

# International Criminal Law : Quo Vadis ?

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**Proceedings of the International  
Conference held  
in Siracusa, Italy,  
28 November – 3 December 2002,  
on the Occasion of the 30th  
Anniversary of ISISC**

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# NOUVELLES ÉTUDES PÉNALES

2004

N° 19

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### *In Memoriam*

This volume is dedicated to the memory of the late Justice Mohammad Fathi Naguib, President of the Egyptian Constitutional Court, who participated in the 30th Anniversary Conference of the Istituto Superiore Internazionale di Scienze Criminali. The proceedings of that conference appear in this book. President Fathi Naguib was one of Egypt's most distinguished jurists, who served during his entire career as a judge in the Egyptian judiciary, and was the only person to have held both the position of President of the Supreme Court of Cassation, and President of the Supreme Constitutional Court.

President Naguib received his LL.B from Cairo University in 1958, where he also received a High Diploma in Political Economy (1959) and a High Diploma in Public Law (1960). In 1972 he received a Ph.D. in Law from the University of Paris.

President Naguib entered the Egyptian judiciary in 1958 and had a long career in both the Public Prosecutor Agency and the ordinary courts, rising to the level of the Court of Appeal and then the Court of Cassation (Egypt's highest court of general jurisdiction). During his career, he also served in several positions in the Ministry of Justice, including Assistant to the Minister for Arbitration Affairs (1987-88), Assistant to the Minister for Legislation (1988-95), and Assistant to the Minister for Judicial Inspection Affairs (1995-2000).

In 2000, he was appointed as Senior Vice President in the Court of Cassation. The following year, he rose to the position of President of that Court and President of the Supreme Council of the Judiciary. In September 2001, he moved to the Supreme Constitutional Court as its Chief Justice.

President Naguib played a significant role in many important arbitrations, including the Taba border dispute between Egypt and Israel, in which he was first selected in 1985 as a member of the national committee for defending Taba, then a member in the defense panel.

He was one of the leading Arab authorities in legislation and international judicial agreements, and participated as an Egyptian representative in drafting and concluding many international agreements. He also participated in drafting a great number of the basic laws in the country, including Commercial and Maritime Law, Civil Procedure Law, Arbitration Law, Leasing Law, Family Law and Intellectual Property Law.

President Naguib also published widely in the fields of financial policy, public finance, and tax legislation. His publications also cover the Egyptian judicial system, legal procedure in family law, and the Court of Cassation in France.

## Preface

The Association Internationale de Droit Pénal is pleased to present in this 19th volume of NOUVELLES ÉTUDES PENALES (NEP), the proceedings of the 30th Anniversary Conference of the Istituto Internazionale di Scienze Criminali. In November, 2002, the Institute hosted over 100 of the world's most distinguished jurists to discuss the future of international criminal law, and many of the presentations heard there can be found in this volume. The Association is also pleased to include the proceedings of the 2002 Conference of its Young Penalists section, held in Noto, Italy, on the topic of terrorism.

September 12-19, 2004, the Association will host its XVIIth International Congress in Beijing, China. The XVIIth Congress will be of particular significance to me, as I will leave the Presidency of the Association after three terms, having previously served as Secretary General for three terms (1974-89), and prior to that, as Deputy Secretary General (1972-74). Even though many colleagues urged me to be available for further service, I thought it was in the best interest of the Association to have a new President and a new Executive Committee. The vitality of an Association depends on youthful, enthusiastic, and wise leadership, and its capacity to generate new ideas, programs, and activities. This is why I thought it best for new leadership to take over.

After our June, 2003 Conseil meeting in Paris, Secretary General Helmut Epp sent a circular letter to the members of the Conseil and to the Presidents of the national groups, informing them of my decision, as well as inviting them to submit names of candidates for the Presidency, the Executive Committee, and the Conseil de Direction. We benefited from a large number of candidacies and nominations, evidencing the interest of many in carrying out our tradition of service and dedication to scholarship, the advancement of international and comparative criminal justice, and strengthening of the rule of law and human rights. As announced by the Secretary General, based on the decision of the Conseil in June, 2003, the Executive Committee met in Siracusa in December, 2003, and put together its recommendations which will be submitted to the Conseil de Direction at its June 3-4, 2004 meeting in Paris. The Conseil will then vote on these recommendations, which will be submitted to those attending the XVIIth Congress in Beijing, where in accordance to our by-laws, the final vote will take place.

During my 32 years in the service of the Association, it has been my privilege to see the realization by the United Nations of the establishment of the International Criminal Court. This is something our Association has been working for since 1924, and to which its succeeding presidents, as well as many distinguished members of its Conseil de Direction, have significantly contributed. As Chairman of the Diplomatic Conference's Drafting committee, and previously as Vice-Chair of the General Assembly's Preparatory Committee and the General Assembly's Ad Hoc Committee for the Establishment of an International Criminal Court, it has been my privilege to be among those who carried the baton through the finish line of long relay race. But I am mindful that even though I was one of the three chairs at the Diplomatic Conference who carried that baton to the finish line, that the world community depended on many who preceded us in this long, historic race for the advancement of justice and human dignity.

During my term as President, I also had the privilege of serving as chairman of the Security Council's Commission to Investigate Violations of International Humanitarian Law in the former Yugoslavia, which resulted in the accumulation of such evidence that led the Security Council to the establishment of the International Criminal Tribunal for the former Yugoslavia. Today, we witness a former head of state charged with genocide, crimes against humanity, and war crimes before that tribunal. To have been part of this process is also a source of great pride and satisfaction.

More importantly, during the last twelve years in which so much has occurred in the arena of international criminal justice, I was able to carry the banner of the Association in a way that established our presence in a visible manner before the international community. The meetings held at ISISC, in cooperation with the AIDP and the United Nations, as well as the publication of several volumes of the *Revue Internationale de Droit Pénal* and *NEP*, which were distributed in the thousands of copies worldwide, no doubt made a lasting impact as to the Association's role and contribution in the pursuit of the goal of international criminal justice and human rights.

The work of the Association over the last thirty years has been significant. We have expanded our individual membership base, as well as our national groups, contributed to transitional justice in many central and eastern European countries, provided technical assistance to developing countries, promoted human rights (particularly in the Arab world), and published 19 issues of *NEP*, as well as several special (additional) issues

of the Revue. We have continued to benefit from the support of national groups which have hosted preparatory colloquia and borne the cost of the respective issues of the Revue pertaining to these colloquia. This has been essential to our financial ability. We have also consistently received a modest, though highly appreciated contribution from the French Ministry of Justice for the Revue.

But above all, the Association has benefited from the extraordinary dedication of the members of its Executive Committee, and more particularly, of its Vice President, Reynald Ottenhof, who started with me in 1974 as Deputy Secretary General. Prior to that, Reynald assisted our past President, Pierre Bouzat for many years, and has thus been part of the life of the Association for a longer period than anyone else. The Association is indebted to him for his indefatigable work, for his dedication, and for above all the devotion he has brought to his work in his service to the Association. It was thanks to him that in the last thirty years, we have been able to publish some 80 volumes of the Revue and NEP, in a manner which evidences its scholarly quality. We are also grateful to Eres Publications for their work on the Revue. While many of the members only know that the Revue is on occasion late in appearing, what they do not know is the hard work and the time devoted by Reynald in getting these issues published and distributed, particularly when the delay was due to causes unrelated to him. The work done behind the scenes by Jose Luis de la Cuesta, Helmut Epp, Jean Paul Laborde, Reynald Ottenhof, Ulrika Sundberg, Jean Francois Thony, Peter Wilkitzki, and Abdel Azim Wazir, to name only my principal collaborators in the Executive Committee, merits recognition by all the members of the Association. They will continue to provide the Association with their leadership and their services.

I would also like to mention a number of our national groups who over the years have contributed most consistently and most significantly to the work of our Association by repeatedly hosting preparatory colloquia, and in the case of Germany and Austria of also hosting a Congress in addition to repeatedly hosting national colloquia, and publishing several volumes of the Revue. Lastly, I wish to acknowledge the dedicated work of Valérie LaRegle, who is in charge of membership.

There is much more to say about the contributions of individuals and national groups to the life and work of the Association, but due to the limitations of this newsletter, I cannot mention them all. However, I want my many colleagues and friends all over the world to know that their support and friendship, as well as their contribution to the Association

over the years, is truly appreciated. I would be remiss, however, not to mention the major contributions of the Siracusa institute to the work of the Association. In addition to co-hosting numerous activities with the AIDP, it has published the largest number of volumes of the *Revue* and *NEP* than any national group, and it is the extraordinary accomplishments of ISISC which also bring credit to the AIDP. Suffice it to recall that in its first thirty years, ISISC hosted 287 conferences with the participation of 19,495 jurists from 155 countries (among whom were some 4,500 professors from 444 university faculties), and also collaborated with 131 inter-governmental and non-governmental organizations. Professors Stile and Ottenhof, as well as the members of the Executive Committee, have significantly contributed to their success.

The Conseil de Direction names 16 members of the 25 member board of ISISC, and it is my hope to be re-nominated by the new Conseil after its election in Beijing, and to continue to serve as President of ISISC for at least another term.

I could not conclude this farewell message without remembering the many dear and departed friends with whom I have had the pleasure and privilege of working over the years. Some of them are of a previous generation, but many are of my own. Among those of an older generation, past Presidents Jean Graven, who was also my Professor, Paul Cornil, and Pierre Bouzat, as well as Marc Ancel. Among those of my generation, Laszlo Viski, Gerhard Grebing, Helene Frago, and Joao Marcello de Araujo. All four served as Deputies Secretary General with me, either during my tenure as Secretary General or as President. Their contributions to the Association should always be remembered, as their friendship is fondly remembered by me.

There are many other distinguished members of the Association with whom I have had privilege of working over the last forty years, and who have departed. They were all remembered in appropriate in memoriam in the *Revue*, and in *NEP*. I have always considered it my most important function to remember others, and to pay homage to them. This may not be the most appropriate place to list them all, but our membership can turn to our many issues of the *Revue* and *NEP* to see how we have appropriately remembered our past colleagues who served on the Conseil de Direction.

Lastly, there are three members of our Conseil to whom I would like to pay personal homage and to wish many more years of productive life. They are Gerhard O.W. Mueller, Vice-President, Giuliano Vassalli, who was a Vice President for many years, and now Honorary Vice President, and Hans Heinrich Jescheck, our former President and now Honorary

President, who served two terms and with whom I served as Secretary General for both terms. Their contributions to international criminal law, comparative criminal law, and national criminal law, both as scholars and as public servants, have been immeasurable. But they also represent a bygone era of those who are scholars, gentleman, public servants, and soldiers, in short, modern renaissance men. If I were to think of role models and symbols of this Association, these three distinguished personalities would be the ones. With men like Mueller, Jescheck and Vassalli, and those who presently serve on the Executive Committee, there is not doubt that our Association, which has such a great past, will also have a great future.

It has been my honor to serve the Association for 32 years, and I take this opportunity to thank its members for the confidence they have placed in me by unanimously electing me to my positions since Budapest, 1974. I hope I have lived up to your expectations, and that I have faithfully followed in the footsteps of such great ones as de Vabres, Graven, Herzog, Jescheck, Pella, Mueller, Vassalli, and Von List.

To the new President, its new Executive Committee, and its new Conseil de Direction, I can only extend my best wishes and continued support, and to the Association, I can only add *ad majorem gloria*.

M. Cherif Bassiouni  
President



Invitation to the XVIIth Congress of the  
International Association of Penal Law, Beijing, China  
September 12 – 19, 2004

The AIDP is proud to hold its first Congress in Asia, to be held in Beijing from September 12-19, 2004, and organized by the China Law Society and the China National Group of the AIDP. The XVIIth International Congress of Penal Law will deal with four important contemporary topics which are described in this announcement. The timeliness of these topics, as well as the value we place on having our congress in Beijing, are important reasons why members of the Association should make every effort to attend. We hope to see a large turnout at the Congress, which will also be the first time that such a major event will be held in China. On the occasion of the Congress, we will also elect the President and the Executive Committee of the Association, as well as the members of its Conseil de Direction for the years 2004-2009.

The Chinese government has allowed us to use the Great People's Hall for the inaugural ceremony. The rest of the Congress will take place at the sumptuous hotel. A visit to the Great Wall and to the Forbidden City is planned. Other optional tourist packages are also available.

The Congress is historically important because we are in an era of transition toward a more global society. Globalization, however, poses challenges. At the international level, we face increased threats to peace and security, and enhanced transnational criminality. Thus, we witness throughout the world many relatively small conflicts which, however, produce large-scale victimization. We have also witnessed the increase in terrorism, organized crime, cyber-crimes, trafficking in women and children for sexual exploitation, corruption, drug trafficking, and other forms of white collar crime. Even at the national levels, we witness in most societies an increase in the number of crimes, as well as in the number of perpetrators of crimes, while we also note the weakening of criminal justice systems.

These manifestations of international, transnational and national criminality pose increasing challenges to all peace-loving societies, and more particularly to developing societies whose economies and social structures are more vulnerable. These societies face difficulties in a world in which the disparities between rich and poor nations are increasing.

Jurists who specialize in criminal law must, therefore, in addition to being specialists in their own national legal systems, acquire knowledge about international criminal law, and comparative criminal law and procedure. This is particularly true for government lawyers, judges, prosecutors, and academics. Law schools must intensify their teachings in these subjects.

The AIDP has since its inception offered opportunities for jurists from all over the world to exchange experiences, and to develop contacts. More significantly, it has been a bridge between different legal systems in the world, thus creating a better understanding between different legal systems. Lastly, the Association has been the principal advocate for an international criminal court for over 100 years, and this was achieved in the United Nations Rome Treaty of July 17, 1998. Members of the Association should feel proud of this achievement. Contemporaneously, the Association, its leadership, and members have been active in many other areas of international criminal justice, and have been involved in the formation and administration of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Six of the ICTY judges are AIDP members, and two are members of the Conseil.

While great progress has been achieved in the development of international criminal justice, more international cooperation is called for so that justice and the protection of human rights can be effectively upheld. The Congress will no doubt contribute to development of such cooperation by providing us a wonderful opportunity to exchange ideas, share experiences, and renew friendships among participants from different countries and regions.

As one of the largest cities in the world, Beijing has a history of 3,000 years, was the capital city of five dynasties in ancient China, and has been the capital of the People's Republic of China since 1949. In addition to the academic program of the Congress, international delegates can expect to have an exciting experience in social programs and touring activities for which we are preparing. We will do our best to make your stay in China both fruitful and pleasant. We hereby warmly invite you to the Congress, and we look forward to seeing you in Beijing.

For more information, please visit the Association's web site at <http://www.penal.org/>.

**Prof. M. Cherif Bassiouni**  
President, AIDP

**Prof. Gao Mingxuan**  
Vice President of AIDP

Vice President of the China Law Society  
President of the China National Group of AIDP

### **Congress Topics**

- |           |                                                                                       |
|-----------|---------------------------------------------------------------------------------------|
| Section 1 | Criminal Responsibility of Minors in National and International Legal Order           |
| Section 2 | Corruption and Related Crimes in International Economic Activities                    |
| Section 3 | Principles of Criminal Procedure and their Application in Disciplinary Proceedings    |
| Section 4 | Concurrent National and International Jurisdiction and the Principle “Ne bis in idem” |

### **Congress Program**

#### **September 12 (Sunday)**

Full Day Registration

Afternoon Meeting of COEX & CODIR

Evening Welcome Reception (Hosted by Embassies in Beijing)

#### **September 13 (Monday)**

Morning Opening Ceremony

Afternoon Work 1 & 3; Free 2 & 4

Evening Welcome Reception (Hosted by Chinese Government)

#### **September 14 (Tuesday)**

Morning Work 2 & 4; Free 1 & 3

Afternoon Work 1 & 3; Free 2 & 4

Evening Round Table I: Regional and National Patterns in the International Trafficking in Women and Children

#### **September 15 (Wednesday)**

One-day excursion of all participants

**September 16 (Thursday)**

Morning	Work 1 & 4;	Free 2 & 3
Afternoon	Work 2 & 3;	Free 1 & 4
Evening	Round Table II: Computer Crimes, Cyber-Terrorism, Child Pornography and Financial Crimes	

**September 17 (Friday)**

Morning	Work 3 & 4;	Free 1 & 2
Afternoon	Work 1 & 2;	Free 3 & 4
Evening	Meeting of COEX & CODIR to discuss Resolutions Drafting Resolutions by working groups	

**September 18 (Saturday)**

Morning	Adoption of Resolutions 3 & 4;	Free 1 & 2
Afternoon	Adoption of Resolutions 1 & 2;	Free 3 & 4
Evening	Gala Dinner; Printing of resolutions	

**September 19 (Sunday)**

Morning	Final Session (adoption of resolutions) Closing Ceremony General Assembly (elections of the Board & Young Penalists)
Afternoon	Meeting of COEX (new) and CODIR (new)

**Congress Venue**

Beijing Friendship Hotel, Beijing, China

Beijing Friendship Hotel is the largest garden-style hotel in Asia. Built in 1954, it covers an area of 335,000 square meters. Its style is of classic elegance with traditional Chinese architecture. It has over 1700 rooms and 27 meeting halls. It offers a full range of amenities, including a large variety of services, such as restaurants, business center, meeting and recreational facilities of international standards.

