, para. 25.

<sup>75</sup> *Ibid.* See also Judith Gardam and Michelle Jarvis, “Women and Armed Conflict: The International Response to the Beijing Platform for Action”, in *Columbia Human Rights Law Review*, 2000, vol. 32, no. pp. 1–65.

<sup>76</sup> Report on Violence against Women, para. 28, see *supra* note 71.

<sup>77</sup> *Ibid.*, para. 50.

In its policy document on reparations, the ICC has indicated that it will draw on the Basic Principles in its approach to Article 75 of the ICC Statute<sup>78</sup>. It is to be hoped that the views of women's organisations, the Special Rapporteur on Violence against Women and discussions of those having addressed the effects of armed conflict on women such as the judges of the Tokyo Women's Tribunal will be taken into account as the ICC's policies and decisions on this matter evolve.

Before concluding this chapter, some mention should be made of the manner in which women's civil society organisations utilised their experiences to influence the debates that occurred during the negotiations for the ICC Statute. Although those negotiations took place prior the holding of the Tokyo Women's Tribunal, work associated with the comfort women issue was part of the non-governmental efforts to improve the content of the Statute itself as well as the Rules of Evidence and Procedure that would govern the work of the ICC.

### **17.3.5. The Influence of Women's Civil Society Organisations on the Development of International Law**

When negotiations began for the establishment of the ICC, a number of women's organisations formed the Women's Caucus for Gender Justice ('Women's Caucus'). Several individuals who had worked on the comfort women issue<sup>79</sup> participated in the Women's Caucus's efforts to make the ICC Statute more attuned to the rights and interests of women. As Pam Spees observes:

the caucus's advocacy was broader than the effort to include gender crimes and mechanism for their effective prosecution; it went straight to the heart of the positioning of this Court in the world – its independence, its fairness, and its associations with peace.<sup>80</sup>

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<sup>78</sup> ICC Statute, Art. 75, see *supra* note 1, calls on the Court to establish principles relating to reparations and allows the Court to make orders against a "convicted person specifying reparations"; Evans, 2012, p. 102, see *supra* note 8.

<sup>79</sup> The idea for a Tribunal had been discussed prior to the commencement of negotiations but few concrete steps had been taken. It was during the meetings in Rome that specific ideas and responsibilities for the holding of the Tribunal were agreed upon by the groups and individuals who would ultimately help to organise and participate in the Tokyo Women's Tribunal.

<sup>80</sup> Pam Spees, "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power", in *Signs*, 2003, vol. 28, no. 4, p. 1234.

During the negotiations side events<sup>81</sup> were held that highlighted the facts surrounding the comfort women issue, including the failure of the women to obtain accountability from the government of Japan and the omission of specific charges during the IMTFE. The connection between past failures of the international justice system and the content of the ICC Statute was raised during meetings with government delegations. The situation of the comfort women, along with other cases, provided graphic examples of why the grave breaches provisions of the Geneva Conventions were insufficient, as they did not include crimes most often directed against women.<sup>82</sup>

The Women's Caucus lobbied for the full articulation of the range of gender-based crimes so that prosecutors and investigators would have the basis for bringing specific and targeted charges against perpetrators. The final text of Articles 7 and 8 of the ICC Statute refer to "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual violence [...] as war crimes and crimes against humanity [...]. Additionally, trafficking and gender-based persecution are [listed in Article 8] as crimes against humanity".<sup>83</sup>

Significant work was undertaken with respect to the crime of sexual slavery, particularly the concept of slavery, in order to ensure that it did not weaken existing international standards. Unfortunately, even though the text as adopted was an improvement on the initial draft, it continues to be inconsistent with the 1926 Slavery Convention as discussed above in footnote 68. There was greater success with respect to the crime of rape as the Women's Caucus believed it was crucial that the concept of consent not be used to justify acts that take place in a coercive environment, and that the modern focus on the victim was maintained, that is, that the acts

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<sup>81</sup> During international meetings non-governmental organisations often hold seminars or lectures for delegates in order to inform them of specific issues associated with the purpose of the international meeting. The author was present in Rome and in 1982–1987 worked with the International Commission of Jurists, during which time she attended numerous meetings of the then Human Rights Commission, its Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and the Milan Congress on Crime Prevention.

<sup>82</sup> Spees, 2003, p. 1239, see *supra* note 80.

<sup>83</sup> *Ibid.*, pp. 1239–40.

of the perpetrator are the major concern rather than the consent of the victim.<sup>84</sup>

During a non-governmental organisation-planned seminar the members of the Women's Caucus associated with the comfort women issue spoke about their work and the experiences of the comfort women, emphasising the psychological issues the women continued to endure once their ordeal had come to an end, which were exacerbated by the lack of national and community support structures.<sup>85</sup> The discussions pertaining to the comfort women, coupled with the efforts of those who had worked with women in Rwanda and the former Yugoslavia, contributed to the debates and ultimate support for a strong victims' support unit and the recognition that resources had to be put into community-based programmes.

Connected to the theme of partial justice discussed in the first part of this chapter, the Women's Caucus highlighted the importance of maintaining contact with conflict-affected communities about the status of investigations and trial proceedings, as well as working with communities and victims to ensure that they understood the limits of the international justice system. Although the outreach unit of the ICC has worked hard to assist communities to understand the work of that organisation, it is still the case that affected communities continue to wonder if their concerns are fully appreciated by the international community.<sup>86</sup>

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<sup>84</sup> *Ibid.*, pp. 1240–41.

<sup>85</sup> Women's International War Crimes Tribunal, Oral Judgment, paras. 371, 394–452, see *supra* note 40.

<sup>86</sup> The rights and interests of victims were subjects of discussion at the Kampala Review Conference. See Assembly of State Parties, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Official Records RC/11, p. 4 and Annex V(a) Final Report by the Focal Points (Chile and Finland), Stocktaking of International Criminal Justice: The Impact of the Rome Statute System on Victims and Affected Communities, pp. 77ff (<https://www.legal-tools.org/doc/146df9-1/>). An overview of the issues discussed at the conference can be gleaned from the following documents: Victims' Rights Working Group, "The Impact of the ICC on Victims and Affected Communities", 2010; International Criminal Court, Review Conference of the Rome Statute, Discussion Paper by Eric Stover, Camille Crittenden, Alexa Koenig, Victor Peskin and Tracey Gurd, "The Impact of the Rome Statute System on Victims and Affected Communities", 30 May 2010, RC/ST/V/INF.4.

The “gap between law in rhetoric versus law in action”<sup>87</sup> brings us full circle. In my closing remarks, I return to some of the issues raised in the introduction and section 17.2. of this chapter.

#### 17.4. Conclusion

Peoples’ Tribunals arise from the desire of ordinary people as well as civil society actors to find a way to bridge the gap between the rhetoric concerning international law and the limited reach of our international institutions in reality. They attempt to work with disadvantaged or marginalised groups to find a way of articulating grievances and allowing those affected by serious violations of their rights to believe that the international community does understand the impact that certain actions have had on their lives. Whether a particular tribunal utilises existing standards or seeks to avoid utilising state-centric notions of the law, there is a core concern common to all such tribunals: the recognition given to those who might otherwise be forgotten or ignored. Those of us who have engaged with international law know that it “still hesitates between the sovereignty of states and the protection of human beings”.<sup>88</sup> Richard Falk observes that initiatives such as the World Tribunal on Iraq “[rest] on an ethos of concern and responsibility for fundamental law and morality [...] expressive of the impulse to feel, think and act as a global citizen in an increasingly globalizing world”.<sup>89</sup> The history of international criminal law is as much about the disparity in treatment accorded to victims and the injustices brought about by the failure to give full consideration to the concept of equality before the law as it is about asserting the supremacy of the law following the commission of mass atrocities. Our understanding of international criminal law and its concern with the provision of justice will be enhanced if we consider organisers of Peoples’ Tribunals as partners in the search for justice, a justice that will have greater relevance to those affected by the horrors of armed conflict.

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<sup>87</sup> Henry, 2013, see *supra* note 51.

<sup>88</sup> Pierre-Marie Dupuy, “Between the Individual and the State: International Law at a Crossroads?”, in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 461.

<sup>89</sup> Richard Falk, *The Costs of War: International Law, the UN, and World Order after Iraq*, Routledge, London, 2008, cited in Çubukçu, 2011, 427, see *supra* note 23.



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## An Afro-Asian Perspective on the International Criminal Court

Rahmat Mohamad\*

### 18.1. Introduction

What can state actors anticipate from courts of international justice? Consequently, what motivates them to support certain features of international criminal justice while negating others? The exponential development of international criminal justice, particularly since the mid-1990s, has triggered fierce political and academic debates in the area on issues including the institution of the International Criminal Court ('ICC'). Much literature has been generated analysing the power politics underlying the ICC and its possible impact on the administration of criminal justice at the international level.

The pedagogic three-pronged goals of domestic criminal justice systems cannot be transplanted directly to the moral, institutional and political contexts of the international realm. Systemic crimes which international criminal justice seeks to grapple with are typically committed over a longer period of time by a large number of perpetrators.<sup>1</sup> Normally only

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<sup>1</sup> Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff Publishers, Leiden, 2006, p. 141.

a small fraction of crimes committed in one conflict can be prosecuted before international courts.<sup>2</sup> Hence, the overarching purpose of international criminal justice is not deterrence as much as being a catalyst for reconciliation and rehabilitation in post-conflict situations. Its enforcement, however, is conditional on the willingness and ability of states to comply with the standards set by international criminal law. As Louis Henkin argues in his treatise *How Nations Behave*, international law acquires its “stickiness” through a protracted process of interaction between nations, negotiations on normative standards, and subsequent internalisation by nations.<sup>3</sup> This construct can be developed to the trajectory and development of the field of international criminal law as well.

From the Nuremberg trials to the establishment of a permanent court mandated to prosecute individuals committing grave offences against humanity, transnational criminal adjudication has developed over a period of more than half a century. The deliberations at the seminars in the Historical Origins of International Criminal Law Project aimed at broadening research in the area with a view to further consolidation of the discourse. This has been very timely. The ICC, established to prosecute individuals, is at a critical juncture at the time of writing, for several reasons. First, Palestine<sup>4</sup> joining the Court may prompt a significant departure from its current focus on African States. Second, the African Union’s move to grant immunity from prosecution to the heads of state and “senior officials” appears to be a step backward in pursuance of international criminal justice.<sup>5</sup> Given this state of affairs, juxtaposing Asian-African

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<sup>2</sup> See Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal”, in *Human Rights Quarterly*, 1998, vol. 20, no. 4, pp. 774–77.

<sup>3</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy*, Council on Foreign Relations, New York, 1979.

<sup>4</sup> Depository Notification, Rome Statute of the International Criminal Court, State of Palestine: Accession, Reference, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015. The Rome Statute of the International Criminal Court entered into force for the State of Palestine on 1 April 2015 making it the 123rd State Party to the Statute.

<sup>5</sup> African Union (Assembly of the Union), ‘Decision on the Draft Legal Instruments’, Assembly/AU/Dec.529 (XXIII) (Malabo 26-27 June 2014) (‘XXIII Assembly of the Union, African Union’) (<https://www.legal-tools.org/doc/5bf82e/>). The African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The amendments include Article 46*Abis* which grants immunity *ratione personae* to the heads of States and governments and senior State officials before the African Court of Justice and Human and Peoples Rights.

positions on the establishment and functioning of the Court with its historic significance in the promotion of criminal justice will help us better appreciate its relevance and analyse its inadequacies.

## **18.2. Importance of the International Criminal Court**

Since the history leading up to the creation of the ICC is well known, this chapter will not deal with it except to mention a few points. International courts and tribunals are indeed a recent development, something that appeared on the horizon after the Second World War.<sup>6</sup> For nearly five decades after Nuremberg we saw inaction. The turbulent events in Europe and Africa in the 1990s once again prompted us to turn to international criminal courts for delivering justice.<sup>7</sup> Indeed it is our collective memory of the horrors of mass crimes that fueled our desire and momentum to establish a permanent international court to try humanity's worst criminals.

Although there were commonalities in aims and intentions, fashioning a permanent international court that could get jurisdiction over all of mankind was no easy task. As explained later in the chapter, there was a large number of concerns that particularly smaller and less powerful actors in the international community had with the structure of the court. We should examine how far these concerns were resolved and to what extent the fears were correct (or incorrect). The answer will provide some explanations of the current attitudes of Asian and African states towards the ICC.

## **18.3. Positions of Asian-African States Leading up to the Adoption of the ICC Statute**

Since it is not possible to portray all the positions of Asian and African states in relation to issues covering a wide variety of matters of the ICC, this chapter highlights the five major concerns of Asian and African states expressed during the negotiation process.

The process of resolving disagreements over various provisions of the Statute was conducted in an organised manner. The 13 parts of the

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<sup>6</sup> The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 August 1945 (<https://www.legal-tools.org/doc/844f64/>).

<sup>7</sup> United Nations Security Council resolution 827, 25 May 1993 (<https://www.legal-tools.org/doc/dc079b/>); United Nations Security Council resolution 955, 8 November 1994 (<https://www.legal-tools.org/doc/f5ef47/>).

Statute were divided among various working groups for detailed discussions. The working groups were supported by informal consultations and discussions conducted among various political and regional groups such as the Non-Aligned Movement ('NAM'), the Arab Group, the Latin America Group, and many non-governmental organisations. The European Union also acted as one entity on many issues. While no group of states acted as a monolithic bloc, several groups of states emerged. The three major groups of states which were formed during the conference were the 'like-minded group' ('LMG'), the P-5 Group and the NAM Group.<sup>8</sup>

### 18.3.1. Powers of the United Nations Security Council

The relationship between the ICC and the United Nations Security Council was a matter of great concern at the Rome Conference.<sup>9</sup> Under the Rome Statute the Security Council may refer a matter to the ICC Prosecutor, even if the situation is not taking place on the territory of a state party.<sup>10</sup> That is, non-parties may be subjected to the jurisdiction of the ICC

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<sup>8</sup> The LMG Group consisted of 55 states (many African countries such as Algeria, Benin, Burkina Faso, Burundi, Congo, Egypt, Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland and Zambia), including many from Western Europe and Latin America. The LMG group was the strongest supporter of an independent and effective ICC, and was opposed to the moves of powerful nations to curtail the powers of the ICC. The solidarity of the P-5 Group was clearest on two points during the negotiations: a strong role for the Security Council vis-à-vis the Court and the exclusion of use of nuclear weapons from the list of weapons considered illegal in the Statute. With the exception of United Kingdom, which had joined the LMG shortly before the Rome Diplomatic Conference, the P-5 also wanted the jurisdiction of the Court and its exercise carefully circumscribed. They did not want the crime of aggression to be included within the Statute. The NAM Group (which included a diversity of delegations) comprised mainly India, Egypt and Mexico and argued against the chief concerns of the P-5 nations. The NAM Group also advocated a much less powerful ICC, which differed from the LMG position of a strong ICC, but espoused positions similar to that of P-5 in advocating a Court whose powers would be relatively restricted. Most NAM delegations were committed to the inclusion of the crime of aggression in the ICC Statute, although they did not necessarily agree on the definition of the crime. Some NAM delegations (such as Barbados, Jamaica and Trinidad and Tobago) wanted drug trafficking and some delegations (such as India, Sri Lanka, Algeria and Turkey) wanted terrorism to be included in the Rome Statute.

<sup>9</sup> Jennifer Trahan, "The Relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices", in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 417–73.

<sup>10</sup> Rome Statute of the International Criminal Court, 17 July 1998 ('ICC Statute') (<https://www.legal-tools.org/doc/7b9af9/>). Article 13 of the Statute provides that,

notwithstanding that the Court is a treaty-based institution and therefore ought not technically speaking reach non-parties.<sup>11</sup>

As regards the power of the Security Council to initiate action, countries had serious reservations at Rome. Several NAM States opposed any role for the Security Council.<sup>12</sup> For example, India expressed concern over the possibility that this power could be extended and exercised even against states that are not signatory to the ICC Statute, thus violating a long-standing principle of international law laid down in the Vienna Convention on the Law of Treaties.<sup>13</sup> In so doing, it was argued that this move blurred the distinction between customary and treaty-based international law.

It was, furthermore, questioned how non-parties, especially from among the permanent members of the Security Council (USA, China and Russia), can justify their exceptionalism of subjecting to the Court another non-state party while not accepting the Court's jurisdiction themselves.<sup>14</sup>

Similarly, the ability of the Security Council to defer ICC proceedings was another controversial provision of the Statute, strongly opposed by many States.<sup>15</sup> Article 16 of the ICC Statute provides that the Security Council may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (namely not commence or proceed with) an in-

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the Court may exercise its jurisdiction [...] if:  
[...]

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

<sup>11</sup> Article 34, Vienna Convention on the Law of Treaties, 23 May 1969 (<https://www.legal-tools.org/doc/6bfcd4/>). A fundamental principle of international treaty law as codified in Article 34 of Vienna Convention is that only states that are party to a treaty should be bound by its terms.

<sup>12</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998. Official Records. Vol. 2, Summary Records of the Plenary Meetings and of the Meetings of the Committee of Whole, p. 73, A/CONF.183/13 (Vol. II) (<https://www.legal-tools.org/doc/78fea6/>) ('Rome Conference vol. II'). Mr. Muladi (Indonesia) said: "[...] in Cartagena de Indias, the [NAM states] reaffirmed that the Court must be independent of political influence of any kind [...] in particular the Security Council, which must not direct or hinder its functioning".

<sup>13</sup> *Ibid.*, p. 122.

<sup>14</sup> It is to be noted that the issue of non-ratification of the Statute was not a development foreseen at the time of its drafting. It is a post-2002 development.

<sup>15</sup> Rome Conference vol. II, pp. 74, 76, see *supra* note 12.

vestigation or prosecution for a renewable period of twelve months.<sup>16</sup> As such it recognises the ability of the Security Council to suspend the activities with regard to a specific situation or case, when it is considered that the suspension is necessary for the maintenance or restoration of international peace and security.<sup>17</sup> It was argued that a political body such as the Security Council should not be given the power to interfere with the working of a legal institution such as the ICC.<sup>18</sup>

However, in the final version, states could not stop the Security Council from being given the right to trigger the jurisdiction of ICC. But as a kind of compromise, it was added (in Article 16) that it is subject to a renewable period of 12 months.<sup>19</sup> This constituted a compromise between those states which in the negotiation process were in favour of a total independence of the Court from the Security Council, and those advocating a Court subordinated to it.

### 18.3.2. Powers of the ICC Prosecutor

An issue of critical importance at the Rome Diplomatic Conference was that of the powers of the Prosecutor under the ICC Statute.<sup>20</sup> As is well known, the ICC Prosecutor can initiate an investigation on the basis of a referral from any ICC state party or from the Security Council acting under Chapter VII of the Charter of the United Nations.<sup>21</sup> Additionally and more controversially, the Prosecutor can initiate investigations *proprio motu* on the basis of information received from individuals or organisa-

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<sup>16</sup> ICC Statute, Art. 16, see *supra* note 10. Article 16 states:

no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

<sup>17</sup> *Ibid.*

<sup>18</sup> Rome Conference vol. II, p. 78, see *supra* note 12. Mr. Ayub (Pakistan) said:

Pakistan wished the Court to be impartial and independent of political influence of any kind. It was therefore not in favour of giving a role in the functioning of the Court to any organ of the United Nations, in particular, the Security Council, which was primarily a political body, since that might cloud the Court's objectivity.

<sup>19</sup> ICC Statute, Art. 16, see *supra* note 10.

<sup>20</sup> *Ibid.*, Art. 42.

<sup>21</sup> ICC Statute, Arts. 13(b) and 14, see *supra* note 10.

tions about crimes within the jurisdiction of the Court.<sup>22</sup> This had raised a lot of criticisms primarily on the ground that it could become a political tool for intervention into the internal affairs of states.<sup>23</sup>

For instance, China expressly disagreed with the power given the Prosecutor to initiate investigation or to prosecute *proprio motu*, which it considered to be exercisable “without checks and balances against frivolous prosecution”, thus amounting to “the right to judge and rule on State conduct”.<sup>24</sup>

### 18.3.3. Principle of Complementarity

To maintain and preserve national criminal jurisdiction was a principal concern of many states at the Conference.<sup>25</sup> Hence, one of the foundational principles of the ICC Statute, namely the principle of complementarity<sup>26</sup> (which means that the Court will supplement but not supersede national jurisdictions), was a hotly debated issue. The basic idea behind complementarity is to maintain state sovereignty, under which “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”, to enhance national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes listed in the Statute.<sup>27</sup>

Many countries had expressed the view that the principle of complementarity would be in keeping with the principle of sovereignty.<sup>28</sup> For

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<sup>22</sup> *Ibid.*, Article 15.

<sup>23</sup> Rome Conference vol. II, pp. 109, 111, 124, see *supra* note 12.

<sup>24</sup> *Ibid.*, p. 124.

<sup>25</sup> *Ibid.*, pp. 82, 218. Mr. Baja (Philippines) said: “National judicial systems should have primacy in trying crimes and punishing the guilty. The International Criminal Court should complement those systems and seek action only when national institutions did not exist, could not function or were otherwise unavailable”.

<sup>26</sup> This is embodied in the Preamble and Article 17 of the ICC Statute; see YANG Lijun, “On the Principle of Complementarity in the Rome Statute of the International Criminal Court”, in *Chinese Journal of International Law*, 2005, vol. 4, no. 1, pp. 121–32.

<sup>27</sup> ICC Statute, Preamble, see *supra* note 10.

<sup>28</sup> Rome Conference vol. II, p. 73, see *supra* note 12. Mr. Muladi (Indonesia) said:  
[...] the Conference must uphold the principle of respect for national sovereignty and join the emerging consensus that the Court’s jurisdiction should be complementary to that of national courts and based on the consent of the States concerned. The [NAM states] considered that

example, China deemed the principle of complementarity as “the most important guiding principle of the Statute”, which should be “fully reflected in all its substantive provisions and in the work of the Court, which should be able to exercise jurisdiction only with the consent of the countries concerned”.<sup>29</sup>

The difficult aspect of the negotiations was to develop the criteria setting out the circumstances when the Court should assume jurisdiction even where national investigations or prosecutions had occurred. Two broad concepts emerged: unwillingness and inability. As provided in Article 17 of the ICC Statute, where national criminal jurisdictions are unwilling or unable genuinely to carry out investigations and prosecutions of the most serious crimes of international concern, the ICC will instead investigate and prosecute those allegations.<sup>30</sup> But this formulation left several questions unanswered (particularly with regard to the terms “unwilling and unable”) as to the meaning, scope and extent of control to be exercised by the international judges over domestic proceedings.

#### 18.3.4. Universality versus State Sovereignty

One of the main reasons cited by almost all those who opposed the treaty was that the ICC went against the concept of national sovereignty. This is hardly surprising as the project of an ICC as such meant that states would have to accept a certain limitation of one of the most sacred areas of state sovereignty, namely criminal jurisdiction. But each country has its own understanding and definition of sovereignty based on its interests and historical experience. There were states which (in spite of their declared support for the project) only wanted a symbolic or limited jurisdictional competence of the future ICC. To this group belonged India, Indonesia, Mexico and also Japan.<sup>31</sup> Two of them (India and Mexico) were quite vocal

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the principle of complementarity was fundamental and should apply to all of the provisions governing the Court.

<sup>29</sup> *Ibid.*, p. 75; Elizabeth Wilmschurst, “Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 127.

<sup>30</sup> ICC Statute, Art. 17(1)(a), see *supra* note 10. Art. 17(1)(a) provides that “[a case is inadmissible if it] is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

<sup>31</sup> Rome Conference vol. II, pp. 67, 107, 125, 338, see *supra* note 12. Mr. Owada (Japan) said: “The guiding principle of operation should be complementarity, in that the Court



among them and hostile with regard to potential Security Council control over the ICC.<sup>32</sup> This was in clear contrast to the position of the P-5 which wanted a central role to be given to the Security Council both in referring matters to the ICC and in filtering or blocking cases going to it.<sup>33</sup> The Group called LMG, which consisted of 55 states from Africa, Western Europe and Latin America, preferred a jurisdictional regime based on some form of universal jurisdiction, meaning that a state party obtaining custody over a person responsible for core crimes would enable the Court to exercise jurisdiction over that person regardless of his nationality or the place of the crime.<sup>34</sup>

States also had differing views about whether the Court should be able to exercise jurisdiction over the nationals of states that were not parties to the Rome Statute. There was a proposal floated by the Republic of Korea that enjoyed wide support.<sup>35</sup> It allowed the ICC to exercise jurisdiction over the nationals of states not party to the court as long as one of the following states with a connection to the crime had ratified the Statute: the territorial state, the custodial state, or the state of nationality of the

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should have jurisdiction only when national systems of criminal justice were not operational or effective”.

<sup>32</sup> *Ibid.*, pp. 86, 207. Mr. Gonzalez Galvez (Mexico) noted that

the Conference was taking place at a time when the United Nations was discussing a number of proposals for reform of the Security Council; those discussions were relevant to the present debate. The Conference should not repeat the mistake made at San Francisco by tying the new Court to the organs of the United Nations, like the International Court of Justice.

<sup>33</sup> *Ibid.*, pp. 75, 95, 115. Mr. Ushakov (Russian Federation) said: “a court not working in close combination with the Security Council would be doomed to failure”.

<sup>34</sup> See, for example, *ibid.*, p. 75. Mr. Kaul (Germany) argued that since

the contracting parties to the Statute could individually exercise universal jurisdiction for the core crimes, they could also, by ratifying the Statute, vest the Court with a similar power to exercise such universal criminal jurisdiction on their behalf, though only of course with regard to the core crimes [even if the State, where the crime has been committed or of which the accused is a national, is not a State Party to the Rome Statute or has not accepted its jurisdiction otherwise].

<sup>35</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998. Official Records. Vol. III, Reports and Other Documents, pp. 227, 228, A/CONF.183/13 (Vol. III) (‘Rome Conference vol. III’) (<https://www.legal-tools.org/doc/e03967/>).

accused or the victim. This was ultimately rejected on the criticism that it provided for near-universal jurisdiction.<sup>36</sup>

At the end of the Conference, states voted to allow ICC jurisdiction over nationals of non-states parties as long as either the territorial state or the state of nationality of the accused joined the Court. Therefore, outside of situations referred by the Security Council, the ICC only has jurisdiction over offences committed when a State that has nationality or territorial jurisdiction over the offence is a state party to the ICC Statute.<sup>37</sup>

### 18.3.5. Crime of Aggression

The issue of the crime of aggression was one of the central points of contention during the Rome Conference and during the preparatory process in the *Ad Hoc* Committee and the Preparatory Committee. The problem was compounded by the fact that the 1996 ILC Draft Code of Crimes did not include the crucial definition of the state act of aggression, contrary to the Draft Code it adopted on first reading in 1991.<sup>38</sup>

In the middle of the Diplomatic Conference, there was increasing support for the crime of aggression to be included despite the knowledge that no agreement could be reached at the Conference on its definition or on the role of the Security Council. The P-5 took the position that they could agree on the inclusion of the crime of aggression only if the proper role of the Security Council was recognised.<sup>39</sup> Many other states distinguished between the definition of aggression for the ICC and the competence of the Security Council to determine whether an act was aggres-

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<sup>36</sup> *Ibid.* Universal jurisdiction is normally exercised by states whose principal link to the crime in question is the presence of the alleged offender.

<sup>37</sup> ICC Statute, Arts. 12 and 13, see *supra* note 10.

<sup>38</sup> Draft Code of Crimes against the Peace and Security of Mankind: Titles and texts of articles adopted by the Drafting Committee on second reading at the forty-seventh and forty-eighth sessions, UN doc. A/CN.4/L.522 (1996); Draft Code of Crimes against the Peace and Security of Mankind: Titles and texts of articles adopted by the Drafting Committee, UN doc. A/CN.4/L.459.

<sup>39</sup> Rome Conference vol. II, p. 95, 115, 123, see *supra* note 12. Mr. Scheffer (United States of America) said that any definition of aggression “must also clearly refer to the Security Council’s exclusive role under the Charter to determine that aggression had taken place, as a pre-condition to the exercise of the judicial authority of the Court”.

sion.<sup>40</sup> The NAM strongly supported the inclusion of the crime though there were disagreements as to the definition.<sup>41</sup>

On the politically more controversial question of the role of the Security Council, there was intense disagreement. Some countries, led by the five permanent members of the Security Council (China, France, Russia, United Kingdom, and United States), supported an activation provision that reserved jurisdiction determinations to the Security Council alone.<sup>42</sup> The majority of states parties, most of which at any given time are not members of the Security Council, opposed a so-called “Security Council trigger” for ICC aggression cases.<sup>43</sup> These countries include many in the NAM Group and developing countries generally, including many African nations.<sup>44</sup>

The delegations of Azerbaijan and Greece then paved the way for a compromise by suggesting that the crime should be included in Article 5 without a definition and without entering into force, and that a future preparatory commission should be mandated to formulate such provisions for consideration and action by the Review Conference.<sup>45</sup> The NAM delegations submitted this approach as a formal proposal which was accepted.<sup>46</sup>

It is interesting that the principal opposition to the ICC Statute (from countries that have not adopted it) still runs along these lines. It is indeed unfortunate that three out of the five permanent members of the Security Council even to this date remain non-committal to being a part of the ICC. A good number of states point out this fact as a legitimate reason not to join the court.

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<sup>40</sup> *Ibid.*, pp. 175–76. Ms. Sundberg (Sweden) argued that it “would be of great importance to maintain the distinct roles of the Court and the Security Council in [defining the act of aggression]. The Court needed a clear and precise definition of what constituted a criminal act”.

<sup>41</sup> *Ibid.*, pp. 148, 207.

<sup>42</sup> *Ibid.*, pp. 176–77.

<sup>43</sup> *Ibid.*, pp. 175–76. Ms. Flores (Mexico) argued that the “Court should have universal jurisdiction, and any aggressor should be punished. Granting an exclusive monopoly to the Security Council would open the door to the casting of a veto to give impunity to aggressors”.

<sup>44</sup> *Ibid.*, pp. 178–82.

<sup>45</sup> *Ibid.*, p. 330. Mr. Gadyrov (Azerbaijan) said “there could be a transitional clause stating that, pending a definition thereof, the provisions on the crime of aggression [...] would not come into force”.

<sup>46</sup> *Ibid.*, p. 248.

Be it the scope of powers of the Security Council or the ICC Prosecutor, the issue seems to be that many prominent actors of the international community have not been convinced that there are adequate checks and balances. This stands as an impediment to universal acceptance of the ICC Statute.

#### **18.4. Evolution in the Positions of Asian and African States after the Establishment of the ICC**

##### **18.4.1. General Concerns of AALCO Member States**

AALCO has conducted seminars and workshops on specific thematic concerns relating to the ICC. In 2009,<sup>47</sup> 2010<sup>48</sup> (pre-Review Conference) and 2011<sup>49</sup> (post-Review Conference) it convened three Expert Group Meetings on various issues and challenges facing the ICC in New Delhi and Putrajaya in collaboration with the Governments of Japan, Malaysia and the ICC Secretariat. From these meetings we can infer that the Member States were primarily concerned with the following: 1) the relationship between the ICC and the UN Security Council; 2) the principle of complementarity in light of the post ICC Review Conference developments; 3) bilateral immunity agreements; 4) the reluctance of Asian states to ratify the ICC Statute; 5) the immunity of heads of states; 6) the importance of strengthening the domestic legal institutions of both parties and non-parties to the ICC Statute; 7) domestication of the provisions of the Rome Statute into the national legislations; 8) *proprio motu* powers of the ICC Prosecutor; and 9) imparting proper training to prosecutors and judges (state parties and non-states parties) about the provisions of the Rome Statute; and 10) the exclusive focus of ICC's prosecutorial interventions in one continent while numerous alleged violations occur elsewhere. As we can see, most of the issues centre around the pre-Rome

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<sup>47</sup> "The International Criminal Court: Emerging Issues and Future Challenges", Seminar jointly organised by AALCO and the Government of Japan, 18 March 2009, New Delhi.

<sup>48</sup> Round Table Meeting of Legal Experts on the Review Conference of the Rome Statute of the International Criminal Court, Jointly organised by the Governments of Japan and Malaysia and AALCO, 30–31 March 2010, Putrajaya, Malaysia.

<sup>49</sup> Meeting of Legal Experts on the Rome Statute of the International Criminal Court: Issues and Challenges, Jointly organised by the Government of Malaysia, ICC and AALCO, 19–20 July 2011, Putrajaya, Malaysia.

Statute concerns, or they are more specific manifestations of those concerns.

Many AALCO member states and larger countries have not joined as ICC states parties yet. AALCO member states, both parties and non-parties, have expressed their views as to why many still remain outside the ICC Statute. These reasons include:

- Some say that the essential elements of criminal law or criminal due process are missing in the design of the ICC.
- Some States seem to believe that the ICC undermines the sovereign right to exercise jurisdiction over their own nationals.<sup>50</sup> The idea of subjecting its own citizens to an international trial may not be that attractive.
- Some states hold the view that the definition of “the most serious crimes of international concern” (namely, crimes of genocide, crimes against humanity and war crimes) adopted by the ICC Statute was broader than those recognised in customary international law. Such vague and broad definitions, it is believed, give the Court an unfettered ability to decide when an alleged crime was within the jurisdiction of the Court. Furthermore, a wide definition of “crimes against humanity” might be against some of their domestic laws, in particular, the preventive laws which were intended to safeguard national security and public order.<sup>51</sup>

Another stream of thought among AALCO member states is the belief that the establishment of the ICC is the result of consensus only among some states. One of the member states wished for a declaration to be adopted by AALCO stating that the ICC does not have jurisdiction over non-ratifying states, and that it should not intervene in the internal matters of any such state.<sup>52</sup> Another state questioned the actions of the

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<sup>50</sup> See the Statement of Republic of Korea wherein it expresses this view with respect to the attitude of other States, Summary Records of the Fourth General Meeting, Report of the Forty-Third Annual Session of AALCO, 21–24 June 2004, Bali, Indonesia (<https://www.legal-tools.org/doc/e3091c/>).

<sup>51</sup> See the Statement of Malaysia, Summary Records of the Third General Meeting, Report of the Forty-Second Annual Session of AALCO, 16–20 June 2003, Seoul, Republic of Korea (<https://www.legal-tools.org/doc/059891-1/>).

<sup>52</sup> See the Statement of Sudan, Summary Records of the Fifth General Meeting, Report of the Forty-Sixth Annual Session of AALCO, 2–6 July 2007, Cape Town, South Africa (<https://www.legal-tools.org/doc/1ab3d7/>).

ICC regarding the issue of warrants of arrest against alleged war criminals of a non-state party to the ICC Statute.<sup>53</sup>

During the Annual and Special Meetings of AALCO, there were four major issues which were intensely debated: the principle of complementarity; the crime of aggression; the role of the UN Security Council; and the immunity of heads of states.

#### **18.4.2. The Principle of Complementarity**

The effect of the ICC on national sovereignty by virtue of the principle of complementarity was expressed by one country as a reason for not acceding to the ICC Statute.<sup>54</sup> Its concern was that the ICC would itself determine whether a particular state is unwilling or unable to carry out the investigation or prosecution genuinely and that this subjective interpretation by the Court would result in the sovereignty of a state being compromised if the Court determines that the state has not complied with what the Court deemed to be “willing” and “able”.<sup>55</sup>

Another member stated that

the conduct of the ICC Prosecutor should neither nullify the principle of complementarity nor prevent the national court of pertinent countries to invoke its jurisdiction against the perpetrators. The States wished that the Court’s activities should be conducted in strict compliance with the principle of complementarity set forth in the Rome Statute and be a true complement to national judicial systems. Serious international crimes should in the first place be handled and punished by national judicial systems. The Court should not take the place of the State in the exercise of its inherent powers and functions.<sup>56</sup>

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<sup>53</sup> *Ibid.*, see the statement of Malaysia.

<sup>54</sup> As the ICC was established through an international treaty – the ICC Statute – and most of the countries in the world were involved in its drafting, the Court has jurisdiction over the core crimes of international concern and its power is limited by complementarity; that is, national jurisdiction comes first, ICC’s jurisdiction second.

<sup>55</sup> See the statement of Malaysia, *supra* note 51.

<sup>56</sup> See the views of the Chinese delegate, “The International Criminal Court: Emerging Issues and Future Challenges”, Seminar jointly organised by AALCO and the Government of Japan, 18 March 2009, New Delhi.

Drawing on AALCO member states' perceptions generally, the application of the principle of complementarity is considered key to survival of the ICC's work and the vitality of national criminal justice, societal tradition and culture. One AALCO member state, Malaysia, observed that over and above the constitutional, legal and procedural issues of ICC Statute membership, it remained concerned about how the powers of investigation and prosecution would be exercised, particularly in relation to the principle of complementarity.<sup>57</sup>

### 18.4.3. Crime of Aggression

Regarding the definition of the crime of aggression, AALCO member states (such as Indonesia) have generally considered it a serious international crime, whose incorporation in the jurisdiction of the ICC would be very significant to its credibility and would ensure a balanced and realistic approach to ending the most serious international crimes.<sup>58</sup> It was noted that the ICC should have the widest possible reach in terms of providing for various acts defining the crime of aggression, and in this regard the definition adopted by UN General Assembly resolution 3314 of 1974 could be a sound point of departure for both general definitions as well as for the selection of acts for inclusion in the definition (Iran and Malaysia).

The 2010 Kampala Review Conference presented a unique opportunity for states to examine closely the ICC's progress in fulfilling its core mandate of putting an end to impunity for egregious crimes through the prosecution of alleged perpetrators.<sup>59</sup> Some of the specific proposals considered at the Review Conference were: 1) Review of Article 124 of the ICC Statute and other proposals;<sup>60</sup> 2) the crime of aggression;<sup>61</sup> 3) proposal made by Belgium on criminalising the act of employing certain

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<sup>57</sup> See the views of Malaysia, Round Table Meeting of Legal Experts on the Review Conference of the Rome Statute of the International Criminal Court, Jointly organised by the Governments of Japan and Malaysia and AALCO, 30–31 March 2010, Putrajaya, Malaysia.

<sup>58</sup> Mauro Politi, "The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 1, pp. 267–88.

<sup>59</sup> See Nelly Corbin, "The Kampala Review Conference: Which way forward for the International Criminal Court?" (on file with the author).

<sup>60</sup> Review Conference of the Rome Statute of the International Criminal Court, resolution RC/Res.4, 10 June 2010 (<https://www.legal-tools.org/doc/de6c31/>).

<sup>61</sup> Depositary Notification, Rome Statute of the International Criminal Court, Liechtenstein: Proposal of Amendment, Reference. C.N.727.2009.TREATIES-7, 29 October 2009.

weapons (poison and poisonous gas) in internal armed conflicts;<sup>62</sup> and 4) the proposal made by Norway to strengthen the enforcement of sentences by the Court.<sup>63</sup>

Prior to the Review Conference, a Meeting of Legal Experts was convened by AALCO in co-operation with the Government of Malaysia and the ICC in Putrajaya, Malaysia in 2011.<sup>64</sup> The discussions at the meeting centred on the following themes: 1) Preconditions for the exercise of jurisdiction; 2) bilateral immunity agreements; 3) the principle of complementarity; 4) criteria for selection of situations and opening of investigations; 5) relationship between peace and justice; 6) post-Kampala Review Conference; and 7) implications of acceptance of the ICC Statute.

The views expressed by participating states revealed many concerns. In a nutshell they were as follows. The principle of complementarity remained a grave concern, as the term itself was not defined in the ICC Statute, according to some states. The relationship between the ICC and the UN Security Council was keenly debated, in light of the referral of situations by the Security Council to the Court, particularly in view of the fact that a few permanent members of the Council were not ICC members. Concerns were also expressed about the interpretation of Article 98 of the ICC Statute relating to bilateral immunity agreements and that it was an issue that required careful interpretation.<sup>65</sup> The powers of the ICC Prosecutor were also discussed at length. Some of the AALCO member states also spelled out their reasons for not acceding to the ICC Statute which included the additional financial burden on their governments and the difficulties of internalising the provisions of ICC Rome Statute into their domestic legislation.

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<sup>62</sup> Depositary Notification, Rome Statute of the International Criminal Court, Belgium: Proposal of Amendment, Reference. C.N.733.2009.TREATIES-8, 29 October 2009.

<sup>63</sup> Depositary Notification, Rome Statute of the International Criminal Court, Norway: Proposal of Amendment, Reference. C.N.713.2009.TREATIES-4, 29 October 2009.

<sup>64</sup> See *supra* note 49.

<sup>65</sup> ICC Statute, Art. 98(2), see *supra* note 10. Art. 98(2) provides that the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.



Many member states also viewed positively the 2010 ICC Review Conference held in Kampala which adopted the amendments to the ICC Statute and to the Elements of Crimes concerning the crime of aggression, which will enter in to force once 30 ratifications have been reached and a decision is made to that effect after 1 January 2017.

#### **18.4.4. Role of the United Nations Security Council**

AALCO member states wanted a clearly defined role for the UN Security Council, in case of failure to determine acts of aggression, to the effect that independent judicial bodies such as ICC should not be impeded. The view was expressed that the ICC is an independent judicial body that should not be subordinated to the Security Council (Iran and Malaysia).<sup>66</sup>

Another concern with regard to the role of the UN Security Council vis-à-vis the ICC relates to its deferral power under Article 16 of the ICC Statute. Many AALCO member states have expressed the view that the Security Council inappropriately uses its discretionary powers in disregard of their real concerns.

#### **18.4.5. Immunity of Heads of States**

The issue of states with constitutional monarchies or presidential immunities facing difficulty accepting the ICC Statute has also been highlighted. Many delegates have noted that their countries were not a party to the ICC Statute for both legal and political reasons, the primary one being the sovereignty of the nation.

An important development is that the African Union Assembly at its 23rd Summit (held 26–27 June 2014) adopted a protocol to amend the protocol on the Statute of the African Court of Justice and Human Rights ('ACJPR Amendment').<sup>67</sup> The amendment protocol confers on the proposed ACJHR international criminal jurisdiction over crimes of genocide, war crimes and crimes against humanity which also fall under the jurisdiction of the ICC, and 11 other crimes.

More importantly, a controversy has centred on the immunity provision under Article 46*Abis* which ensures immunity to serving African

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<sup>66</sup> See the statements of Malaysia and Iran, Summary Records of the Fifth General Meeting, Report of the Forty-Eighth Annual Session of AALCO, 30 June–4 July 2008.

<sup>67</sup> XXIII Assembly of the Union, African Union, see *supra* note 5.

Union heads of states or governments and senior state officials.<sup>68</sup> The conformity of this provision with that of Article 27<sup>69</sup> of the ICC Statute to which the majority of African states are members, has attracted significant debate. One thus finds a clear contradiction between Article 46*Abis* of the African Court and Article 27 of the ICC Statute.<sup>70</sup> What the ICC Statute has removed, the amendment protocol has protected.

In addition, the AU Summit Meeting of the Assembly of Heads of States and Government (12 October 2013) reiterated its opposition to a number of prosecutions at the ICC.<sup>71</sup> It called on the UN Security Council to act under Article 16 of the ICC Statute and defer proceedings against the president of one country.<sup>72</sup> It also decided that African states should not comply with the ICC with regard to that particular case, including a call for non-compliance with the arrest warrant for that president.<sup>73</sup> In addition, the AU has called on the UN Security Council to defer the investigations and prosecutions in the Kenya situation.<sup>74</sup> This development shows the disapproval of some African states towards the functioning of the ICC. However, it has to be carefully balanced with the very fundamental principle for which the ICC was established, that is to end the culture of impunity and ensure accountability for the most serious crimes.

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<sup>68</sup> African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/846(XXV) (<https://www.legal-tools.org/doc/32c33d/>). Art. 46*Abis* states:

no charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

<sup>69</sup> ICC Statute, Art. 27, see *supra* note 10. According to Art. 27, the ICC Statute applies equally to all persons without distinction based on their official capacity. Hence, it removes immunities which may ordinarily apply, under national and international laws, to state officials.

<sup>70</sup> Presentation made by the Secretary-General of AALCO, “The Asian-African Perspectives on the International Criminal Court”, Seminar on Historical Origins of International Criminal Law, Session 1, Saturday, 29 November 2014.

<sup>71</sup> African Union, Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1(Oct.2013) (<https://www.legal-tools.org/doc/edad86/>).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

### 18.5. Final Remarks

Until the end of the Cold War, Nuremberg stood out as a unique judicial event that mirrored universal outrage against German actions during the Second World War. With the creation of the United Nations *ad hoc* international criminal jurisdictions in 1993–1994, this perspective was altered. Instead of being the only one of its kind, Nuremberg is now seen as the first of its kind.

In a broader sense, it appears that the establishment of the ICC has been hailed by the comity of nations by and large. The establishment of an international institution that prosecutes perpetrators of war crimes and other such acts is an imperative for reconciliation in post-conflict societies. However, a large number of important international actors have refused to join the Court for reasons that are closely connected to lack of adequate mechanisms to ensure checks and balances on the exercise of its powers. At the time of writing, 123 states are parties to the ICC Statute and 21 cases and nine situations have been brought before the Court.<sup>75</sup> Despite its global mandate, all prosecution cases in its young history have come from Africa. The silence of the Court, as a matter of fact, with regard to the territory of some states parties needs explanation. This is a popular concern in AALCO: that there are some grave violations on which the ICC chooses to remain silent. Due to this and other reasons, to be discussed next, the participation of AALCO member states in the ICC is still lacklustre. Among 47 AALCO member states, only 18 have become party to the ICC Statute.<sup>76</sup>

While there are a good number of critics of this line of reasoning (many of them merit recognition), we need to remember here a doctrine that courts from the common law tradition often repeat: justice must not only be done but also be seen to have been done. This is particularly important in the context of international criminal justice because its justice and administration cannot happen expediently in the absence of the approval of the states concerned. Ensuring that the checks and balances in the ICC are flexible enough to account for the varying needs and viewpoints nations at different stages of socio-economic development is crucial for the survival of the ICC itself.

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<sup>75</sup> International Criminal Court, “The States Parties to the Rome Statute”, available on the ICC’s web site.

<sup>76</sup> *Ibid.*

The other major challenge before the ICC relates to its character as an organisation, that is the issue of universality, sustainability and complementarity. In order to achieve the universality of membership of the ICC, it should be recognised that each country has its own legal culture and position on the ratification of the Statute, which has different political implications on the home front of each state. Therefore, sustainable efforts should be taken on the part of the international community to iron out the differences and misconceptions around the ICC Statute, and thereby accommodate the viewpoints of non-state parties, including those of AALCO member states, to attain universality of the international criminal justice system.

These arguments of States shed light on their individual and collective concerns. Despite the repeated calls for universalisation by the UN Secretary-General, ultimately ratifying the ICC Statute depends on the sovereign decision of the states. The focus should now be to ensure the credibility of the ICC so that it attains the realm of universality.

AALCO, as a regional inter-governmental organisation, has considered issues relating to the ICC for more than two decades now. It works as a platform for exchange of ideas on important institutional and legal developments at the ICC. The objectives and goals of the Historical Origins of International Criminal Law Project are in consonance with the philosophy of AALCO's involvement in the area, namely the vertical and lateral consolidation of this relatively nascent area of international law. It is in this spirit that co-operation on this front needs to be enhanced further.

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## International Criminal Justice as Progress: From Faith to Critique

Barrie Sander\*

### 19.1. Introduction

International criminal justice is a field whose identity is subject to continual contestation.<sup>1</sup> The field's participants – including states, international organisations, legal counsel, judges, civil society groups, local communities and scholars – are engaged in a constant struggle to orient its development in line with their particular interests. As part of this struggle, participants contest the field's limits and potential, define what is foregrounded and excluded, and shape its functions and objectives.

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The author would like to thank Samuel Moyn, Thomas Skouteris, Darryl Robinson, Mark Drumbl, Jean d'Aspremont, Caroline Fournet, Martha Minow, Larissa van den Herik, Bronwyn Leebaw, Sahib Singh and Alice Dorrer for their thoughtful comments on earlier drafts of this chapter. A version of this chapter was presented at the CILRAP conference on the Historical Origins of International Criminal Law, New Delhi, 29–30 November 2014, and he would like to thank both the organisers and participants of the conference for their inputs. A version of this chapter was also presented at Harvard Law School's Visiting Scholar/Visiting Researcher Colloquium on 9 April 2015, and he would like to thank those in attendance for their comments. He is also particularly grateful to his Ph.D. supervisor, Andrea Bianchi, for his ongoing guidance and support. All errors remain the author's own.

<sup>1</sup> Frédéric Mégret, "In Search of the 'Vertical': Towards an Institutional Theory of International Criminal Justice's Core", in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, The Hague, 2009, p. 182: "the law is a constant theatre of symbolic and real struggles so that international criminal justice's identity is never fixed". On field theory, see generally Pierre Bourdieu and Loïc J.D. Wacquant, *An Invitation to Reflexive Sociology*, Polity Press, Cambridge, 1992; and Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", in *Hastings Law Journal*, 1987, vol. 38, no. 5, p. 814. For reliance on Bourdieusian field theory in international criminal scholarship, see generally Peter Dixon and Chris Tenove, "International Criminal Justice as a Transnational Field: Rules, Authority and Victims", in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, p. 393; and John Hagan and Ron Levi, "Crimes of War and the Force of Law", in *Social Forces*, 2005, vol. 83, no. 4, p. 1499.

Despite its fluidity, over time the field has tended to develop structural biases towards particular dispositions, buttressing some policies and preferences at the expense of others.<sup>2</sup> The existence of such biases naturally begs a number of questions, including why and how the field has come to prioritise certain values over others, and with what consequences for those whom the field is supposed to benefit. It is with the aim of identifying and demystifying some of these biases that this chapter seeks to contribute to the wider project of understanding the history of the field in general. If international criminal justice, like international law more generally, may be considered to be “a product of the past that conditions the future”,<sup>3</sup> then subjecting the field’s past to critical reflection by probing its biases and underlying assumptions becomes a task of especial importance.

As the field of international criminal justice has rapidly institutionalised over the past two decades, one assumption that has become particularly entrenched is the notion that international criminal courts are mechanisms of progress. The progressive character of international criminal courts is perhaps most clearly reflected in the celebratory declarations that have often accompanied their creation. For instance, Richard Goldstone heralded the establishment of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) as “a tremendous and exciting step forward”.<sup>4</sup> Similarly, Judge Philippe Kirsch proclaimed that the creation of the International Criminal Court (‘ICC’) represented “a humanitarian, judicial and practical imperative and as such it *must* succeed”.<sup>5</sup> This triumphant and optimistic tone also tends to be rekindled during the frequent celebration of institutional anniversaries within the field.<sup>6</sup>

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<sup>2</sup> On the notion of structural bias in international law, see generally Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd ed., Cambridge University Press, Cambridge, 2005, pp. 600–15.

<sup>3</sup> Philip Allot, “International Law and the Idea of History”, in *Journal of the History of International Law*, 1999, vol. 1, no. 1, p. 1.

<sup>4</sup> Richard Goldstone, “Conference Luncheon Address”, in *Transnational Law & Contemporary Problems*, 1997, vol. 7, no. 1, p. 2.

<sup>5</sup> “Statement made by Judge Philippe Kirsch, President of the International Criminal Court”, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, The Hague (emphasis added).

<sup>6</sup> See, for example, International Criminal Tribunal for the former Yugoslavia (‘ICTY’), Press Release, “President Meron congratulates the ICTR on 20th anniversary”, 7 Novem-

Beyond these grandiose assertions, the depiction of international criminal courts as engines of progress has also been couched in a number of rhetorical arrangements.<sup>7</sup> For instance, the judicialisation of the field has often been presented through the metaphor of a physical journey,<sup>8</sup> beginning at Nuremberg, continuing through The Hague and culminating in Rome. By depicting the institutional development of the field as a linear series of events, scholars and practitioners have been able to generate a sense of disciplinary movement and orient the field towards progress.<sup>9</sup> As David Koller has put it, individual episodic developments in the field become “no longer isolated phenomena to take on their own accord, but rather milestones falling on an invisible line of progress from injustice to a more rudimentary, and finally, to a more advanced international law”.<sup>10</sup>

Similarly, international criminal courts have also been praised for their humanising value orientation. For instance, Theodor Meron famously argued that international criminal courts exert “broad influence on both the development of international humanitarian law and its humanization”.<sup>11</sup> This humanising value orientation has also been underscored by

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ber 2014. ICTY President Meron remarked how the creation of the International Criminal Tribunal for Rwanda “started a true revolution in international humanitarian law by ending impunity for serious international crimes”; and ICTY, Press Release, “President Meron and ICTR President Joensen congratulate the ICC on the Day of International Criminal Justice”, 17 July 2014. In their letter to ICC President Song, President Meron and President Joensen stated that international criminal courts “have helped to transform the political and legal landscape”.

<sup>7</sup> For a discussion of the notion of progress in the field of public international law, see generally Tilmann Altwicker and Oliver Diggelmann, “How is Progress Constructed in International Legal Scholarship”, in *European Journal of International Law*, 2014, vol. 25, no. 2, pp. 425–44; David Koller, “... and New York and The Hague and Tokyo and Geneva and Nuremberg and ...: The Geographies of International Law”, in *European Journal of International Law*, 2012, vol. 23, no. 1, pp. 97–119; and Thomas Skouteris, *The Notion of Progress in International Law Discourse*, T.M.C. Asser Press, The Hague, 2010.

<sup>8</sup> Koller, 2012, pp. 99–105, see *supra* note 7.

<sup>9</sup> Fleur Johns, Richard Joyce and Sundhya Pahuja, “Introduction”, in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law*, Routledge, London, 2011, p. 2.

<sup>10</sup> Koller, 2012, p. 100, see *supra* note 7. See similarly Immi Tallgren, “Foreword: Searching for the Historical Origins of International Criminal Law”, in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law*, vol. 1, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. xvii–xxii.

<sup>11</sup> Theodor Meron, “The Humanization of Humanitarian Law”, in *American Journal of International Law*, vol. 94, no. 2, 2000, p. 243.

the association of international criminal courts with the individualisation of international law. Chris Gevers, for example, has recently recounted how mainstream histories of the field tend to be rooted in individualism, pursuant to which “the coming of age of international criminal law is nothing less than a moment of triumph: of individuals (human rights) over the collective (sovereignty); of (international) law over politics”.<sup>12</sup> At times this trend towards individualisation has also been characterised as a perceived paradigm shift in international law from state-centrism to anthropocentrism.<sup>13</sup> As the ICTY Appeals Chamber famously proclaimed in the case of *Dusko Tadić*, “a state-sovereignty oriented approach has been gradually supplanted by a human being oriented approach” and “the maxim of Roman law *hominum cause omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community”.<sup>14</sup>

In light of this deeply entrenched association between international criminal courts and progress, this chapter examines how the association has increasingly been contested within international criminal scholarship and what such contestation may signify for the future orientation of the field. For this purpose, the chapter is divided into three sections.

The chapter begins by elaborating three progress claims that have made a prominent contribution to the characterisation of international criminal courts as mechanisms of progress (section 19.2.): first, the claim that international criminal courts are *apolitical*, completely marked off from political activity; second, the claim that international criminal courts are *global peacemakers*, securing peace in the specific conflicts in which they intervene and serving a broader deterrent function across the globe; and finally, the claim that international criminal courts are *global justice providers*, adjudicating the guilt or innocence of the accused according to liberal standards of fairness, defending the universal values of humanity and responding to the needs of victims affected by episodes of mass atrocity. It is argued that these claims have been relied upon by participants

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<sup>12</sup> Christopher Gevers, “International Criminal Law and Individualism: An African Perspective”, in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, London, 2014, p. 223.

<sup>13</sup> Skouteris, 2010, p. 3, see *supra* note 7.

<sup>14</sup> ICTY, *Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-I-AR72, 2 October 1995, para. 97 (“*Tadić case, Decision*”) (<https://www.legal-tools.org/doc/866e17/>).



within the field primarily as articles of faith, a faith rooted in a range of motivations, including the need to appeal to the self-interest of states to support the institutionalisation of the field as well as the attractiveness of international criminal law for the identity of the international legal profession.

As a result of the exuberant faith that has been placed in international criminal courts, the field has witnessed rising expectations concerning what such institutions should achieve in practice, opening up a gap between aspiration and achievement.<sup>15</sup> As this gap has become increasingly apparent, international criminal scholars have become more critical in orientation, now typically referring to progress claims more as objects of scrutiny than articles of faith. Indeed, whereas questioning the progressive character of international criminal courts would once have been to risk being dismissed as a dangerous cynic,<sup>16</sup> bordering on something sacrilegious,<sup>17</sup> this chapter identifies the beginnings of a shift in power within the field towards more critical voices (section 19.3.).

Of course, critical voices have always existed within international criminal scholarship. Yet, recently more radical forms of critique have risen in prominence,<sup>18</sup> seeking not only to illuminate how international criminal courts are often ineffective at achieving many of their aspirations but also to challenge the underlying assumptions on which such courts are premised.<sup>19</sup> With this in mind, this chapter examines three critical counterclaims that have sought to contest and destabilise the association between international criminal courts and progress: first, the counterclaim that international criminal courts are inescapably political; second, the counterclaim that the relationship between international criminal courts and peace is highly contingent on the particular context in question; and finally, the counterclaim that international criminal courts render only a

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<sup>15</sup> Mirjan Damaška, “The International Criminal Court Between Aspiration and Achievement”, in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, no. 1, pp. 19–35.

<sup>16</sup> Immi Tallgren, “Who Are ‘We’ in International Criminal Law? On Critics and Membership”, in Schwöbel, 2014, p. 76, see *supra* note 12.

<sup>17</sup> Christine E.J. Schwöbel, “The Comfort of International Criminal Law”, in *Law and Critique*, 2013, vol. 24, no. 2, p. 179.

<sup>18</sup> On critique as “radical critique”, see generally Grietje Baars, “Making ICL History: On the Need to Move beyond Pre-fab Critiques of ICL”, in Schwöbel, 2014, p. 196, *supra* note 12.

<sup>19</sup> On critique as an “assumptions critique”, see generally Christine Schwöbel, “Introduction”, in Schwöbel, 2014, pp. 2–4, *supra* note 12.

narrow form of justice. It is argued that underpinning these critical claims is a more textured understanding of the symbolic and distributional power of international criminal courts and a concern for illuminating the darker sides of their interventions that tend to be mystified by an uncritical faith in their progressive potential.

Although to date these critical voices have largely been confined to international criminal scholarship, this chapter seeks to bridge the gap between scholarship and practice, at least to a limited extent,<sup>20</sup> by suggesting how some of the insights raised by these critiques might infiltrate the practices of international criminal courts (section 19.4.). In general, critiques advanced to date have tended to adopt a political orientation that advocates either a shift of attention away from international criminal courts so as to open up space for alternative conceptions of justice or a greater sensibility on the part of those participating within international criminal courts for the possible darker sides of their interventions in particular contexts. While reforming the practices of international criminal courts will clearly not be sufficient to comprehensively respond to these concerns,<sup>21</sup> this chapter posits that international criminal courts do have some room for manoeuvre. With this in mind, the chapter makes two suggestions: first, the adoption of a public relations strategy that emphasises the limits of what international criminal courts should be expected to achieve in practice; and second, the incorporation of greater sensitivity to contextual factors within the policies of international criminal courts con-

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<sup>20</sup> On the distinction between critiques that interact with those practising in the field and those that are so radical that they cannot be heard within the disciplinary box of practitioners, see generally Dov Jacobs, “Sitting on the Wall, Looking In: Some Reflections on the Critique of International Law”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 1, p. 10.

<sup>21</sup> On the dilemma confronted by critical scholars concerning whether to advocate reform or revolution, see generally Frédéric Mégret, “International Criminal Justice: A Critical Research Agenda”, in Schwöbel, 2014, p. 45, *supra* note 12, discussing the dialectics of “irrelevance/absorption”; Tallgren, 2014, p. 88, *supra* note 16, discussing the dilemma for the critical scholar of positioning himself somewhere between relevance and irrelevance within the field; Tilmann Altwicker and Oliver Diggelmann, “What Should Remain of the Critical Approaches to International Law? International Legal Theory as Critique”, in *Revue Suisse de droit international et européen*, 2014, vol. 24, p. 84, discussing the dialectic between “reform” and “resistance” within the field of international law; and Grietje Baars, ““Reform or Revolution”? Polanyian versus Marxian Perspectives on the Regulation of the Economic”, in *Northern Ireland Law Quarterly*, 2011, vol. 62, no. 4, p. 415–31, critiquing a Polanyian reformist perspective to the regulation of the economy through law.

cerning whether and how to intervene in particular mass atrocity situations.

The chapter concludes that it is important to remember that *all* responses to episodes of mass violence are inescapably limited and partial, excluding some voices and prioritising others. Looking ahead, therefore, what is most needed is for participants within the field to adopt a critical mindset, one that replaces over-exuberant progress claims with a more modest or semi-agnostic faith in the potential of all emancipatory projects, and one that is alive to the risk that any emancipatory project, including the interventions of international criminal courts, has the potential to eclipse the needs of those whom they are supposed to benefit.<sup>22</sup>

## 19.2. Progress Claims in the Field of International Criminal Justice

Over the course of the past two decades, the field of international criminal justice has witnessed a degree of institutionalisation that few thought imaginable. During this period, international criminal courts have not only become normalised<sup>23</sup> but also prioritised as a mechanism for responding to episodes of mass atrocity.<sup>24</sup> As a result, the vocabulary of international criminal law is now an entrenched part of international discourse, permeating discussions in both legal and political commentary.<sup>25</sup> Indeed, it would not be an exaggeration to suggest that there has been a certain enchantment with international criminal courts, the imagination of both scholars and practitioners alike being captivated by their mystical spell.<sup>26</sup>

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<sup>22</sup> See similarly, David S. Koller, “The Faith of the International Criminal Lawyer”, in *New York University Journal of International Law and Politics*, 2008, vol. 40, no. 4, pp. 1068–69, advocating “a moderate semi-agnostic commitment” to international criminal law, one which would allow us “to use the means of international criminal law while remaining conscious that through our actions we are also contributing to the law’s exclusionary force”.

<sup>23</sup> Ralph Henham and Mark Findlay, “Introduction: Rethinking International Criminal Justice?”, in Ralph Henham and Mark Findlay (eds.), *Exploring the Boundaries of International Criminal Justice*, Ashgate, Aldershot, 2011, p. 1.

<sup>24</sup> Schwöbel, 2013, p. 172, see *supra* note 17.

<sup>25</sup> Sarah M.H. Nouwen and Wouter G. Werner, “Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 161.

<sup>26</sup> Jan Klabbers, “Just Revenge? The Deterrence Argument in International Criminal Law”, in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 250.

Very much driving the judicialisation of the field, international criminal scholars and practitioners have put forward a range of progress claims concerning both the identity and aspirations of international criminal courts. Recently described by Payam Akhavan as “exaggerated normative fantasies”,<sup>27</sup> these progress claims have played an important role in mainstreaming international criminal prosecution as the reflexive first-choice policy for responding to episodes of mass violence.<sup>28</sup>

Against this background, this section elaborates three particularly prominent progress claims that have been advanced by scholars and practitioners within the field and puts forward some tentative suggestions to explain why so much faith has been placed in these claims despite a general lack of empirical or sociological grounding.

### 19.2.1. International Criminal Courts as Apolitical

In her landmark study, Judith Shklar defined “legalism” as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”.<sup>29</sup> Although this definition has become well established in existing international criminal scholarship, less acknowledged is the fact that Shklar went on to identify and critique a particular strand of legalism, which she termed “legalism as an ideology”.<sup>30</sup> Ideological legalism refers to a particular set of beliefs and political preferences internal to the legal profession as a social community that informs their practices and serves as

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<sup>27</sup> Payam Akhavan, “The Rise, and Fall, and Rise, of International Criminal Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 529.

<sup>28</sup> Mark A. Drumbl, “The Future of International Criminal Law and Transitional Justice”, in William A. Schabas, Yvonne McDermott and Niamh (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, 2013, p. 532.

<sup>29</sup> Judith N. Shklar, *Legalism: Law Morals, and Political Trials*, Harvard University Press, Cambridge, MA, 1964, p. 1.

<sup>30</sup> *Ibid.*, p. 112. See also Samuel Moyn, “Judith Shklar versus the International Criminal Court”, in *Humanity*, 2013, volume 4, no. 3, p. 478, arguing that Shklar’s study on legalism was “a vindication of legalism by way of a critique of its traditional defenses”; and Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge University Press, Cambridge, 2011, p. 33, discussing two visions of legalism in Shklar’s study: “legalism as a creative response to the collapse of political authority, which was valuable when guided by good political judgment” and “ideological legalism of academic legal scholarship, which, in her view, threatened to undermine the accomplishments of strategic legalism with a rigid and messianic conception of international law”.

guidance for their members.<sup>31</sup> For Shklar, ideological legalism is what provides legal professionals with “their sense of what it means to be a lawyer”.<sup>32</sup> Although Shklar was writing in the mid-1960s, the field of international criminal justice in the contemporary era arguably remains captivated by one of the central premises of ideological legalism, the idea that legal institutions and legal thinking are “highly discrete practices, clearly marked off within society and deriving much of their validity from their immunity to influence from, and participation in, the normal course of political activity”.<sup>33</sup> In other words, the field continues to adhere to the idea of a strict separation between law and politics,<sup>34</sup> maintaining the idealised vision of law as an apolitical enterprise and reducing the idea of the political to a threatening external influence that must be prevented from corrupting the purity of the judicial process.<sup>35</sup>

The importance of insulating international criminal courts from politics is reflected in several institutional features of the ICC. For instance, the ICC Statute creates an independent prosecutor who is empowered to initiate an investigation on his or her own initiative (*proprio motu*) subject to the authorisation of the Pre-Trial Chamber.<sup>36</sup> This is a significant feature of the ICC since it seeks to provide the institution with a degree of autonomy and independence from both states and the UN Security Coun-

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<sup>31</sup> Shklar, 1964, pp. vii–viii, see *supra* note 29.

<sup>32</sup> *Ibid.*, p. viii.

<sup>33</sup> *Ibid.*, p. ix.

<sup>34</sup> This separation arguably has its roots in legal education, on which see generally Duncan Kennedy, “Legal Education and the Reproduction of Hierarchy: A Polemic Against the System”, in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition*, New York University Press, New York, 2003, pp. 17–18:

The intellectual core of the ideology [of legal education] is the distinction between law and policy. Teachers convince students that legal reasoning exists, and is different from policy analysis, by bullying them into accepting as valid in particular cases arguments about legal correctness that are circular, question-begging, incoherent, or so vague as to be meaningless.

<sup>35</sup> Tor Krever, “Unveiling (and Veiling) Politics in International Criminal Trials”, in Schwöbel, 2014, p. 118, see *supra* note 12, noting that “while commentators disagree, often fiercely, whether a given trial or court should be characterized as political, they share a faith that ICL *can* and *should* be made apolitical”.

<sup>36</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

cil.<sup>37</sup> As Gerry Simpson has remarked, “if the Security Council represented hegemonic ambition and the states parties sovereign constraint, then the prosecutors (and judges) could be viewed as an instantiation of global justice”.<sup>38</sup> The intention to insulate the ICC from external interference is also reflected in the decision to provide the Court with an independent legal personality, rather than incorporating it into the structure of the United Nations.<sup>39</sup> In addition, as a permanent institution, the ICC arguably has greater potential to avoid the charges of victor’s justice that have hovered uncomfortably over previous attempts to operationalise criminal justice on the global stage.<sup>40</sup>

The demarcation between law and politics is also prevalent in the rhetoric surrounding the ICC. For instance, Luis Moreno-Ocampo has argued that his duty as ICC Prosecutor was “to apply the law without political considerations” and that “there can be *no* political compromise on legality and accountability”.<sup>41</sup> For Moreno-Ocampo, the ICC is “a judicial institution operating in a highly political environment”.<sup>42</sup> Similarly, the current ICC Prosecutor, Fatou Bensouda, has emphasised that “the ICC cannot use political considerations in its investigations”,<sup>43</sup> and that “the legal rules that apply are clear and decidedly not political under any circumstances”.<sup>44</sup> According to Bensouda, “politics has *no* place and will play *no* part in the decisions I take”.<sup>45</sup> In addition, judges have also reaf-

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<sup>37</sup> *Ibid.*, Art. 42(1): “A member of the Office shall not seek or act on instructions from any external source”.

<sup>38</sup> Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, Cambridge, 2007, p. 36.

<sup>39</sup> ICC Statute, Art. 4(1), see *supra* note 36.

<sup>40</sup> Amy E. Eckert, “The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide”, in Steven C. Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford University Press, Oxford, 2009, p. 218.

<sup>41</sup> Luis Moreno-Ocampo, “Address”, Conference on Building a Future on Peace and Justice, Nuremberg, 25 June 2007, pp. 3–4 (emphasis in original).

<sup>42</sup> Luis Moreno-Ocampo, “Keynote Address”, Council on Foreign Relations, Washington DC, 4 February 2010 (referring to the words of Judge Song).

<sup>43</sup> Evelyn Ankumah, “Is Africa a Participant or Target of International Justice? – An Interview with Fatou Bensouda, the then-Deputy Prosecutor of the International Criminal Court (ICC)”, Africa Legal Aid, 10 April 2013.

<sup>44</sup> Fatou Bensouda, “The Truth about the ICC and Gaza”, in *New York Times*, 29 August 2014.

<sup>45</sup> Fatou Bensouda, “Address to the Assembly of State Parties”, 12th Session of the Assembly of State Parties, 20 November 2013, para. 14 (emphasis in original).

firmed the apolitical nature of the ICC. For instance, the former ICC President Philippe Kirsch previously stated that there was “not a shred of evidence after three-and-a-half years that the court has done anything political” and confirmed that the Court was “operating purely judicially”.<sup>46</sup> Similar views have also been prevalent in international criminal scholarship.<sup>47</sup>

As these statements suggest, the moral authority of international criminal courts is premised on their renunciation and abdication of politics.<sup>48</sup> According to this progress claim, therefore, international criminal courts are progressive to the extent that they operate in a realm above and beyond the political.

### 19.2.2. International Criminal Courts as Global Peacemakers

For many scholars and practitioners, if politics is mentioned at all in the field of international criminal justice, it is typically only with the aim of personifying law as its victim.<sup>49</sup> In other words, politics is not only distinct from law, but also inferior to it;<sup>50</sup> politics is treated as a word of scorn,<sup>51</sup> an external negative corrupting force on the law.<sup>52</sup> According to

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<sup>46</sup> Steve Herman, “Japan’s Expected to Support International Criminal Court”, in *Voice of America*, 12 June 2006.

<sup>47</sup> See similarly, Moyn, 2013, p. 494, *supra* note 30: “Aside from conservatives who stand in a long tradition of hostility toward internationalist endeavors, along with a few empirical political scientists, no one approaches international criminal law as a political enterprise”.

<sup>48</sup> See similarly, Joseph Hoover, “Moral Practices: Assigning Responsibility in the International Criminal Court”, in *Law and Contemporary Problems*, 2013, vol. 76, no. 3, p. 267; and Leebaw, 2011, p. 178, *supra* note 30.

<sup>49</sup> See, for example, M. Cherif Bassiouni, “The Need for International Accountability”, in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 3, *International Enforcement*, Martinus Nijhoff, Leiden, 2008, p. 5; and Antonio Cassese, “The ICTY: A Living and Vital Reality”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 591.

<sup>50</sup> Shklar, 1964, p. 111, see *supra* note 29:

Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies.

<sup>51</sup> *Ibid.*, p. 122.

<sup>52</sup> See similarly Alana Tiemessen, “The International Criminal Court and the Politics of Prosecutions”, in *International Journal of Human Rights*, 2014, vol. 18, nos. 4/5, p. 446; Sarah M.H. Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2010, vol. 21, no. 4, p. 942; and Frédéric Mégret, “Three Dangers for the International

this view, international criminal courts are not only *apolitical*, but also profoundly *anti-political*, depicting all forms of political judgment as equally self-defeating and pernicious.<sup>53</sup> As Bronwyn Leebaw has recently remarked, most accounts of political judgment are premised on the idea that politics is “tragically and inescapably violent”.<sup>54</sup> Politics is the realm of power wrangling, conflict and struggle, and must be assimilated to the paradigm of the serenely rational judicial process;<sup>55</sup> the political must be *replaced* by the legal.<sup>56</sup>

Complementing this vision of the political is a stirring narrative about the importance of purging state sovereignty,<sup>57</sup> one of the “traditional enemies” of international criminal justice.<sup>58</sup> As Robert Cryer has observed, “when sovereignty appears in international criminal law scholarship, it commonly comes clothed in a hat and cape. A whiff of sulphur permeates the air”.<sup>59</sup> Sovereignty is the *bête noire* of the international criminal lawyer, the sibling of *realpolitik*.<sup>60</sup> For sovereignty to prevail, so the narrative proceeds, would be “a travesty of law and a betrayal of the universal need for justice”.<sup>61</sup> In the words of Antonio Cassese, “either one

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Criminal Court: A Critical Look at a Consensual Project”, in *Finnish Yearbook of International Law*, 2001, vol. 12, pp. 212, 231.

<sup>53</sup> Leebaw, 2011, pp. 17, 38, see *supra* note 30. See similarly, in the field of human rights, Wendy Brown, “‘The Most We Can Hope For...’: Human Rights and the Politics of Fatalism”, in *South Atlantic Quarterly*, 2004, vol. 103, nos. 2/3, p. 453.

<sup>54</sup> Leebaw, 2011, p. 21, see *supra* note 30.

<sup>55</sup> Shklar, 1964, p. 122, see *supra* note 29. See similarly Tor Krever, “International Criminal Law: An Ideology Critique”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, p. 708; and Mégret, 2001, p. 210, *supra* note 52.

<sup>56</sup> Shklar, 1964, p. 139, see *supra* note 29. See similarly, Sara Kendall, “Critical orientations: a critique of international criminal court practice”, in Schwöbel, 2014, p. 56, *supra* note 12.

<sup>57</sup> Gevers, 2014, p. 224, see *supra* note 12.

<sup>58</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 3rd ed., The New Press, New York, 2006, p. 624.

<sup>59</sup> Robert Cryer, “International Criminal Law and State Sovereignty: Another Round?”, in *European Journal of International Law*, 2005, vol. 16, no. 5, p. 980.

<sup>60</sup> *Ibid.*, pp. 980–81.

<sup>61</sup> Tadić case, Decision, para. 58, see *supra* note 14. See similarly M. Cherif Bassiouni, “International Criminal Justice in Historical Perspective”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 140.



supports the rule of law, or one supports state sovereignty. The two are not compatible”.<sup>62</sup>

In light of these ideas about sovereignty and politics, scholars and practitioners have advanced the progress claim that international criminal courts are able to judicialise politics,<sup>63</sup> where judicialisation is equated with depoliticisation, the judicial process serving as a neutral check on sovereign power.<sup>64</sup> According to this claim, the absence of international criminal courts would leave the power-political interests of ruthless leaders and groups unconstrained.<sup>65</sup> To avoid such a situation, it is argued that the establishment of international criminal courts is necessary so as to serve as “a stabilizing beam and corrective antidote to the unprincipled desultoriness and unpredictable vacillation of politics”.<sup>66</sup> According to this view, therefore, political conflict can be neutralised by its subjection to an impartial criminal legal process,<sup>67</sup> international criminal courts serving to promote the message that those in power are not entirely uncon-

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<sup>62</sup> Cryer, 2005, p. 981, see *supra* note 59, referring to the words of Antonio Cassese.

<sup>63</sup> Shklar, 1964, p. 118, see *supra* note 29. The process of judicialisation has been observed by several international legal scholars. See, for example, Ruti Teitel, *Humanity's Law*, Oxford University Press, Oxford, 2011, p. 123, referring to “the judicialization or at least juridification of political struggle and military conflict”; Simpson, 2007, p. 137, *supra* note 38, referring to “the juridification of politics”; and Pierre Hazan, *Judging War, Judging History: Behind Truth and Reconciliation*, trans. Sarah M. de Stadelhofen, Stanford University Press, Stanford, CA, 2007, p. 153, referring to a “new judicial diplomacy”.

<sup>64</sup> See similarly Ruti Teitel and Robert Howse, “Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order”, in *New York University Journal of International Law and Politics*, 2009, vol. 41, no. 4, p. 961; and Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge University Press, Cambridge, 2003, p. 73.

<sup>65</sup> See similarly Krever, 2013, p. 702, *supra* note 55.

<sup>66</sup> Drumbl, 2013, p. 532, see *supra* note 28. See similarly Simpson, 2007, pp. 19–20, *supra* note 38, referring to the notion of “transcendent legalism” to refer to international criminal courts enthusiasts, for whom “there is only prosecution and trial on one hand, and the failures of politics on the other”.

<sup>67</sup> Payam Akhavan, “Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal”, in *Human Rights Quarterly*, 1998, vol. 20, no. 4, p. 749. See also, E.H. Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations*, 2nd ed., Macmillan, 1946, p. 170, noting the legalist belief that by establishing the rule of law “we shall transfer our differences from the turbulent political atmosphere of self-interest to the purer, serener air of impartial justice”.

strained by the rule of law and must not use it in ways that would silence those over whom it is exercised.<sup>68</sup>

In light of this progress claim, it has been argued that one of the most important functions of international criminal courts is to transform political violence against civilians from a prerogative of states into an international crime.<sup>69</sup> For instance, Moreno-Ocampo previously argued that his job as ICC Prosecutor required him to put “a legal limit to the politicians” and to “police the borderline and say, if you cross this you’re no longer on the political side, you are on the criminal side”.<sup>70</sup> For Moreno-Ocampo, rather than adjust his practices to political considerations, it was “time for political actors to adjust to the law”.<sup>71</sup>

This transformation of political conflict by law is said to occur on at least two levels.<sup>72</sup> First, at the instrumental level, it is asserted that international criminal courts can lead to shifts in the behaviour of individuals by altering their cost-benefit analyses of different courses of action.<sup>73</sup> In particular, it is claimed that the possibility of criminal punishment can serve as a credible threat or warning to potential offenders that future wrongdoing will be sanctioned; once individuals realise that they cannot escape sanction for committing atrocities, they will be less likely to carry out such crimes.<sup>74</sup>

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<sup>68</sup> Bill Wringer, “Why Punish War Crimes? Victor’s Justice and Expressive Justifications of Punishment”, in *Law and Philosophy*, 2006, vol. 25, no. 2, p. 181.

<sup>69</sup> David Luban, “State Criminality and the Ambition of International Criminal Law”, in Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, pp. 74–76.

<sup>70</sup> Patrick Smith, “Interview: Luis Moreno-Ocampo, ICC Prosecutor”, in *The Africa Report*, 21 September 2009.

<sup>71</sup> Luis Moreno-Ocampo, “The International Criminal Court: Seeking Global Justice”, in *Case Western Reserve Journal of International Law*, 2007, vol. 40, nos. 1/2, p. 224.

<sup>72</sup> See similarly Koller, 2008, p. 1052, *supra* note 22.

<sup>73</sup> *Ibid.*, pp. 1053–57, *supra* note 22, identifying how international criminal law may affect international discourse through its norms and institutions, which may influence which situations are the focus of international attention and which facts must be taken into account by political actors.

<sup>74</sup> See, for example, ICTR, *Prosecutor v. Kambanda*, Trial Chamber, Judgment and Sentence, ICTR-97-23-S, 4 September 1998, para. 28 (<https://www.legal-tools.org/doc/49a299/>), referring to deterrence as a means for “dissuading for good those who will attempt in future to perpetrate such atrocities”. See similarly Julian Ku and Jide Nzelibe, “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?”, in *Washington University Law Review*, 2006, vol. 84, no. 4, pp. 789–90.

Second, at the moral level, it is argued that international criminal courts can lead to shifts in the underlying identities of members of society once individuals have internalised the norms of international criminal law.<sup>75</sup> According to this moral education perspective,<sup>76</sup> international criminal courts can play a role in shaping and restoring societal values, and thereby encourage the development of habitual conformity with international criminal norms.<sup>77</sup> Payam Akhavan, a strong advocate of this view, has explained how criminal justice systems are accustomed to producing a flow of “moral propaganda” such that the imposition of punishment on a wrongdoer is transformed into a means of expressing social disapproval.<sup>78</sup> By transforming popular conceptions of right and wrong,<sup>79</sup> this moral propaganda may ultimately contribute to a process whereby such values are internalised by members of society and habitual conformity with the

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<sup>75</sup> Koller, 2008, pp. 1057–61, see *supra* note 22, identifying how international criminal law may contribute to a change in politics “by influencing our underlying conceptions of identity” in at least four ways: first, by helping create a community that identifies the necessity of responding to criminal activity; second, by attempting to reintegrate victims into the international community; third, by helping constitute the identity of individuals who have faith in the rule of law; and finally, by reinforcing the responsibility of individuals for their actions.

<sup>76</sup> On the moral education theory in the field of international criminal justice, see generally Kai Ambos, *Treatise on International Criminal Law*, vol. I: *Foundations and General Part*, Oxford University Press, Oxford, 2013, pp. 70–73; Kirsten J. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World*, Routledge, London, 2012, pp. 49–65; Luban, 2011, pp. 70–77, see *supra* note 69; Mirjan Damaška, “What is the Point of International Criminal Justice?”, in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, pp. 343–63; Robert Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law”, in *Stanford Journal of International Law*, 2007, vol. 43, no. 1, pp. 75–77 and 81–85; Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, pp. 173–79; and Akhavan, 1998, p. 737, *supra* note 67. For the elaboration of this account in the domestic criminal context, see generally Johannes Andenaes, “The General Preventive Effects of Punishment”, in *University of Pennsylvania Law Review*, 1966, vol. 114, no. 7, p. 949.

<sup>77</sup> Sloane, 2007, p. 75, see *supra* note 76. See similarly, in the domestic criminal context, Thomas Mathiesen, “General Prevention as Communication”, in Antony Duff and David Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, p. 221.

<sup>78</sup> Akhavan, 1998, p. 746, see *supra* note 67.

<sup>79</sup> It is a point of contention among scholars whether punishment is able to convey both the values of a community *and* the moral reasons behind them, or whether it is limited to only expressing the former. For a useful discussion, see Fisher, 2012, pp. 59–60, *supra* note 76.

law is thereby fortified.<sup>80</sup> In this way, international criminal courts can influence future behaviour by altering the underlying norms of a society.<sup>81</sup>

According to this progress claim, therefore, international criminal courts are progressive to the extent that they can hold politics in check and thereby act as agents of global peace, serving to incentivise the end of hostilities in the specific conflicts in which they intervene and to promote a broader culture of accountability around the globe.<sup>82</sup>

### 19.2.3. International Criminal Courts as Global Justice Providers

The final progress claim that has been advanced by supporters of international criminal courts is perhaps the most intuitive, namely that such courts are well equipped to render global justice. Indeed, ever since their inception, international criminal courts have been immersed in the language and imagery of justice.<sup>83</sup>

For instance, in his opening statement at the International Military Tribunal ('IMT') at Nuremberg, US Prosecutor Robert Jackson cautioned the tribunal to guard against "the unthinking cry for vengeance which arises from the anguish of war" so as to ensure that the trial would ultimately be remembered as "fulfilling humanity's aspirations *to do justice*".<sup>84</sup> In the first Annual Report of the ICTY, President Antonio Cassese emphasised that the establishment of the tribunal had the potential to constitute "a turning point in the world community" capable of opening up "a

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<sup>80</sup> Akhavan, 1998, p. 747, see *supra* note 67. For criticism of this argument, see Mégret, 2001, p. 203, *supra* note 52.

<sup>81</sup> See similarly, Fisher, 2012, p. 59, *supra* note 76; and Damaška, 2008, p. 345, *supra* note 76.

<sup>82</sup> See similarly, Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, Oxford, 2011, pp. 180–81, critiquing the capacity of the ICC to fulfil these functions.

<sup>83</sup> See generally, "Symposium: Pursuing Global Justice Through International Criminal Law", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 73 ff. On the images of justice, see generally, Dennis E. Curtis and Judith Resnik, "Images of Justice", in *Yale Law Journal*, 1986/1987, vol. 96, no. 8, p. 1727.

<sup>84</sup> Robert H. Jackson, "Opening Statement before the International Military Tribunal", 21 November 1945, in *Trial of the Major War Criminals before the International Military Tribunal*, vol. II: *Proceedings: 14 November 1945–30 November 1945*, International Military Tribunal, Nuremberg, 1947, pp. 98–102 (emphasis added).

new path towards the realization of *true international justice*".<sup>85</sup> Similarly, in a speech delivered in 2007, the first Prosecutor of the ICC, Moreno-Ocampo, referred to the ICC Statute as establishing "more than a Court; it created a *global criminal justice system*".<sup>86</sup>

In addition, the emblems of the ICTY, ICTR and ICC all incorporate some variation of the well-known image of the scales of justice. The UN Security Council resolutions establishing the ICTY and ICTR each refer to a determination to put an end to international crimes and "to take effective measures to bring to justice the persons who are responsible for them".<sup>87</sup> The preamble of the ICC Statute also refers to a resolve to "guarantee lasting respect for and the enforcement of international justice".<sup>88</sup> Indeed, it is little surprise that The Hague, the city in which many international criminal courts are located, has been self-branded as the "International City of Peace and Justice".<sup>89</sup>

Yet, although international criminal courts are continually heralded as global justice providers, there remains significant discrepancy concerning what global justice means in this context.<sup>90</sup> In fact, there are arguably at least three different types of global justice that international criminal courts are considered to render.

First, it is argued that international criminal courts render global justice by determining the guilt or innocence of individuals while conforming to liberal constraints designed to safeguard the accused from ar-

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<sup>85</sup> United Nations Security Council, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 29 August 1994, UN doc. A/49/342, S/1994/1007, para. 197 (emphasis added) ('ICTY 1994 Annual Report') (<https://www.legal-tools.org/doc/cacdb7/>).

<sup>86</sup> Moreno-Ocampo, 2007/2008, p. 216, see *supra* note 71 (emphasis added).

<sup>87</sup> United Nations Security Council, resolution 827, Preamble, 25 May 1993, UN doc. S/RES/827 (<https://www.legal-tools.org/doc/0bff83/>); United Nations Security Council, resolution 955, Preamble, 8 November 1994, UN doc. S/RES/955 (<https://www.legal-tools.org/doc/97d395/>).

<sup>88</sup> ICC Statute, see *supra* note 36.

<sup>89</sup> See the website set up by the Municipality of The Hague and the Dutch Ministry of Foreign Affairs (<http://www.thehaguepeacejustice.com/peace-and-justice.htm>).

<sup>90</sup> See similarly Sarah M.H. Nouwen and Wouter G. Werner, "Pursuing Global Justice Through International Criminal Law: Foreword", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 74; Dixon and Tenove, 2013, p. 406, *supra* note 1; and Henham and Findlay, 2011, p. 1, *supra* note 23.

bitrary prosecution or punishment. According to this view, global justice is understood as *criminal justice for the accused*.<sup>91</sup>

This understanding of global justice is premised on a deontological conception of the criminal process, pursuant to which the notion of desert sets limits and demarcates a zone of permissibility on the way the process is managed.<sup>92</sup> In the international criminal context, these desert-based constraints are given expression in the form of several fundamental liberal criminal law principles,<sup>93</sup> which find their roots in both domestic criminal justice systems and international human rights law.<sup>94</sup> By adhering to these

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<sup>91</sup> The scholar who has conducted most work to date in the international criminal context on the conception of justice in terms of deontological constraints is Darryl Robinson. See, in particular, Darryl Robinson, “International Criminal Law as Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 699 (‘Robinson, 2013a’); Darryl Robinson, “A Cosmopolitan Liberal Account of International Criminal Law”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 1, p. 127 (‘Robinson, 2013b’); and Darryl Robinson, “The Identity Crisis of International Criminal Law”, in *Leiden Journal of International Law*, 2008, vol. 21, no. 4, p. 925. See also Frédéric Mégret, “What Sort of Global Justice is ‘International Criminal Justice’?”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 79–85, critiquing depicting the justice of international criminal courts solely in these narrow terms.

<sup>92</sup> Robinson, 2013a, p. 701, see *supra* note 91. This perspective is commonly referred to as negative retributivist in orientation, on which, see generally Fisher, 2012, p. 62, *supra* note 76; James G. Stewart, “The End of ‘Modes of Liability’ for International Crimes”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 1, p. 174; and Antony Duff, “Can We Punish the Perpetrators of Atrocities?”, in Thomas Brudholm and Thomas Cushman (eds.), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives*, Cambridge University Press, Cambridge, 2009, pp. 81–82. For a useful discussion of retributivism in the international criminal context, see generally Alexander K.A. Greenawalt, “International Criminal Law for Retributivists”, in *University of Pennsylvania Journal of International Law*, 2014, vol. 35, no. 4, p. 101.

<sup>93</sup> For a useful overview of these principles, see generally Ambos, 2013, pp. 87–97, *supra* note 76, referring to the principles of legality, culpability and fairness.

<sup>94</sup> On the roots of these criminal law principles, see generally Jens D. Ohlin, “LJIL Symposium: Where to Find the Liberal Principles of Criminal Law”, in *Opinio Juris*, 10 April 2013, arguing that liberal criminal law principles are rooted in “criminal law *theory* – a philosophical inquiry about what the criminal law *ought* to be” (emphasis in original); Frédéric Mégret, “Prospects for ‘Constitutional’ Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part”, Paper at the Workshop on Public Law and Human Rights, Faculty of Law, Hebrew University of Jerusalem, 26 May 2010, p. 11, arguing that “general principles of criminal law are less a set of limited rules to be followed for criminal law’s sake, than fossilized manifestations of a much larger tradition of *human rights*” (emphasis in original); and Allison M. Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law”, in *California Law Re-*

principles, the international criminal process conveys its respect for individuals both in terms of their rationality, in the sense that they act for reasons, and autonomy, in the sense that they are in control of their actions.<sup>95</sup> According to this conception of justice, therefore, international criminal courts render global justice to the extent that they adhere to fundamental liberal standards of criminal law.<sup>96</sup>

Second, it has been argued that international criminal courts render global justice by enforcing the universal values of humanity.<sup>97</sup> According to this view, global justice is understood as *criminal justice for humanity*.

With this idea comes the presupposition that international criminal norms are universal in principle and the goal of universally enforcing them in practice.<sup>98</sup> As Kirsten Campbell has argued, international criminal courts are animated by their attempts “to construct ‘justice’ in terms not simply of the legal ordering of nation-states, but also of the *universal* values of global humanity”, declaring their foundations to be “*universal* norms that apply across the globe”.<sup>99</sup> The universalising logic of international criminal courts is reflected in the preamble of the ICC Statute, which provides that international criminal law is a “delicate mosaic” uniting all cultures, its rules and principles representative of “all peoples” who are “united by common bonds, their cultures pieced together in a

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view, 2005, vol. 93, no. 1, p. 82, arguing that international criminal law “has adopted key philosophical commitments of *national criminal justice systems*” (emphasis added).

<sup>95</sup> Robinson, 2013b, p. 134, see *supra* note 91, referring to this as international criminal law’s “underlying deontic commitment to treat humans justly as moral agents”. On the culturally contingent nature of this conception of criminal responsibility, see Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2009, pp. 9–17.

<sup>96</sup> See similarly Ambos, 2013, p. 88, *supra* note 76: “ICL must respect three fundamental principles honoured by any criminal justice system which rightfully carries the name justice in it”; and Robinson, 2013b, p. 132, *supra* note 91: “A system that neglects the constraint of desert is arguably not a system of ‘justice’, and is arguably not a system of ‘criminal law’ but rather an exercise of ‘police’ power”.

<sup>97</sup> See similarly Mégret, 2014, p. 30, *supra* note 21; and Branch, 2011, p. 181, *supra* note 82.

<sup>98</sup> See similarly in the field of human rights, Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, Oxford University Press, Oxford, 2005, p. 397. On the so-called “universalization effect” of law more generally, see Bourdieu, 1987, pp. 820 and 844, *supra* note 1.

<sup>99</sup> Kirsten Campbell, “The Making of Global Legal Culture and International Criminal Law”, *Leiden Journal of International Law*, 2013, vol. 26, no. 1, pp. 165–66 (emphasis added).

shared heritage”.<sup>100</sup> In this vein, it has commonly been asserted that international crimes are those that “shock the conscience of humanity”,<sup>101</sup> and that punishing the perpetrators of such crimes is a matter of defending and realising justice for humanity itself.

Finally, it has also been argued that international criminal courts render global justice by responding to the needs of victims of mass atrocity situations.<sup>102</sup> According to this view, global justice is understood as *criminal justice for victims*.

For instance, it has often been argued that the actions of international criminal perpetrators contain a message about the value of their victims.<sup>103</sup> Specifically, through their actions, international criminal wrongdoers create the *appearance* of degrading their victims.<sup>104</sup> Moreover, by

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<sup>100</sup> ICC Statute, Preamble para. 1, see *supra* note 36.

<sup>101</sup> *Ibid.*, para. 2.

<sup>102</sup> See similarly Branch, 2011, p. 181, *supra* note 82.

<sup>103</sup> This account of rendering justice to victims is based primarily on the work of domestic criminal law theorist Jean Hampton, on which, see generally, Jean Hampton, “Correcting Harms versus Righting Wrongs: The Goal of Retribution”, in *UCLA Law Review*, 1991/1992, vol. 39, no. 6, p. 1659; and Jean Hampton, “The Retributive Idea”, in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1988, pp. 122–43. For critical discussions of Hampton’s theory, see generally Nathan Hana, “Say What? A Critique of Expressive Retributivism”, *Law and Philosophy*, 2008, vol. 27, no. 2, pp. 139–42; Deidre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law*, New York University Press, New York, 2005, pp. 52–60; Matthew D. Adler, “Expressive Theories of Law: A Skeptical Overview”, in *University of Pennsylvania Law Review*, 2000, vol. 148, no. 5, pp. 1422–25; and David Dolinko, “Some Thoughts About Retributivism”, in *Ethics*, 1991, vol. 101, pp. 549–54. For reliance on Jean Hampton’s theory in the international criminal context, see, for example, Shachar Eldar, “Exploring International Criminal Law’s Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 2, p. 345; Luban, 2011, pp. 71–72, *supra* note 69; Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice”, in *Harvard Human Rights Journal*, 2002, vol. 15, p. 55, fn. 80; and Naomi Roht-Arriaza, “Punishment, Redress and Pardon: Theoretical and Psychological Approaches”, in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995, pp. 17–21. For criticism in the international criminal context, see generally Pablo de Greiff, “Deliberative Democracy and Punishment”, in *Buffalo Criminal Law Review*, 2002, vol. 5, no. 2, pp. 396–97.

<sup>104</sup> Hampton, 1991/1992, pp. 1672–73, see *supra* note 103. Hampton’s theory is based on a Kantian theory of value, pursuant to which “human beings *never* lose value as ends-in-themselves, no matter what kind of treatment they receive”. Consequently, Hampton emphasises that a wrongful act can only ever give “the appearance” of degradation.



representing their victims as worth far less than their actual value, wrongdoers represent themselves as elevated, thereby according themselves a value they do not have.<sup>105</sup> In response, international criminal courts are called upon as retributive mechanisms to “vindicate the value of the victim denied by the wrongdoer’s action”.<sup>106</sup> By punishing wrongdoers, international criminal courts are considered to provide a means of annulling the appearance of the wrongdoer’s superiority.<sup>107</sup>

In addition, by punishing the perpetrators of international crimes, it is argued that international criminal courts can terminate,<sup>108</sup> or at the very least regulate,<sup>109</sup> ongoing cycles of vengeance amongst victims of mass atrocities. In particular, it has been claimed that international criminal courts can dissipate calls for revenge in at least two ways. First, by establishing individual responsibility over the collective assignation of guilt, punishment can assist victims to relinquish feelings of collective responsibility that may otherwise potentially degenerate into feelings of resentment and ultimately lead to further conflict.<sup>110</sup> Second, by punishing wrongdoers, victims will be able to see those who have wronged them pay for their crimes.<sup>111</sup> Punishment on this account is characterised as a means

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<sup>105</sup> *Ibid.*, p. 1677.