**Registration Fee**

Until April 1, 2004

After April 1, 2004

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Member: USD or EURO 250	Member: USD or EURO 300
Student: USD or EURO 150	Student: USD or EURO 200
Add'l Person: USD or EURO 250	Add'l Person: USD or EURO 300
Non-Member: USD or EURO 300	Non-Member: USD or EURO 350

**Entitlements of registered participant:**

1. Congress Sessions, Opening Ceremony and Welcome Reception
2. Congress Lunches & Dinners September 13-19
3. Congress Material & Kits
4. Congress Banquet & Gala Dinner
5. Congress Excursions

**Registration fee does not include accommodation fee or flight fare**

**Note:**

1. Currency acceptable: USD, EURO or RMB yuan
2. Any change or cancellation must be notified in writing to Congress Organizer. Refund with remittance charge deducted will be processed after the Congress based on following policy:

Before June 10, full refund

After June 10 / Before August 10, 50% refund

After August 10, no refund

3. The Method of payment
  - 1) Credit Card
  - 2) Bank Transfer
  - 3) Bank Draft
  - 4) Cash

**Tour Information**

Pre- and Post Congress Tours (PR, PT) will be organized for all accompanying persons and participants. They will provide good opportunities to appreciate ancient Chinese civilization and culture, and to have a view of the daily life of the Chinese people.

**PR-1** Guangzhou - Guilin - Xi'an - Beijing

**PT-1** Beijing - Xi'an - Beijing

**PT-2** Beijing - Xi'an - Guilin

**PT-3** Beijing - Hangzhou - Shanghai (one day trip to Suzhou)

### **Information on Main Tourist Cities**

#### **Xi'an**

Named as Chang'an in ancient China, Xi'an is the capital of Shaanxi Province, and is one of the principal cities in northwest China. With a history of more than 3,000 years, Xi'an was the earliest and longest ancient Chinese capital among the five. The world-famous "Silk Road" started from Xi'an. The Neolithic Museum "Banpo Village" (6,000 year-old), the Terra Cotta Warriors and Horses (200 B.C.) which are still under excavation.

#### **Guilin**

Guilin, in Chinese means "Forest of Sweet Osmanthus." It is praised by numerous visitors, poets, and painters to be the most scenic city in China. The area around is karst land, crags and hill jutting up sharply to form the unusual landscape. As a result of the erosion of the limestone surface, steep isolated hills, caverns and underground channels are formed.

#### **Shanghai**

Shanghai is one of the three municipalities under the direct jurisdiction of the central government. It was once called the "Adventurers' Paradise." With a population of 14 million, Shanghai is the largest city and economic center along the eastern coast. Shanghai is the origin of China's modernization. It has a rich and charming history, culture as well as the most advanced technology. Shanghai provides comprehensive tourism facilities.

#### **Hangzhou**

Hangzhou with the fame of "the paradise on earth below the paradise in heaven," is located on the southern end of the Grand Canal. Marco Polo, the celebrated Italian who traveled to China during the Yuan Dynasty, said that Hangzhou "is the most beautiful and magnificent city in the world." West Lake is the focal point of Hangzhou's scenic splendor. Dream-like islets, bridges, pavilions, tea houses, willows and flowers blend harmoniously into West Lake's serene water.

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Post Code: 100034  
Email: [contact\\_cls@hotmail.com](mailto:contact_cls@hotmail.com)

**Registration materials are available online at:**  
<http://www.chinalawsociety.com>



## **Invitation to the XVIIth Congress of the International Association of Penal Law, Beijing, China September 12 – 19, 2004**

L'Association Internationale de Droit Pénal est très fière de tenir son Congrès à la première fois en Asie à Beijing du 12 au 19 septembre 2004, organisé: par la Société des Sciences Juridiques de Chine et le Groupe National Chinois de l'AIDP. Le Congrès traite les quatre sujets ayant d'importantes questions contemporaines, indiqués dans cette première annonce. Ces sujets pour le Congrès à Beijing sont vraiment opportuns et valables. C'est la raison pour laquelle nos membres de l'Association devraient faire les efforts et participer les plus nombreux possibles au Congrès de l'AIDP en Chine. Durant ce Congrès, nous allons également élire le président, le Comité Exécutif et les membres du Conseil de Direction de l'AIDP pour les années de 2004 à 2009.

Le monde d'aujourd'hui apporte nombreux défis au droit pénal international et aux juristes, par exemple, le terrorisme international, le trafic de femmes et d'enfants, la délinquance informatique, etc. Au fur et à mesure que les grands progrès ont été achevés dans le développement de justice pénale internationale et que plus de coopérations ont été réalisées, la justice est effectivement accordée de l'importance. Le XVIIème Congrès International de Droit Pénal contribuera, sans aucun doute, au développement de cette coopération par nous et pourra donner une précieuse opportunité pour échanger nos idées, partager les expériences et renouveler les amitiés entre les participants venants de différents pays et régions.

En tant qu'une des plus grandes villes du monde, Beijing qui a une histoire de 3000 ans, était la capitale de cinq dynasties de l'ancienne Chine et encore la capitale de la République populaire de Chine depuis 1949. A part du programme académique, les participants du Congrès auront une expérience impressionnante du programme social et le voyage que nous aurions préparé. Nous ferons tous nos possibles pour vous fournir un séjour fructueux et joyeux en Chine.

Nous vous invitons chaleureusement à participer au Congrès et vous attendrons à Beijing.

**Prof. M. Cherif Bassiouni**  
Président de l'AIDP

**Prof. M. Gao Mingxuan**  
Vice-président de la Société des Sciences Juridiques de Chine

President du Groupe National Chinois de l'AIDP, Vice-président de  
l'AIDP

## I. Sujets du Congrès

- |           |                                                                                                          |
|-----------|----------------------------------------------------------------------------------------------------------|
| Section 1 | La responsabilité pénale des mineurs dans l'ordre interne et international                               |
| Section 2 | La Corruption et les délits apparentés dans les transactions commerciales internationales                |
| Section 3 | Les principes du procès pénal et leur mise en oeuvre dans les procédures disciplinaires                  |
| Section 4 | Les compétences criminelles concurrentes nationales et internationales et le principe « Ne bis in idem » |

## II. Programme du Congrès

### Dimanche le 12 septembre 2004

Jour d'enregistrement

- Après-midi: Réunion du Conseil  
Réunion du Comité exécutif
- Soir: Réceptions des ambassades à Beijing

### Lundi le 13 septembre 2004

- Matin: Cérémonie d'ouverture du Congrès
- Après-midi: Section 1 & 3, Libre 2 & 4
- Soir: Réception du Gouvernement chinois

### Mardi le 14 septembre 2004

- Matin: Section 2 & 4, Libre 1 & 3
- Après-midi: Section 1 & 3, Libre 2 & 4
- Soir: Table Ronde: Aspects régionaux et nationaux du trafic de femmes et d'enfants

### Mercredi le 15 septembre 2004

Jour d'excursion

**Jeudi le 16 septembre 2004**

**Matin:** Section 1 & 4, Libre 2 & 3  
**Après-midi:** Section 2 & 3, Libre 1 & 4  
**Soir:** Table Ronde: Délinquance informatique, cyber-terrorisme, pomographie envers les enfants et délinquance financière

**Vendredi le 17 septembre 2004**

**Matin:** Section 3 & 4, Libre 1 & 2  
**Après-midi:** Section 1 & 2, Libre 3 & 4  
Discussion du COEX sur les résolutions  
Discussion du CODIR sur les résolutions  
**Soir:** Groupe de travail: Projet de résolutions

**Samedi le 18 septembre 2004**

**Matin:** Adoption des résolutions, Section 3 & 4, Libre 1 & 2  
**Après-midi:** Adoption des résolutions, Section 1 & 2, Libre 3 & 4  
**Soir:** Dîner de Gala, Edition des résolutions

**Dimanche le 19 septembre 2004**

**Matin:** Session de clôture, Assemblée générale, Elections du Conseil et des Jeunes pénalistes  
**Après-midi:** Réunion du COEX (Nouveau)  
Réunion du CODIR ( Nouveau)

**III. Lieu du Congrès**

L'Hôtel d'Amitié, Beijing, Chine

L'Hôtel d'Amitié est le plus grand hôtel de jardin en Asie. Construit en 1954, il s'étend sur 33,5 hectares et son architecture traditionnelle garde une élégance remarquable. L'Hôtel possède un environnement agréable ayant plus de 1700 chambres, une vingtaine de restaurants, 27 salles de conférence, plusieurs centres de service et nombreux lieux récréatifs.

#### IV. Frais des participants au Congrès

**Remarque:** Les frais d'inscription le déjeuner et le dîner (la réception comprise) du 13 au 18 septembre 2004, le déjeuner du 19 septembre 2004, les matériaux du Congrès, le frais de visite et celui d'assistance aux représentations artistiques.

#### Notes:

monnaies acceptées: USD, EURO ou RMB de Chine

au cas où le frais d'inscription est payé, mais vous ne pouvez pas venir au Congrès à cause d'une situation particulière, si votre annonce pour le Sponsor est faite avant le 10 juin 2004, on vous rendra 100% de frais payés; mais entre le 11 juin et le 10 août 2004, on vous rendra 50%; après le 10 août 2004, rien ne vous sera rendu.

moyen de paiement:

carte de crédit

virement bancaire

mandat télégraphique bancaire

argent liquide

#### V. Renseignements sur les excursions et voyages

Des voyages avant et après la Session seront organisés pour tous les participants et les personnes les accompagnant. Ce sera pour eux de bonnes occasions d'apprécier la civilisation et la culture chinoises et de se faire une idée de la vie quotidienne des Chinois.

**PR-1** Guangzhou – Guilin – Xi'an – Beijing

**PT-1** Beijing – Xi'an – Beijing

**PT-2** Beijing – Xi'an – Guilin

**PT-3** Beijing – Hangzhou – Shanghai (un jour de visite à Suzhou)

#### Informations sur les Principales Villes Touristiques

##### Xi'an

Xi'an, appelée Chang'an dans les temps anciens, est la capitale de la province du Shaanxi et l'une des principales villes du nord-ouest de la Chine. Xi'an, dont l'histoire remonte à plus de 3000 ans, a été la première ville choisie comme capitale et celle qui l'a été le plus longtemps parmi les cinq anciennes capitales. La célèbre Route de la Soie partait de Xi'an. Le musée néolithique du village de Banpo (vieux de 6000 ans), les

guerriers et chevaux en terre cuite (200 av. J.C.) qu'on est encore en train de dégager.

### **Guilin**

Guilin signifie en chinois la « Forêt d'osmanthus ». De nombreux voyageurs, poètes et peintres y'ont vu la ville la plus pittoresque de Chine. Elle est située dans une région karstique, avec des montagnes aux formes étranges qui lui donnent son caractère particulier. L'érosion des roches calcaires a entraîné la formation de pics abrupts isolés, de grottes et de rivières souterraines.

### **Shanghai**

Shanghai est l'une des quatre municipalités sous l'autorité directe du gouvernement central. On l'appelait autrefois le « paradis des aventuriers ». Avec ses 14 millions d'habitants, Shanghai est la plus grande ville et le plus grand centre économique de la côte orientale de la Chine. C'est à Shanghai qu'a commencé la modernisation de la Chine. Elle a une histoire riche et d'intérêt. C'est une capitale culturelle et un centre de technologie ultra-moderne. On y trouve des installations touristiques complètes.

### **Hangzhou**

Hangzhou, réputée pour être « le paradis sur la terre au-dessous du paradis du ciel », se trouve à l'extrémité sud du Grand Canal. Marco Polo, le célèbre voyageur italien qui vint en Chine sous la dynastie des Yuan, a dit que Hangzhou était « la plus belle et la plus magnifique ville du monde ». C'est le lac de l'Ouest qui donne à Hangzhou sa splendeur et son pittoresque. Les îlots, les ponts, les pavillons, les maisons de thé, les saules et les fleurs s'y harmonisent pour créer un paysage de rêve, qui se reflète dans les eaux sereines du Lac.

## **VI. Secrétariat du Congrès**

M. Liang Yi

Directeur général

Département de Liaison Internationale

China Law Society

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# **The XXXth Anniversary of the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy**

## **History, Governance and Activities**

### *Founding Entities*

The International Institute of Higher Studies in Criminal Sciences (ISISC) was founded in Siracusa on September 1972 by the International Association of Penal Law (IAPL), in cooperation with the City, Province, and Chamber of Commerce. A Convenzione was subsequently entered into by the founding entities with the Sicilian Region, and a separate agreement was signed with the City of Noto. The Sicilian Region and other local entities are the principal funding sources of the Institute.

### *Legal Status*

The Institute is a public foundation established by a Decree of the President of the Republic of Italy as a not-for-profit, post-graduate, educational and scientific institution, devoted to studies, research, and to the advancement of criminal sciences in the widest sense, including human rights. It is registered as a not-for-profit foundation under Italian Law (Organizzazione Non Lucrativa di Utilità Sociale – ONLUS).

A non-governmental organization in consultative status with the United Nations, ISISC also has a special cooperation agreement with the United Nations Office of Drugs and Crime in Vienna (UNODC), and it is one of the fourteen organizations comprising the United Nations Crime Prevention and Criminal Justice Programme Network. The Network assists the United Nations Programme and interested Member States in strengthening international cooperation in crime prevention and criminal justice. The organizations which are part of the Network provide a variety of services, including exchange of information, research, training education. The Institute also enjoys consultative status with the Council of Europe through the AIDP, and has cooperation agreements with a number of universities, including: Catania, Palermo, Buenos Aires, DePaul (IHRLI), el-Mansoura, National University of Ireland – Galway, Nantes, San Sebastian, and Malta.

### *Scientific Auspices*

The Institute, although an autonomous legal entity, is under the scientific auspices of the International Association of Penal Law (Association Internationale de Droit Pénal, AIDP). The AIDP was founded in Paris in 1924, with origins in the International Union of Penal Law founded in Vienna in 1889, and is the world's oldest and most prestigious scholarly association in the field of criminal justice. The AIDP has some 3,000 members and affiliates in 120 countries and 47 national sections. The members of the Association constitute a large pool of experts from which the Institute draws support.

To further the scientific objectives of the Institute and the Association, the two organizations frequently co-sponsor activities, and the Association allows the use of the *REVUE INTERNATIONALE DE DROIT PÉNAL* and of *NOUVELLES ÉTUDES PÉNALES* for publication of Institute proceedings. Thus, the scientific activities of the Institute receive worldwide dissemination in the scholarly and professional criminal justice communities.

### *Governing Body*

The governing body of the Institute is an independent 25-member Board of Directors, 16 of whom are elected by the Conseil de Direction of the AIDP from internationally renowned scholars and experts, and 9 ex-officio members: the Rettore of the University of Catania; the President of the Italian National Section of the AIDP; the Mayor and two representatives of the City of Siracusa; the President and a representative of the Province of Siracusa; a representative of the Sicilian Region; and the Mayor of the city of Noto.