<sup>106</sup> *Ibid.*, p. 1686.

<sup>107</sup> Hampton, 1988, pp. 130–31, see *supra* note 103. Hampton argues that her theory provides a coherent explanation for Hegel’s theory that punishment “annuls the crime”, noting that while the imposition of punishment “can’t annul the act itself, [...] it can annul the false evidence seemingly provided by the wrongdoing of the relative worth of the victim and the wrongdoer”. For critical discussion of Hegel’s theory, see generally, Golash, 2005, pp. 50–52, *supra* note 103; and Larry May, *Crimes Against Humanity: A Normative Account*, Cambridge University Press, Cambridge, 2005, pp. 222–24.

<sup>108</sup> See similarly Sloane, 2007, p. 78, *supra* note 76; Austin Sarat, “When Memory Speaks: Remembrance and Revenge in *Unforgiven*”, in Martha Minow (ed.), *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press, Princeton, NJ, 2002, p. 237; Aukerman, 2002, p. 55, *supra* note 103; and Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, New Haven, 1996, pp. 146–47.

<sup>109</sup> See similarly Harvey M. Weinstein and Eric Stover, “Introduction: Conflict, Justice and Reclamation”, in E. Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, p. 14; Nancy L. Rosenblum, “Justice and the Experience of Injustice”, in Minow, 2002, p. 78, *supra* note 108. See also, in the domestic criminal law context, Judith N. Shklar, *The Faces of Injustice*, Yale University Press, New Haven, 1990, p. 94.

<sup>110</sup> ICTY 1994 Annual Report, para. 16, see *supra* note 85.

<sup>111</sup> Antonio Cassese, “Reflections on International Criminal Justice”, in *Modern Law Review*, 1998, vol. 61, no. 1, p. 6.

for gratifying “feelings of hatred” that have been stirred within victims of crime.<sup>112</sup> For instance, Cassese, in his role as the President of the ICTY, famously asserted that the “only civilized alternative to this desire for revenge is to render justice” and that unless perpetrators are prosecuted “feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence”.<sup>113</sup>

Finally, it has also been argued that international criminal courts can provide an important basis for healing the psychological wounds of victims by establishing a historical record of the atrocities under examination.<sup>114</sup> Rendering such a record has been considered to respond to the desires of victims for an official, manageable narrative of the conflict that took place.<sup>115</sup> In particular, it has been asserted that establishing an authoritative historical record can act as a form of social acknowledgment of both their victim and survivor status,<sup>116</sup> signalling society’s renewed solidarity with them, as well as a form of social condemnation of the perpetrators’ acts.<sup>117</sup>

According to these progress claims, therefore, international criminal courts are progressive to the extent that they are global justice providers,

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<sup>112</sup> James F. Stephen, *Liberty, Equality, Fraternity*, Cambridge University Press, 1967, p. 152, cited in Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law*, Oxford University Press, Oxford, 1997, p. 89.

<sup>113</sup> ICTY 1994 Annual Report, para. 15, see *supra* note 85.

<sup>114</sup> Fergal Gaynor, “Uneasy Partners – Evidence, Truth and History in International Trials”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1259.

<sup>115</sup> See similarly, Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, Ardsley, NY, 1997, p. 278; and Stanley Cohen, “State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past”, in *Law & Social Inquiry*, 1995, vol. 20, no. 1, p. 18.

<sup>116</sup> On the importance of “acknowledgment”, see Cohen, 1995, p. 18, *supra* note 115, referring to the distinction between “knowledge” and “acknowledgement” first made by philosopher Thomas Nagel. For further discussion, see generally, Michelle Parlevliet, “Considering Truth: Dealing with a Legacy of Gross Human Rights Violations”, in *Netherlands Quarterly of Human Rights*, 1998, vol. 16, no. 2, p. 143; and Juan Méndez, “Review of A Miracle, A Universe, by Lawrence Weschsler”, in *New York Law School Journal of Human Rights*, 1991, vol. 8, no. 2, p. 583.

<sup>117</sup> See, for example, Jonathan Doak, “The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions”, in *International Criminal Law Review*, 2011, vol. 11, no. 2, p. 275; and Jamie O’Connell, “Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?”, in *Harvard International Law Journal*, 2005, vol. 46, no. 2, pp. 317 and 321–322.

determining the guilt or innocence of the accused according to liberal standards of fairness, defending the values of humanity and responding to the needs of victims.

#### 19.2.4. Progress Claims as Articles of Faith

Uniting the progress claims outlined above is their basis in acts of faith on the part of those who adopt them.<sup>118</sup> Indeed, the commitment of scholars and practitioners to international criminal judicialisation is arguably a particular manifestation of a broader, deep-rooted faith in the progressive nature of international law.<sup>119</sup> As such, despite Justice Robert Jackson's famous proclamation that the establishment of the IMT at Nuremberg constituted "one of the most significant tributes that Power has ever paid to Reason",<sup>120</sup> rarely have the progress claims driving the institutionalisation of the field been supported by empirical evidence or sociological research.<sup>121</sup> The question that naturally arises, therefore, is how this somewhat unbridled faith in the potential of international criminal courts may be accounted for. At least two explanations seem plausible.

First, progress claims were arguably useful for raising the profile of international criminal courts during the field's start-up phase, in particular

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<sup>118</sup> See similarly, Drumbl, 2013, p. 541, *supra* note 28; Carsten Stahn, "Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?", in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, p. 254; Koller, 2008, p. 1021, see *supra* note 22; and Arthur M. Weisburd, "International Law and the Problem of Evil", *Vanderbilt Journal of Transnational Law*, 2001, vol. 34, no. 2, p. 230.

<sup>119</sup> Koller, 2008, p. 1050, see *supra* note 22. On the faith of international lawyers in the progressive potential of international law, see generally David Kennedy, "When Renewal Repeats: Thinking against the Box", in Wendy Brown and Janet Halley (eds.), *Legal Legalism/Left Critique*, Duke University Press, Durham, NC, 2002, p. 392.

<sup>120</sup> Jackson, 1945, see *supra* note 84.

<sup>121</sup> See, for example, Alison Bisset, *Truth Commissions and Criminal Courts*, Cambridge University Press, Cambridge, 2012, p. 33: "few empirical studies"; Janine N. Clark, "The Impact Question: The ICTY and the Restoration and Maintenance of Peace", in Bert Swart Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, p. 55, identifying an "impact gap" in international criminal scholarship; and Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation", in *Human Rights Quarterly*, 2002, vol. 24, no. 3, p. 585: "paucity of empirical evidence".

as a means for guaranteeing the establishment of international criminal courts.<sup>122</sup> As Mark Drumbl has argued,

it may have been strategic for international criminal lawyers to aggressively tout the transformative potential of the atrocity trial in order to convince states to support institutions, donors to fund them, and persons to devote their professional lives and intellectual capital to them.<sup>123</sup>

Indeed, progress claims would have been particularly appealing for states, who could instrumentalise them to divert attention away from past failures of the international community to decisively and effectively intervene to prevent mass atrocity situations,<sup>124</sup> all the while relying on the establishment of international criminal courts “to convert a catastrophe into a positive, humanist project for themselves, appropriating for that end the suffering of the victims”.<sup>125</sup>

Second, faith in the progressive character of international criminal courts may also partially be explained by reference to international criminal law’s transformative potential for the identity of the international legal profession. In many ways, international criminal prosecutions have re-

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<sup>122</sup> See similarly, Drumbl, 2013, p. 541, *supra* note 28; and Patrick L. Robinson, “Creating a Legacy that Supports Sustainable Rule of Law in the Region”, in Richard H. Steinberg (ed.), *Assessing the Legacy of the ICTY*, Martinus Nijhoff, Leiden, 2011, p. 25.

<sup>123</sup> Drumbl, 2013, p. 545, see *supra* note 28. See also Sara Kendall, “Commodifying Global Justice: Economies of Accountability at the International Criminal Court”, *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 133, identifying an ongoing paradox or dilemma for the ICC in terms of its need to make over-ambitious progress claims to secure funding from states while being limited by its retributive framework from achieving such high aspirations.

<sup>124</sup> On the danger of international criminal courts becoming “fig leaves” for the inaction of states, see generally Benjamin Schiff, “The ICC’s Potential for Doing Bad When Pursuing Good”, in *Ethics & International Affairs*, 2012, vol. 26, no. 1, pp. 79–80; Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, Philadelphia, 2005, p. 77; Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2000, p. 207; and Makau Mutua, “Never Again: Questioning the Yugoslav and Rwanda Tribunals”, in *Temple International & Comparative Law Journal*, 1997, vol. 11, no. 1, p. 174.

<sup>125</sup> Skouteris, 2010, pp. 209–210, see *supra* note 7. See similarly Immi Tallgren, “The Sensibility and Sense of International Criminal Law”, in *European Journal of International Law*, 2002, vol. 13, no. 3, p. 594: “the ideology of a disciplined, mathematical structure of international criminal responsibility serves as a soothing strategy to measure the immeasurable”.

sponded to the international lawyer's "fear of the periphery",<sup>126</sup> typified by the constant challenge to prove that international law is 'real' law, not only by giving teeth to the enforcement of international law in the form of criminal sanctions<sup>127</sup> but also by transforming international law from a law of private dispute resolution aimed at ensuring the coexistence of states to a law of integration aimed at fostering public goods.<sup>128</sup> International criminal courts, with their high-powered courtroom theatre attracting the public gaze, have nurtured a growing sense of relevance among the international legal profession.<sup>129</sup>

Regardless of the precise motivation, however, it seems likely that the over-exuberant nature of the faith placed in international criminal courts was to spark a shift in power within the field of international criminal justice towards more critical voices.

### 19.3. The Critical Turn in International Criminal Scholarship

The romanticism surrounding the institutionalisation of the field of international justice has led to rising expectations concerning what international criminal courts should be capable of achieving in practice.<sup>130</sup> These heightened expectations have been far from inconsequential. As the former President of the ICTY Patrick Robinson has explained, "overly ambitious expectations are not harmless, as they can lead to disappointment and a decline in public support later on" and may also "delay the realization of other instruments that are necessary for the attainment of the desired goals".<sup>131</sup> Moreover, ambitious progress claims have also caused tensions and ambiguity concerning the selection, definition and prioritisa-

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<sup>126</sup> Gerry Simpson, "On the Magic Mountain: Teaching Public International Law", in *European Journal of International Law*, 1999, vol. 10, no. 1, pp. 73–74.

<sup>127</sup> See similarly Sarah M.H. Nouwen, "Justifying Justice", in James Crawford and Martti Koskeniemi (ed.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge, 2012, p. 329; Simpson, 2007, p. 57, *supra* note 38; Skouteris, 2010, p. 178, *supra* note 7; and Mégret, 2001, p. 197, *supra* note 52.

<sup>128</sup> See similarly, Skouteris, 2010, p. 176, *supra* note 7; and Mégret, 2001, p. 196, *supra* note 52.

<sup>129</sup> Nouwen, 2012, p. 330, see *supra* note 127.

<sup>130</sup> See similarly, Damaška, 2008, p. 331, *supra* note 76: "overabundance of tasks"; Sloane, 2007, p. 45, *supra* note 76: "unduly high expectations"; and Mégret, 2001, p. 209, *supra* note 52: "international criminal justice promises more than it can deliver".

<sup>131</sup> Robinson, 2011, p. 25, see *supra* note 122.

tion of the myriad of different functions attributed to international criminal courts.<sup>132</sup>

As the gap between the utopian aspirations of policymakers and what international criminal courts could realistically be expected to achieve in practice has become increasingly apparent,<sup>133</sup> there has been a growing sense among international criminal scholars that the time for experiments is over; the honeymoon period has come to a close.<sup>134</sup> Scholars have begun to scale back the unconditional faith they initially placed in international criminal courts.<sup>135</sup> The enthusiasm of scholars has become more tempered, their tone more sober.<sup>136</sup> This shift to a more critical climate in international criminal scholarship has also coincided with a wave of self-assessment among international criminal practitioners and judges

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<sup>132</sup> See similarly, Stahn, 2012, p. 260, *supra* note 118, noting “a functional problem of ‘goal variety’ and ‘goal ambiguity’”; and Damaška, 2008, p. 331, *supra* note 76, noting how the professed goals of international criminal justice “pull in different directions, diminishing each other’s power and creating tensions”. On “goal ambiguity”, see generally Yuval Shany, “Assessing the Effectiveness of International Courts: Can the Unquantifiable be Quantified?”, *Research Paper No. 03-10*, Hebrew University of Jerusalem, September 2010, para. 1.2.

<sup>133</sup> See, for example, Damaška, 2009, p. 19, see *supra* note 15.

<sup>134</sup> See similarly Claus Kreß, “Towards a Truly Universal Invisible College of International Criminal Lawyers”, *FICHL Occasional Paper Series No. 4*, 2014, p. 11, identifying a critical turn in international criminal scholarship in the aftermath of the Security Council’s referral of the situation in Darfur to the ICC. See also the recent collection of papers, “Recent Setbacks for International Criminal Justice Put into Perspective”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 501 ff.; and Mark Osiel, “The Demise of International Criminal Law”, in *Humanity Blog*, 16 November 2013.

<sup>135</sup> See similarly Kirsten Campbell, “Reassembling International Justice: The Making of ‘the Social’ in International Criminal Law and Transitional Justice”, in *International Journal of Transitional Justice*, 2014, vol. 8, no. 1, p. 56, noting that international justice discourses “appear increasingly to attribute limited functions to international criminal law and to give a wider role to national transitional justice processes in conflict resolution and reconstruction”.

<sup>136</sup> See, for example, Kreß, 2014, pp. 12–13, *supra* note 134: “a much more modest and realistic assessment of the potential of international criminal law”; Tallgren, 2014, p. 73, *supra* note 16: “a sobering of tone”; Naomi Roht-Arriaza, “Just a ‘Bubble’? Perspectives on the Enforcement of International Criminal Law by National Courts”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 543: “there is unmistakably a hangover after the euphoria of 1998”. See also M. Cherif Bassiouni, “Wolfgang Friedmann Memorial Award Address”, in *Columbia Journal of Transnational Law*, 2012, vol. 51, no. 1, p. 11: “maybe there is a purposeful intent to make international criminal justice so costly, so cumbersome and so ineffective that people will give up on it”.

as they seek to determine the “legacy” of the *ad hoc* international criminal tribunals, whose mandates are slowly drawing to a close.<sup>137</sup>

Of course, critical voices have always existed within the field of international criminal justice. Indeed, long before the modern system of international criminal law had even begun to emerge, critical voices in the form of realist opposition to the idea of international criminal law were arguably the norm in both political and scholarly circles.<sup>138</sup> These voices sought to challenge the capacity of international criminal courts to exist in a world of self-interested states,<sup>139</sup> as well as dismiss international criminal courts as a form of bad politics.<sup>140</sup> Yet, with the kinetic institutionalisation of the field over the course of the past two decades, these realist voices were largely crowded out by a reinvigorated progressive stream of scholars and practitioners. Sceptical voices were overwhelmed by a soaring rhetoric of progress and a faith-based enthusiasm for the potential of international criminal courts.

That this passionate commitment to international criminal courts was largely grounded in faith should not necessarily be viewed in a negative light. Arguably, recourse to faith is an important driver of all emancipatory projects that attempt to respond to episodes of mass violence, especially when they are in their infancy.<sup>141</sup> At the same time, however, it was perhaps the over-zealousness of this faith that sparked a reinvigoration of critical voices within the field, particularly among international criminal scholars.

Predominantly, these critical voices have taken the form of liberal critiques, challenging international criminal courts for not meeting the liberal standards of justice to which they have proclaimed exemplary adherence.<sup>142</sup> Significantly, these liberal critiques tend to be characterised by

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<sup>137</sup> See generally Swart *et al.*, 2011, *supra* note 121; and Steinberg, 2011, see *supra* note 122.

<sup>138</sup> For discussion of realist opposition to international criminal law, see generally Simpson, 2007, pp. 14–23, *supra* note 38; Mégret, 2001, p. 198–199, *supra* note 52; and Bass, 2000, pp. 8–16, *supra* note 124.

<sup>139</sup> Georg Schwarzenberger, “The Problem of an International Criminal Law”, in *Current Legal Problems*, 1950, vol. 3, no. 1, p. 296.

<sup>140</sup> Simpson, 2007, p. 22, see *supra* note 38.

<sup>141</sup> Koller, 2008, p. 1021, see *supra* note 22.

<sup>142</sup> For useful summaries of liberal critiques, see generally Mégret, 2014, pp. 19–20, *supra* note 21; and Robinson, 2013b, p. 128, *supra* note 91.

a desire to strengthen the effectiveness of international criminal courts,<sup>143</sup> while leaving their underlying assumptions unchallenged.<sup>144</sup>

Alongside liberal critiques, a more radical form of critique has also begun to gain traction within the field,<sup>145</sup> most recently organised under the banner of *Critical Approaches to International Criminal Law*.<sup>146</sup> This group of scholars has sought to illuminate the ways in which international criminal courts are not only ineffective at achieving many of their aspirations but also potentially detrimental to them. While these more radical critiques are far from homogenous, rooted in a variety of theoretical traditions, they have tended to take the form of probing the underlying assumptions on which international criminal courts are based.<sup>147</sup>

Against this background, this section examines the critical turn in international criminal scholarship, with an emphasis on the more radical critiques that have risen in prominence in recent years. After outlining some of the commonalities that tend to characterise these critiques, three critical counterclaims are identified that have been put forward by international criminal scholars in an effort to undermine the dominant progress claims within the field. It is argued that while these critiques have not necessarily been accompanied by a completely rejectionist attitude to-

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<sup>143</sup> See, for example, Schwöbel, 2014, pp. 3–4, *supra* note 19, referring “effectiveness arguments” in international criminal scholarship.

<sup>144</sup> Baars, 2014, p. 197, see *supra* note 18, characterising this form of critique as “pre-fab”, understood as critique that serves “to resolve the ‘problematic’ suggested by the approach itself”. See also Robert Cryer, “Sudan, Resolution 1593, and International Criminal Justice”, *Leiden Journal of International Law*, 2006, vol. 19, no. 1, p. 215, noting that this form of immanent liberal critique is something to which international criminal law “is particularly susceptible, given the suffusion of its rhetoric with references to the rule of law”.

<sup>145</sup> That these approaches are becoming mainstreamed is illustrated by the devotion of a symposium to several of these critical voices within one of the leading journals in the field. See “Symposium: Pursuing Global Justice Through International Criminal Law”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 73 ff.

<sup>146</sup> On critical approaches to international criminal law, see generally Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction*, Routledge, London, 2014; and Robert Cryer, “The Philosophy of International Criminal Law”, in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Cheltenham, 2011, pp. 259–263. See also the creation of the online research network, *Critical Approaches to International Criminal Law* (<http://www.caicl.net/>).

<sup>147</sup> Schwöbel, 2014, p. 4, see *supra* note 19, defining “an assumptions critique” as one which “questions who benefits in the existing parameters, who loses through the given legal structures, and why”.



wards international criminal courts,<sup>148</sup> they have often been underpinned by a political orientation that seeks either to redefine the distribution of power within the field away from international criminal courts towards other projects, or to ensure that international criminal courts are more critical about the different dimensions of the power they exercise.

### **19.3.1. The Commonalities of Critical Approaches to International Criminal Law**

In considering the commonalities of the more radical critiques that have recently gained ground within the field of international criminal justice, it is perhaps somewhat ironic that one of their shared traits is a resistance to precisely this type of pigeonholing.<sup>149</sup> Despite this resistance, it is argued here that a number of theoretical positions are identifiable around which a sufficient degree of commonality exists for an approach to be characterised as critical in orientation.<sup>150</sup> In particular, at least two commonalities are identifiable:<sup>151</sup> first, a commitment to an approach that challenges the assumptions on which international criminal courts are premised; and second, a more textured account of how power circulates within the field of international criminal justice.

#### **19.3.1.1. Critique and Assumptions**

The turn to critique in international criminal scholarship tends to be characterised by a sense of restlessness, ambivalence, anxiety and discom-

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<sup>148</sup> For an example of a rejectionist view of international criminal courts, albeit a reluctant one, see Osiel, 2013, see *supra* note 134.

<sup>149</sup> See, for example, Kennedy, 2002, p. 407, *supra* note 119; and Martti Koskenniemi, “Letter to the Editors of the Symposium”, in *American Journal of International Law*, 1999, vol. 93, no. 2, pp. 351–52.

<sup>150</sup> See similarly, Mégret, 2014, p. 20, *supra* note 21; Altwicker and Diggelmann, 2014, pp. 71 ff., *supra* note 21; Robert Knox, “Strategy and Tactics”, in *Finnish Yearbook of International Law*, 2010, vol. 21, pp. 201 ff.; Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology*, Oxford University Press, Oxford, 2000, chapter 6; and Thomas Skouteris, “Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship”, in *Leiden Journal of International Law*, 1997, vol. 10, no. 3, p. 415.

<sup>151</sup> For further potential commonalities in critical international criminal scholarship, see generally, Schwöbel, 2014, p. 1, *supra* note 19; and Mégret, 2014, p. 17, *supra* note 21.

fort.<sup>152</sup> Resisting the language of success or failure,<sup>153</sup> critique seeks to unveil the underlying presuppositions of international criminal courts and to subject them to an ongoing process of questioning.<sup>154</sup> As Michel Foucault famously put it, critique seeks to reveal “on what kinds of assumptions, what kinds of familiar, unchallenged modes of thought the practices that we accept rest”.<sup>155</sup> We must not let our presuppositions “fall peacefully asleep”.<sup>156</sup> Instead, as Foucault argued:<sup>157</sup>

The tranquillity with which they are accepted must be disturbed; we must show that they do not come about of themselves, but are always the result of a construction the rules of which must be known, and the justifications of which must be scrutinized. [...] What we must do, in fact, is to tear away from their virtual self-evidence, and to free the problems that they pose; to recognise that they are not the tranquil locus on the basis of which other questions (concerning their structure, coherence, systematicity, transformation) may be posed but that they themselves pose a cluster of questions (What are they? How can they be defined or limited? What distinct types of laws can they obey? What articulations are they capable of? What subgroups can they give rise to? What specific phenomena do they give rise to in the field of discourse?). We must recognise that they may not, in the last resort, be what they seem at first sight.

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<sup>152</sup> Several scholars have used the language of “discomfort” to refer to critical approaches. See, for example, Schwöbel, 2013, pp. 183, 188, *supra* note 17; Drumbl, 2013, p. 541, *supra* note 28; and Umut Özsü, “The Question of Form: Methodological Notes on Dialectics and International Law”, in *Leiden Journal of International Law*, 2010, vol. 23, no. 3, p. 687.

<sup>153</sup> See similarly Kendall, 2014, p. 59, *supra* note 56; and Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963–1965: Genocide, History, and the Limits of the Law*, Cambridge University Press, Cambridge, 2006, p. 291.

<sup>154</sup> See similarly Catherine Turner, “Deconstructing Transitional Justice”, in *Law and Critique*, 2013, vol. 24, no. 2, p. 208; and Kendall, 2014, p. 57, *supra* note 56.

<sup>155</sup> Michel Foucault, “For an Ethic of Discomfort”, in James D. Faubion (ed.), *Michel Foucault: Power, Essential Works of Foucault 1954–1984*, vol. 3: *Power*, Penguin, London, 2002, p. 448.

<sup>156</sup> *Ibid.*

<sup>157</sup> Michel Foucault, *Archaeology of Knowledge*, trans. A.M. Sheridan Smith, Routledge Classics, London, 2002, pp. 28–29.

Sometimes these assumptions may be so immediate and intimately linked to us that they are hiding in plain sight.<sup>158</sup> As such, the role of philosophy is “to make visible precisely what is visible” and “to make us see what we see”.<sup>159</sup>

In this vein, the first commonality of critical international criminal law scholarship is that it tends to be characterised as an “assumptions critique”,<sup>160</sup> seeking to probe the limits and boundaries of international criminal courts and to expose the underlying premises and assumed understandings of international criminal law as an argumentative practice.<sup>161</sup>

### 19.3.1.2. Critique and Power

Critiques of international criminal courts also tend to be premised on a particular understanding of the way power circulates within the field, an understanding that tends to be at odds with the account of power implicit in many of the progress claims outlined earlier in this chapter. According to those claims, international criminal courts are primarily mechanisms designed to hold power in check, where power is typically equated with sovereign power. To the extent that international criminal courts are considered to exercise power themselves,<sup>162</sup> it tends to be cast in essentially

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<sup>158</sup> Foucault, 2002, p. 448, see *supra* note 155, noting that “in order to give [one’s own pre-suppositions] the necessary mobility one must have a distant view, *but also look at what is nearby and all around oneself*” (emphasis added). See similarly Andrea Bianchi, “Reflexive Butterfly Catching: Insights from a Situated Catcher”, in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012, p. 203; and Susan Marks, “Four Human Rights Myths”, *LSE Law, Society and Economy Working Papers: Working Paper No. 10/2012*, 2012, pp. 12–17.

<sup>159</sup> Michel Foucault, “La philosophie analytique de la politique”, in D. Defert and F. Ewald (eds.), with J. Lagrange, *Dits et écrits, 1954–1988*, vol. 3, 1994, pp. 540–541, cited in and translated by Anne Orford, “In Praise of Description”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 3, p. 617.

<sup>160</sup> Schwöbel, 2014, p. 4, see *supra* note 19. See similarly Darryl Robinson, “The Controversy over Territorial State Referrals and Reflections on ICL Discourse”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 2, p. 378; and Skouteris, 2010, p. 33, see *supra* note 7.

<sup>161</sup> See similarly Mégret, 2014, p. 44, *supra* note 21, arguing that critique “is not simply a way of negating, but a way of *understanding* international criminal justice differently, with its potential and limitations” (emphasis in original); and Kendall, 2014, p. 60, *supra* note 56, arguing that “a critique of the field interrogates its taken-for-granted understandings”.

<sup>162</sup> See also Mégret, 2014, p. 22, *supra* note 21, observing how the exercise of power by international criminal courts in general “does not say its name, does not reveal itself as such”.

benign terms, for instance the power to secure peace or render justice.<sup>163</sup> Indeed, the only potentially harmful power that such courts are considered to exercise is over the individual defendants on trial, such that judicial excesses must be kept in check by appropriate safeguards in the form of liberal principles of criminal justice.<sup>164</sup>

Yet, from a critical perspective, to focus myopically on these narrow dimensions of power is to overlook the various ways in which international criminal courts constitute forms of productive power,<sup>165</sup> offering “a key medium for the making of contestable, thoroughly political distributive choices – for creating winners and losers, prioritising some voices at the expense of others”.<sup>166</sup> Rather than a mere check on sovereign excess, international criminal courts play a role in constituting and legitimating the conditions in which action takes place, enabling and authorising relations of domination and exploitation.<sup>167</sup> As Sara Kendall has put it, “humanity is not liberated through juridical forms, but is instead subjected

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<sup>163</sup> Mégret, 2014, p. 23, see *supra* note 21.

<sup>164</sup> *Ibid.*

<sup>165</sup> Michel Foucault, *Discipline and Punish: The Birth of a Prison*, Penguin, London, 1991, p. 194:

We must cease once and for all to describe the effects of power in negative terms: it “excludes”, it “represses”, it “censors”, it “abstracts”, it “masks”, it “conceals”. In fact, power produces: it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.

See also Michel Foucault, “Truth and Power”, in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, trans. Colin Gordon *et al.*, Harvester Press, Brighton, 1980, p. 119, noting how power “doesn’t only weigh on us as a force that says no, but [...] traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body”. For a useful discussion of the relevance of this aspect of Foucault’s work to international law, see Orford, 2003, pp. 71–81, *supra* note 64.

<sup>166</sup> Ben Golder, “Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought”, in *London Review of International Law*, 2014, vol. 2, no. 1, p. 83, referring to the field of human rights. See similarly, Mégret, 2015, p. 81, *supra* note 91, arguing that international criminal justice is “a form of distributive justice”.

<sup>167</sup> See, for example, Knox, 2010, p. 202, *supra* note 150: “law is not simply a negative relationship that constrains action, but also one that sets the conditions in which action takes place, *enabling* relations of domination and exploitation” (emphasis in original); and Koskeniemi, 2005, p. 614, see *supra* note 2, describing international law “not as a limiting but an *enabling* device” and “as a set of wide-ranging authorizations for the use of power and privilege” (emphasis in original).

to new configurations of power”.<sup>168</sup> From this perspective, therefore, international criminal courts play a role in constituting identity,<sup>169</sup> as well as serving as a form of governance.<sup>170</sup>

To focus on the productive power of international criminal courts is to acknowledge their definitional qualities.<sup>171</sup> International criminal courts foreground particular narratives and voices, define categories of responsibility, and construct the identities of individuals, groups and the relations between them in particular ways. International criminal courts also establish boundaries, delineating between guilt and innocence, right and wrong, blamers and blamed, and victims and perpetrators.<sup>172</sup>

In establishing these definitions and boundaries, international criminal courts frame and structure the controversies before them in a criminal legal vocabulary.<sup>173</sup> Consequently, those participating in the international criminal process are compelled to translate their grievances and to fit their suffering into the grammar and language of the criminal law. Günter Frankenberg has summarised this process of translation as “a double movement of displacement and deferral”:<sup>174</sup> conflicts are first displaced from everyday life and transferred to judicial institutions for resolution; then, they are deferred according to institutional resource limitations and handled by those with the requisite professional expertise. Inevitably, dur-

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<sup>168</sup> Kendall, 2014, p. 56, see *supra* note 56.

<sup>169</sup> See, for example, Campbell, 2013, p. 166, *supra* note 99, describing how international criminal law contributes to a global identity, declaring its legal subjects to be members of a global community of humanity, owing global obligations and possessing global rights, and ordering social relations through the production of new forms of global legal association; and Koller, 2008, p. 1060, *supra* note 22, emphasising the role of international criminal law in “identity construction”.

<sup>170</sup> Kendall, 2014, p. 58, see *supra* note 56. See similarly David Kennedy, “Reassessing International Humanitarianism: The Dark Sides”, in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006, pp. 132, 152, referring to the field of international humanitarianism; and Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, Cambridge, 2003, p. 168, referring to the field of human rights.

<sup>171</sup> Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice”, in *International Journal of Transitional Justice*, 2008, vol. 2, no. 3, pp. 267, 291.

<sup>172</sup> Stiina Löytömäki, *Law and the Politics of Memory: Confronting the Past*, Routledge, London, 2014, p. 10.

<sup>173</sup> Mégret, 2014, p. 23, see *supra* note 21.

<sup>174</sup> Günter Frankenberg, “Human Rights and the Belief in a Just World”, in *International Journal of Constitutional Law*, 2014, vol. 12, no. 1, p. 52.

ing this process of translation many aspects of the controversy that may be of importance to the individuals and groups concerned are lost,<sup>175</sup> with international criminal courts selectively determining what is relevant according to standards that include jurisdictional criteria, admissibility of evidence thresholds, and constraints in terms of time and resources. Moreover, those who are not able to fit their experiences within the vocabulary of international criminal law may be ignored completely.<sup>176</sup>

In this way, an important dimension of the productive power of international criminal courts resides in their silences, blind spots and exclusions,<sup>177</sup> what may be termed the remainders of the vocabulary of international criminal law.<sup>178</sup> Indeed, these silences are often as, if not more, important than what is spoken;<sup>179</sup> silences are more than simply the absence of voice, but are themselves charged with meaning, representing “the residue” of the exercise of voice, “stories not available, not accepted, not listened to at all”.<sup>180</sup> For instance, by defining those crimes and persons that fall within their purview, international criminal courts also identify and at

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<sup>175</sup> See, for example, Koskeniemi, 1999, p. 358, *supra* note 149, noting “the way legal translation articulates some participant values but fails to do so for other values”, and Robert Y. Jennings, “The Proper Work and Purposes of the International Court of Justice”, in A.S. Muller, D. Raič and J.M. Thuránszky (eds.), *The International Court of Justice: Its Future After Fifty Years*, Martinus Nijhoff, The Hague, 1997, p. 34, noting the unavoidably reductionist nature of the adjudicatory process, which demands the “concentration, refinement, or processing (many expressions suggest themselves) of a case”.

<sup>176</sup> Koller, 2008, p. 1066, see *supra* note 22.

<sup>177</sup> See similarly Martti Koskeniemi, “Projects of World Community”, in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 12; and David Kennedy, “Humanitarian Power”, in David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press, Princeton, NJ, 2004, p. 353.

<sup>178</sup> See similarly Kendall, 2014, p. 66, *supra* note 56; and Koller, 2008, p. 1066, *supra* note 22. See also, in the field of human rights, Frankenberg, 2014, p. 37, *supra* note 174; Golder, 2014, p. 96, *supra* note 166; and Rajagopal, 2003, p. 173, *supra* note 170. See generally Koskeniemi, 1999, p. 358, *supra* note 149: “any style of legal argument may work as a mechanism of blindness”.

<sup>179</sup> See similarly, Bianchi, 2012, p. 203, *supra* note 158; and Athanasios Chouliaras, “Discourses on International Criminality”, in Alette Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach*, Intersentia, Cambridge, 2010, p. 67.

<sup>180</sup> Eric H. Reiter, “Fact, Narrative, and the Judicial Uses of History: *Delgamuukw* and Beyond”, in *Indigenous Law Journal*, 2010, vol. 8, no. 1, p. 66.

times risk implicitly exonerating those that fall outside it.<sup>181</sup> Similarly, by mobilising public sentiment towards particular instances of suffering, international criminal courts also risk directing attention away from others.<sup>182</sup>

It is with these manifestations of power in mind that scholars have begun to refer to international criminal trials as “show trials”, not in the disapproving sense as predetermined spectacles, but in the non-pejorative sense that they constitute didactic and communicative events, pedagogical performances generating meanings about not only crime and punishment but also power, morality, normality, personality and social relations.<sup>183</sup> By failing to recognise these various manifestations of power, participants in the field of international criminal justice risk neglecting the power relations that they reproduce and make possible through their practices.<sup>184</sup>

With these insights in mind, a common goal of critical scholars has been to illuminate the different dimensions of the productive power of international criminal courts so as to awaken a broader sense of responsibility among scholars and practitioners alike for the darker sides of their interventions in particular mass atrocity situations.<sup>185</sup> As Hilary Charles-

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<sup>181</sup> See similarly, Mégret, 2014, p. 24, *supra* note 21; Nicola Henry, *War and Rape: Law, Memory and Justice*, Routledge, London, 2011, p. 126; and Koller, 2008, p. 1066, *supra* note 22. See also, in the field of human rights, Susan Marks, “Human Rights in Disastrous Times”, in Crawford and Koskeniemi, 2012, p. 320, *supra* note 127: “if human rights are a language of responsibility [...], they are also a language of exoneration”.

<sup>182</sup> See similarly, Michelle Burgis-Kasthala, “An Arresting Event: Assassination within the Purview of International Criminal Law”, in Schwöbel, 2014, pp. 246, 259, *supra* note 12; and Henry, 2011, p. 129, *supra* note 180. See also, in the field of human rights, Marks, 2012, p. 319, *supra* note 181; David Kennedy, “The Human Rights Movement: Part of the Problem?”, in Kennedy, 2004, p. 11, *supra* note 177. See also, in the field of public international law, Martti Koskeniemi, “‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law”, in *Modern Law Review*, 2002, vol. 65, no. 2, p. 173.

<sup>183</sup> There is a growing literature in international criminal scholarship that examines the didactic qualities of international criminal courts. For some prominent examples, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, Yale University Press, New Haven, 2001; Osiel, 1997, *supra* note 115; and Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin, London, 1994. See generally, in the domestic criminal justice context, David Garland, *Punishment and Modern Society: A Study in Social Theory*, Oxford University Press, Oxford, 1990.

<sup>184</sup> Orford, 2003, pp. 78–79, see *supra* note 64.

<sup>185</sup> The work of David Kennedy is particularly emphatic on the need for this sense of responsibility. See, for example, David Kennedy, *Of Law and War*, Princeton University Press, Princeton, NJ, 2006, pp. 169–170, 172, advocating “recapturing the human experience of

worth and Kennedy have put it, “we are active participants in intensely political and negotiable contexts and we must confront this responsibility without sheltering behind the illusion of an impartial, objective, legal order”.<sup>186</sup>

### 19.3.2. Critiquing the Progress Claims of International Criminal Courts

Having illuminated some of the commonalities that characterise the more radical critiques that have risen in prominence within international criminal scholarship, this sub-section conducts a closer examination of some of the counterclaims that have been put forward to contest the progress claims outlined earlier in the chapter.

#### 19.3.2.1. The Politics of International Criminal Courts

According to the dominant progress claim, the moral authority of international criminal courts tends to rest on their disavowal of politics. For most scholars and practitioners, the separation of law and politics has been considered to lend legitimacy to international criminal courts,<sup>187</sup> its necessity premised on the importance of guarding against the dangers of arbitrariness within the criminal legal process.<sup>188</sup>

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responsibility for the violence of war” in order to face squarely “the dark sides, risks and costs of [humanitarian action]” and challenging everyone “to recapture the freedom and the responsibility of exercising discretion in this common tongue”; and David Kennedy, “Challenging Expert Rule: The Politics of Global Governance”, in *Sydney Journal of International Law*, 2005, vol. 27, p. 27, noting the need to politicise the decisions of international experts by “rendering implausible the expert’s presentation of the decision, to himself or herself and to others, as *determined* rather than ‘free’” (emphasis in original).

<sup>186</sup> Hilary Charlesworth and David Kennedy, “Afterword: and Forward – There Remains So Much We Do Not Know”, in Orford, 2006, p. 408, see *supra* note 170. See similarly, Burgis-Kasthala, 2014, p. 259, *supra* note 182; and Martti Koskenniemi, “International Law in a Post-Realist Era”, in *Australian Yearbook of International Law*, 1995, vol. 16, p. 13.

<sup>187</sup> See similarly, Emily Haslam and Rod Edmunds, “Victim Participation, Politics and the Construction of Victims at the International Criminal Court: Reflections on Proceedings in *Banda and Jerbo*”, in *Melbourne Journal of International Law*, 2013, vol. 14, no. 2, p. 734; and Richard Ashby Wilson, *Writing History in International Criminal Tribunals*, Cambridge University Press, Cambridge, 2011, p. 37.

<sup>188</sup> See similarly Hoover, 2013, p. 278, *supra* note 48; Jenni Smith, “The ICC: A Forum for Show Trials?”, in *Auckland University Law Review*, 2000–2003, vol. 9, no. 4, pp. 1311–12; and Shklar, 1964, p. 111, *supra* note 29: “the divorce of law from politics is, to be sure,



For critical scholars, however, international criminal courts are intrinsically political.<sup>189</sup> Rather than transcending the political, politics is central to their practices.<sup>190</sup> In this regard, although there are many ways in which one might characterise the different dimensions of the politics of international criminal courts, it is argued here that the politics of such courts is best understood as a recognition of both their margin of discretion as well as their limits. In other words, international criminal courts are political not only because their participants make choices but also because those choices are exercised within particular contexts and subject to certain constraints and pressures.<sup>191</sup>

As such, a critical account is one prepared to interrogate both the discretion and limits of international criminal courts in a way that seems to be foreclosed by the progress claims outlined earlier in the chapter. In what follows, each of these dimensions of the political is examined in greater detail.

#### 19.3.2.1.1. The Politics of Limitation

In terms of *the politics of limitation*, international criminal courts are constrained by the politics of their creation, the political environments in which they operate, and the limits of the legal form of the norms they interpret and enforce.

First, international criminal courts *owe their existence to the political decisions of states*,<sup>192</sup> which remain the driving force behind the pro-

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designed to prevent arbitrariness, and that is why there is so little argument about its necessity”.

<sup>189</sup> See generally, Schwöbel, 2014, *supra* note 146; Tiemessen, 2014, *supra* note 52; Hoover, 2013, p. 263, see *supra* note 48; Haslam and Edmunds, 2013, *supra* note 187; “Roundtable: The Politics Ethics of the International Criminal Court”, in *Ethics & International Affairs*, 2012, vol. 26, no. 1, pp. 53 ff.; Nouwen and Werner, 2010, p. 941, *supra* note 52; Simpson, 2007, *supra* note 38; Martti Koskeniemi, “From Impunity to Show Trials”, *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, p. 1; and Mégret, 2001, p. 193, *supra* note 52.

<sup>190</sup> Hoover, 2013, p. 281, see *supra* note 48.

<sup>191</sup> See generally, Özsu, 2010, p. 705, *supra* note 152; Susan Marks, “False Contingency”, in *Current Legal Problems*, 2009, vol. 62, no. 1, p. 2; Stanley Fish, “The Law Wishes to Have a Formal Existence”, in Stanley Fish, *There’s No Such Thing As Free Speech ... And It’s a Good Thing Too*, Oxford University Press, New York, 1994, p. 178; and Bourdieu and Wacquant, 1992, pp. 102, 136, *supra* note 1.

<sup>192</sup> See similarly Krever, 2014, p. 118, *supra* note 35; Nouwen and Werner, 2010, p. 943, *supra* note 52; and Nancy A. Combs, *Fact-Finding Without Facts: The Uncertain Eviden-*

cess of international criminal institutionalisation.<sup>193</sup> For instance, the IMT at Nuremberg and the International Military Tribunal for the Far East at Tokyo were creations of the great powers in the aftermath of the Second World War, while the ICTY and ICTR each originated within the Western-dominated UN Security Council. Similarly, the negotiations leading up to the adoption of ICC Statute were enmeshed within the state-based paradigm of international treaty law.<sup>194</sup>

As such, far from transcending the political sphere, international criminal courts entail the enactment of particular forms of politics.<sup>195</sup> In this regard, rarely, if ever, have the limits of the jurisdictional mandates of international criminal courts been determined by concerns to optimise their capacity to render justice or secure peace.<sup>196</sup> Indeed, the grandiloquent rhetoric of the states responsible for creating international criminal courts has rarely been matched by the reality of the jurisdictional mandates implemented in practice.<sup>197</sup> As a result, while international criminal courts have been able to constitute their own political reality to some extent, they have also been forced to make compromises with the mandates given to them by states.<sup>198</sup> In this way, powerful states have ensured that international criminal courts are not only selective institutions, but selective in ways that at times appear tailored to meet the dictates of their political interests.<sup>199</sup>

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*tiary Foundations of International Criminal Convictions*, Cambridge University Press, Cambridge, 2010, p. 225.

<sup>193</sup> See similarly, Dixon and Tenove, 2013, pp. 399–400, *supra* note 1; Hoover, 2013, p. 264, *supra* note 48; and Chouliaras, 2010, p. 94, *supra* note 179.

<sup>194</sup> For a critical discussion of the drafting of the ICC Statute and the decisions of states on whether to join the ICC's legal regime, see Sarah Nouwen, "Legal Equality on Trial: Sovereign and Individuals before the International Criminal Court", in *Netherlands Yearbook of International Law*, 2012, vol. 43, pp. 161–66.

<sup>195</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, p. 177.

<sup>196</sup> Combs, 2010, p. 225, see *supra* note 192.

<sup>197</sup> Koskenniemi, 2002, p. 9, see *supra* note 189.

<sup>198</sup> See similarly, Hoover, 2013, p. 264, *supra* note 48; and Lawrence Douglas, "The Didactic Trial: Filtering History and Memory into the Courtroom", in *European Review*, 2006, vol. 14, no. 4, p. 516.

<sup>199</sup> See similarly, Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror*, Random House, New York, 2009, p. 284, arguing that the selectivity of international criminal courts tends to result in "not a rule of law but a subordination of law to the dictates of power"; and Gerry Simpson, "Didactic & Dissident Histories in War Crimes

Second, international criminal courts *operate in irreducibly political environments*. As is well known, international criminal courts lack any supranational enforcement mechanism. As such, while international criminal courts often proclaim the global and borderless nature of the criminality they judge, they are nonetheless forced to function within an international legal system in which state sovereignty remains an important constraint on action.<sup>200</sup> Equally, while international criminal courts formally have a high degree of operational autonomy, employing staff from a variety of different cultures and backgrounds and detaching themselves from the institutional frameworks of the states whose conflicts they investigate and judge,<sup>201</sup> this position is significantly qualified in practice. International criminal justice institutions are dependent on state co-operation for many aspects of their functioning, including funding,<sup>202</sup> the arrest and surrender of suspects, the collection of evidence, the sharing of information from national intelligence agencies, access to witnesses and crime scenes, and the protection of Court investigators and witnesses.<sup>203</sup> As Cassese famously put it, international criminal courts are like “giants without arms and legs”,<sup>204</sup> heavily reliant on the artificial limbs of states and international organisations to enforce their decisions. In this way, international

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Trials”, in *Albany Law Review*, 1996/1997, vol. 60, no. 3, p. 810, describing international criminal law as “hostage to *realpolitik*”, always open to accusations of “bias, selectivity and partiality”.

<sup>200</sup> Nerida Chazal, “Beyond Borders? The International Criminal Court and the Geopolitics of International Criminal Justice”, in *Griffiths Law Review*, 2013, vol. 22, no. 3, p. 712. See also, Mégret, 2015, p. 94, *supra* note 91: “the coming into being of international criminal justice institutionally (via consent) necessarily belies its metaphysics (as immanent justice)”.

<sup>201</sup> Wilson, 2011, p. 37, see *supra* note 187.

<sup>202</sup> See generally Kendall, 2015, p. 113, *supra* note 123.

<sup>203</sup> See generally Wilson, 2011, pp. 39–48, *supra* note 187.

<sup>204</sup> Antonio Cassese, “On Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, in *European Journal of International Law*, 1998, vol. 9, no. 1, p. 13, referring to the ICTY. See also ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Decision on the Admission of Material from the “Bar Table”, ICC-01/04-01/06, 24 June 2009, para. 45 (<https://www.legal-tools.org/doc/c692ec/>), citing the comment by Antonio Cassese with reference to the ICC.

criminal courts tend to be caught between an ideal of a legal system free from politics and the reality of the Westphalian world they confront.<sup>205</sup>

For instance, although states parties are obliged to co-operate fully with the ICC in its investigation and prosecution of crimes pursuant to Article 86 of the ICC Statute, and the entire international community is obliged to co-operate pursuant to Article 25 of the UN Charter when the Security Council initiates an investigation, these provisions tend to be of little assistance to the Court in practice. The Court's only recourse in case of a failure to co-operate is to refer the matter to the Assembly of States Parties or, where the Security Council has referred the matter to the Court, to the Security Council.<sup>206</sup> Yet, the Assembly of States Parties lacks coercive authority, while the support of the Security Council is at the whim of the five permanent members.<sup>207</sup> In either case, the ICC is wholly dependent on so-called "surrogate enforcers",<sup>208</sup> influential external actors that are able to exert pressure and target un-cooperative states.

As such, one story of international criminal courts is of a perennial attempt to emancipate themselves from the interstate world, while at the same time inescapably relying on them to function.<sup>209</sup> And once it is recognised that international criminal justice institutions are less transcendent than deeply reliant on state politics, to pretend that international criminal courts can somehow "leapfrog over politics" is to engage in what David Luban has recently termed "messianic thinking".<sup>210</sup>

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<sup>205</sup> Mégret, 2009, p. 222, see *supra* note 1: "international criminal justice is caught between the substance of its compelling founding narrative and the reality of the international world it confronts".

<sup>206</sup> ICC Statute, Art. 87(7), see *supra* note 36.

<sup>207</sup> Kenneth A. Rodman, "Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 3, pp. 441–42.

<sup>208</sup> Victor Peskin, "An Ideal Becoming Real? The International Criminal Court and the Limits of the Cosmopolitan Vision of Justice", in Roland Pierik and Wouter Werner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*, Cambridge University Press, Cambridge, 2010, p. 206.

<sup>209</sup> See similarly Kendall, 2015, p. 132, *supra* note 123; Rodman, 2014, p. 440, *supra* note 207; Hoover, 2013, p. 283, *supra* note 48; Peskin, 2010, pp. 197–98, *supra* note 208; and Simpson, 2007, p. 46, *supra* note 38.

<sup>210</sup> David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 508.

Finally, international criminal courts are subject to *the limits of the legal form* of the international criminal norms they interpret and enforce.<sup>211</sup> To understand these limits, it is necessary to distinguish between the form and substance of international crimes.

In terms of *substance*, international criminal courts adjudicate crimes that are quintessentially political in nature. International crimes are manifestations of what Luban famously termed “politics gone cancerous”,<sup>212</sup> reflecting the capacity of political organisations to become sources of violence and oppression rather than protection and empowerment.<sup>213</sup> As such, when adjudicating such crimes, *who* is on trial becomes inseparable from *what* is on trial.<sup>214</sup> In other words, international criminal trials are often on a different register compared to most domestic criminal trials, judging not only the accused being prosecuted but also an entire era and its politics.<sup>215</sup> Indeed, Robert Jackson recognised as much in his open-

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<sup>211</sup> See similarly Golder, 2014, p. 112, *supra* note 166: “every attempt to redescribe the *substantive* human of human rights (as, for example, more ethically responsive or more multi-culturally diverse) is mortgaged to the particular *form* of human rights” (emphasis in original); and Knox, 2010, p. 204, *supra* note 150, referring to the materialist approach, according to which,

one cannot understand the structuring features of the law and legal argument on their own terms, or simply as “ideas”. Rather, they need to be understood on the basis of “the material conditions of existence” that is to say those “definite and necessary relations of production that human beings enter into independently of their will”.

<sup>212</sup> David Luban, “A Theory of Crimes Against Humanity”, in *Yale Journal of International Law*, 2004, vol. 29, no. 1, p. 117. See also Fisher, 2012, pp. 23–25, *supra* note 76, applying and expanding Luban’s theory to all core international crimes.

<sup>213</sup> Adil A. Haque, “Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law”, in *Buffalo Criminal Law Review*, 2005, vol. 9, no. 1, pp. 305–6.

<sup>214</sup> See similarly, Mégret, 2015, p. 90, *supra* note 91; and Scott Veitch, “Judgment and Calling to Account: Truths, Trials and Reconciliations”, in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial*, vol. 2: *Judgment and Calling to Account*, Hart, Oxford, 2006, p. 165.

<sup>215</sup> Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. Ralph Schoolcraft, University of Pennsylvania Press, Philadelphia, 2002, p. 56. See similarly, Stina Löytömäki, “Legalisation of the Memory of the Algerian War in France”, in *Journal of the History of International Law*, 2005, vol. 7, no. 2, p. 174; Simpson, 2007, p. 13, *supra* note 38, describing international criminal trials as “the proceduralized clash of competing ideologies”; and Shklar, 1964, p. 155, *supra* note 29, describing the IMT trial at Nuremberg as “a great drama in which the most fundamental moral and political values were the real personae”.

ing statement at the IMT trial at Nuremberg, expressly invoking the connection between the acts of the accused and the politics of Nazism by characterising the individuals on trial as “living symbols” of racial hatreds and fierce nationalisms.<sup>216</sup> In such circumstances, politics is necessarily on trial and the process of judging the guilt or innocence of the accused becomes inextricably bound up with judging the political ideology that the accused supports.

Yet, despite the political *substance* of international crimes, their legal *form* constrains the ability of international criminal courts to situate these crimes within their broader structural contexts. In particular, drawing on the work of the Marxist scholar Evgeny Pashukanis, a number of critical scholars have argued that the legal form is, in its inception, inherently connected to and ultimately supportive of the forces of global capitalism.<sup>217</sup> As such, any challenge to the operation of capitalist market orthodoxy by international criminal courts is simply unrealisable in practice.<sup>218</sup>

In this context, “legal form” should be understood to refer to the patterns of relations and subject positions to which laws attempt to give shape.<sup>219</sup> As with trade and human rights law, the relations and subjects given form by international criminal law are as important to its effects as

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<sup>216</sup> Jackson, 1945, see *supra* note 84.

<sup>217</sup> The author who may be credited with reinvigorating the work of Evgeny Pashukanis in the international law context is China Miéville. See generally, China Miéville, *Between Equal Rights: A Marxist Theory of International Law*, Pluto Press, London, 2006, in particular pp. 75–115. For an overview and critique of several aspects of Miéville’s work, see Susan Marks, “International Judicial Activism and the Commodity-Form Theory of International Law”, in *European Journal of International Law*, 2007, vol. 18, no. 1, p. 199; and Robert Knox, “Marxism, International Law, and Political Strategy”, in *Leiden Journal of International Law*, 2009, vol. 22, no. 3, p. 413. More recently, international criminal scholars have begun to rely on Pashukanis’s work. See, for example, Christine Schwöbel, “The Market and Marketing Culture of International Criminal Law”, in Schwöbel 2014, pp. 275–77, *supra* note 12; Campbell, 2013, pp. 164–165, *supra* note 99; and Grietje Baars, “Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law”, Ph.D. thesis, University College London, 2012, pp. 18–30.

<sup>218</sup> See similarly, in the field of human rights, Golder, 2014, pp. 111–12, *supra* note 166: “the context of global capitalism sets a limit to the contingency of human rights such that any dissident vision of what it means to be human that seriously challenges the operation of market systems appears simply unintelligible or unrealizable”.

<sup>219</sup> Anne Orford, “Trade, Human Rights and the Economy of Sacrifice”, in Orford, 2006, p. 157, see *supra* note 170.

its substantive obligations.<sup>220</sup> Through their representational practices,<sup>221</sup> international criminal courts broadcast a continuous flow of images that shape how individuals and groups understand themselves and the world around them, and regulate behaviour in conformity with those images.<sup>222</sup> As such, international criminal courts contribute to what Foucault referred to as the process of “on-going subjugation”, the process through which “subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts etc.”.<sup>223</sup> These fictional or imagined representations produced by

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<sup>220</sup> *Ibid.*, p. 157.

<sup>221</sup> Orford, 2003, p. 77, see *supra* note 64.

<sup>222</sup> *Ibid.*, pp. 77–78. See similarly Kirsten Campbell, “Victims and Perpetrators of International Crimes: The Problem of the ‘Legal Person’”, in *International Humanitarian Legal Studies*, 2011, vol. 2, no. 2, p. 330:

Legal rules and practices *construct* relationships between legal persons, and symbolise particular forms of intersubjective relations. They do not reflect the actuality of social relations. Rather they instantiate ideas of subjectivity and intersubjectivity, in the sense that they *represent* social subjects and relations in legal form (emphasis in original).

See also Lawrence Rosen, *Law as Culture: An Invitation*, Princeton University Press, Princeton, NJ, 2007, p. 11, characterising law as “contributing to the formation of an entire cosmology, a way of envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real”; Fish, 1994, p. 171, *supra* note 191: “the organization of human relations is not something the law follows or replicates, but something the law produces, and produces by means it invents”; and Garland, 1990, pp. 252–253, *supra* note 183:

Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgments, condemnations, and classifications they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so.

<sup>223</sup> Michel Foucault, “Two Lectures”, in Gordon 1980, p. 97, see *supra* note 165. See also Brown, 2004, p. 460, *supra* note 53: “there is no such thing as *mere* reduction of suffering or protection from abuse – the nature of the reduction or protection is itself productive of political subjects and political possibilities” (emphasis in original); Orford, 2003, p. 81, *supra* note 64, arguing that “those who participate in shaping perceptions of the legality of the actions of states and international organisations need to develop further an intellectual practice which recognises that law’s stories are both an exercise, and an effect of, power relations”; and Garland, 1990, p. 276, *supra* note 183, noting that the representations projected by penal practice are “positive symbols which help produce subjectivities, forms of

international criminal courts contribute to the constitution of subjects by shaping what it is to be an individual (subjectivity) and what it is to socialise with others (intersubjectivity).<sup>224</sup>

Following Pashukanis, it has been argued that, through this process of subjectification, international criminal courts transform the actions of “concrete persons” into the actions of “legal subjects”, the drama of the judicial process creating “a peculiarly juridical reality, parallel with the real world”.<sup>225</sup> This juridical reality consists of relationships between “isolated egoistic subjects, the bearers of autonomous private interests, or ideal property-owners”.<sup>226</sup>

The consequences of the legal form’s abstract individualism are twofold.<sup>227</sup> First, by deeming all individuals to be free and equal subjects before the law, all are entitled to equal protection before the law for their person or property.<sup>228</sup> Interestingly, Pashukanis failed to recognise this protective aspect of abstract individualism, though several other commentators have since acknowledged it.<sup>229</sup> Second, however, a necessary corollary of deeming all individuals as abstract, free and equal subjects is that

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authority, and social relations”. In the international criminal context, see Campbell, 2014, p. 71, *supra* note 135, arguing that international criminal law “assembles ‘the social’ in law by creating chains of legal obligation”.

<sup>224</sup> See generally Campbell, 2011, pp. 327–30, *supra* note 222.

<sup>225</sup> Evgeny B. Pashukanis, *Law and Marxism: A General Theory: Towards a Critique of the Fundamental Juridical Concepts*, trans. Barbara Einhorn, ed. Chris Arthur, Pluto Press, London, 1989, p. 167. See similarly, in the international criminal context, Campbell, 2013, p. 165, *supra* note 99; and Baars, 2012, p. 25, *supra* note 217.

<sup>226</sup> Pashukanis, 1989, p. 188, see *supra* note 225. See similarly Golder, 2014, p. 112, *supra* note 166; and Alan W. Norrie, *Law, Ideology and Punishment: Retrieval and Critique of the Liberal Ideal of Criminal Justice*, Kluwer Academic, Dordrecht, 1991, pp. 7–8.

<sup>227</sup> See similarly, Norrie, 1991, p. 200, *supra* note 226:

We are left with a nuanced analysis of juridical individualism which recognises from one side the obscurantist and, the Marxist term, fetishized character of the legal form; from the other side, the liberative and safeguarding role of individual right is also acknowledged.

And Garland, 1990, p. 117, *supra* note 183: “it is precisely the legal form which penalty takes which simultaneously provides a degree of equality and protection for everyone, while also contributing to a system of inequality and class domination”.

<sup>228</sup> Garland, 1990, p. 117, see *supra* note 183.

<sup>229</sup> See, for example, Antony Duff, “Principle and Contradiction in the Criminal Law: Motives and Criminal Liability”, in Antony Duff (ed.), *Philosophy and the Criminal Law: Principle and Critique*, Cambridge University Press, Cambridge, 1998, p. 192; Norrie, 1991, p. 199, *supra* note 226; and Garland, 1990, p. 117, *supra* note 183.



the legal form masks the material inequalities of power and freedom that separate different classes of individual in society.<sup>230</sup> As Alan Norrie has observed, juridical individualism's assumption of juridical freedom is ideological to the extent that it serves to mystify the reality that "the society in which exchange has come to predominate is one in which individuals have been forced and cajoled into exchange in order to survive, and regardless of their will in the matter".<sup>231</sup> It is this aspect of the criminal legal form on which Pashukanis places particular emphasis, referring to the criminal jurisdiction of the bourgeois state as "organised class terror", and criminal punishment as "a weapon for the protection of class rule".<sup>232</sup>

As a consequence of the limits of the legal form, critical scholars have argued that international criminal courts inescapably reinforce the responsible subjects of capitalist economics and are unable to unearth or respond to the structural forces behind mass atrocity situations,<sup>233</sup> something that would require comprehending and challenging the violence of capitalism itself.<sup>234</sup> Rather, as Grietje Baars has argued, since the legal form is, at its core, a capitalist instrument, "it cannot help but serve the interests of capital and reflect the underlying economic relations".<sup>235</sup>

### 19.3.2.1.2. The Politics of Choice

To recognise the politics of international criminal courts is not only to acknowledge their limits but also to recognise their *powers of discretion*.<sup>236</sup> Rather than a purely mechanistic activity, applying the law to a

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<sup>230</sup> See similarly Norrie, 1991, p. 9, *supra* note 226; and Garland, 1990, p. 118, *supra* note 183.

<sup>231</sup> Norrie, 1991, pp. 9, 12–13, 164–165, see *supra* note 226.

<sup>232</sup> Pashukanis, 1989, pp. 173, 176, see *supra* note 225.

<sup>233</sup> Orford, 2006, p. 192, see *supra* note 219. See similarly Kendall, 2015, p. 114, *supra* note 123; and Schwöbel, 2014, p. 276, *supra* note 217.

<sup>234</sup> Several scholars have confirmed this observation. For a recent articulation of the argument, see Krever, 2013, p. 701, *supra* note 55. See similarly, in the field of human rights, Golder, 2014, p. 112, *supra* note 166.

<sup>235</sup> Baars, 2012, p. 30, see *supra* note 217. See also Schwöbel, 2014, p. 276, *supra* note 217, arguing that international criminal law "operates through neoliberal paradigms [...] because neoliberalism pervades its core, its logic".

<sup>236</sup> See similarly, Darryl Robinson, "Inescapable Dyads: Why the ICC Cannot Win", in *Queen's University Legal Research Paper No. 2015-016*, p. 37, identifying a particular type of politics in international criminal law, which recognises that "legal interpreters act-

given circumstance always entails an element of political choice.<sup>237</sup> As Martti Koskenniemi put it, “there is no space in international law that would be ‘free’ from decisionism, no aspect of the legal craft that would not involve a ‘choice’ – that would not be, in this sense, *a politics of international law*”.<sup>238</sup> And once the discretion of international criminal courts is acknowledged, the line demarcating the limits of such institutions becomes increasingly blurred.

For instance, the statutory frameworks drafted by states are not self-validating; rather, they merely initiate an interpretative exercise that typically culminates in the rendering of judgments in particular cases. While it would be misplaced to argue that legal meanings are generated at the unfettered whim of the participants to international criminal trials,<sup>239</sup> it is evident that participants do possess a margin of discretion to *constitute* the limits of the jurisdiction of international criminal courts, albeit always subject to the constraining pressures of the interpretative community of which they form a part.<sup>240</sup>

The politics of choice open to participants in international criminal courts is perhaps best illustrated by reference to the well-known jurisdictional decision in the case of *Dusko Tadić*, in which the ICTY Appeals Chamber held that serious violations of international humanitarian law in

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ing in good faith are confronted by choices; that their background and understandings and training will influence their choices; and that these choices will have external political impacts”; Hoover, 2013, p. 282, *supra* note 48; Nouwen and Werner, 2010, pp. 944–45, *supra* note 52; and Mégret, 2001, p. 212, *supra* note 52. On the different types of politics of expertise in international law, see generally Kennedy, 2005, pp. 21 ff., *supra* note 185.

<sup>237</sup> See, for example, Koskenniemi, 2005, p. 585, *supra* note 2: “interpretative choices remain just that – *choices*” (emphasis added); and Richard H. Weisberg, “Three Lessons from Law and Literature”, in *Loyola of Los Angeles Law Review*, 1993/1994, vol. 27, nos.1/2, p. 286: “Law and legal language are always bound up in ethical choices”.

<sup>238</sup> Koskenniemi, 2005, p. 596, see *supra* note 2.

<sup>239</sup> Bourdieu and Wacquant, 1992, p. 136, see *supra* note 1; and Bourdieu, 1987, p. 839, see *supra* note 1. See also Andrea Bianchi, “Textual Interpretation and (International) Law Reading: The Myth of (In)determinacy and the Genealogy of Meaning”, in Pieter H.F. Bekker, Rudolf Dolzer and Michael Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, Cambridge University Press, Cambridge, 2010, pp. 48–51, critiquing the indeterminacy approach to interpretation.

<sup>240</sup> Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Duke University Press, Durham, NC, 1989, p. 141. See also Fuad Zarbiyev, “Judicial Activism in International Law – A Conceptual Framework for Analysis”, in *Journal of International Dispute Settlement*, 2012, vol. 3, no. 2, p. 251; and Bourdieu and Wacquant, 1992, p. 126, *supra* note 1.

*non-international* armed conflicts entail individual criminal responsibility under customary international law.<sup>241</sup> Prior to that decision, the prevailing view among legal experts had been that individual criminal responsibility for war crimes was limited to international armed conflicts.<sup>242</sup> Indeed, even the International Committee of the Red Cross had expressly argued prior to the decision that “according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict”.<sup>243</sup> Therefore, when the Appeals Chamber was called upon to interpret the reference to “laws or customs of war” in its Statute, it was far from evident that this reference encompassed war crimes committed in non-international armed conflicts. As William A. Schabas has observed, when the Appeals Chamber issued its jurisdictional decision in *Tadić*, the tribunal effectively “stunned international lawyers by issuing a broad and innovating reading” of the war crimes provisions in its Statute.<sup>244</sup> As such, the *Tadić* decision usefully illustrates the politics of choice open to participants, in this case judges,<sup>245</sup> in constituting the jurisdictional limits of their statutory frameworks.

Viewed from this perspective, therefore, the disavowal of politics by international criminal courts represents an attempt to mask their political choices behind a veneer of objectivity.<sup>246</sup> By obscuring the politics of choice inherent in their decision-making practices, the participants in in-

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<sup>241</sup> *Tadić* case, Decision, para 137, see *supra* note 14.

<sup>242</sup> See, for example, William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge, 2006, p. 232, listing the relevant authorities.

<sup>243</sup> “Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia”, DDM/JUR/442 b, 25 March 1993, at para. 4, cited in *ibid.*, p. 232.

<sup>244</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed., Cambridge University Press, Cambridge, 2011, p. 124. See also Allison M. Danner, “When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War”, in *Vanderbilt Law Review*, 2006, vol. 59, no. 1, pp. 29–33, describing the Appeals Chamber’s interpretation of its war crimes provision as “expansive”, “aggressive”, “broad”, and a “burst of judicial activism”, “the high-water mark of judicial expansiveness at the ICTY with regard to the laws of war”.

<sup>245</sup> For an analysis of the contributions of different prosecutorial teams at the ICTY to the constitution of the ICTY’s growth and development, see generally Hagan and Levi, 2005, p. 1499, *supra* note 1.

<sup>246</sup> See similarly Leebaw, 2011, p. 15, *supra* note 30; and Frankenberg, 2014, p. 57, *supra* note 174.

ternational criminal courts make their decisions seem neutral and natural rather than contingent and contestable.<sup>247</sup> Moreover, the fact that these choices are exercised behind a veil of benevolent humanitarianism, premised on a progress claim that promotes their apolitical character, only serves to reinforce their ideological character.<sup>248</sup>

Yet, to acknowledge these critical insights is not to suggest that international courts would be advised to publicly recognise every aspect of the politics of discretion they inescapably exercise and currently disavow.<sup>249</sup> In fact, to publicly acknowledge all dimensions of the politics of choice inherent in their daily practices would most likely severely undermine the authority and legitimacy of such courts.<sup>250</sup> Rather, these critical insights draw attention to the fact that in exercising their discretion, it is often the case that international criminal courts could have decided otherwise.<sup>251</sup> And where an international criminal court is exercising its discretion in such a way that is considered damaging to the institution and its

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<sup>247</sup> See similarly Golder, 2014, p. 106, *supra* note 166; Tanja Aalberts and Ben Golder, “On the Uses of Foucault for International Law”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 3, p. 606; and Koskenniemi, 2012, p. 12, *supra* note 177.

<sup>248</sup> Mégret, 2014, p. 22, see *supra* note 21. See similarly, in the field of human rights, Golder, 2014, p. 83, *supra* note 166; and Rajagopal, 2003, p. 10, *supra* note 170.

<sup>249</sup> See similarly Schiff, 2012, p. 73, *supra* note 124; and Jens Iverson, “Springing the Trap: Prosecutorial Discretion Beyond Politics and Law”, in *Spreading the Jam*, 20 December 2012, arguing in favour of viewing the discretion exercised by court actors not as a legal or political choice but as “a performance choice”.

<sup>250</sup> On the importance of this ideology to the ongoing legitimacy of judicial practice, see, for example, Moyn, 2013, p. 494, *supra* note 30; Michael J. Struett, “Why the International Criminal Court Must Pretend to Ignore Politics”, in *Ethics & International Affairs*, 2012, vol. 26, no. 1, p. 83; Jean d’Aspremont, “Wording in International Law”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 3, p. 584; Ingo Venzke, “The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation”, in *Loyola of Los Angeles International & Comparative Law Review*, 2011, vol. 34, no. 1, p. 105; and Simpson, 2007, p. 24, *supra* note 38.

<sup>251</sup> Koskenniemi, 2005, p. 600, see *supra* note 2: “the judge or lawyer could always decide otherwise”. See also Austin Sarat and Thomas R. Kearns, “Making Peace with Violence: Robert Cover on Law and Legal Theory”, in Austin Sarat (ed.), *Law, Violence, and the Possibility of Justice*, Princeton University Press, Princeton, NJ, 2001, p. 68: “Wielders of the rules always have the option to understand them anew, to see them in new light, to interpret them in new, yet fully cogent, ways”; and David Kennedy, “One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream”, in *New York University Review of Law and Social Change*, 2007, vol. 31, no. 3, p. 644, celebrating the “moment of vertigo – and of freedom, professional freedom – that comes when we realize it might well be the other way”.

aims, the demonstration of the contingency of the established practice can serve as a prologue for its alteration.<sup>252</sup>

This may be illustrated by reference to one of the current practices of the ICC Prosecutor in its interactions with the UN Security Council. As is well known, one of the triggers of the ICC's jurisdiction is a referral of a situation by the Security Council.<sup>253</sup> In such circumstances, the risk arises that the ICC Prosecutor will be forced to act less according to a cosmopolitan ethic than according to the privileged interests of the Council's permanent members.<sup>254</sup> Indeed, the potential dangers of the close association between the Security Council and the Prosecutor were strikingly revealed by the Council's attempt to exclude nationals of non-state parties from the jurisdictional reach of the ICC in operative paragraph 6 of resolution 1593 of 2005 referring the situation of Darfur to the ICC.<sup>255</sup> The breadth of this provision was startling, not only barring the ICC from exercising its jurisdiction over a select category of officials but also depriving all other states of such jurisdiction and thereby limiting jurisdiction exclusively to the national authorities of each contributing state. Despite its perceived incompatibility with the ICC Statute,<sup>256</sup> the various organs of

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<sup>252</sup> Koskenniemi, 2005, pp. 609, 615, see *supra* note 2. Interestingly, Ben Golder has recently argued that there is a tendency for critique to work pragmatically within the confines of existing legal mechanisms and vocabularies in order to renovate or rejuvenate them. Such critiques tend to be characterised by a “genealogical impulse” towards the redemption rather than the displacement of existing political projects. Golder, 2014, pp. 104–8, see *supra* note 166.

<sup>253</sup> ICC Statute, Art. 13(a) and (b), see *supra* note 36.

<sup>254</sup> See similarly Peskin, 2010, pp. 197–98, *supra* note 208; and Simpson, 2007, p. 44, *supra* note 38.

<sup>255</sup> United Nations Security Council, resolution 1593, 31 March 2005, UN doc. S/RES/1593, para. 6 (<https://www.legal-tools.org/doc/4b208f/>). For a useful discussion of the various ways that paragraph 6 may be interpreted, see Cryer, 2006, pp. 209–14, *supra* note 144. For other attempts by the Security Council to limit the jurisdictional reach of the ICC, see United Nations Security Council, resolution 1422, 12 July 2002, UN doc. S/RES/1422, para. 1 (<https://www.legal-tools.org/doc/1701d5/>); United Nations Security Council, resolution 1487, 12 June 2003, UN doc. S/RES/1487 (renewing Resolution 1422) (<https://www.legal-tools.org/doc/20e269/>); and United Nations Security Council, resolution 1497, 1 August 2003, UN doc. S/RES/1497, para. 7 (<https://www.legal-tools.org/doc/43299a/>).

<sup>256</sup> See, for example, Schabas, 2011, pp. 172–74, *supra* note 244, describing the provision as “a bit of legal poison injected into the resolution”.

the ICC are yet to issue an objection to the operative paragraph.<sup>257</sup> Moreover, the Security Council has since repeated the substance of the operative clause in its resolution referring the situation in Libya to the ICC.<sup>258</sup>

When receiving these types of referrals, the ICC Prosecutor is unavoidably implicated in politics. The question is not *whether* the Prosecutor is acting politically, but rather *what kind of politics* is being manifested in practice.<sup>259</sup> From a critical perspective, any decision not to engage with the legality of these exclusive jurisdiction clauses is as much a political choice as a decision to react. When abiding by such provisions (even if only implicitly), critical scholars have argued that the ICC symbolises less a universal response to “man’s inhumanity to man” than a particularised reaction to “the inhumanity of specific categories of men”.<sup>260</sup> As such, by critiquing the ICC Prosecutor’s current practice of silence, the aim is to reveal the contingency and contestability of such a practice and to motivate its alteration in the future.

Again, this is not to suggest that all challenges confronted by international criminal courts are resolvable by altering how they exercise their discretion. There are limits to what can be achieved by international criminal courts and part of the work of critique is to illuminate those limits and shift our gaze to new horizons. Equally, however, international criminal courts do possess a margin of discretion in conducting their work, a poli-

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<sup>257</sup> See also, Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, Cambridge, 2014, pp. 88–89, arguing that the fact that the Court has acted upon the Security Council resolutions referring the situations in Darfur and Libya to the ICC lends support to the view that the Court considers the exemption clause to be either valid or severable, although there is ambiguity as to which position it has adopted.

<sup>258</sup> United Nations Security Council, resolution 1970, 26 February 2011, UN doc. S/RES/1970, para. 6 (<https://www.legal-tools.org/doc/00a45e/>).

<sup>259</sup> See similarly Shklar, 1964, p. 144, *supra* note 29: “The question, in short, is not, ‘Is law political?’ but ‘What sort of politics can law maintain and reflect?’”. See also Danner and Martinez, 2005, p. 92, *supra* note 94; Nehal Bhuta, “Between Liberal Legal Didactics and Political Manichaeism: The Politics and Law of the Iraqi Special Tribunal”, in *Melbourne Journal of International Law*, 2005, vol. 6, no. 2, p. 246; and Osiel, 1997, p. 66, *supra* note 115.

<sup>260</sup> Simpson, 2007, p. 51, see *supra* note 38. See also Gevers, 2014, p. 229, *supra* note 12, arguing that the African Union’s complaints concerning the referrals of Darfur and Libya to the ICC “have been equally about the ‘injustice’ of the P5 prerogative, and the resultant immunity they and their allies enjoy, as they were about the specifics of those situations”.

tics of choice that tends to be masked by progress claims emphasising the apolitical nature of their practices.<sup>261</sup>

### **19.3.2.2. The Contingent Impact of International Criminal Courts on Peace**

According to the prevailing progress claim, international criminal courts are agents of global peace, contributing to the restoration of peace within the specific conflicts in which they intervene and serving a broader deterrent function against the commission of international crimes more generally. In response to such assertions, a critical literature has emerged revealing that international criminal courts are often ineffective at achieving these aspirations and may even exacerbate tensions within the conflict zones in which they intervene. While this literature does not go so far as to suggest that international criminal courts can *never* have a positive impact on peace processes or deter the commission of international crimes, it recognises that the impact of any particular court will always be highly contingent on the context in question.<sup>262</sup>

With this in mind, the following sub-section elaborates some of the most prominent challenges to the peacemaking credentials of international criminal courts that have been put forward in critical international criminal scholarship to date.

#### **19.3.2.2.1. The Challenge of State Power**

The first obstacle to the peacemaking and general deterrent credentials of international criminal courts arises from the political limits placed on such institutions by states. Whether by means of formally delimiting the personal jurisdiction of international criminal courts or by exerting pressure in the form of withholding or obstructing co-operation, states have left international criminal prosecutors little room for manoeuvre when it comes to determining whom to prosecute in international criminal trials.

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<sup>261</sup> For example, while international criminal courts clearly cannot interpret their way out of relying on state co-operation, international prosecutors do have some margin of discretion to determine what compromises to make with states and how to manage such compromises through their public statements.

<sup>262</sup> Branch, 2011, p. 190, see *supra* note 82. For an overview of recent empirical studies that argue in favour of the ICC having at least *some* deterrent impact, see Geoff Dancy, Bridget Marchesi, Florencia Montal and Methryn Sikkink, “The ICC’s Deterrent Impact – What the Evidence Shows”, in *Open Democracy*, 3 February 2015.

The result has been a stream of one-sided prosecutions, in which individuals aligned with the interests of the Security Council or the governments of powerful states have tended to be spared from scrutiny. As Danilo Zolo has put it, “a dual-standard system of international criminal justice has come about in which a justice ‘made to measure’ for the major world powers and their victorious leaders operates alongside a separate justice for the defeated and downtrodden”.<sup>263</sup>

In terms of *general deterrence*, these limits have been damaging in two respects, both reducing the deterrent threat of punishment and diminishing the moral educational capabilities of international criminal courts.

First, these limits have radically reduced the probability that those who commit international crimes will be punished.<sup>264</sup> According to economic models of crime, effective deterrence requires three components: certainty, severity and celerity of punishment.<sup>265</sup> In other words, punishment will only be able to deter to the extent that the penalties are certain to be imposed, sufficiently severe and imposed sufficiently soon after the offence takes place.<sup>266</sup> In this regard, the political limits of international criminal courts have tended to undermine the certainty and celerity of punishment. Whether as a result of their restrictive jurisdictional mandates,<sup>267</sup> or the dystopian realities that hinder securing arrests,<sup>268</sup> interna-

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<sup>263</sup> Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad*, trans. M.W. Weir, Verso, London, 2009, p. 30.

<sup>264</sup> See similarly Fisher, 2012, p. 52, *supra* note 76; Leslie P. Francis and John G. Francis, “International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, p. 70; and Drumbl, 2007, p. 169, *supra* note 76.

<sup>265</sup> Andrew von Hirsch, “Deterrence”, in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, 3rd ed., Hart, Oxford, 2009, p. 40. Other scholars have narrowed this list to two components, severity and certainty of punishment. See, for example, Drumbl, 2007, pp. 169–70, *supra* note 76; Ku and Nzelibe, 2006, p. 792, *supra* note 74; Tallgren, 2002, p. 575, *supra* note 125; and Akhavan, 1998, p. 796, see *supra* note 67.

<sup>266</sup> Of these components, statistical research in the domestic criminal law context has confirmed that severity is the least important, with associations between severity of punishment and crime rates being fairly weak. See, for example, Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and Per-Olof Wikström, “Deterrent Sentencing as a Crime Prevention Strategy”, in von Hirsch *et al.*, 2009, p. 57, *supra* note 265.

<sup>267</sup> Theodor Meron, “Does International Criminal Justice Work?”, in Theodor Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, Oxford University Press, Oxford, 2011, p. 142.



tional criminal courts have often been hindered from delivering credible and authoritative threats that individuals will be punished for their crimes.<sup>269</sup>

Second, the political limits of international criminal courts have also undermined their capacity to morally educate the local communities where mass atrocities have taken place. In order for the imposition of punishment or the rendering of a historical narrative to have a didactic impact and terminate cycles of vengeance, what matters is that the punishment imposed be perceived as legitimate and the historical narrative rendered be perceived as authoritative and internalised by all sides to the underlying conflict.<sup>270</sup> In communities that have been divided by mass atrocities, this is doubtful at best.

Although it is often asserted that judges possess a special prestige or semantic authority among the communities they serve,<sup>271</sup> this prestige or authority cannot be presumed in the international criminal context.<sup>272</sup> Rather, international criminal courts have tended to struggle for sociological legitimacy in the localities where mass atrocities have taken place.<sup>273</sup>

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<sup>268</sup> Robinson, 2008, p. 944, see *supra* note 91, referring to “the dystopian realities faced by ICL”, namely “the severity and scale of the crimes and the extreme difficulty of securing arrests”.

<sup>269</sup> See similarly Koller, 2008, p. 1027, *supra* note 22; Sloane, 2007, p. 72, *supra* note 76; and Aukerman, 2002, p. 67, *supra* note 103.

<sup>270</sup> See similarly Janine N. Clark, “Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship”, in *International Criminal Law Review*, 2011, vol. 11, no. 2, p. 250; Eric Stover and Harvey M. Weinstein, “Conclusion: A Common Objective, A Universe of Alternatives”, in Stover and Weinstein, 2004, p. 333, *supra* note 109; and Akhavan, 1998, p. 770, *supra* note 67.

<sup>271</sup> See, for example, Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford University Press, Oxford, 2012, p. 147: “semantic authority”; Timothy W. Waters, “A Kind of Judgment: Searching for Judicial Narratives After Death”, in *George Washington International Law Review*, 2010, vol. 42, no. 2, p. 287: “formal authority”; and Michael R. Marrus, “History and the Holocaust in the Courtroom”, in Ronald Smelser (ed.), *Lessons and Legacies V: The Holocaust and Justice*, Northwestern University Press, Evanston, IL, 2002, p. 228: “special prestige”.

<sup>272</sup> See similarly Tim Meijers and Marlies Glasius, “Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case”, in *Human Rights Quarterly*, 2013, vol. 35, no. 3, p. 751; and Colleen Murphy, “Political Reconciliation and International Criminal Trials”, in May and Hoskins, 2010, p. 241, see *supra* note 264.

<sup>273</sup> On sociological legitimacy, see generally Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions”, in *Ethics and International Affairs*, 2006, vol. 20, no. 4, p. 405, defining “sociological legitimacy” as whether a court “is widely be-

Primarily this legitimacy deficit has resulted from their remoteness, both in terms of geographical location as well as personnel.<sup>274</sup> Local communities have often lacked any emotional attachment with international criminal courts, typically perceiving them to be imposing foreign forms of justice,<sup>275</sup> ignorant of the local history of the conflicts on which they adjudicate,<sup>276</sup> and insensitive to local cultural practices.<sup>277</sup> Beyond remoteness, however, failing to prosecute individuals aligned with the interests of the Security Council or powerful states has further diminished the sociological legitimacy of international criminal courts. And as a result of this deficit in sociological legitimacy, international criminal courts have generally struggled to transmit didactic messages that are able to effectively morally educate communities to resist turning to violence in the future.<sup>278</sup>

Beyond general deterrence, the one-sided prosecutions of international criminal courts have also undermined the *peacemaking capabilities* of such institutions within ongoing conflict situations. Important in this regard is the significant power of international criminal courts to stigmatise and allocate blame to particular individuals within the situations in

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lived to have the right to rule” as compared with “normative legitimacy”, defined as whether a court “has *the right to rule*” (emphasis in original).

<sup>274</sup> The benefits of the remoteness of international courts have also been well-documented, on which, see generally, Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 267.

<sup>275</sup> See similarly Conor McCarthy, “Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 370; Janine N. Clark, “From Negative to Positive Peace: The Case of Bosnia and Hercegovina”, in *Journal of Human Rights*, 2009, vol. 8, no. 4, p. 374; and Tzvetan Todorov, “The Limitations of Justice”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, p. 713.

<sup>276</sup> See similarly, Waters, 2010, p. 292, *supra* note 271; and Douglas, 2006, p. 518, *supra* note 198.

<sup>277</sup> See, for example, Kelsall, 2009, *supra* note 95.

<sup>278</sup> For a useful summary of various attempts to improve the sociological legitimacy of international criminal courts, see Stuart Ford, “A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms”, in *Vanderbilt Journal of Transnational Law*, 2012, vol. 45, no. 2, pp. 406–9, noting that according to existing international criminal scholarship, the following factors can be adjusted to improve sociological legitimacy of courts: “(1) the process by which the court is created, (2) the location of the court, (3) the composition of the staff, (4) the institutional structure, (5) the procedures used during the trials, and (6) the court’s outreach efforts”.

which they intervene.<sup>279</sup> This allocation of stigma is not confined to the moment an individual is convicted and sentenced for their actions, but arises as early as the investigation and trial stages of international criminal proceedings. Despite the presumption of innocence, even being a mere suspect of an international criminal court can attract a significant degree of stigma.<sup>280</sup> In this regard, as Mégret has recently argued with respect to the ICC, to be prosecuted by an international criminal court is in a sense “a double stigma”, carrying the stigma attached to the substantive charge as well as the fact that one is being tried by a centralised institution of the international community.<sup>281</sup> And while the stigma attached to suspects is likely to fluctuate depending on the public’s perception of the court in question, being the target of an international arrest warrant tends to significantly undermine the credibility of both individuals and the groups with which they are affiliated.

With this in mind, by ensuring that international criminal prosecutors focus their investigations and prosecutions only on specific individuals to the exclusion of others, powerful states have been able to instrumentalise the stigmatising power of international criminal courts both as a means to undermine the legitimacy of their enemies and to justify military campaigns against them in the name of supporting the cause of global justice. In such circumstances, rather than promoting peace, international criminal courts have risked being cast as little more than tools of the privileged that can readily be instrumentalised against the weak, the courtroom representing the continuation of warfare by legal means.<sup>282</sup> These dangers have been strikingly illuminated by the practice of self-referrals at the ICC, pursuant to which states parties to the ICC Statute have sought to direct the Prosecutor’s attention towards crimes allegedly committed by non-state actors on their territory to the exclusion of abuses allegedly perpetrated by governmental forces.<sup>283</sup>

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<sup>279</sup> See generally, Mégret, 2015, p. 77, *supra* note 91; and Frédéric Mégret, “Practices of Stigmatization”, in *Law and Contemporary Problems*, 2013, vol. 76, no. 3, p. 287.

<sup>280</sup> Mégret, 2013, p. 299, see *supra* note 279.

<sup>281</sup> *Ibid.*, p. 310.

<sup>282</sup> Hoover, 2013, p. 282, see *supra* note 48; Schiff, 2012, p. 77, see *supra* note 124; and Branch, 2011, p. 185, see *supra* note 82.

<sup>283</sup> See, for example, Mégret, 2013, p. 297, *supra* note 279: “the ICC is sometimes at risk of turning into a machine to prosecute warlords”.

For instance, in December 2003 the Ugandan government made a self-referral to the ICC Prosecutor, entitled “Referral of the Situation Concerning the Lord’s Resistance Army [‘LRA’]”.<sup>284</sup> As its one-sided title indicates, the Ugandan government clearly intended to use the referral to target and delegitimise the LRA. Initially, the Prosecutor responded to this referral by clarifying to the Ugandan government that its scope encompasses “all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA”.<sup>285</sup> Yet, to date, the Prosecutor has failed to issue arrest warrants for anyone except the commanders of the LRA.

From a pragmatic perspective, the Prosecutor’s strategy made perfect sense since he would be able to count on the co-operation of the Ugandan government, whilst ensuring not to tread on the toes of any major powers.<sup>286</sup> Moreover, since the LRA commanders were accused of acts of notorious brutality, the Prosecutor could maintain the perception of neutrality by justifying his one-sided focus on the LRA according to purportedly objective legal criteria such as the gravity of the crimes.<sup>287</sup> For instance, in a public statement issued when the five LRA arrest warrants were made public, the Prosecutor argued that crimes allegedly committed by the LRA were “much more numerous and of much higher gravity” than those allegedly committed by the forces of the Ugandan government.<sup>288</sup>

Equally, however, by adopting such a strategy, the Prosecutor risked being seen to grant *de facto* impunity to the forces of the Ugandan government for the atrocities they also allegedly committed during the civil war in northern Uganda.<sup>289</sup> Moreover, by trying to justify its strategy on the basis of objective criteria, the Prosecutor risked being seen as complicit with the type of governmental authority it had purportedly been cre-

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<sup>284</sup> Government of Uganda, “Referral of the Situation Concerning the Lord’s Resistance Army”, submitted by the Republic of Uganda to the ICC, 16 December 2003.

<sup>285</sup> ICC, Situation in Uganda, Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ICC-02/04-01/05-68, 2 December 2005, para. 5 (<https://www.legal-tools.org/doc/1adaf1/>).

<sup>286</sup> Hoover, 2013, p. 283, see *supra* note 48; and Branch, 2011, p. 187, see *supra* note 82.

<sup>287</sup> Branch, 2011, p. 188, see *supra* note 82.

<sup>288</sup> ICC Office of the Prosecutor, “Statement by the Chief Prosecutor on the Uganda Arrest Warrants”, 14 October 2005, pp. 2–3.

<sup>289</sup> Branch, 2011, p. 189, see *supra* note 82.

ated to constrain.<sup>290</sup> This complicity was exacerbated by a number of controversial incidents, such as the initial joint press conference between the Prosecutor and Ugandan President Yoweri Museveni announcing the ICC's investigation in northern Uganda, as well ICC investigators on occasion being accompanied by officers from the Ugandan government's army.<sup>291</sup> These incidents sent the unmistakable message that the Ugandan army would not be investigated by the ICC despite accusations that it had committed atrocities during the civil war.<sup>292</sup> In such moments, as Joseph Hoover has argued, the ICC appears as much concerned "about securing the moral and legal authority of centralised global forms of power as it is about empowering communities and individuals affected by violence".<sup>293</sup> Even more significant for present purposes, however, is the damage this flagrant complicity between the Prosecutor and the Ugandan government has caused to the ICC's peacemaking credentials.

First, the ICC Prosecutor's one-sided prosecutions have enabled the Ugandan government to portray itself as a friend of mankind, fighting to uphold the universal norms of the international community, while instrumentalising the stigmatising power of the ICC's indictments to transform the LRA from an enemy of the government into an enemy of humanity.<sup>294</sup> Indeed, the more the ICC portrayed itself as a neutral and apolitical institution, the more attractive it became as a tool to delegitimise the opponents of the Ugandan government.<sup>295</sup> As such, rather than serving as a peacemaker, the ICC has become a weapon against non-state actors, a political tool for stigmatising non-state violence and validating the Ugandan government's monopoly on the legitimate use of force.<sup>296</sup> Condemned as targets of the ICC, the LRA has become "politically illegitimate, devoid

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<sup>290</sup> Hoover, 2013, p. 282, see *supra* note 48.

<sup>291</sup> Branch, 2011, p. 187, see *supra* note 82.

<sup>292</sup> Hoover, 2013, p. 282, see *supra* note 48.

<sup>293</sup> *Ibid.*, p. 286.

<sup>294</sup> Nouwen and Werner, 2010, p. 962, see *supra* note 52. See similarly Hoover, 2013, p. 284, *supra* note 48; and Branch, 2011, p. 189, *supra* note 82.

<sup>295</sup> Nouwen and Werner, 2010, p. 963, see *supra* note 52.

<sup>296</sup> Mégret, 2013, p. 297, see *supra* note 279. See also Bhuta, 2005, p. 246, *supra* note 259, describing "a politics of manichaeism" whereby "a successor regime may use the trial medium to try to incriminate its foe's behavior and draw a clear distinction between the turpitude of the past, and the political virtue of the present".

of the possibility of political relevance”,<sup>297</sup> thereby undermining the possibility for a political solution. Moreover, the Prosecutor’s strategy has also signalled to other states parties that the ICC is open for business as a tool to eliminate political opponents, there being little risk of investigations being launched against the armed forces of the referring states themselves.<sup>298</sup>

Second, the ICC’s impact on the peace process between the LRA and the Ugandan government has been mixed at best. While the ICC initially received praise for appearing to have brought the LRA to the negotiating table after unsealing the arrest warrants against the LRA’s commanders, the ICC later received blame for the subsequent collapse of the peace talks, with Joseph Kony citing uncertainties concerning accountability as one of his reasons for failing to finalise a peace agreement.<sup>299</sup> As Adam Branch has argued, the point to take away from this episode is that the ICC’s impact on peace will always be contingent upon the political context, “a contingency that ICC supporters tend to deny, arguing categorically that international criminal prosecutions assist the cause of peace, that there can be ‘no peace without (criminal) justice’”.<sup>300</sup>

Finally, the ICC’s one-sided intervention against the LRA has enabled the Ugandan government to justify new military campaigns under the banner of global justice. On the back of its heightened legitimacy as a result of the ICC’s arrest warrants against the LRA commanders, the Ugandan government launched military incursions into the eastern regions of the Democratic Republic of Congo, and obtained assistance from the US military to carry out Operation Lightning Thunder in 2008 in an attempt to capture the LRA commanders.<sup>301</sup> As Branch has argued, it is therefore quite conceivable that the Ugandan government invited the ICC to intervene against LRA “not to help bring the war to an end but to entrench it and to obtain support for its military campaign”.<sup>302</sup> As such, the ICC’s

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<sup>297</sup> Branch, 2011, p. 197, see *supra* note 82. For an argument in favour of a more political approach to justice, see generally Mahmood Mamdani, “Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa”, in *Politics & Society*, 2015, vol. 43, no. 1, p. 61.

<sup>298</sup> Hoover, 2013, p. 283, see *supra* note 48; and Branch, 2011, p. 189, see *supra* note 82.

<sup>299</sup> Rodman, 2014, p. 459, see *supra* note 207.

<sup>300</sup> Branch, 2011, p. 190, see *supra* note 82.

<sup>301</sup> *Ibid.*, p. 191.

<sup>302</sup> *Ibid.*, p. 192.

intervention in Uganda demonstrates the potential for international criminal law to provide a convenient pretext to legitimise military interventions in other states, as well as law enforcement activity against political opponents.<sup>303</sup> In such instances, the ICC becomes embedded within justificatory arguments to legitimise the use of force, the vocabulary of international criminal law facilitating “a neutral and universalist mode of emancipatory intervention”.<sup>304</sup>

#### **19.3.2.2.2. The Challenge of International Criminality**

Beyond the challenge of state power, the ability of international criminal courts to effectively promote peace and deter atrocities has been undermined by both the substance and form of the international crimes they adjudicate.

##### **19.3.2.2.2.1. The Non-Deterrability of International Crimes**

First, international criminal courts adjudicate a category of crimes to which the logic of general deterrence appears to be inapplicable. The logic of general deterrence is premised on the ability of punishment to deter future offenders through rational and prudential dissuasion.<sup>305</sup> The dissuasive message of punishment is *rational* to the extent that it seeks to provide potential offenders with reasons to renounce crime, and *prudential* to the extent that it appeals to potential offenders’ self-interest (as opposed to their consciences) in avoiding punishment.<sup>306</sup> As Payam Akhavan has put it, deterrence presupposes “the existence of identifiable or determinate causes of criminal behavior that are the targets of punishment”.<sup>307</sup> Yet,

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<sup>303</sup> *Ibid.*, p. 186. See similarly, in the field of human rights, Frankenberg, 2014, p. 40, *supra* note 174; Marks, 2012, p. 320, *supra* note 181; and Kennedy, 2004, p. 25, *supra* note 182. See similarly, in the field of international humanitarian law, Kennedy, 2006, p. 167, *supra* note 185.

<sup>304</sup> Kennedy, 2004, p. 23, see *supra* note 182.

<sup>305</sup> R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, Oxford, 2001, p. 4. Some scholars refer to this problem in terms of whether or not certain crimes or criminals are “detrable”. See, for example, Aukerman, 2002, p. 68, *supra* note 103; and Klabbers, 2001, p. 253, *supra* note 26.

<sup>306</sup> Duff, 2001, p. 4, see *supra* note 305. See similarly Tallgren, 2002, pp. 572–73, *supra* note 125.

<sup>307</sup> Akhavan, 1998, p. 741, see *supra* note 67.

assumptions of perpetrator rationality and prudence are ill fitting in the mass atrocity context.