Current membership in the Board of Directors  
(Honorary Members included)

#### **M. Cherif Bassiouni**, President

*President, International Association of Penal Law; Professor of Law and President, International Human Rights Law Institute, DePaul University, Chicago; President, Osservatorio Permanente sulla Criminalità Organizzata - OPCO.*

**Guido De Marco**, Honorary President

*President of the Republic of Malta; Professor of Criminal Law, University of Malta.*

**Ahmad Fathi Sorour**, Honorary President

*President of the Egyptian Parliament; Former Minister of Education; Professor of Criminal Law, University of Cairo; Vice President, IAPL.*

**Giuliano Vassalli**, Honorary President

*President Emeritus, Italian Constitutional Court; Former Minister of Justice; Professor Emeritus of Criminal Law, Rome; Vice President, IAPL.*

**Alvaro Gil-Robles**, Honorary President

*High Commissioner for Human Rights, Council of Europe.*

**Reynald Ottenhof**, Vice President

*Emeritus Professor of Law, University of Nantes; Vice President, IAPL.*

**Giambattista Bufardecì**, Honorary Vice President

*Mayor of Siracusa; Attorney at Law.*

**Alfonso Stile**, Dean

*Professor of Criminal Law, University of Rome La Sapienza; Vice President, IAPL; President, Italian National Section, IAPL.*

**Mario Pisani**, Vice Dean

*Professor of Criminal Procedure, University of Milan.*

**Santo Reale**, Administrative Director

*Attorney at Law, Siracusa.*

**Giovanni Tinebra**, Secretary

*Director-General Department of Penitentiary Administration, Ministry of Justice.*

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**Michele Accardo**, Member

*Mayor of Noto; Attorney at Law.*

**Gaetano Bandiera**, Member

*President, Provincial Counsel, Regional Province of Siracusa.*

**Giovanni Conso**, Member

*President Emeritus, Italian Constitutional Court; Former Minister of Justice, Professor Emeritus, University of Torino.*

**Luisella de Cataldo Neuburger**, Member

*Adjunct Professor of Forensic Psychology, University of Rome La Sapienza.*

**Jose Luis de La Cuesta**, Member

*Professor of Criminal Law, the Basque University of San Sebastian; Deputy Secretary-General, IAPL.*

**Giuseppe di Gennaro**, Member

*Advisor to the Minister of Justice; President Steering Group of Stability Pact, SPAI; Honorary President, Chamber of the Court of Cassation; Former Executive Director, UNFDAC.*

**Helmut Epp**, Member

*Judge; Secretary Austrian National Parliament; Deputy Secretary-General, IAPL.*

**Fabio Granata**, Member

*Assessor for Regional, Cultural and Environmental Education, Sicilian Region; Attorney at Law.*

**Hans-Heinrich Jescheck**, Honorary Member

*Honorary President, IAPL; Former President, Dean and Professor of Criminal Law, Albert Ludwig University; Former Director, Max-Planck Institute for International and Comparative Law.*

**Jean-Paul Laborde**, Member

*Judge; Interregional Adviser, United Nations Crime Prevention and Criminal Justice Programme, Secretary General, RIDP.*

**Ferdinando Latteri**, Member

*Professor of Pathological Special Surgery, Rector, University of Catania.*

**Bruno Marziano**, Member  
*President of the Province of Siracusa.*

**Ferdinando Messina**, Member  
*President, Municipal Counsel of Siracusa.*

**Gerhard O.W. Mueller**, Honorary Member  
*Vice President, IAPL; Vice President, SIDS; Former Chief, U.N. Crime Prevention and Criminal Justice Division; Distinguished Professor of Criminal Justice, Rutgers University, Newark.*

**Antonio Pagliaro**, Member  
*Professor of Criminal Law and Director, Department of Criminal Law, University of Palermo.*

**Ezechia Paolo Reale**, Member  
*Assessor for City-planning, City of Siracusa; Board Member, Center of European Criminal Law, University of Catania; Attorney at Law.*

**Simone Rozès**, Honorary Member.  
*Honorary Vice President, IAPL; First Honorary President, Cour de Cassation, France; Past President, SIDS; Past, Attorney General, Court of the European Communities, Luxembourg.*

**Ulrika Sundberg**, Member  
*Councillor, Permanent Mission of Sweden to the United Nations, Geneva.*

**Jean François Thony**, Member  
*Assistant Legal Adviser, International Monetary Fund; Judge, Court of Appeal of Versailles; Secretary-General and Treasurer, IAPL.*

**Peter Wilkitzki**, Member  
*Ministerial-Dirigent, Federal Ministry of Justice of Germany; Deputy Secretary-General, IAPL.*

**Abdel Azim Wazir**, Member  
*Governor of Damiette; Former Dean and Professor of Criminal Law, the University of Mansourah; Deputy Secretary-General, IAPL.*

*Programs and Activities*

The Institute began its activities gradually, picking up the pace after 1976. From 1973 to 2002, the Institute conducted 287 conferences, seminars, and meetings of committees of experts with a cumulative participation of about 19,495 persons from 155 countries, among whom were some 4,500 professors from 444 university faculties, and has also collaborated with 131 inter-governmental and non-governmental organizations. No academic or scientific organization in the field of law has ever reached so many and accomplished so much in the short span of thirty years.

*Activities with the United Nations and the Council of Europe*

The Institute has undertaken a number of international initiatives, which have included committees of experts of the United Nations and the Council of Europe, convened with the purpose of elaborating international instruments, including a number of activities related to the elaboration of the treaty establishing the International Criminal Court, its Statute, and its Rules of Procedure and Evidence.

Towards the attainment of that goal, the Institute held sixteen international conferences, seminars, and government expert meetings in Siracusa and abroad, which fostered the process leading to the establishment of the International Criminal Court by the Diplomatic Conference held in Rome, on 17 July 1998. These meetings, attended by more than 1,000 jurists and government representatives, produced a number of documents which formed the basis of the discussion in Rome, including the so-called "Siracusa Draft," which was put before the United Nations Preparatory Committee in New York in March, 1996. In 1996-1997, the Institute hosted three inter-sessional meetings of the Preparatory Committee, and in 1998, an inter-sessional meeting of the Diplomatic Conference with its three designated Conference Presidents. Two of the three Chairmen of the Diplomatic Conference were members of the Institute's Board; Professor Conso, President of the Conference, and Professor Bassiouni, President of the Drafting Committee and President of the Institute. In 1999, the Institute also held an inter-sessional meeting of the Preparatory Commission on the Rules of Procedure and Evidence.

Another important meeting held at the Institute was for the Committee of Experts, which prepared the Draft Convention on the

Prevention and Suppression of Torture in 1977. This Draft was formally submitted by the AIDP to the United Nations in 1978 (E/CN.4/NGO/213, 1 February 1978). Subsequently, Sweden formally proposed the text and the General Assembly adopted the Convention in 1984.

The Institute also contributed to the United Nations Convention on Transnational Organized Crime which was signed in Palermo in December 2000, by participating at the negotiation held in Vienna, and as a consulting agency of the Italian Government. The Institute's then Scientific Director, Dr. Alfredo Nunzi, was a member of the Italian Delegation that negotiated the Convention and its two Protocols.

A number of other international instruments have also been elaborated at the Institute. Those which the United Nations have adopted to date are:

- Principles on the Independence of the Judiciary and the Legal Profession
- Principles on the Protection of the Rights of the Mentally Ill
- Guiding Principles on Crime Prevention and Criminal Justice in the Context of Development
- Model Treaty on the Transfer of Prisoners
- Model Treaty on the Transfer of Criminal Proceedings
- Model Treaty on Extradition
- Model Treaty on Enforcement of Sentences

Other international instruments elaborated at the Institute are still pending before the United Nations. They include:

- Draft Guidelines for States of Emergency and Derogations to the International Covenant on Civil and Political Rights
- Draft Convention on the Suppression of Unlawful Human Experimentation

The Institute has also hosted a number of meetings of experts in cooperation with the Council of Europe and under the auspices of its Secretary-General. These activities with the Council of Europe include:

- The drafting of the Comprehensive Convention on International Cooperation in Criminal Matters
- A uniform curriculum for teaching the European Penal Conventions in European universities

- Guidelines for the Protection of Cultural Heritage in Europe (with the participation of the European Parliament)
- Local self-government and the role of the municipal police
- Translation into Arabic and publication of the European Convention on Human Rights and its Protocols and the European Torture Convention

### *Committees of Experts*

Many of the activities mentioned above took the form of a Committee of Experts, but there were also other meetings of experts that took place, as are indicated in the chronological list of activities that follows.

### *Technical Cooperation and Training Seminars*

The Institute has conducted over 40 technical cooperation and training seminars for judges and public officials from developing countries on the topics of organized crime, international cooperation in penal matters, extradition, and the protection of human rights in the administration of justice (described in the list of programs below). These programs were conducted in collaboration with the United Nations, the Council of Europe, the League of Arab States, the Organization of American States, and other international organizations.

Several thousand judges, prosecutors, government officials, researchers, lawyers, and scholars have attended these programs, including those for Egyptian Prosecutors, Judges, Police and Army Officers co-sponsored by the Italian Ministries of Foreign Affairs and Justice, and several programs for Albanian and for Macedonian Judges, Prosecutors, and Police Officers co-sponsored by the Italian Presidency of Council and Ministry of Justice, in cooperation with the Council of Europe and Europol. A similar program was also conducted for African jurists involving more than 200 judges, prosecutors, academics, and lawyers. No other private institution has conducted a more far-reaching technical legal assistance program in the field of criminal justice and human rights.

*International Conferences and Seminars*

The Institute regularly hosts international conferences of experts on subjects of contemporary interest to the international scholarly community, gathering the world's leading authorities and experts in the criminal sciences.

International seminars are conducted in the form of continuing legal education programs, and are attended by academics, judges, government officials, lawyers, and young law graduates.

The Institute also holds annual training seminars for the Young Penalists section of the IAPL, on contemporary topics of international and comparative criminal law. The seminars usually include 60-70 participants from 25-30 countries. These are opportunities for young penalists to get to know their colleagues from around the world, and to network over the years of their careers. They are also given an opportunity to actively participate in these seminars as speakers and panelists, and occasionally their work is published in the *REVUE INTERNATIONALE DE DROIT PÉNAL* and *NOUVELLES ÉTUDES PÉNALES*.

*Inter-Regional Programs*

## THE ARAB HUMAN RIGHTS PROGRAM

Since 1985, the Institute has embarked on a far-reaching human rights program for the Arab world. In December 1985, the Institute held a conference on Criminal Justice Reform and Human Rights Education. Sixty-seven jurists from twelve Arab countries and Palestine attended this conference. As a result of that initiative, a Committee of Experts convened in December 1986 to prepare a Draft Arab Charter on People's and Human Rights. Seventy-six distinguished Arab personalities from twelve Arab countries and Palestine attended the meeting. The "Draft Arab Charter on Human and People's Rights" was submitted to the League of Arab States and to all Heads of State in the Arab World. It received the support of the Arab Lawyers' Union, which represents over 100,000 lawyers in the Arab World.

Thereafter, a series of 17 seminars have been developed on teaching Human Rights in Arab law schools, judicial training centers, police academies, and military justice programs. Three of these programs have been conducted in Egypt. As of December 1998, the number of

participants had exceeded 1,600, among whom were over 350 law professors, instructors in judicial training institutes, police academies, and military justice programs from 18 Arab States. Four volumes of material in Arabic were produced. Over one thousand copies of each of the four volumes were distributed to educators and law libraries in the Arab World. Eight law schools subsequently offered human rights courses annually, exposing some 10,000 students to this subject, while judicial training institutes and police academies have also included human rights education as part of their programs.

The Institute organized seven conferences for jurists of the Arab World that were held in Cairo and Alexandria, with the participation of over 2000 persons. The proceedings of the Cairo and Alexandria conferences resulted in three volumes.

The total number of publications in Arabic reached 11 by 1997, including a special publication in Arabic of the European Convention on Human Rights. This booklet was the first authorized publication by the Council of Europe in a language other than the Council's official language.

Additionally, in 1990-91, the Institute introduced a five-week program for Senior Graduate students from the Arab region. The goal of this intensive program was to familiarize a new generation of jurists with the concern for human rights in the Arab region.

Also, in 1993, two important conferences for Arab Judges were held. The proceedings were published in two volumes: one dealing with the Arab System of judicial training, and the other with interstate cooperation in penal matters.

In November 1997, a conference was held in Cairo on the Establishment of an International Criminal Court. Three hundred persons from six Arab Countries participated.

Finally, in 1998, the Arab program included four conferences, expert meetings and technical assistance and cooperation seminars, dealing with issues such as international cooperation in criminal matters, humanitarian law and regional security, organized crime, and money-laundering, which gathered more than 150 participants from 15 countries, including parliament members, senior prosecutors, high-level government officers, and university professors.

This is the world's most significant regional program in the field of criminal justice and human rights education ever undertaken, and one which has made a great impact in light of the high-level participation

during seminars and other meetings by parliament members, members of governments' cabinets and the Prosecutor General's office, high-ranking police and security officials, university professors, and other participants whose caliber ensured that national policy and legislation benefited from their experience.

Of particular relevance are the programs carried out over several years for judges, prosecutors, and officers of the Egyptian police, co-sponsored by the Ministries of Justice and Foreign Affairs in cooperation with the Egyptian Ministries of Justice and Interior, the Office of the Prosecutor General, the Administrative Control Agency, and the Military Justice Department of the Ministry of Defense.

#### OTHER REGIONAL PROGRAMS

The Institute also developed a program for African jurists, in cooperation with the United Nations Centre for Human Rights, the Centre for International Crime Prevention – United Nations Office at Vienna and the Swedish International Development Agency on Criminal Justice and Human Rights. The first program for English-speaking jurists was held in July 1992. The second one, for lusophone jurists, was held in May 1997. These activities were attended by more than 200 participants from 32 African countries, including several officials from Ministries of Justice, Interior and Foreign Affairs, Chief Justices, General Prosecutors, and other policy- and law-makers.

Other training programs were developed for judges from the Balkans, and for prosecutors and police officials from Albania and Macedonia, in cooperation with the Council of Europe and Europol. After 1999, a number of similar programs were conducted for Eastern and Central European countries, and for the former U.S.S.R. as well.

#### *National and Local Activities*

The Institute annually conducts a number of conferences and seminars for Italian law professors, judges, lawyers, and other jurists.

National Seminars are conducted for Italian judges, co-sponsored by the Superior Council of the Judiciary (Consiglio Superiore della Magistratura), the National Association of Judges (Associazione Nazionale Magistrati), or the Italian Ministry of Justice, which also funds some of these activities. The Superior Council of Judges has published

five books of proceedings of these seminars, and has distributed them to all judges in Italy.

The Master's in legal psychology for judges, lawyers, and other criminal justice experts is part of a long-standing commitment of the Institute in this field, witnessed by 15 volumes published in the series "ISISC - Atti e documenti" of the publishing house Cedam.

Seminars for lawyers and judges of the Sicilian Region are conducted on a topic of interest to the Sicilian Region.

The Institute also conducts seminars in Siracusa and Noto every year for Italian professors of criminal law, criminal procedure, criminology, and legal psychology.

#### *Local Conferences for Lawyers and Judges from Siracusa*

The Italian national program has not only provided a national forum for judges, professors, government officials, and practitioners, but has also been a catalyst for change. The current Code of Criminal Procedure, which entered into effect in 1989 and which has many features of the Anglo-American model of adversarial-accusatorial justice, was the subject of an ISISC seminar in 1977. The seminar was followed by a major publication on this subject and, since then, the Institute has given the project continuous momentum through various programs. The 1978 Law on Decriminalization was also drafted at the Institute by a Committee of Experts, which included parliamentarians and public officials. Still other legislative initiatives saw their beginnings at the Institute, or received their scholarly impetus through conferences and publications, like the Law on the Abuse of Power by Public Officials.

#### *Noto Activities*

The city of Noto, 30 kilometers from Siracusa, is bonded with ISISC by a convention signed in 1972. On the basis of this agreement, the city of Noto has provided the Institute with an additional seat in a seventeenth century National Monument, the Palazzo Trigona-Canicarao. During these 30 years, ISISC has organized in Noto more than 17 activities with 794 participants from 34 countries and 78 Universities, spreading around the world its fame as the capital of Italian Baroque. Specifically, two trends of activities are strictly related with Noto. The first are all the seminars, conferences, and Committees of Experts on Juridical Psychology that

represented a unique example of interdisciplinary meetings involving experts from different fields: attorneys, magistrates, psychologists, professors of law, psychiatrists, criminologists, and psychotherapeutics. The second are the training seminars for the Young Penalists Section of the AIDP, which are exclusively attended by researchers, associate professors, attorneys, and magistrates from all over the world, representing the future policy-makers in the field of international criminal law.

*Monitoring Body on Organized Crime (Osservatorio Permanente sulla Criminalità Organizzata) - OPCO*

As a result of a project presented by ISISC, in 2001 the Sicilian Region established by a regional law (7 May 2001, n. 6, article 49) a new Institution named “Osservatorio Permanente sulla criminalità Organizzata” (Monitoring Body on Organized Crime) as a consulting body to the Region of Sicily. Even though OPCO has its own juridical personality, its governing body is composed of six to eight ISISC Board members named by the ISISC Board of Directors. The relationship between OPCO and ISISC is regulated by a Convention, and on this basis, the Institute gave OPCO its Building B for use.

The goals of OPCO are to advise the Region of Sicily on matters related to European development, as well as to the activities of monitoring, research, and study on organized crime at the national and international level. In particular, OPCO will establish a database containing the regional and international treaties and agreements on organized crime, money laundering, corruption, and related issues, as well as the national legislations of all countries of the world and the most recent and adjourned research on organized crime and its implication and impact. OPCO will regularly publish a bulletin containing the development of its activities, and the most recent information on the fight against organized crime.

*Topics of Conferences and Seminars*

Conferences and seminars conducted by the Institute cover the entire range of criminal justice studies: international criminal law; criminal law and procedure; comparative criminal law and procedure; international and regional protection of human rights; criminology and comparative criminology; legal psychology; penology; and criminal justice policy.

The following are a few illustrations of the variety and diversity of programs offered: the codification of international criminal law; international protection of human rights in criminal justice systems; the future of violence in contemporary society; the philosophy of criminal justice; the role of the judge in modern society; the function of modern criminal justice education; comparative criminology in the Mediterranean Basin; criminal justice and human rights education and reform in the Arab world; the role of the criminological expert in the criminal trial; and comparative criminal procedure in the pre-trial and the post-trial phases. Even in seminars for Italian judges and professors, the subjects have included international and comparative dimensions, including: international criminal law; extradition and judicial space in Europe; European economic penal law; monitoring of the criminal justice system; criminal justice and the mass-media; and terrorism and psychological aspects of the criminal trial. Most of these programs are multi-disciplinary.

#### *Format of Conferences and Seminars*

The extensive experience of the Institute has resulted in the development of a number of formats that have proven effective. However, the standard format used for most programs consists of one week of five working days, at seven working hours per day. The participants also continue their interaction at the hotel where they reside. Usually, a seminar or conference will consist of 30-40 hours of formal discussion and many more hours of informal discussion. This is equivalent to the number of hours required for the study of a given subject in most legal education institutions.

#### *Graduate Instructional Programs*

The Institute provides instructional courses at the Post-Graduate level, as well as in-depth specialization courses. In the summer of 1990, the first graduate program took place. It was a five-week-long instructional course in Human Rights and Criminal Justice for Master's and Doctoral level candidates in Arab law schools and specialized legal institutes. In 1998, the Institute organized the first three-week course of a Masters in Legal Psychology, which is now a recurring activity.