With respect to perpetrator *rationality*, Mark Drumbl has provocatively questioned whether “genocidal fanatics, industrialised into well-oiled machineries of death, make cost-benefit analyses prior to beginning their work”.<sup>308</sup> According to Drumbl, there are two unsettling realities that undermine the assumption of perpetrator rationality in mass atrocity contexts:<sup>309</sup> first, the fact that many perpetrators desire to belong to violent groups; and second, the fact that joining a violent group may be the only viable survival strategy. Moreover, in many mass atrocity situations, governments and society may condone the atrocities being committed so that perpetrators do not view their actions as ones that require deterrence.<sup>310</sup> Rather, violence may be seen as normal or even politically or morally justified.<sup>311</sup> Indeed, several situationist social psychological studies have confirmed that various characteristics of the social environments in which mass atrocities tend to occur, including the role played by authority figures and peer pressure, are likely to complicate the ability of international criminal courts to deter future atrocities.<sup>312</sup>

With respect to perpetrator *prudence*, the ability of punishment to deter will generally be most effective on individuals motivated by narrow self-interest, rather than sacrificing such interests for broader goals.<sup>313</sup> In mass atrocity situations, however, it is common to find instigators of in-

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<sup>308</sup> Drumbl, 2007, p. 171, see *supra* note 76. See similarly, Tallgren, 2002, p. 584, *supra* note 125; Mégret, 2001, p. 203, *supra* note 52; and Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, New York, 1998, p. 50. But see, Sloane, 2007, p. 73, *supra* note 76, cautioning that “it would be misguided to assimilate all war criminals and *génocidaires* to a single psychological profile”.

<sup>309</sup> Drumbl, 2007, pp. 171–72, see *supra* note 76.

<sup>310</sup> Roht-Arriaza, 1995, p. 14, see *supra* note 103.

<sup>311</sup> Branch, 2011, p. 203, see *supra* note 82.

<sup>312</sup> For useful overviews of the relevant social psychological literature, see generally Saira Mohamed, “Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law”, in *Yale Law Journal*, 2015, vol. 124, no. 5, pp. 1642–48; Mikaela Heikkilä, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of these Traits in International Criminal Law*, Åbo Akademi University Press, Turku, 2013, pp. 38–70; Deirdre Golash, “The Justification of Punishment in the International Context”, in May and Hoskins 2010, pp. 211–217, *supra* note 264; and Fletcher and Weinstein, 2002, pp. 603–17, *supra* note 121.

<sup>313</sup> Golash, 2010, p. 211, see *supra* note 312.



ternational crimes acting for what they perceive to be a cause beyond narrow self-interest or even out of blind hatred.<sup>314</sup> In such circumstances, the deterrent effect of punishment may be minimal.

Moreover, even in contexts where it *is* possible to maintain that the politically elite instigators of mass atrocities are acting rationally and instrumentally to retain power,<sup>315</sup> it is nonetheless equally plausible that such politicians may knowingly accept the risk of prosecution, rationally concluding that international crime does in fact pay.<sup>316</sup> Indeed, at least one empirical study seems to support this position, concluding that, rather than deterring future atrocities, the threat of international criminal punishment may serve to exacerbate them by reducing incentives for political settlements.<sup>317</sup>

#### **19.3.2.2.2. The Antagonistic Nature of International Crimes**

Second, as a result of the political substance of international crimes, which as noted earlier typically entail the instrumentalisation of political organisations for violent ends, the individuals targeted by international criminal courts have tended to be viewed by local populations less in their individual capacity than as symbols for the broader political projects they support and as representatives of the communities, political groups or State to which they belong.<sup>318</sup> As a result, the adjudication of international crimes has the potential to antagonise rather than placate local communities.

In the aftermath of episodes of mass violence, members of local communities tend to identify strongly with particular sides to the underlying conflict and consequently possess deeply entrenched internal narratives denying responsibility for any crimes committed by their social

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<sup>314</sup> *Ibid.*, p. 217; and Klabbers, 2001, pp. 253, 266, *supra* note 26.

<sup>315</sup> Akhavan, 1998, pp. 753–65, see *supra* note 67.

<sup>316</sup> See similarly Ku and Nzelibe, 2006, p. 807, *supra* note 74; Koller, 2008, p. 1028, *supra* note 22; Aukerman, 2002, p. 69, *supra* note 103. See also Shklar, 1964, p. 187, *supra* note 29.

<sup>317</sup> Ku and Nzelibe, 2006, pp. 817–31, see *supra* note 74. See similarly Schiff, 2012, p. 78, *supra* note 124; Meron, 2011, p. 151, *supra* note 267; and Anonymous, “Human Rights in Peace Negotiations”, in *Human Rights Quarterly*, 1996, vol. 18, no. 2, p. 258.

<sup>318</sup> Mégret, 2015, p. 90, see *supra* note 91; and Koskeniemi, 2002, p. 16, see *supra* note 189.

group.<sup>319</sup> This has generally been referred to as the myth of individual and collective victimhood that members of particular groups tend to pull over themselves as a means of group survival and protection in the aftermath of mass atrocity situations.<sup>320</sup> In such circumstances, the international criminal conviction of an individual is likely to be interpreted as a verdict on the responsibilities of the community and political group to which that individual belongs.<sup>321</sup>

The consequences are twofold: first, as numerous empirical studies have confirmed,<sup>322</sup> the imposition of punishment on particular defendants is likely to cause cognitive dissonance amongst members of that defendant's social group, leading to a rejection of the attribution of responsibility by the international criminal court in question,<sup>323</sup> and second, rather than

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<sup>319</sup> See, for example, Stover, 2005, p. 143, *supra* note 124; Miklos Biro, Dean Ajdukovic, Dinka Corkalo, Dino Djipa, Petar Milin and Harvey M. Weinstein, "Attitudes toward justice and social reconstruction in Bosnia and Herzegovina and Croatia", in Stover and Weinstein, 2004, p. 195, *supra* note 109; Parlevliet, 1998, p. 159, *supra* note 116; and Michael Ignatieff, "Articles of Faith", in *Index on Censorship*, 1996, vol. 25, no. 5, p. 114.

<sup>320</sup> See, for example, Stover, 2005, p. 5, *supra* note 124; Ignatieff, 1996, p. 116, *supra* note 319; see also Fletcher and Weinstein, 2002, p. 589, *supra* note 121.

<sup>321</sup> Mégret, 2015, p. 90, see *supra* note 91.

<sup>322</sup> See, for example, Janine N. Clark, "The ICTY and Reconciliation in Croatia: A Case Study of Vukovar", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, p. 414, qualitative empirical study in Croatia; Clark, 2011, p. 77, see *supra* note 121, qualitative empirical study in in Bosnia-Herzegovina; Laurel E. Fletcher and Harvey M. Weinstein, "A World unto Itself? The Application of International Justice in the Former Yugoslavia", in Stover and Weinstein 2004, p. 44, *supra* note 109, qualitative empirical study of 32 judges and prosecutors with primary or appellate jurisdiction for national war crimes trials in three areas of Bosnia-Herzegovina; and Biro *et al.*, 2004, p. 183, *supra* note 319, two surveys of attitudes and beliefs of inhabitants of three cities – Vukovar, Mostar, and Prijedor – in Croatia and Bosnia and Herzegovina in 2000 and 2001. However, see Timothy Longman, Phuong Pham and Harvey M. Weinstein, "Connecting Justice to Human Experience: Attitudes Towards Accountability and Reconciliation in Rwanda", in Stover and Weinstein, 2004, pp. 223–24, *supra* note 109, concluding from an empirical study of reconciliation in four communities in Rwanda that "although ethnic identity continues to divide Rwanda's population, it is important to note, that with the exception of the social justice scale, it is not a significant factor in determining openness to reconciliation".

<sup>323</sup> See, for example, Ford, 2012, pp. 427–30, *supra* note 278, explaining the effect of cognitive dissonance on ethnic Serbians with respect to indictments and convictions at the ICTY; Biro *et al.*, 2004, 195, *supra* note 319, drawing on numerous experiments in social psychology to show that in the process of the formation of a group identity, there is an important role played by categorizing people as "us" and "them"; Stover and Weinstein, 2004, p. 332, *supra* note 270; Fletcher and Weinstein, 2002, p. 588, *supra* note 121; and Ignatieff, 1996, p. 114, *supra* note 319.

condensing responsibility on the shoulders of the individual on trial, convictions are likely to be treated by the members of political or social group of the accused as an attack on their social identity.<sup>324</sup> In such circumstances, the individualisation of responsibility is less likely to pacify than aggravate relations within local communities already torn apart by episodes of mass violence.

### 19.3.2.2.3. The Legal Form of International Crimes

Finally, while the political character of international criminality tends to unsettle relations within local communities in the short term, it is the legal form of such crimes that tends to restrict the ability of international criminal courts to prevent their recurrence in the long term. In particular, as a result of the legal form of the crimes they adjudicate, international criminal courts are ill-equipped to reveal and respond to the broader structural causes that create the conditions of possibility for mass atrocities to occur.<sup>325</sup>

Mass atrocities are not only collective phenomena but also events driven and shaped by underlying political, economic and social structures.<sup>326</sup> Yet, the focus of international criminal courts on the acts and omissions of abstract juridical individuals tends to *divert attention away* from these more structural phenomena.<sup>327</sup> As a result, international criminal law risks being “obscurantist in its ability to hide the underlying social relations which provide the actual springs of human conduct behind the ‘front’ of the abstract responsible individual”.<sup>328</sup> Put differently, we might characterise international criminal courts as “carnavalesque” in their de-

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<sup>324</sup> See similarly Ford, 2012, p. 458, *supra* note 278.

<sup>325</sup> See similarly Krever, 2013, p. 720, *supra* note 55; Koller, 2008, p. 1067, *supra* note 22; and Mégret, 2001, pp. 205, 209, *supra* note 52.

<sup>326</sup> On structural violence, see generally Johan Galtung, “Violence, Peace, and Peace Research”, in *Journal of Peace Research*, 1969, vol. 6, no. 3, p. 167.

<sup>327</sup> See similarly, Grietje Baars, “Capitalism’s Victor’s Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII”, in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, p. 192; Leebaw, 2011, p. 56, *supra* note 30; Marks and Clapham, 2005, pp. 234–35, *supra* note 98; Philip Allot, *The Health of Nations: Society and Law beyond the State*, Cambridge University Press, Cambridge, 2002, pp. 37, 67; and Ruti Teitel, “Bringing the Messiah through the Law”, in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia*, Zone Books, New York, 1999, p. 185.

<sup>328</sup> Norrie, 1991, p. 164, see *supra* note 226.

piction of mass atrocity situations:<sup>329</sup> just like the mirrors of a carnival fun house, international criminal courts tend to greatly exaggerate one aspect of mass atrocities, namely the actions of individuals and the specific events relating to their actions, whilst at the same time distorting and minimising others, namely the collectivities and structural forces that give rise to conflicts in practice. From this perspective, international criminal law is little different from domestic criminal law. Just as holding individuals responsible for what they have done to society may divert attention from how domestic crime is also the product of an unjust domestic society, so in the international context, holding individuals responsible for what they have done to society may divert attention from how international crime is also the product of an unjust international society.<sup>330</sup>

Beyond a distraction, international criminal courts also risk *legitimizing* the systemic processes that they obscure and exclude.<sup>331</sup> By portraying themselves as neutral arbiters of international criminal rules and procedures, international criminal courts may inadvertently operate ideologically to validate and build consensus in the existing international social order.<sup>332</sup> The legitimating function of law has been observed by various scholars in international legal scholarship.<sup>333</sup> For instance, Charlesworth has observed how the tendency of international lawyers to focus on crises as the engine of progressive development leads to international law serving merely as “a source of justification for the status quo”.<sup>334</sup> In the

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<sup>329</sup> Pendas, 2006, p. 294, see *supra* note 153. See also Kirsten Ainley, “Excesses of Responsibility: The Limits of Law and the Possibilities of Politics”, in *Ethics & International Affairs*, 2011, vol. 25, no. 4, p. 412, identifying “excesses of responsibility” in international criminal trials.

<sup>330</sup> See, for example, Veitch, 2006, p. 170, *supra* note 214; Ralph Henham, “The Philosophical Foundations of International Sentencing”, in *Journal of International Justice*, 2005, vol. 1, no. 1, p. 77; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd ed., Cambridge University Press, Cambridge, 2001, p. 211; and Garland, 1990, p. 118, *supra* note 183. See also, Karl Marx, “Capital Punishment”, in *New York Daily Tribune*, 17–18 February 1853: “Is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room only for the supply of new ones?”

<sup>331</sup> See similarly Baars, 2012, p. 227, *supra* note 217; and Chouliaras, 2010, p. 94, *supra* note 179.

<sup>332</sup> Krever, 2014, p. 128, see *supra* note 35.

<sup>333</sup> See generally Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*, Routledge-Cavendish, London, 2007.

<sup>334</sup> Hilary Charlesworth, “International Law: A Discipline of Crisis”, in *Modern Law Review*, 2002, vol. 65, no. 3, p. 391.

human rights context, Wendy Brown has discussed how the ideology of human rights activism, by failing to address the structural constraints of individual agency, largely codifies those constraints.<sup>335</sup> Similarly, in the international criminal context, international criminal courts may serve to reassure, console, and soothe their various audiences by focusing on what they classify as the exceptional actions of a handful of individual perpetrators, whilst at the same time legitimating the chaotic social, economic and political structures that surround mass atrocity situations.<sup>336</sup> The role of powerful outside actors, including states, multinational corporations, international financial institutions and international organisations, may be erased from consideration.<sup>337</sup> In this way, international criminal courts risk becoming instruments of legitimation wielded by the international community “to fix individual responsibility for history’s violent march”.<sup>338</sup>

Most significant for present purposes is that fact that this occlusion of structural conditions in favour of focusing on the actions of abstract and autonomous individuals restricts the ability of international criminal courts to fulfil their general deterrent aspirations.<sup>339</sup> As a result of the legal form, international criminal courts are accustomed to rendering reductionist narratives of the conflicts they examine, encompassing simplified

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<sup>335</sup> Brown, 2004, p. 455, see *supra* note 53.

<sup>336</sup> See similarly, Baars, 2012, p. 224, *supra* note 217: “ICL communicates to us, reassuringly, its *exceptionality* [...], while also confirming to us, *these, these select international crimes, are the ills of international society*” (emphasis in original); and Tallgren, 2002, pp. 593–94, *supra* note 125, describing international criminal law as “a soothing strategy to measure the immeasurable” and which creates “consoling patterns of causality in the chaos of intertwined problems of social political and economic deprivation surrounding violence”.

<sup>337</sup> Miller, 2008, p. 287, see *supra* note 171; and Bronwyn Leebaw, “The Irreconcilable Goals of Transitional Justice”, in *Human Rights Quarterly*, 2008, vol. 30, no. 1, p. 111.

<sup>338</sup> Danner and Martinez, 2005, p. 77, see *supra* note 94. See also Sonja Starr, “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations”, in *Northwestern University Law Review*, 2007, vol. 101, no. 3, pp. 1260–80, discussing and critiquing the focus of international criminal courts on crisis situations.

<sup>339</sup> See similarly, Chouliaras, 2010, pp. 67, 93, *supra* note 179; Kirsten Ainley, “Individual Agency and Responsibility for Atrocity”, in Renée Jeffery (ed.), *Confronting Evil in International Relations: Ethical Responses to Problems of Moral Agency*, Palgrave Macmillan, New York, 2008, p. 57; and Miller, 2008, pp. 287–90, *supra* note 171. See also Paul Gready and Simon Robins, “From Transitional to Transformative Justice: A New Agenda for Practice”, in *International Journal of Transitional Justice*, 2014, vol. 8, no. 3, pp. 345–48, arguing that transitional justice mechanisms in general “do little to map or address horizontal inequalities as a cause of violence” that are necessary to prevent the recurrence of conflict.

caricatures of the actors involved, which fail to confront the underlying structural causes of violence. Indeed, this is a common characteristic of many of the narratives constructed by different international criminal courts.

For instance, the narratives to emerge from the ICTR have tended to focus on the historic ethnic hatred between Hutu and Tutsi, at the expense of illuminating underlying grievances in Rwandan society concerning land and resource distribution, which some scholars have characterised as constituting the enabling conditions for the genocide that ultimately took place.<sup>340</sup> Similarly, the narratives to emerge from the ICTY have tended to paint the underlying conflict in political and ethnic terms, at the expense of considering how the violence was also a product of various external factors, including interventions by international financial institutions such as the International Monetary Fund and World Bank.<sup>341</sup>

In a similar vein, ever since the ICC Prosecutor intervened in northern Uganda, its narrative of the civil war has been myopically focused on the LRA commanders, whose acts of violence have been consistently depoliticised and decontextualised from the social conditions that led to their rise to power. In a narrative reminiscent of Makau Mutua's famed "savage-victim-savior" framework,<sup>342</sup> the ICC Prosecutor has painted a picture of the underlying conflict as one dominated by the violent savagery of the LRA commanders committed against helpless Acholi victims, who appear in need of saving by the international community.<sup>343</sup> By reducing the conflict in northern Uganda to what has been characterised as the senseless, irrational and exceptional evil of the LRA commanders, the Prosecutor's narrative has given the impression that the explanation for the violence in northern Uganda may be located in the individual psy-

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<sup>340</sup> Miller, 2008, pp. 281–84, see *supra* note 171.

<sup>341</sup> Krever, 2013, pp. 715–20, see *supra* note 55.

<sup>342</sup> Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights", in *Harvard International Law Journal*, 2001, vol. 42, no. 1, p. 201. For the application of Mutua's framework to the field of transitional justice, see generally Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections", in *Third World Quarterly*, 2008, vol. 29, no. 2, p. 275.

<sup>343</sup> Joseph Hoover, "Reconstructing Responsibility and Moral Agency in World Politics", in *International Theory*, 2012, vol. 4, no. 1, pp. 257–58.

chology of the perpetrators, and that their apprehension and removal is the appropriate means for its prevention in the future.<sup>344</sup>

Yet, once the structural conditions that led to the rise of the LRA are examined, the Prosecutor's narrative begins to appear increasingly vulnerable. For instance, the Prosecutor's narrative excludes the failures and violence of the Ugandan government that led to the rise of the rebel group in the first place, or the complicity of international groups who provided aid to support the government camps in which the Acholi were forced to live.<sup>345</sup> Similarly, the Prosecutor's narrative mystifies or at the very least downplays the fact that many LRA fighters, including the recently captured Dominic Ongwen, were forcibly recruited as children, and that the group believes it has legitimate grievances to fight for.<sup>346</sup>

As these examples demonstrate, international criminal courts tend to render narratives that are preoccupied with the abnormality of direct political violence rather than the normality of the economic and political structures that lurk beneath.<sup>347</sup> In recognising this point, however, it should equally be emphasised that to critique the mystification of structural causes in the narratives of international criminal courts is neither to belittle nor excuse the extreme acts of violence committed by the accused individuals on trial.<sup>348</sup> In other words, it is possible to acknowledge the limited capacity of international criminal courts to discuss and contest the structural causes of mass atrocities without undermining the notion of individual agency, which forms the fundamental basis on which all forms of individual criminal responsibility rely.<sup>349</sup> Rather, what this critique seeks to illuminate is the limited capacity of international criminal courts *to end violence or deter future atrocities*. By obscuring and potentially legitimating the social, economic and political context of mass atrocity conflicts behind a veil of individual criminal responsibility, the contribution of in-

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<sup>344</sup> Mamdani, 2015, p. 81, see *supra* note 297.

<sup>345</sup> Hoover, 2012, p. 258, see *supra* note 343.

<sup>346</sup> Branch, 2011, p. 197–98, see *supra* note 82.

<sup>347</sup> Krever, 2013, p. 722, see *supra* note 55.

<sup>348</sup> See similarly, Krever, 2013, pp. 719–20, *supra* note 55; Hoover, 2012, p. 260, *supra* note 343; Erin K. Baines, “Complex Political Perpetrators: Reflections on Dominic Ongwen”, in *Journal of Modern African Studies*, 2009, vol. 47, no. 2, pp. 180–82; Sloane, 2007, pp. 60–63, *supra* note 76; and Immi Tallgren, “La Grande Illusion”, in *Canadian Journal of Law and Jurisprudence*, 2002, vol. 15, no. 2, p. 304.

<sup>349</sup> See similarly Sloane, 2007, p. 62, *supra* note 76; and Moore, 1997, p. 490, *supra* note 112.

ternational criminal courts to the prevention of violence, while not entirely absent, is unlikely to be as substantial as the aspirational rhetoric surrounding such courts seems to suggest.<sup>350</sup>

### **19.3.2.3. The Limits of Justice Rendered by International Criminal Courts**

The final progress claim to be subjected to critical scrutiny is the belief that international criminal courts are global justice providers. As will be recalled, international criminal courts have been heralded as mechanisms that can judge individuals in accordance with fundamental liberal principles of criminal law, uphold the universal norms of humanity, and respond to the particular needs of victims of mass atrocity situations.

Leaving aside the burgeoning literature critiquing departures by international criminal courts from the liberal principles of justice they purport to uphold,<sup>351</sup> critical scholars have tended to target the selectivity and particularity of the justice meted out by international criminal courts in practice. In this regard, not only has the selectivity of international criminal courts undermined their claims to be rendering *global* justice but also the particularity of such institutions has risked marginalising alternative conceptions of justice.<sup>352</sup>

#### **19.3.2.3.1. The Selectivity of International Criminal Justice**

First, it has been argued that the claim that international criminal courts are agents of global justice will always fall short in light of their inherent selectivity, which results primarily from state-imposed jurisdictional limitations and co-operation restrictions.<sup>353</sup>

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<sup>350</sup> See similarly Krever, 2013, p. 718, *supra* note 55. See also Pádraig McAuliffe, “Weighing domestic and international impediments to transformative justice in transition”, in *London Review of International Law*, 2015, vol. 3, no. 1, p.197, locating the failure of transitional justice mechanisms to address socio-economic deprivations in the limits imposed by domestic political economy factors which “may undermine the most reformed, transformational approach to justice on the part of international actors and domestic civil society to the point that it represents merely a symbolic salve for a gaping wound”.

<sup>351</sup> For a useful summary of the liberal critique of international criminal courts, see generally, Robinson, 2013b, p. 128, *supra* note 91.

<sup>352</sup> Nouwen and Werner, 2015, p. 157, see *supra* note 25; Branch, 2011, p. 214, see *supra* note 82; and Drumbl, 2007, p. 122, see *supra* note 76.

<sup>353</sup> Branch, 2011, p. 205, see *supra* note 82.



To justify their selectivity, international criminal courts tend to deploy three arguments. First, an evolutionary claim is advanced that declares selective justice to be just the first step on the road to truly global justice.<sup>354</sup> According to this narrative, the selectivity of international criminal justice is only temporary; the glass of justice is half full and will be progressively filled in the years to come.<sup>355</sup> Second, it is argued that the selectivity of international criminal justice does not undermine the interventions that *can* be carried out today.<sup>356</sup> According to this argument, some justice is always better than no justice,<sup>357</sup> and the accommodation of international criminal courts to political power is simply “the constitutive condition” for such courts to realise justice in particular cases.<sup>358</sup> Finally, international criminal courts have sometimes attempted to justify their selectivity based on objective criteria. For instance, the ICC Prosecutor has justified its focus on Africa as victim-driven: the Prosecutor’s mandate is to serve “victims of unimaginable atrocities that deeply shock the conscience of humanity”,<sup>359</sup> many of whom happen to be in Africa.<sup>360</sup> Ac-

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<sup>354</sup> *Ibid.*, p. 206.

<sup>355</sup> The “glass half full” argument finds support in Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, pp. 230–31. For a critique of this argument, see Nouwen, 2012, p. 179, *supra* note 194.

<sup>356</sup> Branch, 2011, p. 206, see *supra* note 82.

<sup>357</sup> See, for example, Damaška, 2008, p. 362, *supra* note 76:

To wait for the global community to supersede states as the dominant actor in the international arena would be to succumb to self-subversion, or worse, to surrender to the blackmail of perfection. It is better to bring some human rights abusers to justice than none at all: the best should not be the enemy of the good.

See also Fisher, 2012, p. 62, *supra* note 76; and Cryer, 2006, p. 218, *supra* note 144.

<sup>358</sup> Branch, 2011, p. 206, see *supra* note 82.

<sup>359</sup> ICC Statute, Preamble para. 2, see *supra* note 36.

<sup>360</sup> See, for example, Ankumah, 2013, *supra* note 43; Fatou Bensouda justifies her choices by arguing that

there are over five million African victims displaced, more than 40,000 African victims killed, thousands of African victims are raped, hundreds of thousands of African children are transformed into killers and rapists, 100% of the victims are Africans, 100% of the accused persons are also Africans. We are on the side of the victims.

See also Dov Jacobs, “Q&A on the ICC and Africa: is the criticism on the legitimacy of the Court legitimate? Part 1”, *Spreading the Jam*, 25 March 2010, noting the importance of the fact that, statistically, “Africa does host some of the most violent and active civil wars in the world, with regional dimensions”; and Richard Goldstone, “Does the ICC Target

According to this narrative, “unequal application of the law is not an injustice in itself, but justified in light of supposedly juridically relevant differences between Africa and the rest of the world”.<sup>361</sup>

The unifying theme of these narratives is that they prioritise a conception of *justice as accountability*, irrespective of the inequality of its application.<sup>362</sup> For Branch, however, one-sided prosecutions are better characterised as “a travesty of justice instead of its partial realization”.<sup>363</sup> Selectivity becomes “a provocation, a denial of justice, and itself a cause for grievance”.<sup>364</sup> Moreover, as Sarah Nouwen has argued, attempting to clothe selectivity in juridically objective justifications merely “legitimizes rather than challenges existing inequalities” within the international community.<sup>365</sup> Such partiality can also paradoxically lead to the expansion of zones of impunity as military interventions to enforce international criminal arrest warrants are sanctified under the banner of global justice and excused in the name of international law enforcement.<sup>366</sup> As Branch has put it, “the doctrine that some justice is better than no justice can end up, not only making justice conform unapologetically to power, but turning trials into an unaccountable tool of further violence and injustice”.<sup>367</sup>

As these more critical voices suggest, the justice of international criminal courts tends to be structured to serve the interests of the powerful rather than the global or the universal. For instance, the subject matter jurisdiction of such courts tends to focus on forms of direct political violence, at risk of diverting attention from more structural forms of exploitation, including internationally enforced disparities in access to medicine and food

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Africa?”, *EQ: Equality of Arms Review*, 2009, vol. 2, p. 3, noting that many victims of international crimes “happen to be in Africa”.

<sup>361</sup> Nouwen, 2012, p. 177, see *supra* note 194. For an empirical evaluation of the ICC Prosecutor’s selection of situations, see Alette Smeulers, Maartje Weerdesteijn and Barbora Holá, “The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP’s Performance”, *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 1.

<sup>362</sup> See, for example, Hoover, 2013, p. 284, *supra* note 48; and Nouwen, 2012, p. 179, *supra* note 194.

<sup>363</sup> Branch, 2011, p. 206, see *supra* note 82.

<sup>364</sup> *Ibid.*, p. 206.

<sup>365</sup> Nouwen, 2012, p. 179, see *supra* note 194.

<sup>366</sup> Branch, 2011, p. 200, see *supra* note 82.

<sup>367</sup> *Ibid.*, p. 207.

security.<sup>368</sup> Similarly, the personal jurisdiction of such courts attempts to condense blame for violence on the shoulders of a few individuals, at risk of diverting attention from the broader responsibility of states, international financial institutions and multinational corporations.<sup>369</sup>

Arguably, as critical scholars have conceded, these restrictions would be less problematic were international criminal courts conceived as technical mechanisms for use in specific, limited circumstances.<sup>370</sup> However, when international criminal courts attempt to promote their credentials as global justice providers through assertions that they are responding to the “most serious crimes of concern to the international community as a whole”, it is more than a little damaging to their universalist aspirations when many of the forms of exploitation that appear to support the interests of the international community are relegated to the shadows beyond their grasp.<sup>371</sup>

#### 19.3.2.3.2. The Particularity of International Criminal Justice

Second, beyond the issue of selectivity, the progress claim that equates international criminal courts with global justice also masks the particularity of the justice they mete out.<sup>372</sup>

Similar to the field of international human rights,<sup>373</sup> international criminal courts are the product of a particular time and place: secular, rationalist, Western, capitalist and modern. As this indicates, justice is always local,<sup>374</sup> justice can only ever be given expression through the par-

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<sup>368</sup> Branch, 2011, p. 213, see *supra* note 82. See similarly, Larissa van den Herik, “Economic, Social, and Cultural Rights: International Criminal Law’s Blind Spot”, in Eibe Riedel, Gilles Giacca and Christophe Golay (eds.), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, Oxford University Press, Oxford, 2014, pp. 365–66; Nagy, 2008, pp. 284–86, *supra* note 342; Miller, 2008, pp. 275–78, *supra* note 171; and Cryer, 2005, p. 330, *supra* note 355.

<sup>369</sup> Sarah Nouwen, “The Sort of Justice the ICC Can and Cannot Deliver”, in *Blog of James G. Stewart*, 28 February 2015; and Branch, 2011, p. 213, see *supra* note 82.

<sup>370</sup> Branch, 2011, p. 214, see *supra* note 82.

<sup>371</sup> Kamari M. Clarke, “Power Politics and its Global Shadows: From Margins to Center”, in *Blog of James G. Stewart*, 20 February 2015.

<sup>372</sup> Hoover, 2013, p. 285, see *supra* note 48.

<sup>373</sup> Kennedy, 2004, p. 18, see *supra* note 182.

<sup>374</sup> Marjan Ajevski, “International Criminal Law and Constitutionalisation: On Hegemonic Narratives in Progress”, in *Erasmus Law Review*, 2013, vol. 6, no. 1, p. 58.

ticular.<sup>375</sup> Therefore, when international criminal courts claim to render *global* justice, they universalise culturally contingent standards and practices under the veil of “a claim of objectivity and neutrality, a claim of occupying no particular viewpoint but the viewpoint of ‘all’”.<sup>376</sup> By claiming to render global justice, international criminal courts may serve to confer an illusory unity on societies and make their particularised vision of justice seem “impartial, inclusory, and rooted in considerations of mutual interest”.<sup>377</sup> For critical scholars, the danger of equating international criminal courts and global justice in this way is that it may serve to restrict alternative conceptions of justice and thereby place “entire forms of national and international domination, violence, and inequality outside the scope of justice as unquestionable”.<sup>378</sup>

As a result of their meteoric rise in popularity, critical scholars have observed a tendency of international criminal courts to crowd out other emancipatory vocabularies,<sup>379</sup> siphoning time, resources and energy away from alternative justice modalities, including restorative, social and economic conceptions of justice.<sup>380</sup> The effect can be homogenising. As Drumbl has recently put it, international criminal law “iconographically ripples through the imaginative space of post-conflict justice”,<sup>381</sup> marginalising and excluding other ways of responding to and thinking about

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<sup>375</sup> Hoover, 2013, p. 285, see *supra* note 48.

<sup>376</sup> Koskenniemi, 2012, p. 10, see *supra* note 177. See similarly Hoover, 2013, p. 286, *supra* note 48.

<sup>377</sup> Marks, 2000, pp. 20–21, see *supra* note 150. See also Campbell, 2013, p. 171, *supra* note 99, arguing that international criminal law “‘universalizes’ culturally specific regulatory standards and practices for the determination of ‘truth’”; and Miéville, 2006, p. 267, *supra* note 217, noting “the universalising and abstracting tendencies in international – legal – capitalism” (emphasis in original).

<sup>378</sup> Branch, 2011, p. 214, see *supra* note 82.

<sup>379</sup> See similarly, Ajevski, 2013, p. 57, *supra* note 374; Schwöbel, 2013, p. 170, *supra* note 17; Karen Engle, “Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement”, in José M. Beneyto and David Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences*, T.M.C. Asser Press, The Hague, 2012, p. 58; Kenneth Anderson, “The Rise of International Criminal Law: Intended and Unintended Consequences”, in *European Journal of International Law*, 2009, vol. 20, no. 2, p. 346; and Tallgren, 2002, p. 593, *supra* note 125.

<sup>380</sup> See similarly Schwöbel, 2014, p. 267, *supra* note 217; and Koller, 2008, p. 1066, *supra* note 22.

<sup>381</sup> Drumbl, 2013, p. 532, see *supra* note 28. See similarly Turner, 2013, p. 198, *supra* note 154.

mass atrocity situations.<sup>382</sup> In this way, international criminal law represents a powerful humanitarian hegemonic discourse, occupying more and more of the creative space in the transitional justice context.<sup>383</sup>

For instance, although empirical studies have confirmed that many victims of human rights abuses often support recourse to criminal prosecution,<sup>384</sup> it is equally the case that the conceptions of justice favoured by victims extend far beyond the narrow retributive notion of justice rendered by international criminal courts, encompassing many different types of aspirations such as securing jobs, improving education, supporting those traumatised by atrocities, securing apologies and reparations, and ensuring the accountability of individuals far beyond those targeted by international criminal courts.<sup>385</sup>

Moreover, in some contexts, the type of justice rendered by international criminal courts may even conflict with the conceptions of justice favoured by members of the local communities that have been directly affected by the mass atrocity situation in question. For instance, as Sarah Nouwen and Wouter Werner have recently recounted,<sup>386</sup> the Acholi leaders in northern Uganda lobbied against ICC intervention against the LRA partially on the ground that they favoured a more restorative conception of justice, and partially on the ground that they favoured a conception of

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<sup>382</sup> See similarly, in the field of human rights, Rajagopal, 2003, p. 171, *supra* note 170, noting how human rights has had “a stranglehold on both the imagination of progressive intellectuals as well as mass mobilization in the Third World”.

<sup>383</sup> See similarly, Schwöbel, 2014, pp. 267–68, *supra* note 217; Ajevski, 2013, pp. 57, 58, *supra* note 374; and Drumbl, 2013, p. 537, *supra* note 28. See also Martti Koskeniemi, “International Law and Hegemony: A Reconfiguration”, in *Cambridge Review of International Affairs*, 2004, vol. 17, no. 2, p. 199, describing a struggle as “hegemonic” when “the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the universal preference”.

<sup>384</sup> See, for example, Ernesto Kiza, Corene Rathgeber and Holger-C. Rohne, *Victims of War: An Empirical Study on Victimization and Victims’ Attitudes towards Addressing Atrocities*, Hamburger Edition, Hamburg, 2006, p. 97. In this study, 79 per cent of interviewees, comprising victims from conflicts in Afghanistan, Bosnia and Herzegovina, Cambodia, Croatia, the Democratic Republic of Congo, Israel, Kosovo, Federal Republic of Macedonia, Palestinian Territories, the Philippines and Sudan were in favour of prosecution for past atrocities.

<sup>385</sup> See, for example, Clark, 2011, p. 70, *supra* note 121; and Stover and Weinstein, 2004, pp. 323–24, *supra* note 270.

<sup>386</sup> Nouwen and Werner, 2015, pp. 164 ff., see *supra* note 25. See also Branch, 2011, pp. 207–8, *supra* note 82.

justice defined in terms of ending the ongoing conflict with the LRA on the ground.

To acknowledge the danger that international criminal courts may monopolise the discourse of global justice is not to claim that alternative conceptions of justice are inherently “better” or more “authentic” than international criminal prosecution, but merely to recognise that the prioritisation of different conceptions of justice will always be contingent on the context in question, varying according to both time and place.<sup>387</sup> Nor is it to argue that there is necessarily an objectively measurable consensus concerning which conception of justice is preferable within local communities in conflict-affected societies. Rather, it is to argue that the urge should be resisted to assume the existence of such a consensus; instead, the contestability of justice in each locale should be embraced.<sup>388</sup> As Branch has argued, “there are political debates on justice and peace within every conflict-affected society – different conceptions of justice between men and women, youth and old, rebel and government sympathizers”.<sup>389</sup> The risk is that international criminal courts may marginalise or silence these debates, thereby undermining the agency of the victims they seek to empower.<sup>390</sup> In other words, victims may have their individuality and particularity erased under the power of a sanctified vocabulary that asserts their innocence, helplessness and passivity, as well as their dependence on the agency and heroism of other actors for vindication, representation and voice.<sup>391</sup>

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<sup>387</sup> Nouwen and Werner, 2015, pp. 164–65, see *supra* note 25.

<sup>388</sup> See similarly Nouwen and Werner, 2015, pp. 175–76, see *supra* note 25; and Drumbl, 2007, p. 10, *supra* note 76.

<sup>389</sup> Branch, 2011, p. 210, see *supra* note 82.

<sup>390</sup> See similarly Schwöbel, 2014, p. 277, *supra* note 217; and Hoover, 2013, p. 286, *supra* note 48.

<sup>391</sup> Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood”, in *Contemporary Problems*, 2014, vol. 76, nos. 3/4, pp. 255–57. See similarly, in other fields of law, Marks, 2012, p. 319, *supra* note 181; Kennedy, 2004, pp. 14–15, *supra* note 182; and Charlesworth, 2002, pp. 387–88, *supra* note 334.

#### 19.4. Reflections on the Critical Turn in International Criminal Scholarship

To date the critical accounts outlined above have largely been confined to international criminal scholarship. One question that naturally arises, therefore, is what impact, if any, these critiques might have on the future practice of international criminal courts.

In considering this question, a useful starting point is to remember that critique is concerned not only with deconstruction but also with empowerment.<sup>392</sup> By revealing the blind spots, antinomies and biases perpetuated by progress claims,<sup>393</sup> critique seeks to give expression and voice to the excluded, silenced and suppressed.<sup>394</sup> In this way, critique is very much a political project:<sup>395</sup> rather than adopting a purely rejectionist attitude towards international criminal courts, its ultimate concern is in fact normative,<sup>396</sup> testing assumptions with a view to *either* capturing international criminal courts for particular emancipatory outcomes *or* shifting our attention towards entirely new frontiers.<sup>397</sup> The former approach en-

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<sup>392</sup> Altwicker and Diggelmann, 2014, p. 71, see *supra* note 21, referring to one understanding of “critique” as concerned with advocating “*change in favor of the disadvantaged*” (emphasis in original).

<sup>393</sup> See, for example, Mégret, 2014, p. 46, *supra* note 21, noting that the challenge for critique is “to upset international criminal justice’s balance, expose some of its contradictions, increase its anxiety, and situate it within a larger horizon of possibilities”; and Kendall, 2014, p. 60, *supra* note 56, noting that critical legal scholarship seeks “to unsettle the liberal sentiments of the legal field, to track its legitimating claims, to reveal its antinomies, and to show its inherent indeterminacy”.

<sup>394</sup> See, for example, Altwicker and Diggelmann, 2014, p. 74, *supra* note 21, referring to “critique” as “unveiling blind spots, inconsistencies, and biases in the discipline of international law” and uncovering “implicit assumptions underlying mainstream doctrine”; and Koller, 2012, p. 105, *supra* note 7: “By introducing new voices, crits [...] identify where the law has failed to meet the needs of the excluded and chart a desired path for new progress”.

<sup>395</sup> Schwöbel, 2014, p. 6, see *supra* note 19. See similarly, Hilary Charlesworth, “Feminist Methods in International Law”, in *American Journal of International Law*, 1999, vol. 93, no. 2, p. 380, describing how critical feminist methodologies “may clearly reflect a *political* agenda rather than to strive to attain objective truth on a neutral basis and may appear personal rather than detached” (emphasis added).

<sup>396</sup> See, for example, Altwicker and Diggelmann, 2014, p. 74, *supra* note 21, noting the “normative dimension” of critical international law scholarship.

<sup>397</sup> Mégret, 2014, p. 46, see *supra* note 21. See also Michelle Farrell, “Critique, complicity and I”, in Schwöbel, 2014, p. 98, *supra* note 12: “a critique is required in order to unmask and explain, with the goal, presumably, of opening up the field to new possibilities for ap-

tails what Mégret has termed “an ability to navigate against yet close to the wind [...] a struggle *for* international criminal justice rather than against it”.<sup>398</sup> The latter approach entails an attempt to produce extravernacular knowledge *against* the disciplinary box of the existing international criminal legal vocabulary.<sup>399</sup> Such an approach is most closely associated with the work of Kennedy in the field of humanitarianism. Specifically, Kennedy has sought “to think outside the professional lexicon”, based on “the intuition that the field’s quotidian practices of criticism and renewal do not go far enough in some way, that they may repeat and reinforce disciplinary blindnesses and biases”.<sup>400</sup>

Against this background, it is suggested that the critiques outlined above have tended to adopt a political orientation characterised by two concerns: first, to reclaim the emancipatory potential of the discourse of justice by shifting attention and expectations away from international criminal courts, and thereby opening up greater space for alternative conceptions of justice;<sup>401</sup> and second, to ensure that the practices of international criminal courts show a greater sensibility for the potentially darker sides of their interventions in particular contexts.<sup>402</sup>

The first concern posits that the axiomatic starting points that led the field of international criminal justice to become dominated by international criminal courts require urgent reconsideration. While there may be a role for such courts within the transitional justice toolbox, it is important to recognise that many of their political limits have been intentionally imposed on such institutions by the states who created them and may therefore be insurmountable. For instance, Baars has argued that it is important not to overlook the fact that the so-called “impunity gap” that exists as a

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prehension”; and Skouteris, 2010, p. 229, *supra* note 7: “Revealing the exclusions of progress narratives and contesting their exclusive right to speak the world ‘as it is’ [...] participates in a *struggle to redefine the filter of right solutions*” (emphasis added).

<sup>398</sup> Mégret, 2014, p. 46, see *supra* note 21.

<sup>399</sup> Kennedy, 2002, p. 373, see *supra* note 119.

<sup>400</sup> *Ibid.*, pp. 384–85, see *supra* note 119. For a critical consideration of whether Kennedy’s attempts have been successful, see Golder, 2014, pp. 87–89, *supra* note 166, arguing that, rather than displacing the discourse of human rights, Kennedy instead “reworks the existing idioms of human rights in a pragmatic voice”.

<sup>401</sup> See, for example, Nouwen and Werner, 2015, p. 157, *supra* note 25; Branch, 2011, *supra* note 82; and Drumbl, 2007, *supra* note 76.

<sup>402</sup> See, for example, Rodman, 2014, p. 437, *supra* note 207; and Schiff, 2012, p. 73, *supra* note 124.



result of the selectivity of international criminal courts is itself created by the power relations that exist within the field.<sup>403</sup> As such, a better term to characterise this gap would be “planned impunity”, the recognition of impunity’s planned nature serving as an acknowledgement that selectivity cannot simply be “corrected”.<sup>404</sup> Similarly, Sara Kendall has argued for greater recognition of the fact that the ultimate constituents of international criminal courts are not conflict-affected communities but states, who constitute and therefore limit their “material conditions of possibility”.<sup>405</sup>

What these critical voices appear to be suggesting, therefore, is a need to relinquish much of the faith placed in international criminal courts by acknowledging that the political limits of such institutions also reflect potentially insurmountable emancipatory limits on what they will ever be able to achieve in practice. By recognising these limits, greater time, imagination and energy can be directed towards the creation and development of other emancipatory projects. Of course, any emancipatory project will ultimately be subject to particular power relations and material conditions of possibility. As such, the aim is not to idolise these alternative projects, but rather to create a greater openness to them in light of the identifiable emancipatory limits of international criminal courts.<sup>406</sup>

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<sup>403</sup> Baars, 2014, p. 208, see *supra* note 18.

<sup>404</sup> *Ibid.*, p. 208. See similarly, Baars, 2012, pp. 307–308, *supra* note 217, advocating a move “away from *legal* emancipation and toward *human* emancipation” (emphasis in original).

<sup>405</sup> Kendall, 2015, p. 134, see *supra* note 123.

<sup>406</sup> Several scholars have advocated clawing back some of the space that international criminal courts have occupied. See, for example, Leebaw, 2011, pp. 170–71, see *supra* note 30, proposing for truth commissions or other investigatory projects to investigate the theme of resistance; Ainley, 2011, pp. 422–27, *supra* note 329, proposing an enhanced form of truth commissions, labelled “responsibility and truth commissions”, authorised to hold individuals and groups to account as well as establish the truth; Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge 2011, exploring different modes of accountability for collective wrongdoing; Jelena Subotic, “Expanding the Scope of Post-conflict Justice: Individual, State and Societal Responsibility for Mass Atrocity”, in *Journal of Peace Research*, 2011, vol. 48, no. 2, p. 157, proposing a system of “triple accountability”, entailing individual, State and societal responsibility for mass atrocities; Mark Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, Cambridge, 2009, proposing the imposition of collective monetary sanctions against the officer corps; André Nollkaemper and Herman van der Wilt (eds.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, exploring different modes of “international responsibility” in response to mass atrocity situations; Drumbl, 2007, pp. 18–21, 181–205, *supra* note 76, proposing a model of “cosmopolitan pluralism” entailing both horizontal and vertical reforms to the field of internation-

The second concern posits that, to the extent that we continue to place our faith in international criminal courts, it is important that their participants become more conscious of the fact that the benefits of their interventions will always be contingent on the particular context in question. In other words, to the greatest extent possible within the confines of their political limits, international criminal courts should strive to develop their practices in line with a critical awareness of the possible darker sides of their interventions.<sup>407</sup>

With these twin concerns in mind, the remainder of this section seeks to bridge the gap between critical scholarship and practice, at least to a limited extent, by suggesting how international criminal courts might consider adapting to *some* of the critiques raised to date. In making these suggestions, two important caveats should be noted at the outset. First, I openly acknowledge that my suggestions will prove insufficient to meet some of the concerns raised by critical scholarship, many of which require energy to be directed towards mobilising alternative expressions of justice. In this regard, my suggestions are not intended to intrude upon such efforts and in some respects seek to provide greater space for such initiatives to be given expression. Second, my proposals should not be equated with a blanket endorsement of *all* arguments raised within the growing body of critical international criminal scholarship. Critical scholarship is subject to its own biases and power relations, which themselves warrant critical treatment. Rather, my proposals have the more modest aim of *initiating a conversation* about how *some* of the arguments raised within critical scholarship might influence the future practices of international criminal courts so as to improve their ability to navigate the complex contexts in which they operate. With these caveats in mind, I turn to the proposals themselves.

#### **19.4.1. A Revised Public Relations Strategy**

First, to the extent that critical scholarship has helped illuminate the political limits of international criminal courts, it is suggested that those oper-

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al criminal justice; and Fletcher and Weinstein, 2002, p. 573, *supra* note 121, proposing an “ecological model” as a framework to guide the steps that must be undertaken to socially reconstruct broken communities in the aftermath of episodes of mass violence.

<sup>407</sup> See, for example, Schiff, 2012, p. 76, *supra* note 124, calling for the ICC “to be aware of the pitfalls it faces and to be aware that the mandate and intentions of the organization do not alone determine its ethical qualities”.

ating within the field could adopt a revised public relations strategy that encompasses a more open and consistent acknowledgement of those limits, specifically with a view to guarding against over-inflated expectations concerning what international criminal courts should be expected to achieve in practice.<sup>408</sup>

At the ICC, for example, this would require a Prosecutor prepared to self-reflexively draw attention to what she cannot do and why. Indeed, the Prosecutor has arguably begun to adopt this strategy by using her symbolic power to attribute blame to the Security Council for failing to adequately assist her office with the arrest of suspects related to the situation in Darfur.<sup>409</sup> However, the Prosecutor could go much further.

For instance, the Prosecutor might consider operating with greater transparency with respect to communications received by her office concerning preliminary examination activities. In its 2014 report on preliminary examination activities, the Office of the Prosecutor noted that 579 communications had been received in the last reporting period, of which 462 were manifestly outside the Court's jurisdiction.<sup>410</sup> Currently, the Prosecutor does not provide any further information on these rejected communications, so the public are left to speculate on the precise content of these communications and on what specific grounds they fall outside the Court's jurisdiction.

While it is plausible that some of these communications concern entirely spurious claims, many are likely to relate to genuine grievances that nonetheless fall outside the scope of the ICC's jurisdiction. Were the

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<sup>408</sup> See similarly, Schiff, 2012, pp. 78–79, *supra* note 124. See also Kendall, 2015, p. 130, *supra* note 123, noting how ICC staff members have already begun to incorporate the phrase “managing expectations” into descriptions of their work”; Leebaw, 2011, pp. 104–8, 117–18 and 178–82, *supra* note 30, on the importance of confronting the limits of the liberal legalist framework of transitional justice institutions in general; and Laurel E. Fletcher, “From Indifference to Engagement: Bystanders and International Criminal Justice”, in *Michigan Journal of International Law*, 2005, vol. 26, no. 4, pp. 1082–92, 1094–95, arguing that international criminal judges should openly acknowledge the limits of their judgments in determining the roles played by bystanders in mass atrocity situations and more generally temper expectations about the transformative potential of trials so as to guard against judgments implicitly conferring collective innocence on bystanders who may have been implicated in situations of mass violence.