The specialization program called "Master's in Legal Psychology" is a 105-hour post-graduate educational course spread over a period of three

consecutive months to ensure continuity and sustainability to the learning experience, as well as to allow maximum participation of the attendees. The first program was held in 1998 and was attended by 50 participants. Plans for the 1999 Masters in Legal Psychology are well under way, along with the preparation of other specialization courses in International Criminal Law and Human Rights.

Starting in 2003, the Institute will organize and hold in Siracusa a “Specialization Course in International Criminal Law,” in cooperation with 6 Universities (DePaul, Galway, Nantes, Palermo, San Sebastian and Malta). The Course will be attended by 50 recent law school graduates, and will consist of 20 working sessions with a final moot court competition on real cases.

#### *Post-Graduate Fellows*

In addition to the Graduate Teaching Programs, the Institute offers each year one or two Post-Graduate Resident Fellowships. While in residence at the Institute, the fellows involve themselves in the activities of the Institute, participate in the various conferences and seminars which are held, and pursue an individual course of research. To date, the Institute has offered eleven Fellowships. Some of the Fellows have joined academia and are now professors, and others have pursued professional careers.

#### *Publications*

As of December 2002, 112 books of the Institute’s proceedings have been published, with one in print. Some of the proceedings of the Institute’s activities are contained in the REVUE INTERNATIONALE DE DROIT PÉNAL and NOUVELLES ÉTUDES PÉNALES, others are published in-house by the Institute in the series QUADERNI.

The Institute also has publishing agreements with two major Italian publishing companies, Cedam (Padova) and Jovene (Naples), for Italian language publications, such as the series on Legal Psychology (currently over 14 volumes). In addition, the Superior Council of Judges (Consiglio Superiore della Magistratura) has published five books of conference proceedings it co-sponsored with the Institute.

Major book publishers in the U.S., France, Italy, Lebanon and the Netherlands have also published some of the Institute’s proceedings.

Almost all the volumes produced by the Institute are the result of meetings it organized, and include original contributions from the world's leading experts in criminal law and human rights issues. The scientific input given by the Institute to the debate surrounding a permanent international tribunal formed a basis for the elaboration of the Statute of the International Criminal Court, and is one of its most outstanding contributions to the study of international and comparative criminal law. Through its roster of experts and that of the AIDP, the intellectual outgrowth of the Institute has reached thousands of professors, policy-makers, criminal justice officers, and scholars throughout the world.

### *Physical Facilities*

The Institute is located in two adjoining modern three-story buildings connected by a garden in the historic city of Siracusa. Building A has an auditorium that can seat 115 persons, and two conference rooms which seat 25 and 40 persons, respectively. All of these rooms are equipped for simultaneous translation.

In addition to a number of small meeting rooms and offices for members of the staff and administrators of the Institute, there is a small print shop that permits the Institute to produce some of its publications in-house. Modern equipment permits rapid duplication of material for distribution during conferences, seminars, and meetings of committees of experts.

Building B has been remodeled and offers similar facilities as those of the Institute's Building A. It is the seat of the new Monitoring Body on Organized Crime (Osservatorio Permanente sulla Criminalità Organizzata), established by regional law and funded by European Union.

These facilities allow the Institute to hold conferences and seminars with more than 250 participants, and host several 15-20 person parallel meetings. New offices can accommodate staff and resident fellows and are equipped with the latest technology.

The city of Noto, 30 kilometers from Siracusa, has provided the Institute with an additional seat in a seventeenth century historic monument, the Palazzo Trigona-Canicario, which is being restored. It will also be equipped for simultaneous translation and readied for conferences.

### *Library*

The library consists of a collection of over 15,000 volumes and reprints in international criminal law, international criminal procedure, human rights and small collections of different countries' books on criminal law, criminal procedure and criminology. The collection card catalog is computerized for easy information retrieval.

The collection is located in five adjacent rooms, which can also be used for meetings of 10-15 persons.

### *Staff*

The staff of the Institute consists of 4 full-time and 2 part-time persons, whose work is coordinated and supervised by the Scientific Director and the Director of the Administration. Additionally, the Resident Fellows participate in the daily functioning of the Institute.

The members of staff are:

Avv. Santo Reale, Administrative Director

Dr. Giovanni Pasqua: Scientific Director

Ms. Maria Teresa Troja: Chief of the Secretariat

Ms. Luisa Modica: Secretary

Mr. Sebastiano Ferla: Accountant

Mr. Ali Hekmat: Attendant

The President, Vice-President, Dean, Vice Dean, and Secretary of the Board are all volunteers and do not receive compensation. In addition, all the persons who are called upon to direct the conferences and seminars of the Institute do so on a volunteer basis. All speakers at conferences and seminars volunteer their time and effort. With the exception of speakers, participants pay their own travel expenses; the Institute covers residence costs only.

It is essentially because of this volunteer work that the Institute is able to carry out so many significant activities with its limited financial resources.

### *Financial Supervision*

Financial supervision is conducted by means of a Board of Supervisors (Revisori) presided over by a Judge of the Court of Accounts (Corte dei Conti), **Dr. Giuseppe Larosa**, with the participation of an auditor from the Sicilian Region, **Dr. Lorenzo Di Gesù**, as well as a

specialist in corporate accounts from the private sector, **Dr. Antonino De Benedictis**. The supervisory body produces an annual report submitted to the board, which along with the Board's Annual Report, is submitted to the various public financing entities. All financial matters are handled by the Banco di Sicilia, which acts as the cashier of the Institute. This elaborate procedure is intended to insure maximum financial integrity and transparency.

### *Philosophy of the Institute*

The Institute has pursued a leadership role developing United Nations norms and standards in the field of international criminal justice and human rights. The most important achievement of this long-standing commitment is certainly embodied in the Statute of the International Criminal Court, to which, since its inception, ISISC greatly contributed as part of its programs fostering the rule of law in different international settings. Its international conferences and seminars bring together jurists from all legal systems and all parts of the world in a politically neutral environment, academically conducive to learning and to the free exchange of ideas. The Institute has and will continue to emphasize the values of universality and humanism in the pursuit of the highest intellectual, scholarly, and academic goals.

In the course of its 30 years of activity, the Institute has promoted the participation of young researchers, women, and academics from all over the world, and more particularly from developing countries, assisting them in finding their way into the international community of scholars. Many who came to the Institute as young research assistants are now professors in different universities around the world.

Participants have ranged in age from the early twenties to the late eighties. All stand on equal footing in the intensive learning experience of the Institute's activities. Many enduring friendships and personal contacts have developed among the participants over the years. The network of ISISC's friendship extends worldwide and has had a significant effect on strengthening and supporting criminal justice reform and human rights in all regions of the world.

In addition to producing scientific work of the highest standards, the Institute has also provided an atmosphere that has promoted better understanding among peoples of the world and peace among nations. The Institute is rightfully proud of having been able to achieve this dual mission of humanistic influence and scholarly accomplishment in an

environment which promotes friendly relations and cooperation. It intends to continue to do so in the years to come.

### *Impact of the Institute*

It is difficult to evaluate intellectual impact, which by its very nature is intangible. It can, however, be observed through certain material characteristics, such as the fact that an impressive number of jurists and academics have participated in Institute activities, and have contributed to and made use of its publications. This is an objective basis from which to project a significant multiplier effect on the thousands of jurists all over the world who have benefited from the Institute's work.

ISISC's record of achievement, as well as its contribution to criminal justice (in particular to international criminal justice and human rights), can also be measured objectively: 287 conferences, seminars, and meetings of experts were conducted in collaboration with 131 inter-governmental organizations and non-governmental organizations. These programs were attended by about 19,495 jurists from 155 countries, including some 4,500 academics from 444 universities. Furthermore, the Institute has produced 112 volumes of publications, containing conference proceedings as well as scholarly and scientific research, all of which have achieved worldwide dissemination.

ISISC's mission to contribute to the development of more effective criminal justice systems, while at the same time strengthening respect for and observance of human rights, is being accomplished through its training programs, which have brought together government officials, judges, academics and lawyers from developed, developing, and least developed countries. The presence in Siracusa and participation in its activities of high-ranking officials who, in their own countries exercise influence and authority, is another way in which the Institute's intellectual contributions reach a wider audience and have long-lasting effects. The officials who have been at Siracusa and who have been involved in its activities include heads of state, government, and parliament, cabinet members (Ministers of Justice, Foreign Affairs, Defense, Interior, and Education), Chief Justices of supreme courts, Presidents of constitutional courts, as well as judges on these high courts, Attorney-Generals and Chief Prosecutors, members of parliaments, and other senior officials (judges, military and police officers, and other government officials). As a result of the participation and involvement of such senior officials, major international, regional, and

national initiatives have been advanced, national legislation passed, ministerial initiatives and policies developed, and changes in attitudes and opinions towards progressive ideas furthered.

Two examples are illustrative. The first is the development of the Arabic human rights program, which is described above and which brought about a major transformation in the Arab world at a time when the very notion of human rights was in question. The second relates to East-West relations during the "Cold War." Throughout the '70s and '80s, the Institute and the AIDP were the primary points of contact for jurists between what used to be called the Communist-Socialist countries and the rest of the world. Thus, when the "iron curtain" fell in 1989, changes in the criminal justice systems of these countries were due in part to jurists who were members of the AIDP and who had attended Institute activities or benefited from AIDP and ISISC academic materials. It was, therefore, particularly significant when in 1991 the Institute convened a major conference on the reform of the criminal justice systems of former socialist countries, which was attended by a large number of chief justices and justices of supreme courts, attorney-generals, chief prosecutors, and other high ranking officials of those legal systems.

Many of the programs conducted by the Institute on the administration of criminal justice for Arab and African countries have had a major impact in these regions, particularly in developing and least-developed countries. Equally noteworthy are training activities for young jurists who, literally by the thousands and from all over the world, have met in Siracusa. From these contacts, friendships have developed, as well as a better understanding of cultural diversity. The solid human and intellectual empathy established among the Institute's network of experts and associates permits the assessment of the impact that its activities have had at both the individual and general level.

At the individual level, the Institute is proud to witness that many of those who attended and continue to attend its meetings have reached top positions in their careers, be they in the academia, in the government, or in their profession. Many have continued to communicate with the Institute and with colleagues they have met through it, thereby fostering the spirit of friendship and intellectual understanding created during their stay in Siracusa. The experience shared at the Institute's premises has become a distinctive feature and supports a sense of belonging to the same group, which ultimately facilitates mutual understanding and international cooperation.

At the general level, the coming into force this year of the International Criminal Court, whose Statute was adopted in Rome on 17 July 1998, would already justify decades of efforts made by any institution. However, ISISC is also in a position to place itself among the shareholders of many other important criminal justice reforms and human rights advancements, both at the international and national level. The outcome of its activities has been the basis, often the backbone, of several international legal instruments, norms, and standards, as well as the framework for national legislation and reform processes. This was possible because the reputation of the Institute is such that its meetings have attracted participants who were or would later become key actors in the national and international arena. Convinced of the high value of the ideas being put forward by ISISC, they could use their influential position to support national reform.

The Institute contributed particularly to the development of norms and standards in international criminal justice through its work with the United Nations, the Council of Europe, the Organization of American States, and the League of Arab States. No other academic institution in the world can match the extraordinary record of accomplishment of ISISC in this field. Its work, along with the work of the AIDP in the field of international criminal justice (for this Institute over the last 30 years, and for the AIDP over the last 79 years), is simply unsurpassed. These two organizations have contributed so much and for so long towards the establishment of an international criminal court and towards combating impunity for international crimes. The IAPL and the Institute, along with the International Commission of Jurists, developed the first text of a draft Convention Against Torture, which they submitted to the United Nations in 1978, and which was adopted in 1984 with substantially similar language. As described above, the Institute also hosted many meetings of experts, which resulted in the adoption of far-reaching international and regional norms and standards, that significantly affected the progressive development and application of criminal justice and which strengthened human rights.

Networking is another significant feature of the Institute's initiatives, since the human relationship established among the persons who meet through the Institute has an effect on their daily professional life. The networking mechanism generated by the Institute allows the thousands of people who are marked by this common experience to liaise daily and benefit from mutual support. The "Siracusa experience" does not only mean membership in a large and high-level intellectual group, but is also

a striving force constantly working for change in academia, the government, the judiciary, and the legal profession, so as to make justice more humane and effective in all countries of the world. This has given the name of the Institute, and that of Siracusa, worldwide attention and recognition.

The “Siracusa spirit” has caused many friendships to develop and facilitated numerous contacts among older and younger jurists, and men and women of all nationalities, races, religions, and political views, creating a network of among so many that have made an incalculable contribution to communication between jurists from all over the world. The intellectual and human openness of the Institute’s work and spirit have set a positive example, which many of the younger participants have embraced and carried with them throughout their careers.

Notwithstanding all of these contributions, the Institute has not grown into an elitist or closed institution, purposefully remaining open, accessible, and service-oriented, particularly towards those with fewer opportunities for access to academic and scientific development.

It is said in the Torah, and both Christianity and Islam echo it, that “he who saves one life has saved all of humanity.” If ISISC in its work has contributed to saving one life, or to sparing one person from torture, or making one human being’s life better, then that alone has made its existence worthwhile. And that belief is what keeps us working at the Institute - the staff, the board, and all our collaborators.

# **The XXXth Anniversary of the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy**

## **Histoire, organisations et activités**

### **ORGANES FONDATEURS**

L'Institut Supérieur International en Sciences Criminelles (ISISC) a été fondé à Syracuse en septembre 1972 par l'Association Internationale de Droit Pénal (AIDP), en coopération avec la Ville, la Province, et la Chambre de commerce de Syracuse. Une « *Convenzione* » a par la suite été conclue par les organes fondateurs avec la région Sicilienne, et un accord séparé a été signé avec la ville de Noto. La Région sicilienne et ces différentes collectivités locales procurent à l'Institut ses principales ressources financières.

### **STATUT JURIDIQUE**

L'Institut est une fondation publique créée par un décret du Président de la République Italienne, en tant qu'institution supérieure et culturelle à but non-lucratif, consacrée à l'étude, la recherche et à l'avancement des sciences criminelles au sens large, comme intégrant les droits de l'homme. Il est enregistré comme organisation à but non-lucratif selon la loi Italienne (*Organizzazione Non Lucrativa di Utilità Sociale - ONLUS*).

En tant qu'organisation non gouvernementale, dotée du Statut consultatif des Nations-Unies, l'ISISC dispose également d'un accord spécifique de collaboration avec le Centre international de Prévention du Crime – Bureau des Nations-Unies de Vienne (CIPC-UNOV), et est l'une des quatorze institutions appartenant au réseau du programme des Nations-Unies pour la prévention du crime et la justice pénale. Ce réseau assiste le programme des Nations-Unies et les états membres dans le renforcement de la coopération internationale pour la prévention du crime et la justice pénale. Les organisations relevant de ce réseau fournissent différents services, comprenant l'échange d'informations, la recherche, les programmes de formation. L'Institut jouit également du statut consultatif près du Conseil de l'Europe, grâce à l'AIDP, et bénéficie de même d'accords de coopération avec un bon nombre d'Universités, dont celles de Catane (Sicile), Palerme (Sicile), Buenos Aires (Argentine), DePaul

(IHRLI), El-Mansoura (Egypte), l'Université nationale d'Irlande de Galway, Nantes (France), San Sebastian (Espagne), et Malte.

### **AUSPICES SCIENTIFIQUES**

L'Institut, bien qu'entité juridique indépendante, est placé sous les auspices scientifiques de l'AIDP. L'AIDP a été fondée à Paris en 1924, sur les bases de l'Union Internationale de Droit Pénal, elle-même créée à Vienne en 1889, et constitue l'association scientifique la plus ancienne, comme la plus prestigieuse, dans le champ de la justice pénale. L'AIDP compte quelque 3000 membres et affiliés dans 120 pays et 47 sections nationales. Les membres de l'association constituent un groupe d'experts indispensable aux travaux de l'Institut.

Dans la perspective d'affirmer les objectifs scientifiques de l'Institut et de l'Association, ces organisations parrainent fréquemment en commun certaines activités, et l'Association a permis l'usage de la Revue Internationale de Droit Pénal, ou de la collection Nouvelles Etudes Pénales, pour la publications des travaux de l'Institut. Ainsi les activités scientifiques de l'Institut reçoivent-elles une diffusion mondiale au sein des communautés professionnelles et doctrinales intéressées à la justice pénale.

### **DIRECTION**

La direction de l'Institut comprend un Conseil d'Administration indépendant formé de 25 membres, dont 16 élus par le Conseil de Direction de l'AIDP, parmi des experts et chercheurs internationalement reconnus, et 9 membres *ex-officio*: le  *Rettore*  de l'Université de Catane, le Président de la section italienne de l'Association Internationale de Droit Pénal, le maire et deux représentants de la ville de Syracuse, le Président et un représentant de la Province, un représentant de la Région sicilienne, et le maire de la ville de Noto.

Les membres titulaires du Conseil d'Administration (y compris les membres honoraires) sont :

#### **M. CHERIF BASSIOUNI, *Président***

Président, Association Internationale de Droit Pénal ; Professeur de droit et Président de l'Institut International des Droits de l'homme, Université DePaul, Chicago, Président de l'Observatoire Permanent sur la Criminalité Organisée (OPCO)

**GUIDO DE MARCO, *Président honoraire***

Président de la République de Malte, Professeur de droit, Université de Malte

**AHMAD FATHI SOROUR, *Président honoraire***

Président du Parlement égyptien, ancien Ministre de l'éducation, Professeur de droit pénal, Université du Caire, Vice-président de l'AIDP

**GIULIANO VASSALLI, *Président honoraire***

Président Emérite de la Cour constitutionnelle italienne, ancien Ministre de la justice ; Professeur Emérite de droit pénal, Rome, Vice-Président de l'AIDP

**ALVARO GIL-ROBLES, *Président honoraire***

Haut commissaire aux droits de l'homme, Conseil de l'Europe

**REYNALD OTTENHOF, *Vice-Président***

Professeur de droit Emérite de l'Université de Nantes, Vice-président de l'AIDP

**GIAMBATTISTA BUFARDECI, *Vice-président honoraire***

Maire de Syracuse, Avocat

**ALFONSO STILE, *Doyen***

Professeur de droit pénal, Université de Rome, La Sapienza, Vice-président de l'AIDP, Président de la Section Italienne de l'AIDP

**MARIO PISANI, *Vice-doyen***

Professeur de procédure pénale, Université de Milan

**SANTO REALE, *Directeur administratif***

Avocat, Syracuse

**GIOVANNI TINEBRA, *Secrétaire***

Directeur général du Département de l'Administration pénitentiaire, Ministère de la justice

**MICHELE ACCARDO, *Membre***

Maire de Noto, Avocat

**GAETANO BANDIERA, *Membre***

Président du Conseil Provincial, Province de Syracuse

**GIOVANNI CONSO, *Membre***

Président Emérite, Cour constitutionnelle italienne, ancien Ministre de la justice, Professeur Emérite, Université de Turin

**LUISELLA DE CATALDO NEUBURGER, *Membre***

Professeur adjoint de psychologie légale, Université de Rome, La Sapienza

**JOSÉ LUIS DE LA CUESTA, *Membre***

Professeur de droit pénal, Université du Pays Basque de San Sebastian, Secrétaire général adjoint de l'AIDP

**GIUSEPPE DI GENNARO, *Membre***

Conseiller au Ministère de la Justice, Président SPAI, Président de chambre honoraire de la Cour de cassation, ancien Directeur exécutif, UNFDAC

**HELMUT EPP, *Membre***

Juge, Secrétaire du Parlement national autrichien, Secrétaire général de l'AIDP

**FABIO GRANATA, *Membre***

Assesseur pour l'éducation régionale, culturelle et environnementale, Région Sicile, Avocat.

**HANS-HEINRICH JESCHECK, *Membre honoraire***

Président honoraire de l'AIDP, ancien Recteur, Doyen et Professeur de droit pénal, Université Albert Ludwig, ancien Directeur, Institut Max-Planck de droit international et de droit comparé

**JEAN-PAUL LABORDE, *Membre***

Juge, Conseiller interrégional, Programme des Nations-Unies pour la Prévention du Crime et la Justice pénale, Secrétaire général de la RIDP

**FERDINANDO LATTERI, *Membre***

Professeur de Chirurgie légale, Recteur, Université de Catane

**BRUNO MARZIANO, *Membre***

Président de la Province de Syracuse

**FERDINANDO MESSINA, *Membre***

Président du Conseil municipal de Syracuse

**GERHARD O.W. MUELLER, *Membre honoraire***

Vice-président de l'AIDP, Vice-président, SIDS; ancien Chef de la Division à la Prévention du crime et la justice pénale des Nations-Unies, Professeur Distingué de droit pénal, Université Rutgers, Newark

**ANTONIO PAGLIARO, *Membre***

Professeur de droit pénal et Directeur du Département de droit pénal, Université de Palerme

**EZECHIA PAOLO REALE, *Membre***

Assesseur aux projets de la Ville, Ville de Syracuse, Membre du Conseil, Centre de droit pénal européen, Université de Catane, Avocat

**SIMONE ROZÈS, *Membre honoraire***

Vice-président honoraire, AIDP, Premier Président honoraire près la Cour de cassation, France, Présidente de la SIDS ; ancien Avocat Général, Cour des Communautés Européennes, Luxembourg

**ULRIKA SUNDBERG, *Membre***

Conseiller, Mission permanente de la Suède près des Nations-Unies, Genève

**JEAN-FRANÇOIS THONY, *Membre***

Conseiller adjoint, Fonds Monétaire International, Conseiller près la Cour d'appel de Versailles, Secrétaire général adjoint et Trésorier de l'AIDP

**PETER WILKITZKI, *Membre***

Directeur ministériel, Ministère fédéral de la justice, Allemagne, Secrétaire général adjoint, AIDP

**ABDEL AZIM WAZIR, *Membre***

Gouverneur de Damiette, ancien Doyen et Professeur de droit pénal, Université de Mansourah, secrétaire général adjoint, AIDP

**PROGRAMME ET ACTIVITES**

L'Institut a connu un développement progressif de ses activités, en les intensifiant à partir de 1976. Entre 1973 et 2002, l'Institut a organisé 287 conférences, séminaires, et réunions de comités d'expert, rassemblant au total près de 19 495 participants, issus de 155 pays, dont environ 4500 professeurs provenant de 444 Universités, et a également travaillé en collaboration avec 131 organisations inter gouvernementales, ou non-gouvernementales. Aucune autre organisation scientifique ou académique, n'a eu une telle portée et accompli autant en cette courte période de trente ans, dans le domaine du droit.

**ACTIVITES EN COLLABORATION AVEC LES NATIONS-UNIES ET LE CONSEIL DE L'EUROPE**

L'Institut a participé à un grand nombre d'initiatives internationales, au sein des comités d'experts des Nations-Unies et du Conseil de l'Europe, pour la création d'instruments internationaux, comprenant des activités en relation avec l'élaboration du Traité établissant une Cour pénale internationale, ses statuts, ses règles de procédure.

Pour la réalisation de ces objectifs, l'Institut a tenu seize conférences, séminaires, et comités d'experts à Syracuse et ailleurs, en vue d'accélérer le processus de création de la Cour Pénale Internationale, lors de la conférence diplomatique qui s'est tenue à Rome le 17 juillet 1998. Ces réunions, fréquentées par plus d'un millier de juristes et représentants des gouvernements, ont donné naissance à un nombre de documents qui ont constitué une base de discussion à Rome, et comprenant le « projet de Syracuse », porté devant le comité préparatoire de Nations-Unies, à New-York, en mars 1996. En 1996-1997, l'Institut a accueilli trois réunions intermédiaires du comité préparatoire, et, en 1998, une réunion inter-session de la conférence diplomatique, avec ses trois présidents désignés. Deux d'entre eux étaient des membres du Conseil d'Administration de l'Institut : le Professeur Conso, Président de la conférence, et le Professeur

Bassiouni, Président du comité de rédaction, et Président de l'Institut. En 1999, l'Institut a également tenu une réunion inter-session de la commission préparatoire sur la procédure et les modes de preuves.

Une autre réunion importante tenue à l'Institut a été celle du comité d'experts qui a préparé en 1977 le projet de convention sur la prévention et la répression de la torture. Ce projet fut soumis formellement aux Nations-Unies par l'AIDP en 1978 (E/CN.4/NGO/213, 1 Février 1978). Et par la suite, la Suède proposa ce même texte, qui fut adopté par l'Assemblée Générale en 1984.

L'Institut a également contribué à la Convention des Nations-Unies sur la criminalité organisée transfrontalière, signée à Palerme en décembre 2000, en participant aux négociations tenues à Vienne, et comme agent consultant du gouvernement italien. Le directeur scientifique de l'Institut, de cette époque, le Docteur Alfredo Nunzi, était membre de la délégation italienne qui a discuté de la convention et de ses deux protocoles.

D'autres instruments internationaux ont aussi été élaborés à l'Institut. Ceux adoptés par les Nations-Unies jusqu'à présent sont :

- Les principes des Nations-Unies sur l'indépendance des professions judiciaires et juridiques.
- Les principes sur la protection des droits des malades mentaux.
- Les principes directeurs sur la prévention du crime et la justice pénale, dans une perspective de développement.
- Le traité-modèle sur le transfert des prisonniers.
- Le traité-modèle sur le transfert des procédures pénales.
- Le traité-modèle sur l'extradition.
- Le traité-modèle sur l'exécution des sentences pénales.

D'autres instruments internationaux élaborés par l'Institut sont encore en instance devant les Nations-Unies. Ils comprennent :

- Le projet de lignes directrices sur l'état d'urgence et les dérogations au Pacte international relatif aux droits civils et politiques.
- Le projet de convention sur la répression des expérimentations illicites sur la personne humaine.

L'Institut a enfin accueilli un grand nombre de réunions d'experts, en collaboration avec le Conseil de l'Europe, sous l'égide de son Secrétaire général. Ses activités avec le Conseil de l'Europe comprennent :

- Le projet de convention étendue sur la coopération internationale en matière pénale.
- L'uniformisation des programmes d'enseignement du droit pénal européen dans les universités des états concernés.
- Les lignes directrices pour la protection de l'héritage culturel en Europe (avec la participation du Parlement Européen).
- La décentralisation et le rôle de la police municipale.
- La traduction en langue arabe et la publication de la Convention Européenne des Droits de l'Homme ainsi que de ses protocoles, et de la Convention Européenne sur la Torture.

### COMITES D'EXPERTS

Une grande part des activités mentionnées ci-dessus ont pris la forme de comités d'experts, mais d'autres réunions de spécialistes se sont tenues, comme il est indiqué ci après dans la liste chronologique des activités.

### COOPERATION TECHNIQUE ET COURS DE FORMATION

L'institut a conduit plus de 40 opérations de coopération technique et séminaires de formation, à l'intention des juges et fonctionnaires des pays en voie de développement, sur la criminalité organisée, la coopération internationale en matière pénale, l'extradition et la protection des droits de l'homme dans l'administration de la justice pénale (décrits ci après dans la liste). Ces programmes ont été élaborés en collaboration avec les Nations-Unies, le Conseil de l'Europe, la Ligue des Etats Arabes, l'organisation des Etats-Unis, et autres organisations internationales.

Plusieurs milliers de juges, procureurs, officiers gouvernementaux, chercheurs, juristes et étudiants ont suivi ces programmes, y compris des magistrats, membres du parquet, officiers de police et de l'armée égyptiens, avec le concours du Ministère italien des Affaires Etrangères et de la Justice. Quelques programmes ont été élaborés avec la Présidence du Conseil italien, et le Ministère de la Justice, et en collaboration avec Europol et le Conseil de l'Europe, à l'intention des juges, procureurs et officiers de police de Macédoine et d'Albanie. Un programme similaire a aussi été proposé aux juristes africains, rassemblant plus de 200 juges, procureurs, professeurs et juristes. Aucune autre Institution privée n'a

apporté une assistance aussi approfondie en matière de technique juridique, dans le champ spécifique de la justice pénale et des droits de l'homme.

## **CONFERENCES INTERNATIONALES ET SEMINAIRES**

L'Institut accueille régulièrement des conférences internationales d'experts, sur des thématiques intéressant la communauté scientifique, réunissant les membres dirigeants et experts en sciences criminelles du monde entier.

Les séminaires internationaux sont menés sous la forme de programmes de formation continue, et sont suivis par des enseignants, chercheurs, juges, officiels des gouvernements, juristes, avocats et jeunes diplômés en droit.

L'Institut tient également annuellement des séminaires de formation à l'intention de la section des Jeunes Pénalistes, sur des problématiques contemporaines du droit pénal, et en droit comparé. Ces séminaires réunissent habituellement 60 à 70 participants, de 25 à 30 pays. C'est, pour les jeunes pénalistes, l'opportunité d'apprendre à connaître leurs collègues du monde entier, et de travailler en réseau tout au long de leur carrière. Il leur est aussi donnée la possibilité de participer activement lors de ces séminaires, comme intervenants ou panélistes et il arrive que leurs travaux soient publiés au sein de la Revue Internationale de Droit Pénal et des Nouvelles Etudes Pénales.

## ***PROGRAMMES INTER REGIONAUX***

### **PROGRAMME ARABE DES DROITS DE L'HOMME**

Depuis 1985, l'Institut a entrepris un vaste programme relatif aux droits de l'homme dans le monde arabe. En décembre 1985, l'Institut a tenu une conférence sur la réforme du droit pénal et l'enseignement des droits de l'homme, suivie par soixante sept juristes, issus de 12 pays arabes et de Palestine. A la suite de cette initiative, un comité d'experts s'est réuni en décembre 1986 pour préparer un projet de Charte Arabe des Droits de l'homme et des peuples. Soixante seize personnalités importantes du monde arabe, représentant 12 pays arabes ainsi que la Palestine ont assisté à cette réunion. Le « projet de Charte Arabe des Droits de l'homme et des peuples » a été soumis à la Ligue des Etats

Arabes, et à l'ensemble des chefs d'états arabes. Ce projet a reçu l'appui de l'Union des Avocats Arabes, représentant plus de 100 000 avocats du monde arabe.

Depuis lors, 17 séminaires ont été proposés, sur l'enseignement des droits de l'homme dans les Facultés de Droit des pays arabes, les centres de formation juridique, les académies de police, et les programmes en matière de justice militaire. Trois de ces formations se sont déroulées en Egypte. En décembre 1998, le nombre des participants avait dépassé 1600 personnes, parmi lesquelles on peut compter plus de 350 professeurs de droit, enseignants au sein des Instituts de formation judiciaire, des académies de police, des programmes de formation militaire, originaires de 18 états Arabes. Quatre volumes en langue arabe ont été publiés. Plus d'un millier de copies de chacun de ces ouvrages ont été distribués aux enseignants et bibliothèques de droit à travers le monde arabe. Huit facultés de droit proposent désormais annuellement des formations en matière de droits de l'homme, confrontant quelque 10 000 étudiants à ce thème, tandis que les instituts d'études judiciaires et écoles de police ont inclus les droits de l'homme dans leurs programmes d'enseignement.

L'Institut a organisé sept conférences destinées aux juristes du monde arabe, qui se sont tenues au Caire et à Alexandrie, avec la participation de plus de 2000 personnes. Les actes des conférences du Caire et d'Alexandrie ont donné le jour à 3 ouvrages.

Le nombre total des publications en langue arabe s'élève à 11 depuis 1997, et comprend une publication spéciale de la Convention Européenne des Droits de l'Homme. Cette traduction a été la première autorisée par le Conseil de l'Europe, dans une langue autre que les langues officielles du Conseil.

L'Institut a par ailleurs initié, en 1990-1991, un programme d'une durée de cinq semaines, à l'intention des juristes diplômés du monde arabe. L'objectif de ce programme intensif était de familiariser les futures générations de juristes arabes à la question des droits de l'homme dans leurs pays.

De même, en 1993, se sont déroulées deux importantes conférences destinées aux magistrats des pays arabes, dont les actes ont été publiés en deux volumes : le premier traite du système arabe de formation judiciaire, le second a trait à la coopération inter-étatique en matière pénale.

En novembre 1997, une conférence s'est tenue au Caire sur l'établissement d'une Cour Pénale Internationale. Trois cents personnes, issues de 6 pays arabes y ont participé.

Enfin, en 1998, le programme arabe comportait 4 conférences, réunions d'experts et séminaires d'assistance et de coopération technique, traitant de questions telles la coopération internationale en matière pénale, le droit humanitaire et la sécurité régionale, la criminalité organisée et le blanchiment d'argent. Ces conférences ont réuni quelque 150 participants, en provenance de 15 pays, et comprenant des membres du Parlement, des procureurs, des hauts fonctionnaires, et des professeurs d'université.

Ainsi s'agit-il du programme régional le plus important dans le champ de la justice pénale, et de l'enseignement des droits de l'homme jamais entrepris, et celui qui a eu le plus grand impact, si l'on considère l'importante participation à ces séminaires de parlementaires, membres des cabinets gouvernementaux, et des bureaux de procureurs généraux, hauts fonctionnaires de la police et de la sécurité, professeurs d'universités, et autres, dont l'influence a permis que les politiques nationales et législatives bénéficient de leur expérience.

Particulièrement importants sont les programmes organisés depuis plusieurs années, à l'intention des juges, procureurs, officiers de police égyptiens, sous le co-patronage des Ministères de la Justice et des Affaires Etrangères, et en collaboration avec des Ministères égyptiens de la Justice et de l'Intérieur, le bureau du Procureur général, l'agence de contrôle administratif, et le département de justice militaire du Ministère de la Défense.

## **AUTRES PROGRAMMES REGIONAUX**

L'Institut, en coopération avec le Centre des Nations-Unies des Droits de l'Homme, le Centre international pour la prévention du crime - bureau des Nations-Unies de Vienne, et l'Agence suédoise pour le développement de la coopération internationale, a aussi développé un programme destiné aux juristes africains sur la justice pénale et les droits de l'homme. Le premier de ces programmes pour juristes anglophones s'est tenu au mois de juillet 1992. Le second, à l'intention des juristes de langue portugaise, s'est déroulé en mai 1997. Ces activités ont été suivies par plus de 200 participants, issus de 32 pays d'Afrique, et comprenant nombre de hauts fonctionnaires des Ministères de la Justice, de l'Intérieur, des Affaires Etrangères, des présidents de juridictions, des procureurs généraux, et autres participants dont l'envergure a permis d'en faire bénéficier les responsables de la politique législative et de la politique criminelle.