<sup>409</sup> ICC Office of the Prosecutor, “Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)”, 12 December 2014.

<sup>410</sup> ICC Office of the Prosecutor, “Report on Preliminary Examination Activities 2014”, 2 December 2014, para. 18.

Prosecutor to publicise the reasons for rejecting particular types of communications, she could promote awareness of these grievances and the particular reasons why they fall beyond the ICC's reach. For instance, she could draw attention to alleged atrocities that fall within the subject matter jurisdiction of the Court, but which cannot be examined purely for reasons of limits placed on the Court's personal and territorial jurisdiction. Similarly, she could point to communications concerning longer-term, more structural abuses that fall outside the Court's subject matter jurisdiction, as well as communications concerning abuses allegedly committed by corporations and other collective entities that fall beyond the Court's personal jurisdiction.

Indeed, there are recent signs that the ICC Prosecutor may be beginning to move in this direction. Following the receipt of numerous communications concerning allegations of atrocities committed by the so-called Islamic State of Iraq and al-Sham/Greater Syria (ISIS), the ICC Prosecutor issued a "clarification", in which she explained her decision not to open a preliminary examination into the situation given the narrowness of the jurisdictional base for doing so.<sup>411</sup> In the statement, the Prosecutor acknowledged the seriousness of the atrocities in question, which undoubtedly fall within the Court's subject matter jurisdiction, but also pointed to the political limits placed on its jurisdiction by the unwillingness of Syria or Iraq to become parties to the ICC Statute and the failure of the Security Council to refer the situation to the Court.

By more frequently publicising the political limits of the ICC in this way, the Prosecutor can use her symbolic power to draw attention to the broader scope of atrocities that the public has communicated to her office, while at the same time guarding against the ICC being depicted as the panacea of global justice. Moreover, by resisting the urge to promote the ICC as a sort of magic bullet for responding to mass atrocity situations,<sup>412</sup> a more open and public acknowledgement of the limits of the institution may help generate space for broader and more varied expressions of justice.<sup>413</sup>

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<sup>411</sup> ICC Office of the Prosecutor, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS", 8 April 2015.

<sup>412</sup> Weinstein and Stover, 2004, p. 5, see *supra* note 109.

<sup>413</sup> See similarly Drumbl, 2013, pp. 540–41, 545, *supra* note 28: "international *criminal law* should recede and international *post-conflict justice* – a broader paradigm that includes diverse accountability modalities and a more sublime lexicon – should step up" (emphasis in

#### 19.4.2. A Revised “Interests of Justice” Strategy

Second, to the extent that critical scholarship has illuminated a more textured understanding of the power of international criminal courts, it is suggested that international criminal courts could take greater account of context when deciding whether and how to intervene in particular mass atrocity situations.<sup>414</sup>

To understand how this might be achieved in practice, a useful illustration is provided by the ICC Prosecutor’s current policy concerning the “interests of justice” criterion that she considers when determining whether or not to initiate an investigation or prosecution. According to the Prosecutor’s Policy Paper on the Interests of Justice, a decision not to proceed with an investigation or prosecution on the basis that it would not serve “the interests of justice” should be understood as “a course of last resort”,<sup>415</sup> an “exceptional” measure,<sup>416</sup> which would require rebutting the strong presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1)(a) and (b) or Article 53(2)(a) and (b) have been met.<sup>417</sup> The policy paper notes that other transitional justice mechanisms should be seen as “complementary” to the work of the ICC, forming part of “a comprehensive approach” to justice, rather than as alternatives.<sup>418</sup> Moreover, the paper emphasises that “there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor”.<sup>419</sup>

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original); and Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice”, in *Journal of Law and Society*, 2007, vol. 34, no. 4, p. 413, noting how “transitional justice has become overdominated by a narrow legalistic lens” and arguing for a thicker variant of transitional justice.

<sup>414</sup> See similarly Doug Saunders, “Why Louise Arbour Is Thinking Twice”, in *The Globe and Mail*, 28 March 2015, referring to the latest thoughts of Louise Arbour, who has recently advocated “a kind of political empathy”, which entails “a capacity to genuinely try to understand what an issue looks like from an opponent’s or from another party’s point of view – a blueprint for understanding before you act, as opposed to rushing into things”.

<sup>415</sup> ICC Office of the Prosecutor, “Policy Paper on the Interests of Justice”, September 2007, p. 9 (‘ICC Interests of Justice Policy Paper’).

<sup>416</sup> *Ibid.*, p. 3.

<sup>417</sup> *Ibid.*

<sup>418</sup> *Ibid.*, pp. 7–8.

<sup>419</sup> *Ibid.*, p. 1. See also, Fatou Bensouda, “International Justice and Diplomacy”, in *New York Times*, 19 March 2013: “As the ICC is an independent institution, it cannot take into con-

As this brief summary reveals, the Prosecutor's current policy on "the interests of justice" strongly prioritises international criminal prosecution in all but the most exceptional circumstances, trumping both alternative conceptions of justice and any peace negotiations that may be ongoing. Such an approach appears to be premised on the assumption that the power exercised by the ICC is essentially benign in nature and also demonstrates a reluctance to accept the idea that the benefits of ICC interventions will always be contingent on the particular context in question.

Yet, the Prosecutor's current policy is not inevitable. The "interests of justice" criterion is left undefined in the ICC Statute, so the Prosecutor arguably possesses a significant degree of leeway concerning how she formulates her policy in relation to it. As such, it is suggested that the Prosecutor might consider reformulating her current policy so as to enable her office to better evaluate the likely timing and impact of ICC interventions in particular domestic contexts.<sup>420</sup> Such a reformulated policy could involve expressly taking into account contextual factors such as ongoing peace processes and local justice initiatives that the Prosecutor currently seeks to ignore. Moreover, it could enable the Prosecutor to be more de-

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sideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council".

<sup>420</sup> See similarly, Priscilla Hayner, "Does the ICC Advance the Interests of Justice?", in *Open Democracy*, 4 November 2014, proposing a broader understanding of "the interests of justice" criterion pursuant to which the ICC Prosecutor could take into account the local dynamics in which she intervenes; and Patrick Hayden, "Political Evil, Cosmopolitan Realism, and the Normative Ambivalence of the International Criminal Court", in Steven C. Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford University Press, Oxford, 2009, p. 173, advocating for a cosmopolitan realist approach, which would "reflexively seek out the most realistic course of action to best achieve justice in any given situation", including, for example, taking specific account of the justice interests of local communities affected by episodes of mass atrocity and potentially deferring to local, customary mechanisms of restorative justice where relevant. See also, Nouwen, 2014, pp. 27–28, *supra* note 257, arguing for a "realist" approach according to which

States' primary right to deal with their pasts could be an avenue to more justice, both in quantitative terms (domestic justice systems combined have more resources, capacity and experience than the ICC) and in a qualitative sense (the promotion of a concept of justice that is meaningful for the society concerned and a prioritization that reflects that society's needs.

For criticism of these perspectives, see generally, Richard Dicker, "Throwing Justice under the Bus Is Not the Way To Go", in *Open Democracy*, 11 December 2014; and Struett, 2012, p. 83, *supra* note 250.

manding on states that self-refer situations on their territory, considering the broader consequences of one-sided prosecutions.<sup>421</sup> Although recognition of these contextual factors would be more complicated for the Prosecutor, as Priscilla Hayner has recently argued, “there may be a greater risk in not being attentive to the range of justice concerns that extend beyond the specific prosecutorial interests at hand”.<sup>422</sup>

The principal challenge of operationalising this suggestion lies in the fact that the ICC Prosecutor will never have perfect or even near perfect knowledge about the short or long term effects of her interventions in particular contexts.<sup>423</sup> Moreover, the danger exists that openly acknowledging contextual factors could encourage negative behaviour or obstructionism on the part of states in an effort to dissuade ICC intervention.<sup>424</sup>

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<sup>421</sup> See similarly, Hoover, 2013, p. 286, *supra* note 48, arguing that the ICC should reorient its practice in such a way that it “challenges states that refer cases more directly”; and Rodman, 2014, p. 464, *supra* note 207, arguing, with respect to self-referrals, that the ICC Prosecutor should engage “not only with the government that solicits the investigation, but also local civil society groups as well as international actors involved in promoting human rights and the rule of law” and only proceed with investigations once it has received “commitments by the referring government to improve those human rights and democratic practices of greatest concern to the stakeholders”.

<sup>422</sup> Hayner, 2014, see *supra* note 420. See also, Rodman, 2014, p. 463, *supra* note 207, arguing that the ICC Prosecutor should apply “a politically grounded legalism that locates international criminal justice within broader international and local efforts to address violent conflicts and their aftermath”; and Hayden, 2009, p. 171, *supra* note 420, arguing that that “the interests of justice” criterion could provide an avenue for overcoming the peace or justice binary “in favour of a more nuanced conception of political justice in which peace and (retributive or restorative) justice connect depending upon the particular needs and interests of plural social contexts”. See also, Mégret, 2015, p. 96, *supra* note 91, proposing a particular understanding of the “gravity” threshold, pursuant to which the relative gravity of crimes and fault of perpetrators would be contextualised “within an overarching understanding of the international system and some of its inbuilt injustices, in an effort to counter the latter”.

<sup>423</sup> Struett, 2012, pp. 85–86, see *supra* note 250.

<sup>424</sup> See similarly, Struett, 2012, p. 84, *supra* note 250; and Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court”, *European Journal of International Law*, 2003, vol. 14, no. 3, p. 496. The ICC Prosecutor has recently acknowledged this danger in the context of discussing whether “feasibility” is a relevant factor to consider when determining whether to open an investigation. Initially, the Prosecutor argued that “the feasibility of conducting an effective investigation in a particular territory” was a relevant factor to consider when determining whether to open an investigation. ICC Office of the Prosecutor, “Annex to the ‘Paper on some policy issues before the Office of the Prosecutor’: Referrals and Communications”, September 2003, p. 1. More recently, however, the Prosecutor has argued that weighing feasibility as a separate self-standing factor “could prejudice the consistent application of the Statute and

For instance, Richard Dicker has argued that were the Prosecutor openly to agree to defer arrest warrants to enhance peace efforts, state officials and rebel groups under investigation would be incentivised to attempt to manipulate the Prosecutor by appearing to engage in peace negotiations whenever they believed an arrest warrant was near.<sup>425</sup>

Undoubtedly, these concerns deserve serious reflection. Nonetheless, it is suggested that provided the revised policy is stringently circumscribed,<sup>426</sup> it could provide an important way for the Prosecutor to demonstrate “an open mind about good-faith creative alternatives to prosecution”.<sup>427</sup> By adopting such a revised policy, the Prosecutor would send out a clear message that she recognises the symbolic power she possesses and the complexity of the contexts in which she intervenes. Moreover, such a policy would enable the Prosecutor to recognise that the benefits of ICC interventions are not inevitable, but contingent on the political context, a context that the Prosecutor seeks to take seriously.

### 19.5. Conclusion

Immi Tallgren once remarked that international criminal courts offer “a truly illuminating package of ideas”, specifically targeting “questions of life and death, the choices between good and evil, the promises of justice, peace and love in a meaningful manner”.<sup>428</sup> Yet, in promoting unrealistically ambitious aspirations, Tallgren added that international criminal courts also represent “a religious exercise of hope that is stronger than the desire to face everyday life”.<sup>429</sup>

This chapter has elaborated some of the progress claims upon which this quasi-religious faith in international criminal courts has been built. It has sought to demonstrate how the progress claims that have typically dominated the field are not neutral, but constitute value-laden propositions concerning the power and potential of international criminal courts.

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might encourage obstructionism to dissuade ICC intervention”. ICC Office of the Prosecutor, “Policy Paper on Preliminary Examinations”, November 2013, para. 70.

<sup>425</sup> Dicker, 2014, see *supra* note 420.

<sup>426</sup> For a convincing proposal as to how this might be achieved, see, for example, Robinson, 2003, pp. 495–98, *supra* note 424.

<sup>427</sup> *Ibid.*, p. 497.

<sup>428</sup> Tallgren, 2002, p. 593, see *supra* note 125.

<sup>429</sup> *Ibid.*



Moreover, the chapter has identified the beginnings of a shift in power towards more critical voices within international criminal scholarship, with a range of counterclaims that question the progressive potential of international criminal courts becoming increasingly prominent in the field.

A testament that this more critical scholarship is beginning to gain traction in mainstream quarters is evident in the more sober tone now beginning to be adopted by practitioners and judges in the field. For instance, the former President of the ICTY, Judge Patrick Robinson, recently observed that

contributing to peace, security, and reconciliation or providing a sense of justice to victims and communities are admirable goals and desirable effects of the criminal proceedings, but such goals cannot steer the Tribunal's work and are not under the Tribunal's control.<sup>430</sup>

As these remarks suggest, critical scholarship is beginning to have a humbling effect on the aspirations of international criminal courts leading to a more realistic appraisal of what such institutions can be expected to achieve in practice.

Whether the critical turn in international criminal scholarship will trigger a more radical loss of faith in international criminal courts remains to be seen.<sup>431</sup> For the time being, it is clear that the vast majority of both scholars and practitioners believe that there is still some room for international criminal courts within the transitional justice matrix.<sup>432</sup> For instance, Drumbl has argued that his critical insights into the field should not necessarily lead to an inevitable crowding out of international criminal courts, but more modestly to an appreciation that the value of such courts “best flourishes when trials constitute *a* means to justice, not *the* means to justice”.<sup>433</sup>

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<sup>430</sup> Robinson, 2011, p. 25, see *supra* note 122.

<sup>431</sup> See, for example, Dov Jacobs, “Post Conflict Justice and the ICC: Some Thoughts on False Expectations and the Illusion of Staying Together ‘For The Kids’”, in *Spreading the Jam*, 15 December 2014; and Osiel, 2013, *supra* note 134.

<sup>432</sup> See, for example, Kreß, 2014, p. 12, *supra* note 134, noting that, by and large, “international criminal lawyers do not seem to have abandoned their support for the international criminal justice project ‘after the honeymoon’”.

<sup>433</sup> Drumbl, 2007, p. 21, see *supra* note 76 (emphasis in original). See similarly Fletcher and Weinstein, 2002, p. 603, *supra* note 121, arguing that trials “must be considered one part

In the face of recent critiques that have illuminated both the limits and darker sides of the practices of international criminal courts, this chapter also concludes that there is room for maintaining faith in such institutions, albeit one that is more modest and semi-agnostic in nature.<sup>434</sup> Moreover, while the capabilities of international criminal courts will always be limited, it is argued that a more consistent and public acknowledgment of those limits, together with a greater sensibility of the contexts in which they intervene, may help such institutions better navigate the complicated terrain in which they operate, whilst opening up more space for the expression and realisation of other emancipatory projects.

With these insights in mind, the ultimate message of this chapter is a call to remember that there is an inevitable incompleteness and inadequacy to *all* responses to episodes of mass violence.<sup>435</sup> Any response will be subject to particular constellations of power, excluding some voices and prioritising others. Looking ahead, therefore, the challenge for participants within the field is to strive to become more conscious of these constellations, tempering enthusiasm for over-exuberant progress claims with a critical inquisitiveness for the darker sides of the interventions of all emancipatory projects, all the while maintaining a willingness to be inspired and to imagine what can be created in the face of such critiques and limitations.<sup>436</sup>

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of a larger process in which additional incentives for community rebuilding are developed”.

<sup>434</sup> Koller, 2008, pp. 1067–69, see *supra* note 22. See also, Luke Moffett, “Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague”, *Journal of International Criminal Justice*, 2015, vol. 13, no. 2, pp. 281–311, identifying “a need to manage expectations as to what the ICC can and cannot do”; and Kieran McEvoy and Kirsten McConnachie, “Victims and Transitional Justice: Voice, Agency and Blame”, in *Social & Legal Studies*, 2013, vol. 22, no. 4, p. 497: “transitional justice arguably requires a greater degree of *humility*” (emphasis in original).

<sup>435</sup> See, for example, Nouwen and Werner, 2015, p. 176, *supra* note 25: “human law, culture and conventions will *always* be short of the justice we strive for because justice is mediated by men”; Turner, 2013, p. 208, *supra* note 154:

The challenge to remain open to critical engagement is rooted in the idea of an infinite idea of justice that is irreducible to law. It is in this ongoing process of questioning that justice lies – in the openness to the other, the existence of whom is immanent to the idea of transition.

See also Minow, 1998, p. 5, *supra* note 308, recognising “the incompleteness and inescapable inadequacy of each possible response to collective atrocities”.

<sup>436</sup> Minow, 1998, p. 29, 51, see *supra* note 308. See similarly Ainley, 2011, p. 426, *supra* note 329; and Gideon Boas, “What is international criminal justice?”, in Gideon Boas, William

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A. Schabas and Michael P. Scarf (eds.), *International Criminal Justice: Legitimacy and Coherence*, Edward Elgar, Cheltenham, 2012, p. 24.

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## Victim Participation, Reparations and Reintegration as Historical Building Blocks of International Criminal Law

Furuya Shuichi\*

### 20.1. Introduction

In deciding the issue of the arrest warrant for Thomas Lubanga Dyilo, Pre-Trial Chamber I of the International Criminal Court ('ICC') found that

[t]he reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system<sup>1</sup>

This statement clearly indicates that the ICC is an organisation not only for prosecuting and trying a person responsible for the crimes falling under its jurisdiction but also for providing remedies for the victims of those crimes. In this regard, a victim-oriented perspective is one of the important characteristics of the ICC system. This feature of the ICC is also making an impact on international criminal law in general, and nowadays the idea of bringing justice to victims is commonly invoked as a *raison d'être* and as having an important role in international criminal law. Actually, Trial Chamber I in its Decision of 2012 on the reparation principles and procedures found as follows:

The Statute and the Rules introduce a system of reparations that reflects *a growing recognition in international criminal*

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<sup>1</sup> International Criminal Court ('ICC'), Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06, para. 136.

*law* that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.<sup>2</sup>

However, the interests of victims were not of central concern to international criminal law in the early stages of its development. While the specific field of international criminal law has a relatively short history when compared with other traditional fields of international law, the concern for victims is quite a new phenomenon even in its history. In fact we can safely say that it had been marginalised until the Rome Statute of the International Criminal Court ('ICC Statute') embodied the victim-oriented perspective as part of the international legal system in Article 68 paragraph 3 (victim participation)<sup>3</sup> and Article 75 (reparation).<sup>4</sup>

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<sup>2</sup> ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06, 7 August 2012, para. 177 (emphasis added) ('Lubanga case, Decision') (<https://www.legal-tools.org/doc/a05830/>).

<sup>3</sup> Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Art. 68, Protection of the victims and witnesses and their participation in the proceedings ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>):

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

<sup>4</sup> *Ibid.*, Art. 75, Reparations to victims:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the

The incorporation of the relevant provisions in the ICC Statute, however, is not a fortuitous event. Rather these provisions reflect a growing attention to victims within national criminal justice systems as well as universal and regional human rights systems, and also a reaction to criticism of the manner in which victims' concerns were considered by the ICC's predecessors.<sup>5</sup> The victim-oriented perspective in the ICC system is an end product that is constructed from the building blocks of various attempts to pay attention to the victims of crimes.

This chapter aims to examine how the victim-oriented perspective has been historically brought into the field of international criminal law, and whether, and if at all, it has changed the original nature of that field.

## 20.2. Nuremberg and Tokyo Tribunals

According to traditional international law, a violation of rules applicable in a situation of armed conflict is considered as a conduct of state, even though an individual actually commits an act constituting the violation, such as a wilful killing or injury of civilians. The responsibility for the violation resides in the state of the national who commits the act, and that national (individual) is immune from responsibility under international law because his conduct is totally attributed to the state. This so-called state-centred perspective was the situation of international law until the end of the Second World War: a violator was a state and a victim was also a state. However, the establishment of two International Military Tribunals in Nuremberg and Tokyo changed the situation. In these tribunals, individuals having committed conduct that constituted crimes against peace, war crimes and crimes against humanity were held responsible for

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convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

<sup>5</sup> Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2012, pp. 87–88.

their own conduct. From this time on, the accountability of violations of international law started shifting from the state to the individual, and without doubt this provided the foundations for the current development of international criminal law.

Nevertheless, this development completely disregarded another individual: those who were injured and damaged by the violations of those perpetrators. The individual victims did not have any positive position before the Nuremberg and Tokyo tribunals. The Nuremberg Tribunal basically adopted the adversarial approach with a common law emphasis. As a result, there were no provisions for victim participation other than as witnesses, and no record indicates that the idea of including victims as a *partie civile* (civil party) was even mentioned by those states that had the tradition of civil party participation in their domestic systems.<sup>6</sup> This was also true for the Tokyo Tribunal.

Even as witnesses, the Nuremberg Tribunal did not provide a suitable forum for victims because it relied mainly on documentary evidence rather than on live testimony. As the Nazis left a meticulous inventory of their crimes, the prosecution had full documentary evidence of the crimes of the accused which became the basis for the indictments. The prosecution compiled more than 200,000 affidavits, but only 94 witnesses testified and most of the affidavits and witnesses were former SS members, camp guards and Nazi Party members.<sup>7</sup> Ironically, the prosecutorial strategy to rely primarily on documentary evidence minimised the role of victims in the trials.<sup>8</sup> On the other hand, the Tokyo Tribunal relied on a greater amount of victim-witness testimonies. It called 416 persons to the witness stand and accepted affidavits and depositions from 779 individuals, many of which came from victims. However, the selection of victims to testify as witness did not necessarily reflect the realities of the crimes committed.<sup>9</sup> For example, despite the fact that a number of gender-based

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<sup>6</sup> Liesbeth Zegveld, “Victims’ Reparations Claims and International Criminal Courts”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 86–87.

<sup>7</sup> Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia, Cambridge, 2011, p. 136.

<sup>8</sup> Yael Danieli, “Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law”, in *Cardozo Law Review*, 2005/2006, vol. 27, no. 4, p. 1641.

<sup>9</sup> Leyh, 2011, p. 136, see *supra* note 7.



crimes took place in Nazi- and Japanese-controlled areas, no victims of such crimes were called to testify at these proceedings.<sup>10</sup>

As to the reparation to victims, the Nuremberg Tribunal had the competence to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.<sup>11</sup> However, no such order was made. The Tokyo Tribunal did not have any similar competence at all. Moreover, neither tribunal had any competence or procedure to receive claims of reparation from victims.

In this regard, international criminal law, which surely stemmed from the Nuremberg and Tokyo Tribunals, was conceptualised as a system of law little concerned with victims but rather one concerned primarily with perpetrators and the enforcement of the rules of international law itself.<sup>12</sup> Actually the International Law Commission ('ILC'), which was directed by the UN General Assembly to formulate the principles of international law recognised in the Charter of the International Military Tribunal at Nuremberg ('IMT Charter') and in the Judgment of the Tribunal, did not refer to the word "victim" at all in the formulated principles and their commentaries.<sup>13</sup> Further, the basic concept of international criminal law focusing on the trial and punishment of perpetrators was not altered when it moved on to the next step which advanced this field of international law: the adoption of the Genocide Convention in 1948. The Convention obliges contracting parties to provide effective penalties for persons guilty of genocide,<sup>14</sup> but provides nothing with regard to victims. In

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<sup>10</sup> Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence", in *International Journal of Transitional Justice*, 2009, vol. 3, no. 1, p. 115; Leyh, 2011, p. 136, see *supra* note 7.

<sup>11</sup> Charter of the International Military Tribunal, Part of the London Agreement of 8 August 1945, Art. 28 ('IMT Charter') (<https://www.legal-tools.org/doc/64ffdd/>) provided: "In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany".

<sup>12</sup> Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, Cambridge, 2012, p. 43.

<sup>13</sup> International Law Commission, Principles of International Law Recognized by the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, 1950, in *Yearbook of the International Law Commission*, 1950, vol. II, pp. 374–78 ('Nuremberg Principles') (<https://www.legal-tools.org/doc/5164a6/>).

<sup>14</sup> United Nations General Assembly resolution 96 (I), Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, Art. 5 ('Genocide Convention') (<https://www.legal-tools.org/doc/44b386/>).

fact, the Draft Convention prepared by the UN Secretary-General in 1947 stipulated as follows:

Article XIII (Reparations to Victims of Genocide)

When genocide is committed in a country by the government in power and by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.<sup>15</sup>

The Draft Convention contemplated various types of redress for victims which appeared to predict the ways of reparation provided for in Article 75 of ICC Statute and Rule 97 of the ICC Rules of Procedure and Evidence.<sup>16</sup> However, the draft article on reparation was lost in the final negotiation process, and then the Genocide Convention adopted on 9 De-

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The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

<sup>15</sup> Draft Convention on the Crime of Genocide, 26 June 1947, UN doc. E/447, p. 9.

<sup>16</sup> *Ibid.*, p. 49:

Comments on Article XIII [...] 2. Who is redress to consist of?

Redress may be made to members of the human group who are victims of genocide, or to the groups as a whole.

(a) Redress for members of the group.

The dead cannot be brought back to life but compensation or pensions may be given to the spouses, children, or other persons maintained by the deceased.

There may be restitution of seized property or compensation corresponding to the value of the goods in question, wherever such restoration is not possible.

Compensation may be made to persons who have been imprisoned, deported or maltreated.

Special benefits may be granted to survivors of the group in the form of houses, scholarships, etc.

(b) Redress for the group as such.

Such redress may take various forms: reconstitution of the moral, artistic and cultural inheritance of the group (reconstruction of monuments, libraries, universities, churches, etc. and compensation to the group for its collective needs).

ember 1948 failed to contain any provision on redress and reparation for victims.<sup>17</sup>

### **20.3. Movements outside International Criminal Law**

During the decades after the Nuremberg and Tokyo Tribunals, the international community was still inclined to pay attention to individual perpetrators, but not to victims. In the 1970s, however, this situation changed. Parallel with the attention paid to victims of crime at the domestic level in the late 1960s and early 1970s, and the birth of a new field of study known as victimology, some important developments also occurred at the international level, which required states to strengthen their victim-oriented measures in judicial proceedings.

#### **20.3.1. Movements in the United Nations**

Until the mid-1970s, the United Nations focused on the crime itself and on creating universal standards on the treatment of suspects, accused and prisoners in the criminal justice system. Since then, however, several UN organs and other UN-sponsored fora – including the UN Crime Prevention and Criminal Justice Programme and the UN Congresses on the Prevention of Crime and the Treatment of Offenders held every five years – have contributed to the development of victim-focused international pro-

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<sup>17</sup> William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, pp. 470–71. The deletion of the article is considered to be due to the fact that the United States believed that the redress should be a part of the jurisdiction of an *ad hoc* tribunal pending the establishment of permanent international penal tribunal. Draft Convention for the Prevention and Punishment of Genocide (Text Suggested by the Government of the United States), Article VII reads:

In addition, such an *ad hoc* tribunal shall also be authorized to assess damages on behalf of persons found to have sustained losses or injuries as a result of the violation of this Convention by any High Contracting Party. Prior to the assessment of any such damage any State alleged to have violated the Convention, shall be given an opportunity to be heard and to submit evidence on its behalf. Each High Contracting Party agrees to pay such damages, and comply with the terms of the Convention. The *ad hoc* tribunal shall have authority to determine the method of distribution and payment of any amounts so awarded.

Draft Convention of the Crime of Genocide, Communications Received by the Secretary-General, 5. Communication Received from the United States of America, 18 October 1947, UN doc. A/401/Add.2, p. 20.

grammes and standards.<sup>18</sup> For example, during the Fifth UN Congress on the Prevention of Crime held in 1975, state representatives began to address victim-related issues that focused on the economic and social consequences of crime.<sup>19</sup> Five years later, during the Sixth UN Congress on the Prevention of Crime, participants began to consider the victims of abuse of power,<sup>20</sup> and the Seventh UN Congress in 1985 discussed several issues relating to victims as one of its main topics.<sup>21</sup>

In 1985 the increased attention on victims in the UN Congresses led to the adoption by the UN General Assembly of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power ('Victims' Declaration').<sup>22</sup> As its title indicates, the Victims' Declaration is divided into two parts: part A (victims of crime) and part B (victims of abuse of power). It has a common phrase of definition for both types of victims: "persons who, individually or collectively, have suffered harm,

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<sup>18</sup> Raquel Aldana-Pindell, "An Emerging Universality of Justiciable Victims' rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes", in *Human Rights Quarterly*, 2004, vol. 26, no. 3, pp. 617–18.

<sup>19</sup> Fifth United Nations Congress for the Prevention of Crime and the Treatment of Offenders, Geneva, Switzerland, 1–12 September 1975, "Economic and Social Consequences of Crime: New Challenges for Research and Planning", Working Paper prepared by the Secretariat, UN doc. A/CONF.56/7, para. 37:

The administration of justice all too often leaves the victim of crime a forgotten person. The declared and latent objectives of the prevailing systems – rehabilitation, punishment and deterrence – pit the State against the offender with little emphasis on the situation of the victim.

<sup>20</sup> Sixth United Nations Congress for the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August–5 September 1980, "Crime and the Abuse of Power: Offences and Offenders Beyond the Reach of the Law?", Working Paper prepared by the Secretariat, 22 July 1980, UN doc. A/CONF.87/6, para. 8:

The problem is urgent: these kinds of offences [by the abuse of power] and offenders characteristically victimize large groups of citizens, often entire segments of the population, and in such ways that the harm to the individual is virtually unidentifiable. The perpetrators are often shielding by their power and privilege from prosecution and punishment and, indeed, "some of the most damaging antisocial acts are not yet legally defined as crimes in some jurisdictions".

<sup>21</sup> See Main Principles of Justice and Assistance for Victims of Crime, annexed to the Seventh United Nations Congress for the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August–6 September 1985, "Victims of Crime", Working Paper prepared by the Secretariat, 1 August 1985, UN doc. A/CONF.121/6, pp. 59–62.

<sup>22</sup> Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, UN doc. A/Res/40/34/Annex ('Victims' Declaration').

including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights”. However, the victims of crimes (part A) are defined as those who suffered such harm “through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power” (Article 1). On the other hand, the victims of abuse of power (part B) are those who suffered harm “through acts or omissions that do not yet constitute violations of national criminal law but of internationally recognized norms relating to human rights” (Article 18). This means that while part A deals with the victims of ordinary crimes under domestic law, part B provides for the matters for the victims of violations of international law relating to human rights which could be within the scope of international criminal law according to its current sense.

Part A is notably more elaborated, and provides specifically that victims are entitled to access to mechanisms of justice and prompt redress (Article 4) and their views and concerns are to be presented and considered at appropriate stages of the proceedings (Article 6),<sup>23</sup> offenders should make fair restitution to victims, their families or dependants (Article 8), states should endeavour to provide financial compensation to victims if not available from the offenders or other sources (Article 12), and victims should receive the necessary material, medical, psychological and social assistance (Article 14). On the other hand, part B does not mention specific rights of victims, and just urges states to consider incorporating in the national law norms proscribing abuses of power and providing remedies to victims including restitution and/or compensation, and necessary material, psychological and social assistance and support (Article 19).

This feature demonstrates that the main purpose of the Victims’ Declaration was to call upon states to secure justice and assistance for victims of domestic crime by national legislation. Nevertheless the Victims’ Declaration is significant because it was the first international document that mentioned explicitly the right of victims to access to justice and to present their views and concerns at the appropriate stage of proceedings and, even to a limited extent, paid attention to the remedies to the victims of violations of international law.

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<sup>23</sup> This Article concerning victim participation is worded so broadly that it does not oblige states to secure victim’s rights of specific involvement in the trial process such as the right to present evidence at trial. Leyh, 2011, p. 97, see *supra* note 7.

Following the adoption of the Victims' Declaration, in 1989 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a subsidiary body of the UN Commission on Human Rights ('CHR'), entrusted the task of undertaking a study on the status of the right to reparation for victims of human rights violations to Theo van Boven as Special Rapporteur. He presented the first text in 1993 and the revised draft in 1996, and then in 1997 submitted his final draft of the Basic Principles and Guidelines on the Rights to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law.<sup>24</sup> This draft was circulated among states and other interested parties, and received a number of substantive comments.

In 1998 M. Cherif Bassiouni was appointed as an independent expert to finalise the document, and he submitted a draft to the CHR in 2000.<sup>25</sup> However, the adoption of the text was delayed due to concerns of states that the draft might imply the responsibility of states to pay compensation to the victims of the past events.<sup>26</sup> After several exchanges of views on the draft between the expert and the member states of the CHR, it was approved eventually in 2005 as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('Basic Principles'), which was then adopted in the General Assembly by consensus.<sup>27</sup>

In the Basic Principles, the victims are defined in Principle 8 as

persons who individually or collectively suffered from harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.

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<sup>24</sup> Basic Principles and Guidelines on the Rights to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, 16 January 1997, UN doc. E/CN.4/1997/104.

<sup>25</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, 18 January 2000, UN doc. E/CN.4/2000/62, Annex.

<sup>26</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Ardsley, NY, 2003, p. 95.

<sup>27</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, Annex (16 December 2005) ('Basic Principles').

It is noteworthy that, while the first half of the definition is almost the same as that of the Victims' Declaration, the second half elaborates and specifies the definition made in part B of the Victims' Declaration which mentions just the violations of internationally recognised norms relating to human rights. The Basic Principles refer separately to the violations of international human rights law and those of international humanitarian law. The explanatory comments, however, emphasise the victim-oriented perspective rather than the difference between two fields of law as follows:

Insofar as the principles and guidelines are victim oriented and are essentially predicated on the concept of social and human solidarity and not only on the concept of State responsibility, it would be difficult to link the rights of victims to the source of the conventional or customary law that is at the basis of victims' rights. Consequently, it must be understood that these principles and guidelines are not intended to reflect the legal differences between international human rights law violations and international humanitarian law violations.<sup>28</sup>

The Basic Principles provide that, in the case of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him (Principle 4). Furthermore, it states that the remedies for violations of international human rights law and humanitarian law include the victim's right to (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.

Interestingly, the Preamble of the Basic Principles emphasises that "the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of *existing legal*

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<sup>28</sup> Explanatory comments, in Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Geneva, 20, 21 and 23 October 2003, UN doc. E/CN.4/2004/57, 10 November 2003, p. 26.

*obligations* under international human rights law and international humanitarian law”.<sup>29</sup> It is, therefore, based on the premise that the rights of victim prescribed in it are not of *lex ferenda*, but already established ones in international law.

In relation to this, it should be noted that it took 16 years to complete the document. During the period from 1989 to 2005 we witness dramatic changes in the field of international criminal law: the establishment of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’) and then the ICC in rapid sequence. At the beginning of the drafting process, the document mainly focused on the violations of international human rights which can be seen as a mere extension of the Victims’ Declaration of 1985. However, its scope has been expanded to include the violations of international humanitarian law in the wake of the birth of the two *ad hoc* Tribunals, and later was profoundly affected by relevant provisions of the ICC Statute. In fact, the Preamble mentions both the Victims’ Declaration and Articles 68 and 75 of the ICC Statute as the existing outcomes to be affirmed. It is true that the drafting process of the Basic Principles has had a major impact on the development of the victim-oriented perspective in international criminal justice, but it is also true that the drafting process has been influenced by the actual progress of international tribunals and courts. In other words, the Basic Principles are, in a sense, a starting point of the victim-oriented perspective in international criminal law, but at the same time they represent the latest stage of the historical development of that perspective up to the present.

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<sup>29</sup> *Ibid.*, p. 28, Preamble, para. 7 (emphasis added). The explanatory comments also point out that:

The principles and guidelines do not create new substantive international or domestic legal obligations. They provide for mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under human rights law and international humanitarian law. At the same time, they seek to rationalize through a consistent approach the means and methods by which victims’ rights can be addressed, so as to maximize positive outcomes and minimize the diversity of approaches that may cause uneven implementation. It should be noted that the fact that the rights of victims are articulated with specificity, and their remedies addressed with particularity, does not create new substantive legal obligations.



### 20.3.2. Movements in the Regional Human Rights Courts

To trace the historical development of victims' rights, it is also indispensable to examine the practice of regional human rights bodies.

All major regional human rights conventions stress the rights of the accused in criminal proceedings. This is quite a natural consequence because a state is more powerful than any of its citizens, and the power of the state is most embodied in the field of criminal law where the state has the power to incarcerate individuals. Procedural limitations on the exercise of state power are one way to control the possible abuse of power. In fact, the drafters of the regional human rights conventions exclusively envisioned them for the protection of the rights of the accused, because they had the underlying assumption that the state has great power over the accused and therefore must abide by certain procedural standards in order to ensure the accused's fair trial. From such a point of view focusing on the relationship between a state and accused, the interests of victims were seen to be the same as those of the state trying the accused, and therefore victims were not expected to play a particular role in the criminal proceedings.<sup>30</sup>

In the late 1980s, however, a shift first occurred from the accused-focused protection of human rights to more victim-oriented one in the Inter-American Court of Human Rights ('IACtHR'). During the late 1980s and 1990s many Latin American states struggled with the consequences of the brutal civil conflict and state-orchestrated crimes like torture and enforced disappearance, which had characterised the previous decades, as well as the subsequent problems of impunity.<sup>31</sup> State authorities were protecting state agents accused of human rights abuses by failing to investigate, prosecute and punish them. Now the imbalance of power was not between the accused and a state, but rather between victims and a state. As a result, the IACtHR began adopting a strong victims' rights jurisprudence while there was no explicit provision of such rights in the American Convention on Human Rights.

The IACtHR has recognised victims' rights through its interpretations of the right to life and rights relating to personal integrity together

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<sup>30</sup> Leyh, 2011, p. 126, see *supra* note 7.

<sup>31</sup> Mykola Sorochinsky, "Prosecuting Torturers, Protecting 'Child Molesters': Toward a Power Balance Model of Criminal Process for International Human Rights Law", in *Michigan Journal of International Law*, 2009, vol. 31, no. 1, p. 186.

with Article 1(1) (general duty to ensure the full exercise of the rights), Article 8(1) (right to fair trial) and Article 25 (right to an effective remedy). In the case of *Velásquez Rodríguez*, the IACtHR found that Article 1 obliged states to investigate grave violations of human rights, and held that the duty to investigate is closely connected with the right of victims to know all the facts surrounding the disappearance of their loved one.<sup>32</sup> Afterwards, it began to recognise that impunity would foster chronic recidivism of human rights violations and total defencelessness of victims and their relatives, and to admit that states are obliged under Article 1 to prosecute the persons responsible for human rights violations and, where appropriate, punish them.<sup>33</sup> Furthermore, the IACtHR has also held that states have the duty to provide compensation for the resulting damages. In the case of *Blake*, for instance, it found that “Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake’s relatives [...] to be compensated for the damages and injuries they sustained”.<sup>34</sup>

According to the IACtHR, the obligations of states to investigate, prosecute, punish and make reparation entail a victim’s right to access to justice and the right to be heard in the judicial proceedings. In the case of *Street Children*, it found as follows:

Moreover, it is evident from Article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.<sup>35</sup>

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<sup>32</sup> Inter-American Court of Human Rights (‘IACtHR’), *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988 (Merits), paras. 166, 176, and 181 (‘Velásquez Rodríguez case’) (<https://www.legal-tools.org/doc/18607f/>).

<sup>33</sup> IACtHR, “*White Van*” (*Paniagua-Morales et al.*) *v. Guatemala*, Judgment, 8 March 1998 (Merits), paras. 173 and 181; IACtHR, *Blake v. Guatemala*, Judgment, 24 January 1998 (Merits), para. 121 (‘Blake case’) (<https://www.legal-tools.org/doc/121294/>); IACtHR, *Durand and Ugarte v. Peru*, Judgment, 16 August 2000 (Merits), para. 143 (‘Durand and Ugarte case’).

<sup>34</sup> Blake case, Judgment, para. 97, see *supra* note 33. Velásquez Rodríguez case, Judgment, para. 174, see *supra* note 32; Durand and Ugarte case, Judgment, para. 144, see *supra* note 33.

<sup>35</sup> IACtHR, “*Street Children*” (*Villagran-Morales et al.*) *v. Guatemala*, Judgment, 19 November 1999 (Merits), para. 227 (<https://www.legal-tools.org/doc/32ef2e/>).

The IACtHR has constantly held that states are obliged to provide victims with criminal process which must be effective and fair, and found explicitly in the case of *Blake* that “Article 8 (1) of the Convention also includes the rights of the victim’s relatives to judicial guarantees”.<sup>36</sup>

While not as drastic as in the IACtHR, the European Court of Human Rights (‘ECtHR’) has also paved a similar path to the right of victims. It has examined Article 1 (duty to secure rights), together with Article 2 (right to life), Article 3 (prohibition against torture and inhuman and degrading treatment), Article 6 (right to fair trial) and Article 13 (right to a remedy) to find that a state’s violations of its duties may also violate the rights of victims. According to the jurisprudence of the ECtHR, the right to a remedy for violations of the right to life and the prohibition against torture entails obligations on states to carry out effective investigations that can lead to the identification and possible punishment of those found to be responsible.<sup>37</sup> The duty of the state to carry out the effective investigations and prosecutions, in turn, derives the rights of victims to participate in judicial proceedings when national proceedings allow for participation, which includes the right to obtain information.<sup>38</sup> In light of the fundamental importance of the right to life, the ECtHR has further found that the right to a remedy requires that states to provide victims with the opportunity to claim compensation.<sup>39</sup>

The foregoing analysis of the practice of regional human rights courts clearly demonstrates that the rights of victims have been examined from late 1980s and broadly accepted in the second half of 1990s. This fact is quite important because the period of the second half of 1990s coincided with the drafting process of the Basic Principles and also the negotiating process of the ICC Statute, both of which were attempting to provide for the victim participation and the right to reparation. It follows

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<sup>36</sup> *Blake* case, Judgment, para. 97, see *supra* note 33.

<sup>37</sup> See European Court of Human Rights (‘ECtHR’), *McCann and Others v. The United Kingdom*, Grand Chamber, Judgment, Application no. 18984/91, 27 September 1995, para. 161; ECtHR, *Assenov and Others v. Bulgaria*, Chamber, Judgment, Application no. 24760/94, 28 October 1998, para. 102 (<https://www.legal-tools.org/doc/fd22dc/>).

<sup>38</sup> ECtHR, *Ogur v. Turkey*, Grand Chamber, Judgment, Application no. 21594/93, 20 May 1999, paras. 92–93; ECtHR, *Gul v. Turkey*, Fourth Section, Judgment, Application no. 22676/93, 14 December 2000, para. 93; ECtHR, *Hugh Jordan v. The United Kingdom*, Third Section, Judgment, Application no. 24746/94, 4 May 2001, para. 109.

<sup>39</sup> ECtHR, *Kaya v. Turkey*, Chamber, Judgment, Application no. 22729/93, 19 February 1998, para. 107.

from this that these processes, though being made independently of one another, shared the same mood of changing the meaning of criminal proceedings from an accused-focused one to a more victim-oriented one.

#### **20.4. International Criminal Tribunals for the Former Yugoslavia and for Rwanda**

To confirm the mood of the late 1990s, which inclined to support the victims' rights, it is interesting as well as necessary to examine the practices of the ICTY and ICTR in terms of victims.

With regard to the victim participation, neither the Statute nor the Rules of Procedure and Evidence of the ICTY provide for active involvement of victims in the criminal proceedings other than as witnesses. This is also applied to the ICTR whose Statute and Rules were modelled after the ICTY. When the ICTY Statute was prepared, a proposal allowing the appointment of separate counsel for victims was submitted, but it was not eventually accepted. The reasons for its rejection were explained as follows:

In preparing the Statute, consideration was also given to authorizing the appointment of a separate counsel for the victims to protect their interests. This would be similar to the concept of *partie civile* employed in many civil countries. However, the proposal was not accepted for several reasons. First, the Prosecutor is entrusted with the responsibility for protecting the interests of the international community in ensuring the prosecution and punishment of the perpetrators. In this respect, the victims' interests would be coextensive with those of the international community and would be adequately protected by the Prosecutor. The victims' interest in obtaining compensation is not within the jurisdiction of the International Tribunal which was established for the purpose of prosecuting and punishing the persons responsible for the atrocities. Furthermore, the participation of counsel for the victim as a third party to the criminal proceedings could lead to interference with the case presented by the Prosecutor or divert the attention of the court from the relevant issue in the criminal proceedings thereby prolonging the trial.<sup>40</sup>

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<sup>40</sup> Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 1, Transnational Publishers, Ardsley, NY, 1995, p. 139.

This explanation indicates that, at least in 1993, the victim-oriented perspective was not so valued by the drafters as compared with other factors necessary for the Tribunal, like the efficiency of criminal proceedings. According to Claude Jorda and Jérôme de Hemptinne, a victim is nothing more than the “object-matter” before the procedures of *ad hoc* Tribunals.<sup>41</sup>

The vulnerable position of victims is also applied to the system of reparation for the damages that victims suffered by the crimes falling under the jurisdiction of the *ad hoc* Tribunals. Pursuant to Article 24(3) of the ICTY Statute, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. In response to this provision, Rule 105 of the Rules of Procedure and Evidence provides that the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate. Nevertheless, the system of restitution has not been operated so far. Both the ICTY in the *Milošević* case<sup>42</sup> and the ICTR in the *Kabuga* case<sup>43</sup> have ordered the seizure or freezing of substantial assets belonging to perpetrators. These measures, however, have been taken in order to secure the arrest of an accused rather than to make restitution to victims.<sup>44</sup>

In terms of compensation, on the other hand, there were some proposals for the ICTY Statute which entrusted the ICTY with the task of dealing with the compensation claims of victim.<sup>45</sup> However, these were

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<sup>41</sup> Claude Jorda and Jérôme de Hemptinne, “The Status and Role of the Victim”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court*, Oxford University Press, Oxford, 2002, p. 1389.

<sup>42</sup> ICTY, *Prosecutor v. Slobodan Milošević*, Trial Chamber, Decision on Review of Indictment and Application for Consequential Orders, IT-99-37-I, 24 May 1999, paras. 26–29 (<https://www.legal-tools.org/doc/d50c15/>).

<sup>43</sup> ICTR, *Prosecutor v. Felicien Kabuga*, Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), Miscellaneous–Kabuga Family-01-A, ICTR-99-44B, 22 November 2002.

<sup>44</sup> McCarthy, 2012, p. 47, see *supra* note 12.

<sup>45</sup> For example, Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Turk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia (9 February 1993), Annex 6, Draft Convention on an International War Crimes Tribunal for the Former Yugoslavia, Article 30, in Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal*

not accepted, and actually no provision concerning compensation exists in the Statute.<sup>46</sup> As a result, the deficiency of the procedure for victim compensation in the Statute brought the judges of the ICTY to adopting Rule 106.<sup>47</sup> According to Rule 106, the Registrar shall transmit to the competent authorities of the states concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. Thereafter, pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. Before the national court or other body, the

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*Tribunal for the Former Yugoslavia*, vol. 2, Transnational Publishers, Ardsley, NY, 1995, p. 287; The National Alliance of Women's Organization, Re: Gender Justice and the Constitution of the War Crimes Tribunal pursuant to Security Council Resolution 808 (31 March 1993), paras. 9–10, in *ibid.*, p. 403; Recommendation of the Organization of the Islamic Conference on the establishment of an ad hoc International War Crimes Tribunal for the territory of the former Yugoslavia, annexed to the Letter Dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General, UN doc. A/47/920, S/25512 (5 April 1993), III. 4, in *ibid.*, p. 406.

<sup>46</sup> Morris and Scharf, 1995, p. 286, see *supra* note 40, explain the reasons as follows:

First, the Security Council decided to establish an international criminal tribunal to prosecute and punish the perpetrators of war crimes and other atrocities in Resolution 808 (1993). There was no indication that the Security Council intended this tribunal to deal with questions of victim compensation as a result of those crimes. Second, the International Tribunal will require substantial resources to conduct the investigation, prosecution and trial of major criminal cases. There was some question as to whether the International Tribunal would receive the necessary financial support to effectively perform its essential functions as a criminal tribunal. The proposal to have the International Tribunal also function as a claims commission could not be reconciled with existing financial constraints.