D'autres programmes de formation ont été institués pour les juges des pays Balkans, et procureurs ou officiers de police d'Albanie et de Macédoine, en coopération avec Europol et le Conseil de l'Europe. Après 1999, un certain nombre de programmes similaires ont été organisés à l'intention des pays d'Europe Centrale et d'Europe de l'Est, ou des pays de l'ex-U.R.S.S.

## **ACTIVITES NATIONALES ET LOCALES**

L'Institut organise chaque année un ensemble de conférences et de séminaires destinés aux professeurs, juges, avocats et autres juristes italiens.

Les séminaires nationaux sont organisés pour les juges italiens, en collaboration avec le Conseil supérieur de la magistrature (*Consiglio superiore della magistratura*), l'Association des juges (*Associazione nazionale magistrati*), ou encore avec le Ministère de la justice italien, qui finance aussi certaines de ces activités. Le Conseil supérieur de la magistrature a publié cinq ouvrages à la suite de ces séminaires, et les a diffusés à l'ensemble des magistrats italiens.

Le master en psychologie légale, à l'intention des juges, juristes et experts en droit pénal fait partie de l'engagement de l'Institut dans ce domaine, comme en témoignent les quinze volumes publiés dans la collection « ISISC-atti e documenti », aux éditions Cedam.

Les séminaires destinés aux magistrats et juristes de la Région de Sicile ont pour thématique des sujets en relation avec cette région.

L'Institut organise aussi des séminaires à Syracuse et Noto, chaque année, pour les professeurs italiens de droit pénal, procédure pénale, criminologie et psychologie légale.

## **CONFERENCES LOCALES POUR JURISTES ET MAGISTRATS DE SYRACUSE**

Le programme national italien est non seulement un mode de réunion des magistrats, professeurs, membres du gouvernement et praticiens, mais a été aussi le catalyseur de changements. L'actuel code de procédure pénale, entré en vigueur en 1989, et qui s'inspire largement du modèle anglo américain d'une justice de type accusatoire, a fait l'objet d'un séminaire de l'ISISC en 1977. Ce séminaire a été suivi d'une importante publication sur ce sujet, et, depuis lors, l'Institut contribue à approfondir la réflexion sur ce thème, parmi les autres programmes. La loi de 1978 sur

la décriminalisation a également été élaborée à l'Institut par un comité d'experts, composé notamment de parlementaires et d'agents publics.

D'autres initiatives législatives ont vu le jour à l'Institut, où y ont reçu l'impulsion nécessaire à leur évolution, à travers les conférences et publications, comme la loi sur les abus de pouvoir des agents publics.

### **LES ACTIVITES DE NOTO**

La ville de Noto, située à trente kilomètres de Syracuse, est liée à l'ISISC par une convention signée en 1972. Sur la base de cet accord, la ville de Noto a fourni à l'Institut un siège annexe, au sein du *Palazzo Trigona Canicrao*, monument national du 17<sup>ème</sup> siècle. Pendant ces trente années, l'ISISC a organisé à Noto plus de 17 manifestations, réunissant 794 participants, issus de 34 pays et 78 universités différentes, consacrant ainsi Noto comme la capitale de l'Italie baroque, dans le monde entier. Plus précisément, deux groupes d'activités sont exclusivement rattachés à la ville de Noto. Le premier comporte les séminaires, conférences et comités d'experts en psychologie judiciaire, et constitue l'unique exemple de réunion interdisciplinaire, impliquant des spécialistes d'horizons différents : avocats, magistrats, psychologues, professeurs de droit, psychiatres, criminologues et psychothérapeutes. Le second est constitué des séminaires de formation pour la section des jeunes pénalistes de l'AIDP, lesquels sont exclusivement organisés par des chercheurs, professeurs associés, avocats et magistrats du monde entier, représentant l'avenir du droit pénal international.

### **ORGANISME DE FORMATION SUR LE CRIME ORGANISE (OSSERVATORIO PERMANENTE SULLA CRIMINALITA ORGANIZZATA) - OPCO**

En réponse à un projet déposé par l'ISISC, la Région de Sicile a créé en 2001 (loi du 7 mai 2001, n°6, article 49), une nouvelle institution appelée « Observatoire permanent de la criminalité organisée », en tant que corps consultant de la Région Sicile. Même si l'OPCO dispose de sa propre personnalité juridique, le comité dirigeant est composé de 6 à 8 membres du Conseil d'administration de l'ISISC, nommés par le Conseil d'administration de ce même Conseil. Les relations entre OPCO et l'ISISC sont régies par une convention, et, sur ce fondement, l'Institut a concédé à l'OPCO le bâtiment B de ses locaux à titre d'usage.

Les missions de l'OPCO consistent à conseiller la Région de Sicile sur des questions relatives au développement européen, tout autant que d'informer de ses activités d'observation, recherches et études sur le crime organisé, à un niveau national et international. Plus précisément, l'OPCO doit créer une base de données comportant les traités et accords nationaux et internationaux, relatifs à la criminalité organisée, le blanchiment d'argent, la corruption, ainsi que les solutions qui y sont proposées, de même pour les différentes législations nationales de l'ensemble des pays, ainsi que le résultat des recherches, des plus anciennes aux plus récentes sur la criminalité organisée, ses implications et conséquences. L'OPCO publiera régulièrement un bulletin sur le développement de ses activités, et les informations les plus récentes en matière de lutte contre la criminalité organisée.

## **SUJETS DES CONFERENCES ET SEMINAIRES**

Les conférences et séminaires organisés par l'Institut couvrent une large part des sciences criminelles : droit pénal international, droit pénal et procédure pénale, droit pénal comparé et procédure pénale comparée, protection nationale et internationale des droits de l'homme, criminologie et criminologie comparée, psychologie légale, pénologie et politique criminelle.

Quelques illustrations de la variété et de la diversité des programmes proposés : la codification du droit pénal international, la protection des droits de l'homme dans les systèmes de justice pénale, l'avenir de la violence dans les sociétés contemporaines, la philosophie de la justice pénale, le rôle du juge dans les sociétés modernes, la fonction du droit pénal contemporain, la criminologie comparée dans le bassin méditerranéen, la justice criminelle et la formation des droits de l'homme, leur évolution dans les pays arabes; le rôle de l'expert en criminologie dans le procès pénal ; la procédure pénale comparée en amont du procès et phase post-sentencielle. Même les séminaires destinés aux magistrats et professeurs italiens ont comporté des dimensions internationales et comparatives : le droit pénal international, l'extradition et l'espace judiciaire européen, le droit pénal économique, l'observation des systèmes de justice pénale, la justice pénale et les médias, le terrorisme et les

aspects psychologiques du procès pénal, la plupart de ces programmes étant interdisciplinaires.

## **DUREE DES CONFERENCES ET SEMINAIRES**

L'importante expérience de l'Institut a permis le développement effectif de différents séminaires, en considération de leur durée. Quoi qu'il en soit, la plupart des programmes sont réalisés sur une semaine pour 5 jours de travail, à raison de 7 heures par jour. Les participants continuent également leurs discussions dans l'hôtel où ils résident. Ordinairement, un séminaire ou une conférence consiste en 30 ou 40 heures de discussions formelles, et un nombre important de discussions informelles. Ceci correspond au nombre d'heures requis pour l'étude d'une thématique donnée dans la plupart des instituts de formation en sciences juridiques.

## **PROGRAMMES D'ETUDES SUPERIEURES**

L'Institut organise des sessions de niveau post gradué, ou de spécialisation approfondie. Pendant l'été 1990, le premier programme de formation a été mis en place. Il s'agissait d'un programme de formation de 5 semaines sur les droits de l'homme et la justice pénale, destiné aux candidats aux masters et doctorats des facultés de droit arabes, et aux institutions publiques spécialisées. En 1998, l'Institut a organisé la première session de 3 semaines du master en psychologie légale, qui est désormais régulièrement tenu.

Le programme de formation intitulé « master de psychologie légale » est un programme de 105 heures, dispensé aux post gradués, sur une période de 3 mois, pour assurer la continuité et la stabilité de cette expérience, et pouvoir y permettre un maximum de collaboration des participants. Le premier programme s'est tenu en 1988, et a été suivi par 50 participants. Prévu en 1999, les masters de psychologie légale se poursuivent en parallèlement à la préparation d'autres programmes de spécialisation en droit pénal international et droits de l'homme.

A partir de 2003, l'Institut organisera, et tiendra, à Syracuse un programme de formation spécialisée en droit pénal international, en coopération avec 6 universités (DePaul, Galway, Nantes, Palerme, San Sébastian et Malte). Ce programme pourra être suivi par 50 jeunes diplômés des facultés de droit, et consistera en 20 sessions de travail, avec un examen terminal pratique.

### ***BOURSIERS POST-GRADUES***

Outre des programmes d'enseignement, l'Institut offre chaque année une ou deux bourses de résidence à des diplômés. Pendant leur séjour à l'Institut, les boursiers s'intègrent dans les activités de l'Institut, participent aux différents séminaires et conférences organisés, et poursuivent leur activité individuelle de recherche. A ce jour, l'Institut a offert 11 bourses. Certains de ces boursiers ont rejoint l'université où ils sont maintenant professeurs ; d'autres ont poursuivi leur carrière professionnelle.

### ***PUBLICATIONS***

Jusqu'en décembre 2002, 112 ouvrages ont été publiés à l'initiative de l'Institut, dont un encore à l'impression. Une partie du bilan des activités de l'Institut est contenue dans la Revue internationale de droit pénal, et la collection *Nouvelles Etudes Pénales*, une autre partie est publiée par l'Institut, dans la série *Quaderni*.

L'Institut a également publié en accord avec deux groupes majeurs d'édition italiens, Cedam (Padoue) et Jovene (Naples), pour les publications en langue italienne, une collection de psychologie légale (plus de 14 volumes à ce jour). De plus, le Conseil supérieur de la magistrature (Consiglio Superiore della Magistratura) a publié 5 ouvrages, en collaboration avec l'Institut, à la suite de conférences.

D'importants éditeurs américains, français, italiens, libanais et hollandais ont aussi publié certains travaux de l'Institut.

La plupart des ouvrages dirigés par l'Institut sont le résultat des rencontres que celui-ci organise, et comportent des contributions originales d'experts reconnus mondialement sur les questions de droit pénal et de droits de l'homme. L'impulsion scientifique donnée par l'Institut aux débats autour de la création d'un tribunal pénal international permanent a fondé les bases de l'élaboration du Statut de la Cour pénale internationale, et est l'une de ses plus importantes contributions à l'étude du droit pénal international et du droit pénal comparé. Grâce au nombre de ses experts, et à ceux de l'AIDP, le rayonnement intellectuel de l'Institut a touché des milliers de professeurs, responsables politiques, agents de la justice pénale, et étudiants à travers le monde.

## **MOYENS MATERIELS**

L'Institut est situé dans deux immeubles modernes contigus de trois étages, et reliés par un jardin, dans la ville historique de Syracuse. Le bâtiment A dispose d'un auditorium de 115 places, et de deux salles de conférences de 25 et 40 places, respectivement. Ces salles sont équipées pour la traduction simultanée.

Outre les petites salles de réunions, et les bureaux des membres de l'Institut et du personnel administratif, l'Institut dispose d'une petite imprimerie qui lui permet d'éditer certains ouvrages. Un équipement moderne permet la reproduction rapide des documents à distribuer lors des conférences, séminaires, et réunions des comités d'experts.

Le bâtiment B a été rénové et offre les mêmes facilités que le bâtiment A. C'est le siège de l'Observatoire permanent de la criminalité organisée, établi par une loi régionale, et fondé par l'Union européenne.

Ces facilités matérielles permettent à l'Institut de tenir des conférences et séminaires réunissant plus de 250 participants, et d'accueillir 15 à 20 personnes en réunion parallèle. Les nouveaux bureaux servent au personnel, résidents invités, et sont équipés des technologies les plus avancées.

La ville de Noto, à 30 kilomètres de Syracuse a permis d'ajouter à l'Institut un siège annexe dans un monument historique du 17<sup>ème</sup> siècle, le *Palazzo Trigona - Canicarao*, en restauration. Cet endroit sera également équipé pour la traduction simultanée.

## **BIBLIOTHEQUE**

La bibliothèque est constituée d'une collection de plus de 15 000 ouvrages et reproductions en droit pénal international, procédure pénale internationale, droits de l'homme, et de petites collections de différents pays sur le droit pénal, la procédure pénale et la criminologie. Le catalogue est informatisé pour faciliter la recherche et la localisation des documents.

L'ensemble des collections est disposé dans 5 petites pièces adjacentes, qui peuvent également servir de salles de réunion pour 15 ou 20 personnes.

## **PERSONNEL**

Le personnel de l'Institut comporte 4 personnes à temps plein et deux personnes à mi-temps, dont le travail est coordonné et dirigé par le

directeur scientifique et le directeur administratif. Par ailleurs, les résidents invités participent au fonctionnement quotidien de l'Institut.

Les membres du personnel sont :

Avv. Santo Reale, directeur administratif

Dr. Giovanni Pasqua, directeur scientifique

Mme. MariaTeresa Troja, secrétaire en chef

Mme. Luisa Modica, secrétaire

Mr. Sebastiano Ferla, comptable

Mr. Ali Hekmat, agent

Le Président, le Vice-président, le Doyen, le Vice doyen et le Secrétaire sont tous bénévoles et ne reçoivent aucune indemnité. De plus, toutes les personnes qui sont appelées à diriger les conférences et séminaires de l'Institut accomplissent leur tâche sur la base du volontariat. Tous les intervenants aux séminaires et conférences offrent leur temps et leur travail. A l'exception des intervenants, les participants prennent à leur charge leurs frais de déplacement. L'Institut subvient pour sa part aux frais d'hébergement.

C'est ce volontariat qui permet à l'Institut de gérer autant d'activités importantes, avec les ressources limitées dont il dispose.

### ***CONTROLE FINANCIER***

La gestion financière est assurée par un Conseil de surveillance (Revisori), présidé par un juge de la cour des comptes (corte dei conti), avec la participation d'un auditeur de la Région de Sicile, ainsi que celle d'un spécialiste de la gestion des groupements du secteur privé. Le corps de supervision rend un rapport annuel, soumis au Conseil d'administration, et soumis, en même temps que le rapport annuel du Conseil d'administration aux différentes organisations publiques. Toutes les questions financières sont gérées par la Banque de Sicile, qui est également la Banque de l'Institut. Cette procédure élaborée doit permettre d'assurer au maximum l'intégrité financière et la transparence.

### ***PHILOSOPHIE DE L'INSTITUT***

L'Institut a poursuivi un objectif essentiel en matière de développement des règles des Nations-Unies et des standards dans le

champ de la justice pénale internationale et des droits de l'homme. L'œuvre la plus accomplie de ce long effort réside certainement dans le Statut de la Cour pénale internationale, auquel l'ISISC, depuis sa naissance a grandement contribué, de même, par ses activités, qu'à l'essor du droit dans les différents cadres internationaux. Ses conférences et séminaires amènent des juristes de tous les systèmes juridiques, de tous pays, à apprendre et échanger leurs idées, dans un cadre académique politiquement neutre. L'Institut a toujours, et continuera à mettre en valeur les principes d'universalité et d'humanisme, en poursuivant les buts intellectuels, académiques et d'érudition les plus élevés.

Au cours de ses 30 années d'activité, l'Institut a développé la participation des jeunes chercheurs, des femmes et des universitaires du monde entier, et plus particulièrement des pays en voie de développement, les assistant dans la recherche de leur voie dans la communauté internationale des chercheurs. Beaucoup de ceux qui sont venus à l'Institut comme jeunes assistants de recherche sont désormais professeurs dans différentes universités du monde.

L'âge des participants varie de 30 ans pour les plus jeunes à 80 ans pour les plus anciens. Tous se retrouvent à égalité dans les expériences intenses d'apprentissage au sein des activités de l'Institut. Beaucoup de relations amicales et personnelles se sont développées entre les participants au cours des années. Le réseau des amitiés de l'ISISC s'étend sur le monde entier, et a un effet significatif sur la consolidation et le soutien de l'évolution du droit pénal et des droits de l'homme, dans tous les pays du monde.

Outre d'une production scientifique exigeante, l'Institut a aussi créé une atmosphère favorisant une meilleure compréhension entre les personnes, quelle que soit leur nationalité, et, par là même, la paix entre les pays. L'Institut est fier à juste titre d'avoir pu réaliser cette double mission d'influence humaniste et d'accomplissement intellectuel, dans un environnement prônant les relations d'amitié et de coopération. Il ne reste qu'à poursuivre dans cette voie.

## **RAYONNEMENT DE L'INSTITUT**

Il est difficile d'évaluer l'impact intellectuel dans la mesure où celui qui est, par nature, intangible. Il peut cependant être mesuré au travers de certaines observations matérielles, comme le fait qu'un nombre impressionnant de juristes et chercheurs ont participé aux activités de

l'Institut, y ont contribué, on fait usage de ses publications. C'est un fond objectif depuis lequel on peut présumer une démultiplication des influences de l'Institut, en considération des milliers de juristes, issus du monde entier, qui ont bénéficié de son travail.