<sup>47</sup> Antonio Cassese, the first President of the ICTY, described the background of adopting Rule 106 as follows:

We decided to adopt provisions in Rule 106 of our Rules of procedure whereby the Tribunal has the right to transmit the judgement to the relevant national authorities deciding that somebody, say, has been raped or has been the victim of physical atrocities, and then we also go on to say that under the national legislation the victim, or person claiming through the victim, may bring action in a national court. This is a sort of hint to the victim: please go to the national court and try to get some sort of vindication of your rights.

Comment by Antonio Cassese, in Albrecht Randelzhofer and Christian Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instance of Grave Violations of Human Rights*, Martinus Nijhoff, The Hague, 1999, p. 48.

Judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Thus, the structure of the ICTY and ICTR presupposes individual access to national courts by each victim and leaves the decision of whether to provide compensation to the national judicial system. In post-war Yugoslavia and Rwanda, however, domestic courts were ill-prepared to handle such cases.<sup>48</sup> In fact, neither the ICTY nor the ICTR has ever put Rule 105 or Rule 106 into effect. The reparation system in the *ad hoc* Tribunals ended up being “pie in the sky”.

Significantly, in 2000, the vulnerable position of victims in the ICTY and ICTR was once challenged, and a movement toward its improvement emerged. Carla Del Ponte, then Prosecutor of both Tribunals, raised the issue of incorporating victims’ compensation and participation in proceedings before the Security Council.

The voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. [...] It is regrettable that the Tribunal’s statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed. And yet my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it. We should therefore give victims the right to express themselves, and allow their voice to be heard during the proceedings. [...] I would therefore respectfully suggest to the Council that present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process.<sup>49</sup>

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<sup>48</sup> M. Cherif Bassiouni, “International Recognition of Victims’ Rights”, in *Human Rights Law Review*, 2006, vol. 6, no. 2, pp. 242–43.

<sup>49</sup> Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council, Press Release, The Hague, 24 November 2000, JL/P.I.S./542-e (<http://www.icty.org/sid/7803>). See also Statement of the Prosecutor, Ms. Del Ponte, before the Security Council, Provisional Verbal Record of 4150th meeting, 2 June 2000, UN doc. S/PV.4150, pp. 5–6.

Almost at the same time, the ICTY judges examined the possibility of improvement at the plenary meeting and adopted the report which reviewed relevant principles and assessment of the current state of international law including the Victims' Declaration, Basic Principles and the system of the ICC for victims.<sup>50</sup> In view of the current situation, the report stated that "there does appear to be a right to compensation for victims under international law",<sup>51</sup> but answered in the negative to the issue of amending the Statute and the Rules for victims. The report explained the reasons as follows:

While it would be possible for the Tribunal's Statute and Rules to be amended to provide for a procedure akin to that envisaged in the International Criminal Court, there are a number of factors that make this approach very difficult to implement. These procedures would increase the workload of the Chambers and further exacerbate the length of the Tribunal's proceedings, thus undermining its efforts to provide accused with fair and expeditious trials. Moreover, the Tribunal has now been in existence for a number of years, and the introduction of such procedures is likely to prove difficult to implement and run counter to its principal objective of prosecuting those responsible for the crimes in the former Yugoslavia. In view of the strenuous efforts that the Tribunal is making to address the length of its trials, it would not be wise to debate and adopt procedures which undermine those efforts.<sup>52</sup>

The ICTR judges also discussed compensation for the victims in Rwanda, but the conclusion was virtually the same as that of the ICTY judges.<sup>53</sup> Following the negative decisions of the judges of both Tribu-

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<sup>50</sup> Letter dated 12 October 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General, annexed to the Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, 3 November 2000, UN doc. S/2000/1063, paras. 5–18.

<sup>51</sup> *Ibid.*, para. 21.

<sup>52</sup> *Ibid.*, para. 47.

<sup>53</sup> "The judges wholeheartedly empathize with the principle of compensation for victims, but, [...] believe that the responsibility for processing and assessing claims for such compensation should not rest with the Tribunal." Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, *annexed to* the Letter dated 14 December 2000 from the Secretary-General addressed to the President of the Security Council, UN doc. S/2000/1198, 15 December 2000, p. 3.



nals, the idea of establishing a more victim-oriented system in the *ad hoc* Tribunals was abandoned.

For the purpose of this study on the historical development of victim-oriented perspective, it is quite interesting that the ICTY, which was established in 1993 on the premise that the *sole purpose* of an international criminal tribunal is to try those responsible for the crimes under its jurisdiction and to provide the accused with fair and expeditious trials,<sup>54</sup> had to take into account seriously the new trend of respecting the interests of victims in 2000, even if it ended in vain. This suggests that the victim-oriented perspective in international criminal law bloomed in the mid-1990s and then rapidly became dominant in late 1990s and early 2000s with the adoption of the ICC Statute. In this regard, it is necessary to offer an overview of the negotiating process of the ICC Statute concerning victim participation and reparation.

### 20.5. Negotiating Process of the ICC Statute

The approach to victim reparation in the draft Statute for an international criminal court drafted by the ILC was more restrained than the form the ICC Statute eventually took. In 1993 the Working Group of the ILC drafted a provision stipulating that the court may order the confiscation of property and proceeds unlawfully obtained and may further order the return of such property to its rightful owner and the payment of fines or illicit proceeds to the Registrar to defray the costs of the trial, to the state whose nationals were the victims of the crime or to a fund to be established by the UN Secretary-General.<sup>55</sup> The present provision appears to be in line with the restitution system under ICTY Rule 105, and be more vic-

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<sup>54</sup> United Nations Security Council, Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, UN doc. S/RES/827, para. 2 ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>):

The Security Council [...] Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace [...].

<sup>55</sup> Draft Statute of an International Criminal Court, Article 53 and Commentary, in Report of the Working Group on a Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission*, 1993, vol. II, part 2, UN doc. A/48/10, p. 125 (<https://www.legal-tools.org/doc/f3681f/>).

tim-oriented to the extent that it envisaged the establishment of a fund for victims.

In the draft of 1994, however, the relevant provisions concerning the competence of the court in regard to forfeiture and restitution were deleted. The members of the ILC felt that such a remedy was more appropriate in a civil rather than a criminal case, and that allowing the court to consider the remedy of victims would be inconsistent with its primary function, namely to prosecute and punish without delay perpetrators of the crimes. On balance, the ILC considered that these issues were best left to national jurisdictions.<sup>56</sup> No further proposal to confer upon the court a competence to deal with reparation including compensation was made in the ILC draft, while the idea of establishing a trust fund was maintained as the mechanism to which the fine paid by indicted persons was to be transferred.

Following the ILC's work, the Preparatory Committee elaborated the discussions on the reparation for victims, in which two concrete proposals were made. The first proposal titled "Compensation for the Victims" virtually echoed ICTY Rule 106, according to which the Registrar shall transmit to the competent authorities of the states concerned the judgment by which the accused was found guilty, and the victims may institute proceedings in a national court in order to obtain compensation for the prejudice the accused caused to them. The judgment of the court shall be binding on national jurisdictions as regards the criminal liability of the person convicted and the principles relating to compensation and restitution.<sup>57</sup> The second proposal, which was made by France, directly entrusted the court with the competence in terms of compensation and restitution. It provided that "[w]here necessary, it shall also establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the persons convicted".<sup>58</sup>

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<sup>56</sup> Draft Statute of an International Criminal Court, Article 47 and Commentary, *Yearbook of the International Law Commission*, 1994, vol. II, part 2, UN doc. A/49/10, p. 60 (<https://www.legal-tools.org/doc/2081e3/>).

<sup>57</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (Compilation of proposals), General Assembly Official Record, 51st sess., suppl. no. 22A, 13 September 1996, UN doc. A/51/22, p. 224 (<https://www.legal-tools.org/doc/03b284/>).

<sup>58</sup> *Ibid.*, p. 223.

The direct and more ambitious approach taken by the French proposal raised the concerns of some states that the court's competence to award compensation in terms of crimes under international law may imply the responsibility of states and eventually be used to make reparation orders against them. It is widely believed that the proposed reparations article was a "stalking horse" for awards of reparations against states.<sup>59</sup> In addition, there was also a concern that the reparation procedure would impose a significant additional burden upon the court and hamper it in discharging its core mandate of prosecuting and punishing those responsible for heinous crimes.

In spite of these concerns, subsequent discussions in the Preparatory Committee and the Rome Conference basically moved towards the support for the strong regime for victim reparation in line with the French proposal. This was due in no small measure to the willingness of common law states, particularly the United Kingdom, which are not so familiar with the reparation for victim through criminal proceedings in their domestic legal system.<sup>60</sup> Furthermore, the participation of numerous non-governmental organisations ('NGOs') in the negotiations leading to the Rome Conference boosted the support for a reparation system more ambitious than that undertaken by the ILC. NGOs not only participated in the negotiating process in a capacity as observers but they also prepared expert analyses of crucial issues, disseminated opinions and proposed draft texts. Indeed, the adoption of the relevant provisions to establish a regime of victim participation and reparation owed much to the lobbying efforts of the NGOs.<sup>61</sup>

Until the last meeting of the Preparatory Committee, the draft text has been improved significantly in favour of a positive approach, and the text forwarded to the Rome Conference explicitly provided that "[t]he Court may make an order directly against a convicted person for an appropriate form of reparations to, or in respect of, victims, including resti-

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<sup>59</sup> Christopher Muttukumar, "Reparations to Victims", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, The Hague, 1999, p. 264.

<sup>60</sup> Fiona McKay, "Are Reparation Appropriately Addressed in the ICC Statute?", in Dinah Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, Transnational Publishers, Ardsley, NY, 2000, p. 168.

<sup>61</sup> McCarthy, 2012, pp. 52–53, see *supra* note 12. See also Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press, Oxford, 2007, pp. 71–74.

tution, compensation and rehabilitation”.<sup>62</sup> Thus, at the Rome Conference, the issue became how strong a reparation article there would be, not whether there would be one at all.<sup>63</sup>

The most crucial problem in the Rome Conference was whether the competence of the court in terms of reparation should be extended to the states concerned with a case under trial. The final draft submitted to the Conference, even in the bracketed form, provided that the court may also make an order that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a state, if the convicted person was, in committing the offence, acting on behalf of that state in an official capacity.<sup>64</sup> The present provision received support from a number of states, partly because the Victims’ Declaration stipulates that “where public officials or other agents acting in an official or quasi-official capacity have violated national criminal law, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted”.<sup>65</sup> However, a significant number of states were strongly opposed. Their most cogent argument came from the basic philosophy of the international criminal court: if the award of reparations could be made against states, that reparation regime would be based on the principle of state responsibility. On the other hand, the envisaged international criminal court would work under the principle of individual responsibility. According to opponents of the proposal, the reparation regime against states would be inconsistent with the basic framework of the court and, if accepted, the provisions on jurisdiction and admissibility of the Statute would have required substantial reconsideration.<sup>66</sup> In response to this situation, France and the United Kingdom made

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<sup>62</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Draft Statute of an International Criminal Court, Article 73(2)(a), in Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Final Act, UN doc. A/CONF.183/2/Add.1, 14 April 1998, p. 117 (‘Report of the Preparatory Committee, Article 73(2)(a)’) (<https://www.legal-tools.org/doc/816405/>).

<sup>63</sup> McKay, 2000, p. 170, see *supra* note 60.

<sup>64</sup> Report of the Preparatory Committee, Article 73(2)(a), p. 117, see *supra* note 62.

<sup>65</sup> Victims’ Declaration, Art. 11, see *supra* note 22.

<sup>66</sup> Muttukumaru, 1999, p. 268, see *supra* note 59.

a joint proposal of a new provision deleting the order to states,<sup>67</sup> which eventually became Article 75 of the ICC Statute.

It is true that the ICC Statute achieved breakthrough results and paved the way for incorporating the victim-oriented perspective into international criminal law. Nevertheless, the fact remains that its success was achieved by the exclusion of state responsibility to make reparation to victims which had been accepted, at least partially, in the Victims' Declaration and the jurisprudence of human rights courts, and later would be fully admitted in the Basic Principles.<sup>68</sup> In light of the complex negotiating process, the reparation regime under the ICC Statute is the result of pragmatic compromise rather than a carefully planned overarching framework based on the victim-oriented perspective.<sup>69</sup> It is not a perfect system, but because of its imperfection there is room for it to be enriched further by incorporating subsequent developments of international law. Actually, it appears that this process has started.

## 20.6. Conclusion

In the 2012 Decision in the *Lubanga* case, the Trial Chamber I of the ICC points out as follows:

The Chamber accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best

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<sup>67</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Article 73, Reparations to Victims: Proposal Submitted by the Delegations of France and the United Kingdom of Great Britain and Northern Ireland, UN doc. A/CONF.183/C.1/WGPM/L-28, 26 June 1998 (<https://www.legal-tools.org/doc/eba97a/>).

<sup>68</sup> Basic Principles, para. 15, see *supra* note 27:

In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.

<sup>69</sup> McCarthy, 2012, p. 53, see *supra* note 12.

Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles. These international instruments, as well as certain significant human rights reports, have provided guidance to the Chamber in establishing the present principles.<sup>70</sup>

Among the six documents enumerated, four were adopted after the ICC was established: the Basic Principles (2005), the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005),<sup>71</sup> the Nairobi Declaration on Women and Girls' Right to a Remedy (2007)<sup>72</sup> and the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007)<sup>73</sup>. It is clear that these documents were drafted under the strong influence of the ICC system on victim participation and reparation. Without the relevant provisions of the ICC Statute, these documents would not have come into existence or, if they had, would have only come much later. On the other hand, as the Decision mentioned, the Trial Chamber relied on these documents to set up the concrete principles applied to the reparation for the victims of crimes that Lubanga had committed.

This suggests quite symbolically that the victim-oriented perspective in international criminal law has been developed in a cross-referencing way. One document provides the origin of certain ideas to be referred to by relevant subsequent documents, but at the same time, that document itself can elaborate, and sometimes expand, its contents by incorporating the ideas of those subsequent documents. In fact, there were frequent cross-references in the discussions concerning the ICTY/ICTR Statute and Rules, the ICC Statute, the Basic Principles and other relevant documents. The *Lubanga* decision indicates that this dynamism is certain-

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<sup>70</sup> Lubanga case, Decision, para. 185, see *supra* note 2.

<sup>71</sup> United Nations Economic and Social Council, resolution 2005/20, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN doc. E/RES/2005/20, 22 July 2005.

<sup>72</sup> The Nairobi Declaration was issued by women's rights advocates and activists, as well as survivors of sexual violence in situations of conflict at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi, 19–21 March 2007 ([https://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf)).

<sup>73</sup> Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles), adopted at the International Conference on Free Children from War, Paris, February 2007 ([http://www.unicef.org/protection/files/Paris\\_Principles\\_EN.pdf](http://www.unicef.org/protection/files/Paris_Principles_EN.pdf)).

ly working to bring about a more elaborated victim-oriented perspective in the field of international criminal law.





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## A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice

Chris Mahony\*

### 21.1. Introduction: Case Selection Independence as a Justice Cascade Barometer

Over the past two decades, international institutions have increasingly been established to prosecute international crimes, including: war crimes, crimes against humanity, genocide, other serious violations of international humanitarian law and, ostensibly, crimes against the peace (the crime of aggression).<sup>1</sup> In this chapter<sup>2</sup> I argue that the international system

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<sup>1</sup> International crimes generally considered under customary international law to be those for which individual criminal responsibility may be applied. For an examination of these crimes see Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2008; Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, New York, NY, 2009; M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Ardsley, NY, 2003.

<sup>2</sup> I thank more than 150 interviewees who provided invaluable data for this work as well as the experience provided by colleagues at various international criminal justice institutions, think tanks and universities with whom I have been fortunate to work. Particular thanks are due to Professor David Anderson for his comments, support and supervision throughout my D.Phil. thesis from which this chapter partially draws. Thanks to Lee-Lon Wong, Benjamin Mugisho, Maanya Tandon and Stephanie Burgenmeier for research assistance. Thanks also to Keble College, Oxford, CILRAP and Auckland University Law School for

and the post-Cold War global order critically shaped the trajectory of international criminal law enforcement in two ways. First, it enabled a contest over control of case selection primarily between powerful states and weak states,<sup>3</sup> and, to a lesser extent, with actors seeking independent prosecution of core international crimes cases. Second, as a part of the weak versus powerful state contest, it preferred the prosecution of international humanitarian law violations (*jus in bello*) to prosecution of the crime of aggression (*jus ad bellum*).

In order to identify these two emergent trends we must look beyond the legal instruments (referred to in the theme of the research project of which this chapter is part as the significant building blocks), and towards the interests of those actors who design them. By identifying the historical positions of states, one can identify the trajectory of international criminal justice, the behaviour it enables and stigmatises, and the impact of shifting global power dynamics on its post-Cold War re-emergence.

I begin the chapter by surveying some of the leading theoretical approaches to identifying the contestation of realist state self-interest with normative advance of international crimes prosecution. I identify the gap in the literature that demands a consistent theoretical framework capturing the interface of these two often-competing forces across the international criminal justice landscape. I then introduce the key elements of case selection independence before examining examples of when and how case selection independence elements have been compromised. In doing so, I identify the historical origins of the contemporary international criminal justice framework: weak versus powerful state competition over the prosecution of the waging of war or its conduct, and over case (including situation) selection control.

To identify international criminal law and international criminal law's historical origins, I focus on the international criminal justice function of greatest geopolitical utility to states: case selection. The power to shape what and who is prosecuted within international criminal justice is significant. It enables power to stigmatise particular actors or entities – creating and reinforcing narratives about conflicts, and lending diplomatic

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supporting fieldwork that informed this chapter. The views expressed are my own and do not reflect those of CILRAP or the World Bank. Any errors are and remain my own.

<sup>3</sup> I loosely define powerful states as those holding permanent seats at the United Nations Security Council and weak states as those not holding permanent Security Council membership and commonly residing in the Global South.

weight to subsequent action (whether diplomatic, military, or economic). Focusing on the positions of state actors relating to the elements that affect case selection helps identify the behaviour actors sought to deter. It also identifies how enforcement of that deterrence would be controlled – the extent to which international criminal justice is strengthening or weakening.

The literature addressing whether international criminal justice is becoming more independent of political pressure or more captured by it, is growing. Gary Bass argues that victors establishing courts to prosecute core international crimes were not just trying to dispose of their enemies. He suggests legalist values spill into international relations causing states to pursue justice for foreign nationals.<sup>4</sup> He notes that tribunals “seem” to make an impact and that not all victor’s justice is the same.<sup>5</sup> Tribunals certainly have an impact. The stigma attached to an accused by a core international crimes indictment also constructs a narrative around an accused’s role in the conflict. Shaping the narrative around that role informs and legitimises subsequent action on the part of an accused’s adversaries. Bass also correctly observes that not all victor’s justice is the same. However, he provides a particularly low bar of criteria for determining *bona fide* international crimes prosecutions (“independent judiciary, the possibility of acquittal, some kind of civil procedure, and some kind of proportionality in sentencing”).<sup>6</sup> His criteria simplify the many complexities of criminal justice design and function, ignoring many methods available to those seeking to undermine an independent prosecution of international crimes cases in a given conflict. Bass’s low bar also enables his interpretation of international criminal justice employed by British and American governments as driven by the norm of legalism.

David Bosco is less deferential than Bass. Bosco more directly engages prosecution case selection independence in his analysis of the International Criminal Court’s (‘ICC’) first 10 years.<sup>7</sup> Bosco observes four powerful state positions towards the Court including:

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<sup>4</sup> Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2014, pp. 12, 14.

<sup>5</sup> *Ibid.*, pp. 14–15.

<sup>6</sup> *Ibid.*, p. 16.

<sup>7</sup> David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, New York, 2013.

1. 'Active marginalisation' including verbal attacks against legitimacy, resource deployment to undermine other states' support, and Security Council deferrals;
2. 'passive marginalisation' including withholding of diplomatic and resource support and advocacy in support of alternative courts;
3. 'control' including Security Council referrals to shape case selection, selective resource provision and leverage of budgetary support; and
4. 'acceptance' including moves towards membership, non-selective provision of support (including Security Council referrals).<sup>8</sup>

Bosco also observes four categories of prosecution case selection response to external political pressure:

1. 'Apolitical' including no political consideration and case selection based on crimes' gravity and independent application of law to fact;
2. 'pragmatic' pursuit of case selection that allow trials to function by avoiding antagonism of governments that might withhold cooperation;
3. 'strategic' case selection that builds key diplomatic relations and avoids antagonism of powerful states; and
4. 'captured' case selection directed by powerful states and that responds to their interests.<sup>9</sup>

Bosco's categories of politicisation are of descriptive utility but without a framework for distinguishing one category of independence from another. The literature more broadly is also without a framework for identifying politicisation through both the design and function of jurisdictions to try core international crimes cases. Bosco's prosecution categories accept the jurisdictional constraints the Rome Statute endow upon the ICC. Like Victor Peskin, Bosco considers the extent to which the prosecutor is constrained by political pressure in performing her or his function.<sup>10</sup> To distinguish between categories of independence from political pressure within a court prosecution, or more importantly, to compare one tribunal to another or to assess whether international criminal justice is becoming more independent of political pressure or more captured by it, both the

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<sup>8</sup> *Ibid.*, p. 12.

<sup>9</sup> *Ibid.*, p. 20.

<sup>10</sup> Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge University Press, Cambridge, 2008.

jurisdictional and functional constraints of prosecution case selection must be considered cumulatively. This requires that we consider the historical origins and context of each court's creation and how that context shaped the jurisdictional and co-operative constraints upon prosecution case selection.

This chapter examines the factors affecting the 'independence' of prosecution case selection and their historical origins. It considers the cases of the ICC, the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR'), and the Special Court for Sierra Leone ('SCSL'). I examine case selection in what Kathryn Sikkink terms "international trials" – trials of individuals (rather than states) for human rights violations in a particular conflict resulting from co-operation between multiple states, usually through the United Nations ('UN').<sup>11</sup> International trials are the first of two streams of international crimes prosecution that Sikkink cites as driving individual criminal responsibility in international law towards "hard law" status.<sup>12</sup> The second stream is domestic and foreign prosecution.<sup>13</sup> Sikkink claims that people working in like-minded governments and international and domestic non-governmental organisations ('NGOs') drove these two streams, causing what she calls a "justice cascade".<sup>14</sup>

Sikkink's theory of a justice cascade has gained prominence suggesting that the historical origins of international criminal law lie predominantly in the normative intent of persons seeking independent prosecution of core international crimes cases. A "cascade" is the second of three stages of a norm's life cycle that Martha Finnemore and Sikkink cite. The first is "norm emergence" when norm entrepreneurs with convictions about change emerge to use existing platforms to proselytise, causing states to adopt norms where it is politically expedient to do so. The second stage is the "norm cascade", when, after enough states adopt the norm, international influence without domestic pressure procures various

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<sup>11</sup> Kathryn Sikkink, "From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations", in Walter Mattli and Ngaire Woods (eds.), *The Politics of Global Regulation*, Princeton University Press, Princeton, NJ, 2009.

<sup>12</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W.W. Norton, New York, 2011, pp. 96–97.

<sup>13</sup> *Ibid.*, p. 97.

<sup>14</sup> *Ibid.*, p. 98.

levels of conformity. The third stage is “norm internalisation” when, over time, norms are internalised and professionals press for codification.<sup>15</sup>

A cascade presumes that enough states have adopted the norm of individual criminal accountability and that international influence, without domestic pressure, procures levels of conformity. A cascade constitutes “a rapid, dramatic shift in the legitimacy of norms and actions on behalf of those norms”.<sup>16</sup> Do “various levels” of conformity constitute “rapid, dramatic” shifts, or does it depend on the level of conformity? What if the level of conformity declines? If conformity declines, this chapter presumes, a norm is no longer “cascading”. It is in fact, “contracting”. In her analysis, Sikkink aggregates domestic (local prosecution of local crimes), foreign (prosecution of crimes committed elsewhere) and international prosecutions by courts and tribunals established by multiple actors under treaty or through the UN.<sup>17</sup> In doing so she states:

The justice cascade is a dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (like trials) on behalf of those norms. It doesn't mean that true justice will be done, just that the norm has new strength and legitimacy as we can see from how common it has become to put state officials on trial.<sup>18</sup>

“Strength” and “legitimacy” are bold claims, but do these claims apply to international criminal justice, and particularly to case selection independence at the ICTY, ICTR, SCSL and ICC? Sikkink's theory would suggest that the evolution of these tribunals would have applied greater co-operative pressure to state actors, greater delegation of case selection power to international courts and, therefore, greater independence to prosecution case selection within those Courts, via international rather than domestic pressure. Sikkink makes the claim, for example, that the ICC constitutes a strong and independent court, without stating what constitutes “independence”.<sup>19</sup>

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<sup>15</sup> Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, in *International Organization*, 1998, vol. 52, pp. 887–917.

<sup>16</sup> Cass Sunstein, *Free Markets and Social Justice*, Oxford University Press, New York, 1997, cited in Sikkink, 2011, p. 8, see *supra* note 12.

<sup>17</sup> Sikkink, 2011, see *supra* note 12.

<sup>18</sup> *Ibid.*, p. 8.

<sup>19</sup> *Ibid.*, pp. 119–20.

A clearer indication of a norm's strength is the extent to which a court enjoys a level of independence sufficient that it may act against the interests of those that designed it. I view case selection independence as the court function of greatest political consequence and therefore an alternative, and arguably more illuminating, measure of normative pressure than the number of international crimes cases. Whether prosecuted or not, the indictment of an individual attaches a degree of stigma to that actor as well as the military or armed group he or she is associated with. That stigma shapes narratives about who the constructive and destructive actors in a conflict are. The stigma lends legitimacy to other actions that may advance the agenda (whether normative or realist) of state and non-state actors. In using case selection independence to identify institutional integrity sufficient to act against designing interests, I set out what independence is and how elements of independence can change. By doing so, I consider the quality of international crimes prosecution, not the quantity.

Sikkink preferences domestic mechanisms, citing critics of the ICC as failing to understand the decentralised and secondary nature of international accountability systems while admitting that enforcement quality varies between countries.<sup>20</sup> I observe that many elements of case selection independence at international courts remain vulnerable. However, many of those elements, particularly those relating to state co-operation, appointment of personnel, and process design, are even more vulnerable to political manipulation at the domestic level.

Sikkink acknowledges that the “norm of individual criminal accountability of state officials for human rights violations is not anywhere near becoming internalized or taken for granted”.<sup>21</sup> However, she also states, “whether a state official is prosecuted for human rights violations depends mainly on whether determined and empowered domestic litigants are pressing for accountability”.<sup>22</sup> By considering the elements of case selection independence, one can better assess Sikkink's constructivist case that a cascade of international crimes prosecutions is being driven by the determined norm promotion of human rights advocates in government and civil society, rather than the more realist interests of states.

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<sup>20</sup> *Ibid.*, p. 19.

<sup>21</sup> *Ibid.*, p. 12.

<sup>22</sup> *Ibid.*, p. 18.

States wielding power over the design and function of a court have significant power over the state, and often the region, in which crimes occurred. The nature of a government's role in creating, designing and co-operating with courts is of increasing importance in international relations and for understanding the origins of international criminal justice.

The variety of processes that the selection of cases to be prosecuted can initiate is wide and the outcomes of these processes important. From the vantage point of a government, investigation and prosecution of alleged state crimes may cause various levels of economic, political and other sanctions that can constrain the operation of key actors and the state (or non-state group) apparatus. Sanctions may weaken a government's capacity to repel armed internal or foreign groups and may lend those groups legitimacy. They may also weaken the government's domestic popularity. Conversely, prosecution of an armed group may entrench a government in power by stigmatising certain groups or individuals and justifying sanctions or military action that weaken the armed group's legitimacy and resources. The power to influence which crimes are investigated can assist states in strengthening their legitimacy and advancing their interests. For that reason, identifying the factors that affect the independence of international crimes case selection is important for scholars seeking to explain the emergence of international institutions empowered to take such politically significant action. Explanations emphasising the role of norms suggest the normative power of international crimes prosecution is more instructive than states' interest in shaping international crimes case selection. To test this, we must examine whether courts are able to pursue the very actors that designed them.

The following sections describe the case selection independence framework and the emergence of international criminal justice. The summary of approaches to creation of variably autonomous international criminal justice institutions and processes explores the ambiguity or absence of guiding principles provided by theory. The section on the emergence of international criminal justice allows the various models of international criminal courts to be examined. A historical perspective illustrates and justifies the selection of each of the identified models of international court. It also introduces the impact of self-interested state pressure on case selection in international criminal justice.



## 21.2. The Literature Examining the Politics of International Courts

As demonstrated by Bass, Sikkink and Bosco, the majority of the existing literature does not systematically link the elements of court design to state co-operation or theorise what constitutes prosecution case selection independence. Transitional justice literature on politics and international crimes prosecution primarily focuses on state co-operation.<sup>23</sup> Institutional design literature examining the design of courts and tribunals prosecuting international crimes rarely engage with the literature on state co-operation.<sup>24</sup> As a result of this disconnect between design and co-operation, political scientists and legal scholars are only now beginning to fully explore the application of international relations and political theory to international criminal law.

Victor Peskin's seminal analysis of state co-operation at the ICTY and ICTR is particularly important for understanding state methods of co-operation.<sup>25</sup> Peskin's focus on co-operative practice identifies the ICTY's and ICTR's dependence on the extent to which they are empowered to compel co-operation. He notes that by employing a range of approaches, the tribunals enjoyed co-operation from some states but not others. Instead, the complexities of state co-operation and design policy required a different form of analysis. Peskin necessarily collated the effects of an emerging collective security structure, states' interests, and the organisa-

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<sup>23</sup> See, for example, Peskin, 2008, see *supra* note 10; Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity. A Memoir*, The Other Press, New York, 2009; Phil Clark, "Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda", in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, Cambridge University Press, Cambridge, 2009, pp. 244–69; Phil Clark, "Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda", in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2010.

<sup>24</sup> See, for example, Beth Simmons and Allison Danner, "Credible Commitments and the International Criminal Court", in *International Organization*, 2010, vol. 64, pp. 225–56; Bartram S. Brown, "U.S. Objections to the Statute of the International Criminal Court", in *New York University Journal of International Law and Politics*, 1999, vol. 31, no. 4, pp. 855–92; Zachary Kaufman, "The United States Role in the Establishment of the United Nations International Criminal Tribunal for Rwanda", in Phil Clark and Zachary Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, Hurst Publishing, London, 2008, pp. 229–60.

<sup>25</sup> Peskin, 2008, see *supra* note 10.

tional dynamics that instruct court interaction with states. His analysis demonstrates the importance of localised post-conflict politics in instructing state policy towards courts and advocacy groups. For example, Peskin asserts that the Rwandan Government used geopolitics and global guilt over Rwanda's genocide to shield itself from the consequences of belligerent non-co-operation with the ICTR.<sup>26</sup> International acquiescence to the Rwandan refusal to co-operate distinguished the ICTR from states under diplomatic and economic pressure from NATO to co-operate with the ICJ. Similarly, Adam Branch and Tim Allen have also explored the extent to which state and non-state actors have manipulated the ICC's function in Uganda, as well as the impact of ICC function on Ugandan politics and security.<sup>27</sup>

To explore court empowerment requires us to turn to courts' historical origins – to their creation and design, and, ultimately, to what might explain states' positions and the power dynamics of state-court negotiation. The Rwandan Government clearly foresaw the relationship between design elements of international tribunals and the subsequent influence states would wield through co-operative leveraging. Zachary Kaufman has examined the creation of the Rwanda Tribunal, particularly the power dynamics within and between states during Security Council negotiation of ICTR Statute.<sup>28</sup> Rwanda refused to vote in favour of the ICTR Statute, citing issues including location and appointment of personnel that would affect its capacity to influence the Tribunal.<sup>29</sup>

Together, both Peskin and Kaufman suggest that states firstly develop policy regarding politically preferred case selection, before identifying and promoting legal and political theory that justifies a preferred design. However, Peskin and Kaufman, like Bass, Sikkink and Bosco, do not systematically trace the practical implications of this relationship. Ruth Grant and Robert O. Keohane distinguish between the design and functional elements of states' effect on institutional independence by dis-

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<sup>26</sup> *Ibid.*

<sup>27</sup> Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, Zed Books, London, 2006; Adam Branch, "The International Criminal Court's Arrest Warrants and the Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity", in *Harvard Human Rights Journal*, 2006, vol. 19, pp. 267–73; Adam Branch, "International Justice, Local Injustice", in *Dissent*, 2004, vol. 51, no. 3, pp. 22–26.

<sup>28</sup> Kaufman, 2008, see *supra* note 24.

<sup>29</sup> *Ibid.*

tinguishing “discretionary authorities” from “instrumental agents”.<sup>30</sup> Discretionary authorities are constrained only by their mandate or jurisdiction. While Grant and Keohane do not speak specifically to criminal proceedings, their theory can be adapted. For international crimes case selection, states would not expect to have any influence beyond the design of prosecution jurisdiction and would rely on *ex post* mechanisms for deterring abuse of power. An “instrumental agent” prosecutor has his or her independence further compromised by states through *ex ante* mechanisms such as denial of investigative access to territory or withholding of finance. The absence of specific consideration of international criminal processes in Grant and Keohane’s analysis causes them to miss some of the other *ex ante* or co-operative mechanisms affecting case selection independence in criminal rather than civil processes. They include provision of intelligence, access to and protection of witnesses, and apprehension of accused. To examine the relationship between design and co-operation, a broader temporal scope (including the historical origins of designing actor interests) with a narrower functional focus – the independence of case selection – is needed.

### **21.3. The Historical Origins of International Criminal Law through an International Crimes Case Selection Independence Framework**

In order to examine the factors affecting the independence of international crimes case selection, one must first be clear about how we define the “independence” of this process. My case selection independence framework employs the “legalisation” literature. Legalisation considers why, and to what extent, states delegate certain tasks and responsibilities to international organisations instead of acting unilaterally or co-operating directly.<sup>31</sup> I adjust the analytical framework of legalisation from judicial or administrative adjudication to criminal prosecution case selection.

Kenneth W. Abbott *et al.* describe “legalisation” as the extent to which rules and procedures hold obligation (are viewed as legally bind-

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<sup>30</sup> Ruth Grant and Robert Keohane, “Accountability and Abuses of Power in World Politics”, in *American Political Science Review*, 2005, vol. 99, no. 1, pp. 29–43.

<sup>31</sup> Darren G. Hawkins, David A. Lake, Daniel L. Nielson and Michael J. Tierney, *Delegation and Agency in International Organizations*, Cambridge University Press, New York, 2006.

ing), are precise (specific and highly elaborated) and delegate authority to an international court or organisation.<sup>32</sup>

The “obligation” that a rule or procedure wields under international law ranges from a high obligation, in which a rule or procedure is viewed as binding upon states (*pacta sunt servanda*), to states’ explicit rejection of intent to be bound by a given rule. Levels of obligation include an unconditional obligation, political treaties, national reservations or escape clauses, hortatory obligations, norms without law-making authority such as United Nations General Assembly’s (‘UNGA’) recommendations and explicit negation.<sup>33</sup> Under a legally binding agreement, states may assert legal claims, engage in legal discourse, invoke legal procedures and resort to legal remedies.<sup>34</sup> Jutta Brunnee and Stephen J. Toope present law as holding greatest legitimacy and persuasiveness in instructing state behaviour when formalised by a wide range of states into a system.<sup>35</sup>

The “precision” of a rule or procedure is the extent to which it is clear, unambiguous and narrows the scope for interpretation as to what is expected of states or other actors.<sup>36</sup> Precision ranges from rules with narrow issues of interpretation (high precision) through limited issues of interpretation, broad areas of discretion and standards of meaning only in reference to specific situations, to rules of ambiguity for which compliance is impossible to determine (low precision).<sup>37</sup>

“Delegation” of authority is the extent to which states provide authority to courts, arbitrators or administrative organisations to adjudicate disputes or the criminality of conduct. Levels of delegation range from binding regulation with centralised enforcement (high delegation), through binding regulations with consent or opt-out clauses, binding internal policies (legitimation of decentralised enforcement), co-ordination standards, draft conventions, normative statements, to forums for negotia-

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<sup>32</sup> Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, “The Concept of Legalization”, in *International Organization*, 2000, vol. 54, no. 3, pp. 402–4.

<sup>33</sup> *Ibid.*, pp. 409–10.

<sup>34</sup> *Ibid.*, p. 410.

<sup>35</sup> Jutta Brunnee and Stephen J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law”, in *Columbia Journal of Transnational Law*, 2000/2001, vol. 39, pp. 19–74.

<sup>36</sup> Abbott *et al.*, 2000, pp. 412–3, see *supra* note 32.

<sup>37</sup> *Ibid.*, p. 415.

tions (low delegation).<sup>38</sup> However, this analysis, as far as it evaluates adjudicatory independence (delegation), was taken a step further by Keohane *et al.* They place greater theoretical emphasis than Abbott and Snidal on the independence of adjudicating authority selection, and access of non-state actors to adjudicating institutions.<sup>39</sup>

Keohane *et al.* evaluate delegation based on “independence”, “access”, and “embeddedness”. “Independence” is described as adjudicatory freedom from three institutional constraints:

1. Judicial selection and tenure (varying from peer selection and long tenure through to state selection and short tenure);
2. legal discretion to interpret standards and norms; and
3. control over material and human resources.<sup>40</sup>

Institutional “access” refers to the breadth of actors that may prompt an institution to become seized of a matter and who may submit a claim to a tribunal (individual actors, groups and states through to states only).<sup>41</sup> Legal “embeddedness” refers to state or institutional control over implementation or co-operation.<sup>42</sup> Less state control and more institutional control (particularly where supported by domestic jurisdiction to implement) provides greater embeddedness and delegation.<sup>43</sup>

Keohane *et al.* view the extent to which an adjudicatory body is willing to settle disputes against states as a key indicator of its “transnational” status. They view the scope for state influence over selection of judges, available information, court finance (resource distribution relative

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<sup>38</sup> *Ibid.*, p. 416.

<sup>39</sup> Abbott and Snidal do identify the effect of state and non-state actors lobbying for favourable adjudicatory personnel as well as the role of non-state actor access to adjudicatory institutions and state policy makers without incorporating it explicitly into their theory of hard and soft law. Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance”, in *International Organization*, 2000, vol. 54, no. 3, pp. 432, 451; Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, “Legalized Dispute Resolution: Interstate and Transnational”, in *International Organization*, 2000, vol. 54, no. 3, pp. 457–488.

<sup>40</sup> Keohane *et al.*, 2000, pp. 460–62, see *supra* note 39.

<sup>41</sup> *Ibid.*, pp. 462–65.

<sup>42</sup> *Ibid.*, p. 466.

<sup>43</sup> *Ibid.*, pp. 466–67.

to case load) and capacity to find facts as critical indicators of court independence.<sup>44</sup>

“Independent” prosecution case selection must also employ many of the above criteria or elements. Employing Keohane *et al.*’s thesis, when the elements are strong – when case selection independence is high – the prosecution will select cases against the interests of those designing the court or triggering its jurisdiction. Identifying state self-interest, therefore, demands more than examination of the enabling legal instruments, but rather a multidisciplinary examination of the interests of the designing actors and the positions they take on particular case selection independence elements. These case selection independence elements include the independence of a prosecutor to select crimes, the precision of the crimes the prosecutor is empowered to prosecute, the obligation of the law upon which the prosecutor acts and the extent to which the prosecutor must reside at an institution created to prosecute precise crimes of narrow interpretation and binding obligation under international law.<sup>45</sup> The prosecutor should enjoy full autonomy, including appointment by peers to long tenure, legal discretion to interpret standards and norms, and control over prosecution material and human resources.<sup>46</sup> Both state and non-state actors, as well as the prosecutor him- or herself, should be able to trigger the prosecution to be seized of a situation. A prosecution should have power to compel co-operation from states, including through domestic courts, to obtain provision of investigative access to territory, to witnesses, to information, documentation and databases, to the accused and full assistance in the apprehension of the accused and the protection of witnesses and investigative personnel.

By considering the above elements, one can make a judgment on the independence of case selection at a particular criminal court. One can trace the particular position of states over jurisdictional and functional elements to their interests in a given situation and to their perceived interest in international criminal law enforcement – to the historical origins of international criminal law. Most importantly, the case selection independence framework allows us to observe whether case selection independence is strengthening or weakening over time. Put succinctly, independent

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<sup>44</sup> *Ibid.*, pp. 470–72

<sup>45</sup> Abbott and Snidal, 2000, pp. 401–19, see *supra* note 39.

<sup>46</sup> Keohane *et al.*, 2000, pp. 460–2, see *supra* note 39.

case selection in international crimes cases requires a transnational institution with high levels of obligation, precision and delegation, including high levels of independence, access and embeddedness.

Abbott and Snidal view high levels of obligation, precision and delegation as “hard law” or fully legalised law.<sup>47</sup> As soon as the level of any one of the variables shifts into the realm of moderate or low, the law becomes soft. This might constitute any combination of high, moderate or low levels of any variable other than when obligation, precision and delegation are all high. A continuum is thus created from “hard” through various levels of “soft” to what would be considered the softest law (where all variables are low). An institution would be considered most independent under “hard” law. Under hard law, rules fully obligate state compliance, provide little room for arbitrary interpretation, and delegate interpretative authority to an independent judicial body whose adjudication could be enforced by domestic courts.<sup>48</sup>

Keohane *et al.* describe institutions where society or individuals hold more control than governments over who judges (independence), what they judge (access), and judgment enforcement (embeddedness) as “transnational” institutions.<sup>49</sup> When the three variables are low, “interstate” institutions or processes provide states a high degree of control.<sup>50</sup> Like hard and soft law, the application of “independence”, “access” and “embeddedness” to institutions based on broad variability is not an exact science. As a consequence the application of “interstate” or “transnational” labels, like that of “hard” or “soft” law, is not binary in the sense that a range of institutional independence may constitute either description. Application of this framework remains qualitative in nature.

The legalisation literature cited above refers to judges or administrators adjudicating a diversity of disputes under international law. Abbott *et al.* cite the ICC, ITCY and ICTR as demonstrating high obligation, precision and delegation.<sup>51</sup> Under broad application of these principles, these courts might merit the status of “legalised” institutions, particularly when compared with the status of, for example, the Group of Seven largest

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<sup>47</sup> Abbott and Snidal, 2000, p. 422, see *supra* note 39.

<sup>48</sup> *Ibid.*, pp. 421–56.

<sup>49</sup> Keohane *et al.*, 2000, p. 469, see *supra* note 39.

<sup>50</sup> *Ibid.*, p. 469.

<sup>51</sup> Abbott *et al.*, 2000, pp. 406, 416, see *supra* note 32.

economies.<sup>52</sup> However, upon closer examination, these courts appear to be acting under considerable constraint. For example, the Security Council retains the option to defer ICC cases on a rolling 12-month cycle and to appoint the ICTR/Y prosecutor.<sup>53</sup> Further, the precision of prosecution case selection criteria varies between international courts and tribunals. Many elements of case selection independence, including the absence of a clear or consistently adhered to obligation to select or prioritise cases according to particular criteria, among other jurisdictional constraints, bring in to question international courts and tribunals' level of "obligation", "precision" and "delegation".

Walter Mattli and Ngaire Woods view global regulation as a multi-stage process including agenda setting, negotiation, implementation, monitoring and enforcement.<sup>54</sup> There are two key phases in which the independence of prosecution case selection is affected by the self-interest of state and non-state actors – history's manifestation in law. The first phase is the agenda-setting, negotiation and design of a court. The second phase relates to a court's function – what Mattli and Woods would term the implementation, monitoring and enforcement phases.<sup>55</sup> A court's design may affect prosecution case selection in a number of ways. The design may provide the prosecution with a very narrow or wide jurisdiction over a number of different variables. These include the crimes a prosecutor may prosecute, where and when those crimes occurred, by whom they were committed, and to what extent other states or multilateral institutions, such as the UN Security Council, must grant jurisdiction over a particular situation. Keohane *et al.* refer to such control of jurisdiction as "gatekeeping".<sup>56</sup> These jurisdictional elements of case selection independence are primarily concerned with "delegation" to the prosecution of legal discretion to select cases. However, jurisdictional elements of court design are also, with the "obligation" of the law, instructing case selection, as well as

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<sup>52</sup> This comparison is drawn by Abbott *et al.*, *ibid.*, pp. 406–7.

<sup>53</sup> Rome Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002, Art. 16 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>54</sup> Walter Mattli and Ngaire Woods, "In Whose Benefit? Explaining Regulatory Change in Global Politics", in Walter Mattli and Ngaire Woods (eds.), *The Politics of Global Regulation*, Princeton University Press, Princeton, NJ, 2009, pp. 1–43.

<sup>55</sup> *Ibid.*

<sup>56</sup> Keohane *et al.*, 2000, p. 459, see *supra* note 39.



that law's "precision".<sup>57</sup> Court design also instructs the scope of state co-operative power over case selection. These design elements include a court's location, personnel appointment processes, financial independence and capacity to compel co-operation. These factors are also concerned with "delegation" to courts of control over material resources or state co-operation.<sup>58</sup>

The second phase in which prosecution case selection is affected – court function – is linked to court design, including the obligation and precision of law, and what Keohane *et al.* describe as the "legal embeddedness" and "independence" elements of delegation.<sup>59</sup> Case selection during court function is affected by state co-operation. The dependence of the prosecution on state co-operation is instructed by the court's enabling statute or legislation. For example, the statute may assign funding responsibility to states or an impartial body, may allocate responsibility for the appointment of personnel and compel state co-operation under law and via punitive processes. Other methods of state co-operation linked but not necessarily attributable to court design, include the supply of evidence and intelligence, investigative access to territory and suspects, and access to, and the protection of, witnesses. Courts may also be affected by co-operation from NGOs, particularly relating to access to evidence and witnesses. The power of a prosecution to compel state co-operation in these elements speaks to the legal embeddedness of a court. In a situation of high embeddedness, a court could compel co-operation through domestic legal implementing mechanisms (autonomous national courts).

I divide the elements under examination into two categories, jurisdiction and function. Jurisdiction is divided up into six elements. The first element is that of jurisdiction over persons, which is further divided into nationality of persons, institutional affiliation and primacy of jurisdiction. The second element is jurisdiction over crimes. Jurisdiction over crimes is further categorised by the nature of the crimes, as well as the elements of the crimes, including *mens rea*, *actus reas* and modes of liability. The third element is the territory over which a court wields jurisdiction, while the fourth element is the temporal jurisdiction of the court. The fifth element is the access to the court, instructing who can trigger an investiga-

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<sup>57</sup> *Ibid.*, p. 461.

<sup>58</sup> *Ibid.*, p. 462.

<sup>59</sup> *Ibid.*, pp. 457–88.

tion to occur. The final element of jurisdiction oriented case selection independence is the case selection criteria a prosecutor may be directed to employ, including gravity, other considerations and seniority.

The functional group of elements includes court capacity to compel co-operation, fiscal independence and court location. Other elements of co-operation include apprehension of the accused, investigative access to territory, provision and appointment of personnel, access to and protection of witnesses, and provision of information from state and other actors.

Initiating and then shaping international crimes case selection via the aforementioned variables of jurisdiction and function has become a useful instrument of foreign and domestic policy for political actors. Case selection has also been a source of discontent amongst states that view its use as selective and inherently political. Certain states that believe they are selectively targeted for prosecution have expressed these views.<sup>60</sup> As a result, a body of literature is emerging that addresses the political nature of international criminal justice. Optimists view the emergence of international criminal justice as the start of an incremental journey toward addressing impunity for the worst crimes.<sup>61</sup> Another school of thought views international courts as instruments of power politics that harm rather than enhance global security.<sup>62</sup> Others still are cognizant of the politicisation of international criminal justice but are less certain about its trajectory or destination, or the deterrent effect it may have on future perpetration of international crimes.<sup>63</sup> The international criminal justice literature has yet

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<sup>60</sup> African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly of the African Union, Thirteenth Ordinary Session, 1–3 July 2009, Decisions and Declarations, 3 July 2009, Assembly/AU/Dec.245(XIII)Rev.1 ('African Union, Decision').