Les réalisations de l'ISISC, comme ses contributions à la justice pénale (en particulier en matière de droit pénal international et de droits de l'homme) peuvent également être mesurées objectivement : 287 conférences, séminaires, et réunions d'experts ont été organisés, en collaboration avec 131 organisations gouvernementales ou non gouvernementales. Ces programmes ont été suivis par près de 19 495 juristes, issus de 155 pays, dont 4500 chercheurs de 444 universités différentes. Par ailleurs, l'Institut a publié 112 ouvrages, contenant rapports de conférences et bilans de recherche intellectuelle et scientifique, qui ont fait l'objet d'une diffusion internationale.

La mission de L'ISISC en vue de contribuer au développement d'une justice pénale plus effective, tout en renforçant le respect et l'application des droits de l'homme, s'est accomplie au travers de ses programmes de formation, en mettant rapprochant membres de gouvernements, juges, chercheurs et juristes, des pays développés, en voie de développement, ou les moins développés. La présence et la participation aux activités de Syracuse de hauts fonctionnaires, exerçant dans leur propre pays influence et autorité, est une autre voie par laquelle les contributions intellectuelles de l'Institut ont trouvé une large audience, et produit des effets à long terme. Les personnalités officielles ayant séjourné à Syracuse, et qui ont été impliquées dans les activités de l'Institut sont des chefs d'état, de gouvernements et parlements, des membres de cabinets ministériels (Ministères de la justice, des affaires étrangères, de la défense, de l'intérieur, de l'éducation), des premiers présidents de cours supérieures, des présidents de conseil constitutionnels, ainsi que des juges de ces mêmes cours, des avocats généraux et procureurs, des membres de parlements, et autres personnalités étatiques de haut rang (juges, militaires, officiers de police, et autres officiers gouvernementaux).

A la suite de la participation et de l'engagement d'autant d'officiels de haut rang, des initiatives majeures ont été prises au niveau international, national ou régional, des législations nationales ont évolué, des projets ministériels et policiers développés, des attitudes et des opinions ont changé pour intégrer davantage d'idées progressistes.

Deux exemples peuvent être considérés comme significatifs :

- Le premier réside dans le développement des programmes arabes relatifs aux droits de l'homme, décrits supra, et qui ont amené une transformation majeure dans le monde arabe, à un moment où la notion même de droits de l'homme était mise en question.

- Le second exemple est relatif aux relations est-ouest pendant la guerre froide. Au cours des années 70-80, l'Institut et l'AIDP ont été le principal point de contact pour les juristes de ce qu'il est habituel d'appeler le bloc socialiste-communiste et le reste du monde. Ainsi, quand le rideau de fer est tombé en 1989, les changements au sein des systèmes de justice pénale de ces pays ont été opérés en partie grâce aux juristes membres et l'AIDP, qui avaient suivi les activités de l'Institut, ou avaient bénéficié du matériel académique de l'AIDP et de l'ISISC. Ce fut particulièrement net quand en 1991, l'Institut tint une importante conférence sur la réforme des systèmes de justice pénale des pays communistes, suivie par nombre de hauts responsables de juridictions, magistrats des cours suprêmes, procureurs et avocats généraux, et autres fonctionnaires de haut rang issus de ces pays.

Bon nombre des programmes conduits par l'Institut sur l'administration de la justice pénale du monde arabe et de l'Afrique ont eu un impact majeur sur les pays concernés, et en particulier sur les pays les moins développés ou en voie de développement. Sont également notables les activités de formation à l'intention des jeunes juristes de tous les pays du monde qui se sont rencontrés littéralement par milliers. Grâce à ces contacts, des amitiés et une meilleure compréhension de la diversité culturelle se sont développées. De solides liens amicaux et intellectuels se sont établis entre experts et associés du réseau de l'Institut, et permettent de considérer que l'impact de ses activités doit s'évaluer à un niveau tant personnel que général.

A un niveau individuel, l'Institut est fier d'attester que beaucoup de ceux qui ont participé et continuent de collaborer à ses activités ont atteint un niveau élevé dans leur carrière, au sein d'universités ou de gouvernements, ou dans leur propre profession. Beaucoup ont continué à entretenir des liens avec l'Institut ou avec des collègues rencontrés par son intermédiaire, perpétuant l'esprit d'amitié et de compréhension intellectuelle né pendant leur séjour à Syracuse. L'expérience partagée dans les locaux de l'Institut est devenue un trait distinctif, et renforce l'idée d'appartenance à un même groupe, ce qui facilite remarquablement la compréhension mutuelle et la coopération internationale.

A un niveau général, l'entrée en vigueur, cette année, de la Cour pénale internationale, dont les statuts ont été adoptés à Rome le 17 juillet 1998 pourrait déjà justifier des décennies d'efforts réalisés par toute Institution. Cependant, l'ISISC est aussi en mesure de se positionner comme acteur de beaucoup d'autres réformes de la justice pénale, comme de l'évolution des droits de l'homme, à un niveau national autant qu'international. Le résultat de ses activités a été la base, souvent l'épine dorsale de nombre d'instruments internationaux, normes et standards, autant qu'un cadre pour les législations nationales et les processus de réforme. Si ceci a été possible, c'est grâce à la réputation de l'Institut, d'une importance telle qu'elle a attiré des participants qui sont, ou seront des acteurs clef de la sphère nationale ou internationale. Convaincus de la haute valeur des idées portées par l'ISISC, ils pourront user de leur position influente pour promouvoir des réformes nationales.

L'Institut a contribué particulièrement au développement des normes et standards de la justice pénale internationale, au travers de son travail en collaboration avec les Nations Unies, le Conseil de l'Europe, l'Organisation des Etats américains, et la Ligue des Etats arabes. Aucune autre organisation intellectuelle dans le monde ne peut revendiquer l'extraordinaire primauté de l'ISISC dans son champ d'intervention. Son travail, à côté de celui de l'AIDP en matière de justice pénale internationale (pour l'Institut, sur ces 30 dernières années, et sur 79 ans pour l'AIDP) est tout simplement inégalé, tant ces deux organisations ont contribué, aussi longtemps, à la création d'une Cour pénale internationale, comme au combat contre l'impunité des crimes internationaux. L'AIDP et l'Institut, en collaboration avec la Commission internationale des juristes, ont développé la première version du projet de Convention contre la torture, qu'ils ont soumis aux Nations-Unies en 1978, et qui a été adoptée en 1984, dans des termes similaires. Comme décrit ci-dessus, l'Institut a également accueilli un grand nombre de réunions d'experts, qui ont conduit à l'adoption de normes et standards, nationaux et internationaux d'une grande portée, et qui ont influencé significativement le développement progressif, comme l'application de la justice pénale, et l'affirmation des droits de l'homme.

Le travail en réseau est une autre caractéristique significative des initiatives de l'Institut, dès lors que les relations personnelles établies entre les personnes se rencontrant par l'intermédiaire de l'Institut ont un effet sur la vie professionnelle quotidienne. Le principe du travail en réseau initié par l'Institut permet à des milliers de personnes, marquées par cette expérience commune, de travailler en liaison quotidienne, et de profiter de

leur soutien mutuel. « L'expérience de Syracuse » n'a pas pour seule signification l'appartenance à un groupe étendu et d'un haut niveau intellectuel, elle symbolise aussi une force d'évolution constante pour l'université, les gouvernements, le corps judiciaire, et les professions du droit, pour une justice plus humaine et effective dans tous les pays du monde.

C'est ce qui a donné au nom de l'Institut, et a celui de Syracuse une attention et une reconnaissance mondiale.

« L'esprit de Syracuse » a engendré de nombreuses amitiés, et facilité de nombreux contacts entre juristes plus jeunes ou plus âgés, entre hommes et femmes, de toutes nationalités, races, religions et horizons politiques, créant un réseau d'une importance telle qu'on ne saurait évaluer sa contribution à la communication entre les juristes du monde entier. L'ouverture intellectuelle et humaine du travail de l'Institut, son esprit, ont généré un exemple positif que beaucoup de jeunes participants ont adopté, et qu'ils perpétuent tout au long de leur carrière.

Malgré toutes ses contributions, l'Institut n'a pas évolué comme une organisation élitiste et formelle, mais au contraire tournée résolument vers l'ouverture, l'accessibilité et l'entraide, particulièrement en favorisant ceux qui ne disposent pas des mêmes facilités d'accès au développement intellectuel et scientifique.

Il est dit dans la Torah, mais le Christianisme et l'Islam s'en font aussi l'écho, « Qui sauve une vie a sauvé toute l'humanité ». Si l'ISIS, de par son travail, a contribué à sauver une vie, à épargner à une seule personne la torture, ou à rendre une seule vie plus heureuse, alors cela seulement justifie son existence. Et c'est cette croyance qui permet à tous, personnel, conseil d'administration et collaborateurs, de continuer à travailler à l'Institut.



**International Criminal Law: Quo Vadis?  
29 November 2002**

**Panel 1 - The values, policies and goals of international  
criminal law in the age of globalization**

*Chair and Presenter:* Professor M. Cherif Bassiouni (US/Egypt)  
Distinguished Research Professor of Law,  
President, International Human Rights Law  
Institute, DePaul University College of Law;  
President, ISISC; President, AIDP

*Panel of Experts:*

H.E. Giuliano Vassalli (Italy), President Emeritus, Constitutional Court of Italy; Former Minister of Justice; Former Senator; Emeritus Professor of Criminal Law, The University of Rome; Honorary President, ISISC; Honorary Vice-President, AIDP

Professor Eric David (Belgium), Professor of International Law, University of Brussels Faculty of Law

Professor Raul C. Pangalangan (Philippines), Dean and Professor of Law, University of Philippines College of Law

Professor William Schabas (Canada), Professor of Law and Director, Irish Centre for Human Rights, National University of Ireland; Member, Sierra Leone Truth and Reconciliation Commission

*Rapporteur:*

Professor Bruce Broomhall (Canada), Assistant Professor of International Law, Department of Legal Studies, Central European University (Budapest, Hungary); Senior Legal Officer for International Justice, Open Society Institute

**Panel Questions:**

1. Can globalization exclude international criminal justice from its framework and goals?
2. Will the goals of profitability in a global economy drive down the values of human rights enforcement?
3. Is there, and should there be, a duty of *aut dedere aut judicare* and how should it be recognized? As a *civitas maxima* to be included in conventional international law, or should it develop through customary international law?
4. Should impunity for certain international crimes be explicitly eliminated, and if so, for what crimes and how?
5. Can amnesty be included in peace agreements, and to what crimes can it apply? What categories of perpetrators? Can mechanisms like truth and reconciliation mechanisms be deemed as accountability mechanisms, and become alternatives for prosecution?
6. Should international guidelines for international criminal accountability be established to prevent impunity?
7. What developments can be expected in the protection of human rights and the rights of victims? Should victims' redress mechanisms be part of the values and goals of international criminal law?

# International Criminal Justice in the Age of Globalization

M. Cherif Bassiouni\*

## Section 1. Introduction

The international criminal justice system is a combination of international institutions, such as the ICC, *ad hoc* tribunals, international investigating bodies, and national criminal justice systems working in a complementary<sup>1</sup> fashion to maximize the opportunities of enforcing ICL. The effectiveness of this loosely connected system will depend on how effectively each institution and particularly national legal systems will carry out their obligations to prosecute or extradite. In time, this loosely connected system will tend toward operational connectivity manifested through the complementary functions of these institutions.

For that to occur, jurisdictional rules will have to be established to regulate the functions of these institutions. A jurisdictional web or network will maximize the actual exercise jurisdictional competence, reduce conflicts between competing jurisdictions, and eliminate the risks of jurisdictional gaps. In addition, this web or network will require with respect to *jus cogens* international crimes, the explicit application of universal jurisdiction, and the elimination of statutes of limitations. Moreover, for these and other international crimes, it will be necessary for the modalities of international cooperation in penal matters to be reinforced and to become more operationally effective<sup>2</sup>. These measures require the full and effective implementation of the legal maxim *aut dedere aut judicare*<sup>3</sup>. The networking concept proposed herein is a reality in many

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1. See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003), at Chapter I, section 1.4; Chapter IV, section 4; Chapter VI, section 2.2.

2. See BASSIOUNI, *supra* note 1, at Chapter V.

3. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW (1995).

sectors in the age of globalization, and has proven its effectiveness and success in the business and financial sectors. The goal of jurisdictional networking as part of complementarity, which is bound to become more than a link between international and national judicial institutions, is to enhance accountability and to reduce impunity for international crimes. This will in turn enhance prevention and reduce international criminality, thus also enhancing international security, justice, and peace.

## Section 2. Enhancing Accountability

The most effective approach to achieving individual criminal accountability for international, transnational, and national crimes requires enhanced national and international prosecutorial efforts, coupled with improved international cooperation in penal matters based on international due process norms and standards<sup>4</sup>. With almost 200 national legal systems, in addition to international adjudicating and investigating bodies all pursuing the same type of violators, this can be achieved by applying more or less the same legal norms, and by cooperating more effectively to achieve this end. Moreover, the international community still lacks a system for redress of victims<sup>5</sup>.

Enhanced international cooperation<sup>6</sup>, however, presumes the existence of effective national justice systems. Unfortunately, this is not always the case, especially in developing and Least Developed Countries, where sufficient expertise is frequently lacking among the operators of national justice systems. This is even more apparent in states that have ongoing civil

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4. See THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS (M. Cherif Bassiouni ED., 1994).

5. There must also be a focus on the need to provide victims of international crimes with compensation, restitution, and rehabilitation. See *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33*, U.N. Doc. E/CN.4/62 (18 Jan. 2000) (basic principles and guidelines on the right to a remedy and reparation are attached as an annex); Commission on Human Rights Resolution on the *Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. 2002/44 (23 April 2002); *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Note by the High Commissioner for Human Rights*, U.N. Doc. E/CN.4/2003/63 (27 December 2002). See also BASSIOUNI, *supra* note 1, at chapter I, note 125 and accompanying text. The enforcement of these victim's rights essentially are to be made through national legal systems and will require a convergence of accountability processes for perpetrators and redress mechanisms for victims. Both must be interconnected. See BASSIOUNI, *supra* note 1, at Chapter II, section 7.

6. See BASSIOUNI, *supra* note 1, at Chapter V.

conflicts or have only recently emerged from such conflicts, and whose legal systems have either collapsed or have been significantly impaired. Recent experiences in post-conflict justice have demonstrated how ill-prepared the international community is in responding to these exigencies.<sup>7</sup> States whose systems of justice have failed are faced with competing economic priorities, and their governments are unable to allocate resources for criminal justice over other more pressing social and economic needs. Donor states that could assist these countries often fail to recognize the importance of providing economic and other forms of technical assistance to restore or enhance the justice systems of recipient states, as is evident in the case of Afghanistan.<sup>8</sup> No effective international programs exist to adequately deal with the restoration of national justice systems in post-conflict situations.<sup>9</sup> Moreover, existing repressive regimes prevent their own systems of justice from functioning independently, impartially, fairly and effectively. All these considerations taken together illustrate that a more globalized approach is indispensable.

Change, however, never comes easy. As Nicolo Machiavelli so aptly noted in 1537, “there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.”<sup>10</sup> A system of international criminal justice is simply a global cooperative undertaking that links international and national justice systems to guarantee that each adheres to the functions that they are dedicated to, in an independent, impartial, fair, and effective manner. For *jus cogens* international crimes, this cooperation includes the enhancement of enforcement capabilities, which maximizes the prospects of accountability.<sup>11</sup>

As international criminal justice evolves, the international community has gradually recognized globalization as inclusive of international

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7. See POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002); ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES (Jane Stromseth ed., 2003).

8. See e.g., AFGHANISTAN: JUDICIAL REFORM AND TRANSITIONAL JUSTICE (International Crisis Group, 28 January 2003).

9. See *supra* note 7.

10. NICCOLO MACHIAVELLI, IL PRINCIPE: LE GRANDI OPERE POLITICHE (1532) (G. M. Anselmi & E. Menetti trans., 1992).

11. The certainty of accountability may be achieved by any one or a combination of several mechanisms irrespective of whether they are enforced through international or national legal and administrative organs. The following accountability mechanisms have been employed in the resolution of conflicts: international prosecutions, international investigatory commissions, national investigatory and truth commissions, national prosecutions, lustration mechanisms, civil remedies, and mechanisms for victim compensation. See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9 (1996), at 18-22.

criminal justice, even though it does not accommodate the interests of some states, particularly the more powerful ones. For instance, the events of 9/11 showed that international crimes are global in scope and require global responses.<sup>12</sup> Terrorism-related crimes, however, are not the only criminal activity that can be considered as increasingly global. Other transnational crimes also share this trait, such as drug-related crimes, organized crime, traffic in women and children for commercial sexual exploitation, and money laundering. These are crimes where state interests are most evident. Conversely, the interests of the international community are more evident in the prevention of such crimes as genocide, crimes against humanity, war crimes, and torture, where state action, state policy, and state action are most involved.