<sup>61</sup> Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary*, Oxford University Press, Oxford, 2011; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, New Press, New York, 2000.

<sup>62</sup> Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror*, Pantheon, New York, 2009; Alex de Waal, "Darfur, the Court and Khartoum: The Politics of State Non-Cooperation", in Phil Clark and Nicholas Waddell (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa*, Royal African Society, London, 2008, pp. 29–36.

<sup>63</sup> Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment", in *American Journal of International Law*, 1996, vol. 90, no. 3, pp. 501–10; Yves Beigbeder, *Judging War Criminals: The Politics of International Justice*, Palgrave Macmillan, New York, 1999; Peskin, 2008 see *supra* note 10; Nataša Kandić, "The Republic of Serbia Office of the War Crimes Prosecutor Has No Strategy for

to deconstruct comprehensively the elements of prosecution case selection independence, identify element variance, and explain the variance of those elements over time and between court models. The literature on institutional design identifies elements of “legalisation” and explanations for its variance. However, it also trains its primary focus upon civil international disputes.

International criminal justice includes elements of independence from states that are novel or of elevated importance comparative to civil disputes. The marginal level of attention that international institutional design literature pays to international criminal justice constitutes a gap in the “legalisation” literature, but more importantly for this project, a gap in the international criminal justice literature. By focusing the institutional design and legalisation framework upon international crimes case selection, this section attempts to (partially) fill that gap and provide a framework for more readily identifying the manifestation of historical self-interest in international criminal law’s development. This project facilitates a more technical formulation of what constitutes prosecution case selection independence in international crimes cases. Selection of international crimes cases is of critical importance to states and their citizens because it is the point at which international institutions encroach upon state sovereignty – where law meets politics – where history manifests.

#### **21.4. Post-Cold War Re-emergence of International Criminal Justice**

During the Cold War, prosecution of international crimes was trumped by the principle of state sovereignty. At the end of the Cold War, however, a new power dynamic of Western predominance at the UN Security Council, accompanied by human rights advocacy, caused the UN’s role to shift from merely deterring aggression to a more encompassing commitment to justice, law and order within individual states.<sup>64</sup> It also enables greater assertiveness on behalf of militarily powerful states as to the enforcement of how armed conflict is conducted. In 1991 and 1992 the Security Council authorised military action in Iraq and peacekeeping in Somalia led by

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Prosecuting War Crimes”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2009, pp. 160–61; Clark, 2010, see *supra* note 23.

<sup>64</sup> Brian Urquhart, “Security After the Cold War”, in Adam Roberts and Benedict Kingsbury (eds.), *United Nations Divided World: The UN’s Roles in International Relations*, Oxford University Press, New York, 2000, p. 82.

the United States. UN peacekeeping became a prominent Security Council response to episodes of instability and large-scale human rights violations.<sup>65</sup> In 1993 the North Atlantic Treaty Alliance ('NATO') and the UN intervened in the conflict in the Balkans. The interventionist policy, as well as civil society condemnation of abuses in that conflict, led to the creation of the first international criminal tribunal since 1946 – the UN-created *ad hoc* International Criminal Tribunal for the former Yugoslavia.<sup>66</sup>

Criminal justice processes became, and continue to be, a response to international crimes. Since 1993 five prominent criminal justice models have emerged. The first is that embodied by the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda.<sup>67</sup> The UN Security Council created the two courts under Chapter VII of the UN Charter in 1993 and 1994 respectively. This status guaranteed the tribunals UN funding as well as empowering them to compel the co-operation of other UN member states.

The second model, a permanent International Criminal Court, emerged during the Rome Conference that concluded with the Rome Statute of the ICC in 1998.<sup>68</sup> Unlike the *ad hoc* international criminal tribunals established by the Security Council to address specific episodes of international crime, the ICC Statute itself provided for the ICC as a permanent, standing institution.

The “hybrid” or “internationalised” courts represent the third model. Like the *ad hoc* international criminal tribunals, they address specific episodes of criminality. They are established, however, under the provisions of an agreement between the host state and the UN. The first hybrid or internationalised court was the Special Court for Sierra Leone in 2000, which was the result of an agreement reached by the Government of Sierra Leone and the UN Secretary-General, with the authorisation of the Se-

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<sup>65</sup> *Ibid.*, pp. 82–103.

<sup>66</sup> James O'Brien, “The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia”, in *American Journal of International Law*, 1993, vol. 87, no. 4, pp. 639–59.

<sup>67</sup> Updated Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, updated 31 January 2010 ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>).

<sup>68</sup> ICC Statute, see *supra* note 53.

curity Council.<sup>69</sup> Because the Security Council does not create the hybrids (as it does the ICTY and ICTR), they are not guaranteed funding from the UN. Instead they are dependent upon voluntary contributions from UN member states.

The fourth model is a domestic court created by the state in which it resides. Domestic courts seek to prosecute crimes committed domestically. These trials are either conducted according to the ordinary criminal justice system of the state in question or occur within special judicial mechanisms established under domestic law. Examples include the trials conducted or planned in Columbia and Uganda.<sup>70</sup>

The fifth model is the domestic exercise of universal jurisdiction. These proceedings do not require the crimes to have been committed on the territory of the state conducting proceedings. The model is exemplified by the proceedings against General Augusto Pinochet in Spain or Charles (Chucky) Taylor Junior by the United States for international crimes committed in Chile and Liberia respectively.<sup>71</sup>

The ICTY was established at a time when United States global predominance was at its peak. Military spending by Russia had shrunk from near USD 400 billion in 1988 to less than USD 100 billion by 1992, while US military spending only shrank from USD 550 billion to around USD 400 billion. While the US economy was growing quickly, Russia's economy was collapsing.

The US Government was able to negotiate acquiescence to a Security Council established international criminal tribunal for the former Yugoslavia from permanent members of the United Nations Security Council during a period of overwhelming comparative military and economic strength. One actor central to the negotiations noted that the Russian Gov-

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<sup>69</sup> United Nations Security Council resolution 1315, On the Situation in Sierra Leone, 14 August 2000, UN doc. S/RES/1315 (<https://www.legal-tools.org/doc/74b576/>). For a deeper examination of the historical origins of this resolution, see Chris Mahony, "A Political Tool? The Politics of Case Selection at the Special Court for Sierra Leone", in Kirsten Ainley, Rebekka Freidman and Chris Mahony (eds.), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone*, Palgrave Macmillan, New York, 2015, pp. 77–100.

<sup>70</sup> Colombia and Uganda have established special judicial bodies within their own domestic justice systems to hear cases of crimes that would ordinarily fall within the jurisdiction of the ICC Statute.

<sup>71</sup> Both Pinochet and Taylor were indicted for crimes committed in their respective home states by prosecutors in other domestic criminal justice systems.

ernment was so preoccupied with the collapse of the Soviet Union that it played little role in the negotiations.<sup>72</sup> The British Government of John Major was reluctant to antagonise Slobodan Milošević by creating a tribunal he might view as a threat.<sup>73</sup> Major's Government subsequently employed restraint from co-operation in provision of resources and evidence that constrained the ICTY prosecution.<sup>74</sup>

The most significant shaping jurisdictional elements during the emergence of post-Cold War international justice related to access and the criminal conduct to be prosecuted. The attempted seizure of triggering power by the United Nations Security Council and the preferencing of international humanitarian law conduct over crimes against the peace set the international criminal justice bargaining position for the negotiation of a permanent international criminal court.

By placing the Security Council as the arbiter of when international crimes cases should and should not be investigated and prosecuted, permanent members of the Security Council sought to endow themselves with veto power over the selection of when and where international crimes would be prosecuted. The case for aggressive war at the ICTR would have been difficult to substantiate but not impossible. The Ugandan Government had supported the Rwandan Patriotic Front ('RPF') in invading Rwanda from Uganda in 1990, an act that may have constituted aggression.<sup>75</sup> The Rwandan Patriotic Front's leader, Paul Kagame, was also trained in the United States. Aggression was excluded by the ICTR's limited jurisdiction over particular crimes and over a restricted time period (the 1994 calendar year).<sup>76</sup> However, in the former Yugoslavia, there was a more compelling case for the inclusion of the crime of aggression given the fact that states, such as Croatia, had declared independence and were militarily engaged extra-territorially. The US Department of State considered it too burdensome on a nascent ICTY to endow it with responsibility

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<sup>72</sup> Interview with a senior United Nations official at the time, The Hague, 29 May 2015.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Colin M. Waugh, *Paul Kagame and Rwanda: Power, Genocide and the Rwandan Patriotic Front*, McFarland and Company, Jefferson, NC, 2004, pp. 88–89; Wm. Cyrus Reed, "Exile, Reform, and the Rise of the Rwandan Patriotic Front", in *Journal of Modern African Studies*, 1996, vol. 34, no. 3, pp. 479–501.

<sup>76</sup> Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by resolution 955, UN doc. S/RES/955 ('ICTR Statute') (<http://www.legal-tools.org/doc/8732d6/>).

for determining whether states could declare independence and whether they had then legally engaged or been engaged in armed conflict.<sup>77</sup> The United States after prosecuting Germany and Japan for the crime of aggression had sought to dilute the crime of aggression during the Cold War.<sup>78</sup> Weak states had sought, in the International Law Commission's 1954 and 1974 definitions to include many components of waging war by proxy.<sup>79</sup> However, in 1989 the US Congress and then the Department of State called for the establishment of an international criminal court to prosecute terrorism, illicit international narcotics trafficking, genocide and torture, excluding crimes against the peace.<sup>80</sup> Weak states, via the General Assembly, called for an international criminal court to enforce a code of crimes against the peace and security of mankind.<sup>81</sup>

Identifying the historical origins of international criminal law requires that we identify the historical interests of those actors who design the institutions and observe whether the institutions are of sufficient institutional integrity, using the case selection independence framework, to confront designing interests by pursuing case selection that confronts their interests.<sup>82</sup> The first prosecutor to be pressed by the evidence to select such a case was Louise Arbour.<sup>83</sup> Arbour was provided with three witnesses who participated in the shooting down of the presidential airplane carrying Rwandan President Juvénal Habyarimana.

Michael Hourigan led investigations into Colonel Théoneste Bagozora, Colonel Anatole Nsengiyumva, the murder of thousands of elites in the first days of the genocide, and the shooting down of the presidential

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<sup>77</sup> Interview with former US Department of State Official, Washington, DC, 9 September 2014.

<sup>78</sup> Chris Mahony, "The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute", in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4, p. 1078.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, p. 1079.

<sup>82</sup> William A. Schabas, "The Banality of International Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 545–51.

<sup>83</sup> Louise Arbour remained unresponsive to requests for interview despite numerous attempts by this author.

aircraft on 6 April 1994.<sup>84</sup> Hourigan reported to James Lyons, an ICTR investigation leader. He was asked by Lyons to set up a more independent and sophisticated investigation that was not as dependent on local leadership in Rwanda.<sup>85</sup> In January 1997 three RPF insiders informed Hourigan that the RPF had not been happy with how the 1993 peace agreement was being implemented, and had, around 15 March 2004, put in place a contingency plan.<sup>86</sup>

Three (3) informants (either former or serving members of the R.P.F.) claiming direct involvement in the 1994 fatal rocket attack upon the President's aircraft. Their evidence specifically implicated the direct involvement of President Paul Kagame, members of his administration and military. The informants also advised that the Kagame administration was actively involved in covert operations aimed at murdering high profile expatriate Rwandans – one such murder was the death of Seth Sendashonga in Nairobi.<sup>87</sup>

In subsequent reports Hourigan described two of the witnesses as members of the RPF special operation team called “the Network”.<sup>88</sup> His UN report asserts that two of the informants were willing to testify before the ICTR that the Network had shot down the plane “with assistance of a foreign government”, if their security could be guaranteed.<sup>89</sup> The sources stated that they were able to provide hard copy evidence of the attack plan.<sup>90</sup> One of the sources was a person who shot a surface-to-air missile

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<sup>84</sup> International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v Théoneste Bagosora et al.*, Affidavit of Michael Andrew Hourigan, Exhibit DNT356, ICTR-98-41-T, 8 March 2007 (‘Hourigan affidavit’).

<sup>85</sup> Interview with James Lyons, Former ICTR investigator, 4 October 2013, via telephone (‘Lyons interview’).

<sup>86</sup> ICTR-OTP, National Team Inquiry, Secret Internal Memorandum, provided by email from Michael Hourigan, received 19 September 2013 (‘ICTR-OTP Memorandum’); Lyons interview, see *supra* note 85; Interview with Michael Hourigan, former Investigator, International Criminal Tribunal for Rwanda, 20 September 2013, via telephone (‘Hourigan interview’).

<sup>87</sup> Hourigan affidavit, para. 7.4, see *supra* note 84.

<sup>88</sup> Lyons interview, see *supra* note 85; Hourigan interview, see *supra* note 84.

<sup>89</sup> UN Office of Internal Oversight Services, Investigation Section OIOS, Confidential Information Report, Michael Hourigan, 1 August 1997, ST/SG8/273, para. iv, provided by email from Michael Hourigan (received 19 September 2013); Hourigan interview, see *supra* note 84.

<sup>90</sup> ICTR-OTP Memorandum, see *supra* note 86; Hourigan interview, see *supra* note 86.



that brought down the plane.<sup>91</sup> Neither Justice Richard Goldstone nor Arbour had ever informed the investigators that the investigation into the plane crash was outside the mandate of the ICTR.<sup>92</sup> Hourigan found the testimony to be “very detailed” and “very credible”.<sup>93</sup> Hourigan informed Commander James Lyons. Together they attended the US Embassy, where Hourigan used a secure telephone to communicate the situation to Arbour at the US Embassy in The Hague.<sup>94</sup> Hourigan was not aware of the historical relationship between the United States and the RPF that formed the nucleus of the Kagame Government.<sup>95</sup> On the phone call Arbour was excited by the investigative breakthrough, and advised Hourigan that the witness evidence corroborated information received from Alison Des Forges of Human Rights Watch (‘HRW’) implicating President Kagame.<sup>96</sup> HRW provided theories of who might have shot down the plane.<sup>97</sup> However, they have never reported findings relating to received testimony despite Hourigan’s in-person testimony to the HRW executive director in New York.<sup>98</sup> After explaining the account of what happened, the HRW executive director Ken Roth concluded the meeting without speaking to the evidence HRW had as to the RPF role in the shooting down of the plane.<sup>99</sup>

The following week, Hourigan was told that he had been asked to go to The Hague to brief Arbour on the investigations. Prior to the meeting Hourigan met with the chief investigator, Al Breau, who listened to Hourigan’s story. At the meeting, Hourigan presented Arbour with the evidence and stated that the investigators involved were held in the highest regard, a position supported by Breau, despite aggressive questioning

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<sup>91</sup> ICTR-OTP Memorandum, see *supra* note 86; Hourigan interview, see *supra* note 86.

<sup>92</sup> Hourigan affidavit, para. 6, see *supra* note 84; Hourigan interview, see *supra* note 86.

<sup>93</sup> Hourigan affidavit, para. 9, see *supra* note 84; Hourigan interview, see *supra* note 86.

<sup>94</sup> Hourigan affidavit, para. 10, see *supra* note 84; Hourigan interview, see *supra* note 86; Lyons interview, see *supra* note 85.

<sup>95</sup> Nick MacKenzie, “Uncovering Rwanda’s Secrets”, in *The Age*, 10 February 2007.

<sup>96</sup> Hourigan affidavit, para. 10, see *supra* note 84; Hourigan, 2013, see *supra* note 86.

<sup>97</sup> Alison des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, New York, 1999.

<sup>98</sup> Hourigan interview, see *supra* note 86.

<sup>99</sup> *Ibid.*

by Arbour about the sources of the information.<sup>100</sup> Arbour advised Hourigan that

the National Team investigation was at an end because in her view it was not in our mandate. She suggested that the ICTR's mandate only extended to events within the genocide, which in her view began 'after' the plane crash.<sup>101</sup>

Despite protestations that the temporal and territorial jurisdiction of the Court, as well as the crimes within the Statute, included terrorism and murder within Rwanda during 1994, Arbour insisted the investigation cease.<sup>102</sup> Arbour asked if the memorandum provided to her was the only copy.<sup>103</sup> Breau did not comment in support or against Hourigan's contestations of Arbour's decision to end the investigation. Hourigan never discovered what happened to the three informants.<sup>104</sup> The functional control of designing actors over the ICTR case selection independence appeared to have triggered its first direct and explicit intervention of restraint.

#### **21.4.1. State Self-Interest's First International Justice Test: Del Ponte, NATO and the Kagame Showdown**

Arbour's successor, Carla Del Ponte, asserted greater case selection independence than her predecessor. The exclusion of crimes against the peace from the ICTY Statute also excluded jurisdiction over the legality of NATO's military engagement in the former Yugoslavia.<sup>105</sup> On May 14 1999 Arbour had, confidentially, established a working group to assess NATO's aerial bombardment of Serbia. Del Ponte supported the working group<sup>106</sup> and publicly announced she was investigating a dossier of allegations against the NATO bombing campaign.<sup>107</sup> Del Ponte was made *persona non grata* in Washington DC where high-ranking officials refused to

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<sup>100</sup> Hourigan affidavit, paras. 20–21, see *supra* note 84; Hourigan, 2013, see *supra* note 86.

<sup>101</sup> Hourigan affidavit, paras. 21–22, see *supra* note 84.

<sup>102</sup> *Ibid.*, paras. 22–29.

<sup>103</sup> *Ibid.*, para. 28.

<sup>104</sup> MacKenzie, 2007, see *supra* note 95.

<sup>105</sup> Aaron Schwabach, "The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia", in *Pace International Law Review*, 1999, vol. 11, no. 2, p. 405.

<sup>106</sup> Del Ponte, 2009, p. 59, see *supra* note 23.

<sup>107</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2012, p. 290.

meet with her as part of an “isolate and annoy” strategy.<sup>108</sup> It was at this time that a sleeping giant – the United States – was awakened to the limits of functional control using implicit means under the *ad hoc* tribunal model.

The ICTY lacked precision in compelling the prosecution to prioritise cases according to specific criteria. In identifying the rationale for refraining from indictments over NATO aerial bombardment, one ICTY Office of the Prosecutor (‘OTP’) officer stated:

Each of those five incidents were questionable in their own way and reasonable minds could differ as to whether or not an individual war crime was entailed, but I think the first thing is that if you’ve got a scenario where you’re from the outset having a debate between reasonable minds as to whether or not there’s criminality, it’s not the most promising template to launch an investigation.<sup>109</sup>

Upon questioning the rationale for the indictment of those with command control over the security forces of the Former Yugoslav Republic of Macedonia, whose forces were responsible for substantially fewer civilian deaths than the NATO aerial bombardment,<sup>110</sup> the officer noted that at that time: “We were also absolutely terrified that Macedonia was going to ignite, so we wanted to exercise jurisdiction that was to some extent, to some extent deterrent, which I don’t think was ever an argument for NATO to be honest”.<sup>111</sup>

The ICTY officer did not observe any systematised approach to case selection but rather an *ad hoc* approach that subjectively oscillated from thematic prioritisation, to attempted deterrence based on political calculation, to the gravity of the crimes committed.<sup>112</sup> The historical infancy of international criminal law at the time of ICTY case selection en-

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<sup>108</sup> Victor Peskin, citing Western diplomats, cites Del Ponte’s failure to secure Western support as a communication issue. However, David Scheffer, a former US Ambassador at Large for War Crimes, notes that Del Ponte’s lack of communication or co-operation was due to her investigation of NATO bombardment of Serbia. See Peskin, 2008, p. 211, *supra* note 10; Scheffer, 2012, pp. 291–92, *supra* note 107.

<sup>109</sup> Interview with former ICTY prosecution official, 13 August 2015, via telephone (‘ICTY prosecution official interview’).

<sup>110</sup> Xabier Agirre Aranburu, “Gravity of Crimes and Responsibility of the Suspect”, in Bergsmo, 2009, pp. 147–166, p. 160–61, see *supra* note 63.

<sup>111</sup> ICTY prosecution official interview, see *supra* note 109.

<sup>112</sup> *Ibid.*

abled a prosecution, unconstrained by a process requiring objective application of criteria to alleged conduct, to subjectively adopt and emphasise variant justifications for selecting or not selecting conduct for prosecution. The subjective imprecision of case selection was only modified to demand selection of those most responsible and subsequently also those notorious offenders by the ICTY Appeals Chamber.<sup>113</sup> The prosecutor was not constrained in pursuing crimes of greatest gravity. That opened the door for a decision, whether as a response to pressure or not, that caused the ICTY to refrain from selecting a case against the interests of the actors that designed it.

Del Ponte did assert greater case selection independence at the ICTR. While refraining from initially reopening the investigation into the assassination of President Habyarimana, she did open investigations into killings by the RPF who had been supported by the US Government. Paul Kagame, who led the RPF and subsequently became President, employed co-operative pressure through the withholding of prosecution access to territory for investigation, to witnesses and to evidence. As a consequence of the related witness and investigator safety concerns, Del Ponte decided that it was unsafe to continue investigations inside Rwanda.<sup>114</sup> In 2002 the Rwandan Government moved from impediment to complete obstruction of witness participation, bringing ICTR cases to a standstill and placing some in jeopardy.<sup>115</sup> In June 2002 the prosecutor visited Kagame in Kigali where he instructed her that the Tribunal must not investigate the Tutsi militia he had commanded.<sup>116</sup> Kagame stated: “You misunderstood what I told you before. Now I’m telling you what you are doing. Don’t touch [...] Stop the investigation. [...] We know what you are doing. [...] We will not allow you to do this”.<sup>117</sup> Del Ponte received from HRW, who wrote to the US Ambassador to the UN, a note that Rwandan claims to be pursuing RPF cases themselves were spurious – the trials were few, and the sentences were light.<sup>118</sup> The active obstruction of the Rwanda Gov-

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<sup>113</sup> International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Mučić et al.*, Appeals Chamber, Judgment, IT-96-21, 20 February 2001, para. 612 (<https://www.legal-tools.org/doc/051554/>).

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, para. 224.

<sup>116</sup> *Ibid.*, para. 225.

<sup>117</sup> *Ibid.*

<sup>118</sup> Del Ponte, 2009, p. 228, see *supra* note 23.

ernment meant the determining actor for the integrity of ICTR case selection independence would be the US Government.

In May 2003 Del Ponte was summoned to a meeting at the State Department with then US War Crimes Ambassador, and former ICTR lead prosecutor,<sup>119</sup> Pierre-Richard Prosper. Also attending was a Rwandan delegation, including the Rwandan Ambassador to the US. Prosper endorsed the Rwandan Ambassador's demand that Rwanda, not the ICTR, should investigate and prosecute RPF crimes.<sup>120</sup> At one point, Prosper presented a draft agreement that he asked Del Ponte to sign. It handed jurisdiction for prosecuting RPF crimes to the Rwandan Government. Del Ponte refused. Prosper informed her that "some States think that the [ICTR] should have its own prosecutor. You will not be reappointed. And for the [Yugoslavia tribunal] you will be reappointed only for two years".<sup>121</sup> The Security Council subsequently removed Del Ponte as ICTR prosecutor.

#### **21.4.2. The Scramble to Capture the ICC**

Del Ponte's attempted assertion of case selection independence against the interests of the ICTR's designing actors, principally the United Kingdom and United States Governments, triggered increased consciousness of the unintended consequences of case selection independence. These states were consequently particularly engaged with the election of the ICC prosecutor.

The *ad hoc* tribunals set the historical precedent for the ICC's negotiation. In 1994 the UN General Assembly established a Preparatory Committee to advise on the ICC's establishment.<sup>122</sup> The weak state-dominated UNGA resolution signalled weak states' intent to shift international justice triggering power away from the hegemony of the Security Council. Three of the five permanent members ('P5') of the Security Council, the United States, Russia and China, have not ratified the ICC Statute. Since the 1998 establishment of the ICC by the Rome Statute

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<sup>119</sup> See profile page of Pierre-Richards Prosper, Arent Fox LLP, at: [http://www.arentfox.com/people/pierre-richard-prosper#.Vih81KSX\\_m1](http://www.arentfox.com/people/pierre-richard-prosper#.Vih81KSX_m1).

<sup>120</sup> Del Ponte, 2009, p. 231 see *supra* note 23.

<sup>121</sup> *Ibid.*, p. 233.

<sup>122</sup> United Nations General Assembly resolution 49/53, Establishment of an International Criminal Court, 9 December 1994, UN doc. A/RES/49/53.

(predominantly by smaller countries) several courts, “internationalised” via UN assistance or formal UN-host state agreement, have been established. The courts for international crimes in Sierra Leone, East Timor, Cambodia and Kosovo, and political crimes in Lebanon, were predominantly designed by the Security Council, exclude the crime of aggression and assert primacy of jurisdiction over state courts.

### **21.5. What State Self-Interest Tells Us about the Historical Origins of the ICC**

The historical origins of the preference to prosecute international humanitarian law violations rather than crimes against the peace reside in the hasty post-Nuremberg repositioning of powerful states and weak states. Prosecution of crimes against the peace was envisaged at the conclusion of the First World War enabling its post-Second World War criminal enforcement.<sup>123</sup> The historical origins of the ICC Statute, therefore, may be traced to the UNGA preference for prosecution of crimes against the peace (as well as international humanitarian law violations) versus the posturing of powerful states, particularly the US Government preference for the exclusion of crimes against the peace.<sup>124</sup> Only by tracing the positioning of the small states (through UNGA documents) and powerful states (through Security Council and domestic statements of policy and preference) does the chasm show between powerful states’ attempts to reserve the right to war for state self-interest and weak states that seek to simultaneously protect against direct or indirect attack by powerful states and primacy of jurisdiction over international justice.<sup>125</sup>

UNGA’s first policy position emerged in its 1947 creation of the International Law Commission (‘ILC’).<sup>126</sup> In its first report in 1949, the ILC found that because war was outlawed, determining its conduct was no

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<sup>123</sup> Treaty of Peace between the Allied and Associated Powers and Germany, Art. 227, Versailles, 28 June 1919 (‘Versailles Treaty’) (<https://www.legal-tools.org/doc/a64206/>).

<sup>124</sup> I explore the negotiation and agreement of the ICC Statute and the election of the first prosecutor in greater depth in Mahony, 2015, see *supra* note 78.

<sup>125</sup> *Ibid.*

<sup>126</sup> United Nations General Assembly resolution 174 (II), Establishment of an International Law Commission, 21 November 1947, UN doc. A/RES/174(II).

longer relevant.<sup>127</sup> The ILC's 1954 draft statute criminalised offences against the peace, including conduct considered war by proxy such as organising, encouraging or assisting armed groups or civil unrest.<sup>128</sup> Two decades later the definition retained key elements of waging war by proxy.<sup>129</sup>

In response to United States attempts to shape the design of an international criminal court to prosecute international humanitarian law violations only, and after the 1993 Security Council creation of the ICTY, the UNGA requested ILC prioritisation of a draft ICC statute. Its initial report included the crime of aggression, including intervention and colonialism.<sup>130</sup> The other issue of concern to weak states was that of primacy of jurisdiction. The issue of primacy emerged in discussion surrounding the process for triggering ICC jurisdiction.<sup>131</sup> While some states were willing to cede primacy,<sup>132</sup> a majority of mainly weak states, but also the United States and other powerful states, sought to maintain primacy.<sup>133</sup>

One area of normative advance was the post-ILC 1994 draft introduction of the prosecutor's *proprio motu* power to trigger jurisdiction trumping an emerging compromise between weak and powerful states to share the jurisdiction trigger (between the Security Council and state par-

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<sup>127</sup> International Law Commission, Report of the ILC on the Work of its First Session, 12 April 1949, Official Records of the UNGA, 4th sess., suppl. no. 10, UN doc. A/CN.4/13, p. 281 (<https://www.legal-tools.org/doc/62cc36/>).

<sup>128</sup> International Law Commission, Report of the ILC Covering the Work of its Sixth Session, 28 July 1954, 9th sess., suppl. no. 9, UN doc. A/CN.4/88, pp. 151–52 (<https://www.legal-tools.org/doc/dd7567/>).

<sup>129</sup> United Nations General Assembly resolution 3314, Definition of Aggression, Art. 3, 14 December 1974, UN doc. A/RES/3314 (<https://www.legal-tools.org/doc/95a6b0/>).

<sup>130</sup> See United Nations Security Council, Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, UN doc. S25704, annexed to International Law Commission, Report of the ILC on the Work of its Forty-sixth Session, 2 May–22 July 1994, Official Records of the UNGA, 49th sess., suppl. no. 10, UN doc. A/49/10, pp. 21, 23 ('ILC Report 1994') (<https://www.legal-tools.org/doc/49194a/>); International Law Commission, Report of the ILC on the Work of its Forty-fourth session, 4 May–24 July 1992, Official Records of the UNGA, 47th sess., suppl. no. 10, UN doc. A/47/10, p. 12 (<https://www.legal-tools.org/doc/ccc5b8/>).

<sup>131</sup> ILC Report 1994, pp. 23–24, see *supra* note 130.

<sup>132</sup> *Ibid.*, pp. 21, 23–24.

<sup>133</sup> *Ibid.*, pp. 23–24; Scheffer, 2012, p. 169, see *supra* note 107.

ties.<sup>134</sup> This original provision of primacy to weak states compensated their self-interest for the adoption of a definition of the crime of aggression that excluded war by proxy and allows Security Council filtering of aggression cases.<sup>135</sup> While this definition of aggression ostensibly excludes waging war by proxy, recent jurisprudence suggests the mode of liability of aiding and abetting criminalises *de facto* that same conduct.<sup>136</sup> The 1994 draft provided for gravity as the sole criteria for case selection before “interests of justice” considerations were introduced to the final ICC Statute.<sup>137</sup> A UNGA *ad hoc* committee text for consideration at the Rome Conference provided for the option of complementarity.<sup>138</sup>

In the agreed ICC Statute, powerful states secured their discretion to trigger and defer jurisdiction, including over non-state parties, despite the protestations of a number of weak states and norm entrepreneurs.<sup>139</sup> Three of the five permanent members, therefore, enjoy the discretion to deploy the ICC where politically expedient while protecting their own nationals from prosecution through abstaining from ratification (in the case of Russia, China and the United States).<sup>140</sup> Similarly, these powers also enjoy the discretion, where consensus can be reached, to protect those of adequate political clout from prosecution via deferral. At the 2010 Kampala Review Conference, powerful states secured a definition of the crime of aggression that requires state against state conduct, of character, gravity, or scale constituting a manifest UN Charter violation that the violating actor was aware of.<sup>141</sup> Unlike international humanitarian

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<sup>134</sup> William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2007 p. 142.

<sup>135</sup> ILC Report 1994, pp. 38–39, 43, see *supra* note 130.

<sup>136</sup> Mahony, 2015, pp. 1112–13, see *supra* note 78.

<sup>137</sup> ILC Report 1994, p. 67, see *supra* note 130.

<sup>138</sup> Mahnouch Arsanjani, “The Rome Statute of the International Criminal”, in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 22; Schabas, 2007, p. 15, see *supra* note 134.

<sup>139</sup> ICC Statute, Art. 13(b), see *supra* note 53; Lionel Yee, “The International Criminal Court and the Security Council: Articles 13(b) and 16”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, Boston, 1999, p. 147.

<sup>140</sup> In 2000 the United States suspended their signature obligations under the Vienna Convention. American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Status of the US Signature of the Rome Statute, 11 September 2008.

<sup>141</sup> Kai Ambos, “The Crime of Aggression after Kampala”, in *German Yearbook of International Law*, 2010, vol. 53, pp. 463–509.



law violations by nationals of non-state parties on the territory of state parties, only the Security Council can trigger jurisdiction over conduct allegedly constituting aggression by a non-state party or a non-consenting state party situation.<sup>142</sup> The ICC Statute disarms weak states of unorthodox methods of defending themselves against stronger adversaries that are unafraid of committing the crime of aggression.

An area of case selection independence advance from the *ad hoc* and hybrid tribunals is the degree of precision of case selection criteria and process outlined in the OTP's Draft Policy Paper on Preliminary Examinations that evaluates jurisdiction, admissibility and the interests of justice.<sup>143</sup> The OTP, therefore, wields significant power to determine if domestic proceedings demonstrate a state is able and willing to prosecute crimes and whether crimes' gravity, victims' interests, and the "interests of justice" demand a situation's formal investigation.<sup>144</sup>

The United Kingdom and Canadian Governments quickly mobilised bureaucratic resources to help secure the election of Luis Moreno-Ocampo, an Argentinian prosecutor, as the ICC's first prosecutor.<sup>145</sup> Moreno-Ocampo subsequently hired the same personnel into key positions within the Jurisdiction, Cooperation and Complementarity Division of the OTP with significant influence over the selection of situations and cases.<sup>146</sup> The internal institutional capture was secured during the first two years of the function of the ICC. ICC prosecution personnel identify an internal struggle in which the prosecutor, supported by actors engaged in his campaign to become prosecutor, sought to extend his own discretion

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<sup>142</sup> *Ibid.*

<sup>143</sup> International Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, p. 1 ('OTP-ICC Policy Paper'); ICC Statute, Art. 53(1)(a)–(c), see *supra* note 53.

<sup>144</sup> See International Criminal Court, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo and Bosco Ntaganda*, Annex II, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-01/07, 10 February 2006, para. 29; OTP-ICC Policy Paper, pp. 10–15, see *supra* note 143; International Criminal Court, Office of the Prosecutor, Report on Activities Performed during the First Three Years (June 2003–June 2006), The Hague, 12 September 2006, p. 2; ICC Statute, Art. 53(1)(c), see *supra* note 53.

<sup>145</sup> Mahony, 2015, pp. 1096–98, see *supra* note 78.

<sup>146</sup> *Ibid.*

and to employ subjective justification for situation and case selection unsupported by the objective application of law to fact.<sup>147</sup>

### **21.6. The Historical Origins of the Latest International Criminal Justice Iteration**

State self-interest explains much about the ICC prosecution's unwillingness to pursue cases that confront powerful states' self-interest. Although a degree of ICC prosecution capture by powerful states may be observed, weak state influence over situation and case selection appears to be increasing. China's economic power is increasing. As it indicates its Security Council support for Russia's preference of the principle of state sovereignty, the Security Council appears to be a declining trigger of ICC jurisdiction.<sup>148</sup> In a May 2014 indication of this trend, Russia and China vetoed a draft resolution to refer the situation in Syria to the ICC.<sup>149</sup> The veto indicated that unlike the situation in the former Yugoslavia, where the Russian sphere of influence was impinged upon, Russia and China are prepared to obstruct ICC jurisdiction where it confronts their interests. This scenario renders the ICC more dependent upon state party or prosecutor-triggered situations, placing greater influence over situation and case selection in the hands of weak states that may withhold co-operation or situation referral. It is in this context of increasing weak state power that the African Union has become increasingly assertive in its position towards the ICC.

By 2009 the African Union was already asserting it would not cooperate with the ICC on the situation in Sudan and requesting deferral of the Sudanese and Kenyan situations.<sup>150</sup> By 2011 it continued to hold out the threat of non-cooperation, refusing to endorse the candidacy of the court's second prosecutor, Fatou Bensouda.<sup>151</sup> As strong states at the Se-

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<sup>147</sup> Interview with former Rome Conference delegate and ICC member, 4 December 2012, The Hague; Interview with former Rome Conference delegate and ICC member, 28 November 2012.

<sup>148</sup> ICC jurisdiction may be triggered by the Security Council, by the prosecutor, or by a State Party to the ICC Statute; ICC Statute, Arts. 10–16, see *supra* note 53.

<sup>149</sup> UN News Centre, "Russia, China Block Security Council Referral of Syria to International Criminal Court", 22 May 2014 (<http://www.un.org/apps/news/story.asp?NewsID=47860#.ViL96kvinKM>).

<sup>150</sup> African Union, Decision, p. 2, see *supra* note 60.

<sup>151</sup> Interview with Member, US Mission to the UN, New York, 2 November 2012.

curity Council remained unresponsive to African Union calls for deferral of the Sudanese and Kenyan situations, the African Union went further in asserting its non-co-operation.<sup>152</sup> It further argued that the ICC should not indict heads of state and that trials should occur within the territory of states where abuses occurred, exaggerating the co-operative leverage that government would enjoy.<sup>153</sup> Further, the African Union sought to elevate its engagement to ensure that the complementarity option for preventing ICC jurisdiction over senior government actors was readily available to member states. It firstly required that African Union states consult the African Union prior to referring situations to the ICC and sought to expedite the provision of jurisdiction over international crimes to the African Court of Human and Peoples' Rights. This action seeks to fully exploit the availability of complementarity to preserve *de facto* immunity for government actors while allowing the ICC to function only where it pursues the adversaries of African governments.

The Kenyan Government had requested mass departure from the ICC be employed by the African Union.<sup>154</sup> African governments were becoming weary of powerful state competence in shaping case selection at international criminal justice institutions. Alongside Rwanda, they had also observed United States and United Kingdom capacity to employ criminal justice processes to advance strategic objectives, including regime strategy in Liberia and regime support strategy in Sierra Leone.<sup>155</sup> A realist self-interested perspective of African Union member governments explains their reluctance to depart from the ICC Statute. They instead wish to lock in an institution that provides an easily gamed complementarity system rather than have the ICC fall away and risk the re-emergence of Security Council-established courts with primacy of jurisdiction over African courts.<sup>156</sup> To allow the Security Council to re-emerge as the pri-

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<sup>152</sup> African Union, Decision on Africa's Relationship with the International Criminal Court (ICC), Extraordinary Session of the Assembly of the African Union, Decisions and Declarations, 12 October 2013, Ext/Assembly/AU/Dec.1(Oct.2013), pp. 1–2.

<sup>153</sup> *Ibid.*

<sup>154</sup> This position has been intimated or requested by other African Union member governments, for example Uganda and more recently South Africa. See "Museveni Blasts ICC at UN General Assembly", in *Sudan Tribune*, 25 September 2013; "ICTJ Deplores ANC Resolution to Lead Africa-wide Withdrawal from ICC", in *SABC News*, 13 October 2015.

<sup>155</sup> Mahony, 2015, see *supra* note 69.

<sup>156</sup> For a deeper examination of the question of complementarity and African Union repositioning, see Christopher Mahony, "If You're Not at the Table, You're on the Menu: Com-

mary author of international justice institutions would cede the key case selection-shaping role into which the African Union has manoeuvred. The historical origins of this most recent iteration of international criminal justice case selection independence compromise lie at the feet of weak states' and powerful states' self-interest. By securing a forum, the Rome Conference, where weak states were able to advance their jurisdictional preferences, weak states secured an international criminal justice pivot away from Security Council-dominated predecessor institutions that left weak state governments more vulnerable.

Perhaps the most important iteration of the latest international criminal justice iteration is the locking in of the preference for responsibility attribution for crimes during conflict to those actors with command responsibility, participating in a joint enterprise or aiding and abetting international humanitarian law violations. This is a significant advance for the realist self-interest of those states wishing to reserve the right to wage war directly or indirectly without attaching stigma to that action. Similarly, by focusing upon the conduct of war and not causes of war, as Andrew Clapham notes, "simple rules attributing conduct to single actors fail to capture the complexity of the phenomena" of massive crimes.<sup>157</sup>

### **21.7. Conclusion: Explaining Post-Cold War International Criminal Justice Case Selection Independence**

Regulatory change, according to Mattli and Woods, requires communication of deficiencies to negatively affected constituencies alongside norm entrepreneur collaboration with committed allies.<sup>158</sup> To identify the impact of norm entrepreneurs in impinging upon realist state self-interest, we must identify the historical self-interest of states and chart the extent to which that self-interest manifests in key elements of the most sensitive point of normative advance: case selection. Consideration of historical

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plementarity and Self-Interest in Domestic Processes for Core International Crimes", in Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, The Hague, 2015, pp. 229–59 (<https://www.legal-tools.org/doc/0b06df/>).

<sup>157</sup> Andrew Clapham, "Issues of complexity, complicity and complementarity: from the Nuremberg Trials to the dawn of the new International Criminal Court", in Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003, pp. 50–51.

<sup>158</sup> Mattli and Woods, 2009, see *supra* note 54.

origins, therefore, should trace state self-interest, through case selection independence variables to identify the scope for or attempt at case selection confront the self-interest of designing actors. Rather than impinging significantly upon state self-interest, norm entrepreneurs failed to grasp the implications of ICC Statute provisions and failed to communicate them sufficiently to negatively affected constituencies – those outside strong and weak state governments. Strong and weak states shared a realist interest in capturing international criminal justice case selection but also retained an interest in deploying it against one another. Weak states, in a compromise with strong states, captured norm entrepreneurs through compromises, such as complementarity, that those entrepreneurs still endorse despite their clear manifestation in opposition to case selection independence. Norm entrepreneurs had managed to engage and mobilise around the fact that ‘an’ international criminal court had been mooted. As that mobilisation grew, P5 states attempted to set the agenda by establishing courts that advanced their interests – courts the potential replication of which they then used as leverage to extract weak state concessions on the crime of aggression. In establishing and empowering the *ad hoc* tribunals, powerful states also set in place a path-dependent trajectory of the mode of liability of aiding and abetting, which wields significant implications for powerful states’ ability to wage war by proxy – a significant, if unintended, normative advance.

Realist state interests emphasised liberalist civil society power to cause state action against realist interests in order to procure support for the realist gain of complementarity. Emphasising the normative power of domestic prosecutions also lent emphasis to norm entrepreneurs’ role.

The extent to which norm entrepreneurs have been captured in international criminal justice is best demonstrated by an assessment of the state of international crimes prosecution in a recent special edition of the *Journal of International Criminal Justice*. While the contributors bemoan the decline of international criminal justice alongside domestic exercise of universal jurisdiction, their analysis is largely descriptive. Payam Akhavan, who does not even mention the significant reach of universal jurisdiction, lauds the ICC Statute’s “empowering” of national jurisdictions, citing success as an idle ICC.<sup>159</sup> Akhavan argues that if we accept con-

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<sup>159</sup> Payam Akhavan, “The Rise, and Fall, and Rise of International Criminal Justice”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 527–36.

strained case selection independence now, independence will expand incrementally within the international criminal justice system.<sup>160</sup> He omits to say how space could be opened up without significant ICC Statute revision or abandonment. David Luban and Diane Orentlicher similarly cite complementarity as an achievement, but nominate incidents of contraction in both universal jurisdiction and international criminal justice.<sup>161</sup>

Mireille Delmas-Marty does identify complementarity and generic or caveated ICC Statute provisions as sovereignty orientations. However, she wrongly attributes non-prosecution of economic actors to ICC jurisdiction, neglecting aiding and abetting and OTP resource constraints.<sup>162</sup> More importantly, the attempted explanations the special edition provides do not, through any framework, trace functional impediments to courts' statute provisions, and the contestation of realist and normative interests that produced them.

Of the special edition's authors, William A. Schabas comes closest to providing an explanation. He identifies a willingness to confront designing interests by citing a willingness to prosecute the powerful as a measure of normative advance.<sup>163</sup> Further, he rightly identifies international criminal justice's cyclical nature. He observes the shift in African states' position from one of court supporter to that of opponent. He also identifies the US policy shift from opponent to cautious supporter. However, his characterisations of African states' initial support lend them norm entrepreneur status rather than self-interested actors attempting to extinguish Security Council discretion to impose jurisdiction. Further, characterisation of African Union policy towards the ICC as broadly in opposition ignores the benefits of state referral the African Union seeks to maintain, as indicated by its reluctance to abandon the Court as Kenya requested. Where the empirical data in the examined cases completely supports Schabas is in his characterisation of gradual US endearment by a Court sufficiently captured to refrain from breaching US interests, and in

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<sup>160</sup> *Ibid.*

<sup>161</sup> David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 505–15; Diane Orentlicher, "Owning Justice and Reckoning with its Complexity", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 517–26.

<sup>162</sup> Mireille Delmas-Marty, "Ambiguities and Lacunae: The International Criminal Court Ten Years On", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 553–61.

<sup>163</sup> Schabas, 2013, pp. 545–551, see *supra* note 82.

his indication of weak state contestation of Security Council discretion to trigger and defer jurisdiction.<sup>164</sup> His observations of African Union hostility towards Security Council intervention reinforce African Union enthusiasm for ICC function at the behest of state referral. Miles Kahler's observations that governments choose legalised institutions where the benefits of collective action and co-operation outweigh sovereignty and other costs of legalisation best reflect the US position.<sup>165</sup> While the United States has not delegated to the ICC Statute, it is gradually accepting its existence in that it binds others to a system of regulation that advances its interests while almost completely removing sovereignty costs through functional capture and complementarity. US confidence endorses the view of Judith Goldstein *et al.* that it is the functional, rather than the jurisdictional, constraints that are most instructive for understanding institutional independence.<sup>166</sup>

Schabas's citation of a disaffected civil society threatening the Court confronts the Mattli and Woods's thesis that criticism might drive ICC Statute reform or mobilisation behind greater case selection independence in alternative fora. This sensitive handling of norm entrepreneurs enables their poor performance in communicating system deficiencies. That performance drives international justice inadequacies including regulatory capture by realist state interests. That capture is further enabled by the "more is better" approach of Sikkink to norm cascade. The embrace of complementarity threatens to further diminish norm entrepreneurs' normative impact as domestic justice sector reform opportunities divert capacity from communicating system failures to negatively affected constituencies.

The critical post-Cold War cases demonstrate the power of hegemonic stability, where victor's justice can be pursued when a hegemon is able and willing to assert itself. In Rwanda, an Anglo-American-employed ICTR supported a client regime, as it did in Sierra Leone alongside a strategy of Liberian regime change. In Uganda, a US-conscious and nascent ICC-OTP, captured from within by Anglophone agency, demon-

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<sup>164</sup> *Ibid.*

<sup>165</sup> Miles Kahler, "The Causes and Consequences of Legalization", in *International Organization*, 2000, vol. 54, no. 3, p. 662.

<sup>166</sup> Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, "Introduction: Legalization and World Politics", in *International Organization*, 2000, vol. 54, no. 3, pp. 385–99.

strated the power of a unipolar global order.<sup>167</sup> The design and function of these courts occurred during circumstances of unquestioned US economic and military predominance, but also under increasing capacity for norm entrepreneur mobilisation in an internet era accompanying globalisation. As the rate of globalisation slows, according to Abbott and Snidal, so too will the hardening of legalisation, suggesting hegemonic stability was assisted in driving an advance in international crimes case selection.<sup>168</sup> Schabas cites potential for a cyclical international justice downturn after an active decade following the ICTY's establishment. That analysis fits my argument that readjustment of international crimes case selection independence appears to mirror shifts in the global economic order. That shift is also a natural manifestation of the compromise of weak state and powerful state realist interests that captured ICC design. That compromise, along with the shifting global order, diminishes powerful states capacity to employ justice instruments while increasing that capacity for weak state governments. Consensus is emerging among weak and powerful states that the ICC Statute advances their interests. That consensus causes, as David Epstein and Sharyn O'Halloran note, diminished independence, unlike the East–West disagreement that produced a norm entrepreneur ICTR prosecutor.<sup>169</sup> Employing a case selection independence framework, itself in nascent form, focuses attention on the international criminal justice function of greatest sensitivity and utility for self-interested states. It focuses identification of the historical origins of international criminal justice on the influence of norm entrepreneurs seeking objective application pursuit of all those most responsible for crimes, and self-interested governments seeking to utilise international crimes case selection for political purpose.

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<sup>167</sup> See Mahony, 2015, see *supra* note 78; Mahony, 2015, see *supra* note 156.

<sup>168</sup> Abbott and Snidal, 2000, p. 456, see *supra* note 39.

<sup>169</sup> David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers*, Cambridge University Press, New York, 1999.



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