The process of globalization of international criminal justice is a slow and gradual process that has already started with enhanced international cooperation in penal matters,<sup>13</sup> and will evolve into a complementary system of international criminal justice.<sup>14</sup>

A threshold question is whether international criminal justice should be viewed distinctly as part of the values, policies, and practices of the international legal system or whether it also selectively ingests characteristics from national legal systems. If ICJ is conceived as the latter, it would form a *sui generis* system based on the concept of complementarity, whose substantive contents and procedural mechanisms are yet to be formulated.<sup>15</sup> Consequently, the identification of the philosophy and policy of international criminal justice reflects the interests, goals, and values of the international legal system, as well as, in part, those of national legal systems. This is why the philosophy and policy of international criminal justice derives in large part from “general principles of law,” which are identified from international and national legal norms.<sup>16</sup>

A comparative assessment of national philosophies and policies of criminal justice leads to the conclusion that, notwithstanding the diversity of national criminal justice systems, a historical thread runs through all families of national legal systems. These historical affinities can be retraced

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12. See INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937-2001 (M. Cherif Bassiouni ed., 2001); 1, 2 INTERNATIONAL TERRORISM: A COMPILATION OF UNITED NATIONS DOCUMENTS 1972-2001 (M. Cherif Bassiouni ed., 2002); M. Cherif Bassiouni, *Legal Controls of International Terrorism: A Policy-Oriented Perspective*, 43 HARV. INT'L L.J. 83 (2002).

13. See BASSIOUNI, *supra* note 1, at Chapter V.

14. See *supra* note 1.

15. See *supra* BASSIOUNI, *supra* note 1, at Chapter I, sections 3 and 4.

16. See M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law.”* 11 MICH. J. INT'L L. 768 (1990).

to most legal systems going back to approximately 3,500 years ago. It is the existence of an implied “social contract,” which connotes that the individual forsakes the right to individual vengeance in exchange for the state’s duty to protect its members, and in cases of infringement the individual is required to accept punishment as just desert.<sup>17</sup> As a result, every organized society manifested a legal system that has either entirely or partially taken away the victim’s right to act unilaterally in seeking vengeance or redress outside the established social order. Either due to the dictates of social order<sup>18</sup> or as a result of an implied social contract, organized society has historically taken away the individual’s right of unilateral vengeance or redress. In doing so, it has substituted for it a social system represented in the twin aspects of legal redress embodied in the criminal and civil branches of the law and judicial institutions.<sup>19</sup> In other words, organized society has separated the right to exact punishment, which devolved from the individual to the state, from the right to seek civil redress, which remained the individual’s prerogative. Similarly, this phenomenon can be found in the international criminal justice system. It is illustrated where the existence of an implied social contract is assumed through the allocation of the right to punish to a cooperative international criminal justice system based on the concept of complementarity<sup>20</sup> in order to provide justice and ensure peace.

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17. See, e.g., JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* (Ronald Ginsley ed. 1972); BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., 1990).

18. Through the institutionalization of criminal justice, societies have removed the right for individual vengeance and the continuing cycle of violence which often times results. See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (John Lord trans. 1965). See also LARRY MAY, *HUMANITARIAN CRIMES: PHILOSOPHICAL PROBLEMS IN INTERNATIONAL CRIMINAL LAW* 22 (2001). By analyzing the dictates of social order the author finds that the desire to survive brings people together to form societies, and in the absence of this desire men would have no reason for obeying rules; therefore, the corresponding desires for security and respect provide a basis for legal and moral rules prohibiting killing, bodily attack and respect for property. As a result, the State agrees to protect the citizens by enforcing these laws in exchange for the citizens’ allegiance to the law. *Id.*

19. Legal philosophers, no matter what philosophical persuasion they adopt, agree with that proposition. See, e.g., THOMAS HOBBS, *LEVIATHAN* (A.R. Waller ed., 1904); JEREMY BENTHAM, *WORKS* (John Boaring ed., 1859); CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Richard Bellamy ed., 1995); JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* (Thomas P. Peardon ed., 1952); HERBERT L.A. HART, *THE CONCEPT OF LAW* (1961); LON FULLER, *THE MORALITY OF LAW* (2d rev ed 1969).

20. See *supra* note 1.

### Section 3. National Criminal Justice Systems Enforcing ICL Norms

The pursuit of international criminal justice has become part of the international legal system through an evolutionary process. It began with the emergence, convergence and coalescence of humanistic values in different civilizations,<sup>21</sup> which, along with the interests of states, has produced a synthesis of goals and policies among different national criminal justice systems and their international counterparts.<sup>22</sup> That process, however, also included the development of international norms, prohibiting certain conduct as the criminalization of genocide, crimes against humanity, and war crimes, among the most serious crimes.<sup>23</sup>

The emergence of international criminal law norms has necessarily led to the need to enforce them, both as a means of upholding the values transgressed by the violation and also because of policy considerations believed to enhance compliance and reinforce deterrence. The need to enforce these norms required the creation of institutions, which led to the establishment of *ad hoc* international investigatory bodies, *ad hoc* international criminal tribunals and the ICC. As enforcement processes developed, they contributed to the evolution of the norms they applied. An interaction developed between international law norm-making and jurisprudential development of norm application, giving both impetus and vigor to the norm-developing processes, as well as to the development of enforcement institutions and structures.

The enforcement of international criminal law norms requires sanctions against the actors who perpetrate the crimes, or who generate the policies that bring about the commission of the crimes. The international legal system chose to direct its sanctions against individuals on the assumption that individual criminal responsibility is a more effective general deterrent.<sup>24</sup> Since the subject of international criminal law sanctions is directed against individuals, the framework of the international legal

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21. See BASSIOUNI, *supra* note 1, at Chapter I, section 3.

22. See among the many writings on this subject, STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d ed. 2001); GARY BASS, *STAY THE HAND OF VENGEANCE* (2000); NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (1995); M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 7, at 3; Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991).

23. See however, M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in 1 *INTERNATIONAL CRIMINAL LAW* (M. Cherif Bassiouni ed., 2d rev. ed. 1999).

24. See *supra* BASSIOUNI, *supra* note 1, at Chapter II, section 3.

system had to expand to accommodate the larger role of individuals as subjects of that system. Thus, the international legal system necessarily had to turn to the experience of national legal systems to borrow from their institutions of criminal justice. International investigatory, prosecutorial, and adjudicating bodies and processes were modeled after national criminal justice systems, often blending the diversity represented in the families of the world's major criminal justice systems.<sup>25</sup> The borrowing process necessarily included the method by which norms are formulated, their contents, and the sanctions attached to them. The borrowing of sanctions from national legal experiences was relatively simple with respect to contemporary national legal systems, in which penalties are limited to the death penalty, imprisonment, fines, confiscations, limitations on civil and political rights as a consequence of conviction, and, in some countries, corporal punishment. With the exception of the latter, which is practiced in some Muslim states with respect to certain crimes, and the death penalty, which has been abolished in over half the countries of the world,<sup>26</sup> the other penalties are recognized and applied in all legal systems of the world.

"The death penalty cannot be useful, because of the example of barbarity it gives men. . . . It seems to me absurd that the laws which are an expression of the public will, which detest and punish homicide, should themselves commit it."<sup>27</sup> The infliction of death as punishment has been condemned by many because of its barbaric nature and the lack of regard given to the interests of the offender. Moreover, some scholars argue that such barbaric, brutal punishment impedes the moral development of societies that resort to capital punishment, while, simultaneously, undermining the moralizing effects of punishment.<sup>28</sup> In contrast, one expert notes that "[i]t may be said that capital punishment for murder exerts a

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25. This was the case with the International Criminal Court. See *Rome Statute of the International Criminal Court*, A/Conf.183/9, 17 July 1998; COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed., 1999); THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy Lee ed., 1999); REFLECTION ON THE CRIMINAL COURT (A.M. von Hebel et al. eds., 1999).

26. A total of 111 countries have abolished the death penalty in law or practice, while in 2003, among the remaining countries, ninety per cent of all known executions took place in China, Iran, Saudi Arabia, and the United States. For more facts and figures on the death penalty around the world, see <http://web.amnesty.org/rmp/dplibrary.nsf/index?openview>. See Bryan Stevenson, *Capital Punishment in the United States of America*, in INTERNATIONAL COMMISSION OF JURISTS 47 (2000).

27. See BECCARIA, *supra* note 14, at 50; M. Cherif Bassiouni, *Death Penalty in the Shari'a*, INT'L COMMISSION OF JURISTS 65 (2000).

28. See ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (3d ed. 2002); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE 186-190 (1973); THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES (Hugo A. Bedau ed., 2d ed. 1998); MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY (1997).

moral influence by indicating that life is the most highly protected values.”<sup>29</sup> However, how can the death penalty be ignored for crimes in which so many are killed? To allow such perpetrators to live could be an affront to the victims and their survivors, while also not conducive to reconciliation. The converse may, however, be true if the spared perpetrator genuinely accepts responsibility and expresses remorse. All of these and other considerations are, however, speculative, because they deal with so many variables. The theory of punishment connoting an “eye for an eye” supports the simple selection of the infliction of death as a means to deter criminals from committing certain international crimes, which produce large-scale killings and other human degradations. However, the effectiveness of the death penalty as a deterrent has not yet been proven, even though the harshness and finality of such punishment is evidenced each time an individual’s life is taken.<sup>30</sup> Furthermore, the non-applicability of the death penalty is a symbol of reverence for human life. Consequently, international and regional human rights instruments abolish it, and it has been excluded as punishment from the statutes for the ICC, ICTY, and ICTR.

The question with respect to punishment in the international criminal justice system is, therefore, not so much what penalties to apply if one excludes the death penalty and corporal punishment; rather, it is a question founded on the philosophical and policy basis and goals of punishment for international crimes.

#### **Section 4. The Distinction Between the Policies and Goals of Punishment in National Criminal Justice Systems and Those in the International Criminal Justice System**

The international legal system’s primary goal of punishment is the preservation of world order and the maintenance of peace and security. National criminal justice systems, while concerned with the preservation, restoration, and improvement of public order, strive to achieve the goals of rehabilitation and social integration of individual offenders.<sup>31</sup> Furthermore,

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29. Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 950 (1966); Johannes Andenaes, *The Morality of Deterrence*, U. CHI. L. REV. 649-64 (1970).

30. Various studies have compared homicide rates of different states with similar social environments but contrasting penalties for homicide, and have concluded that executions have no effect on homicide rates. ZIMRING & HAWKINS, *supra* note 23, at 189.

31. See W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT’L L. 175, 176 (1995), where the author synthesizes the

the assumptions of general deterrence in national legal systems are different from those that can be made about the international legal system's capacity for generating deterrence, thus resulting in general prevention.

The differences between these two types of legal systems, the international and the national, imply consequences that go beyond considerations of philosophical and policy bases of punishment for international crimes. National legal systems have established institutions, structures and personnel to carry out the enforcement functions of the criminal justice system on a consistent and regular basis. Therefore, they produce certain results and allow for specific assumptions that can be made about prevention and deterrence. In contrast, the international legal system does not yet have a permanent system of international criminal justice with similar capabilities; consequently, the assumptions about its deterrence cannot be assessed. Retribution and just desert are more appropriate as philosophical and policy bases for the punishment of international crimes, whereas rehabilitation and social integration goals are more relevant to that of national criminal justice systems. Further, the functions of national criminal justice are also educational, and thus have a preventive effect, a result of the socio-psychological impact of the notoriety attached to trials and prosecutions.<sup>32</sup>

Assumptions about the effectiveness of the different functions of justice systems vary significantly between national legal systems and the international legal system. However, the effectiveness of these functions can be measured *inter alia* against two different criteria: 1) the absence of prosecutions for major crimes, such as genocide, crimes against humanity and war crimes, and 2) the absence of other forms of accountability.<sup>33</sup> For instance, national societies have varying degrees of political integration

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goals of national legal systems into seven specific goal programs: 1) preventing discrete public order violations that are about to occur; 2) suspending public order violations that are occurring; 3) deterring, in general, potential public order violations in the future; 4) restoring public order after it has been violated; 5) correcting the behavior that generates public order violations; 6) rehabilitating victims who have suffered the brunt of public order violations; and 7) reconstructing in a larger social sense to remove conditions that appear likely to generate public order violations. *Id.*

32. Prohibitions against certain conduct demonstrates to all individuals that society views such conduct as wrong and morally reprehensible, while punishment for violations of certain norms reinforces the negative attributes of the conduct and educates society on the implications of violating certain norms. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM* 163-164 (1997).

33. See M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 7, at 3; M. Cherif Bassiouni, *Proposed Guiding Principles for Combating Impunity for International Crimes*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 7, at 255.

and social cohesion. Therefore, they are not entirely dependent on the role of trials as a form of education, victim redress, victim satisfaction, reconciliation between victim and aggressor groups, or as a means of achieving general deterrence. These goals and functions are accomplished through different political and social mechanisms, except for the goal of general deterrence,<sup>34</sup> which is predicated on the assumption of effective enforcement and sanctions.<sup>35</sup> Alternatively, the international legal system needs to accomplish all of these goals through particular enforcement mechanisms and through the notoriety given to its trials. The notoriety with respect to “direct enforcement,” however, has only started in the last eighty years, or on an *ad hoc* basis.<sup>36</sup> Only recently have other accountability mechanisms which are also necessary to advance international criminal accountability evolved.<sup>37</sup>

### **Section 5. The Need to Harmonize the International Criminal Justice System and National Criminal Justice Systems**

The international criminal justice system consists of international and national criminal justice institutions which collectively undertake enforcing international criminal law norms.<sup>38</sup> Ideally it would function as a networking system whose cooperating units need to have: 1) uniform or substantially similar substantive legal norms;<sup>39</sup> 2) similar norms and procedures on international cooperation in penal matters applicable to international and national legal institutions;<sup>40</sup> 3) harmonized penalties for international crimes (whether before international or national institutions); and 4) harmonized due process norms applicable to international and national processes.<sup>41</sup>

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34. General deterrence is applicable to all members of society, and involves the effectiveness of legal threats in changing the behavior of all members of society. ZIMRING & HAWKINS, *supra* note 23.

35. The latter being accomplished by an effective system.

36. For a discussion on the history of international prosecutions, see Chapter VI.

37. See *supra* note 28.

38. See *supra* BASSIOUNI, *supra* note 1, at Chapter I, section 1.4, and Chapter IV.

39. See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE & DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

40. See *supra* BASSIOUNI, *supra* note 1, at Chapter V.

41. See BASSIOUNI, PROTECTION OF HUMAN RIGHTS, *supra* note 4; ANNE F. BAYEFSKY, THE U.N. HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS (2001); HUMAN RIGHTS & THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS (Christopher Gane & Mark Mackarel, eds., 1997). See also BASSIOUNI, *supra* note 1, at Chapter IX.

The international criminal justice system will not likely occur as a result of planning and sound legal techniques, but rather it will develop as a result of non-orderly processes in which fortuitous events and practical exigencies will incrementally enhance the goals intended to be attained. These processes are likely to be spurred by the need to enhance inter-state criminal cooperation in preventing and repressing the increased number of transnational crimes in the age of globalization illustrated since 9/11.<sup>42</sup> The same phenomenon of globalization will also require greater inter-state cooperation with respect to domestic criminality. All of these factors will enhance international criminal justice, though they will not bring about orderly or systematic outcomes. Instead, they will enhance the harmonization, and in some respects, uniformization of norms<sup>43</sup> and procedures.<sup>44</sup>

International criminal justice will be enhanced by increased cooperation in preventing and suppressing transnational and domestic criminality. However, it may not necessarily be enhanced with the same effectiveness for major international crimes, which perhaps may not occur until the ICC attains more universality.<sup>45</sup> The threat to this progress will confirm the political manipulation of *ad hoc* international criminal tribunals and the ICC with respect to the three most serious international crimes, namely genocide, crimes against humanity, and war crimes.<sup>46</sup> This political manipulation will derive from *realpolitik*, which will use international criminal justice as a tool to achieve its goals.<sup>47</sup> Thus, the likelihood that amnesties and other *de facto* means of granting impunity will compromise international criminal justice remains a threat to international criminal justice.<sup>48</sup>

Historically, the battle for international criminal justice, which started after the First World War, has ended with the establishment of the ICC.

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42. See, e.g., U.N. S.C. Resolution 1373 on terrorism-financing, which has led over 124 states to enact legislation in less than three months. See <http://www.un.org/Docs/sc/committees/1373>.

43. For example, as a result of developing ICC national implementing legislation.

44. For example, as in the case of international cooperation in penal matters. See BASSIOUNI, *supra* note 1, at Chapter V.

45. As of April 23, 2003, there are 89 state parties to the ICC Statute. See also generally BASSIOUNI, *supra* note 1, at Chapter VII.

46. See, e.g., BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 7.

47. Bassiouni, *Combating Impunity*, *supra* note 18; BASS, *supra* note 27.

48. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: THE PLACE FOR TRUTH COMMISSIONS IN A CHANGING WORLD (2000). See also TRANSNATIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995).

Moreover, a new phase is about to begin. Similar to its predecessor, the new phase will go through a series of difficulties as *realpolitik* will seek to manipulate international criminal justice, while its proponents will seek to prevent it. However, by judging by the success of the earlier phase, it is accurate to predict that the next one is also likely to succeed, though only incrementally. Due to globalization, however, the progress of international criminal justice is likely to move faster than it did during the earlier phase, which started after WWI and ended with the establishment of the ICC.<sup>49</sup> This notion of creating cohesion within an international framework is reminiscent of the belief that there is nothing more powerful than an idea whose time has come.<sup>50</sup> International criminal justice is more than an idea, it is an ideal which represents the commonly shared values of the international community. Its time has come.

## **Section 6. The Philosophy and Policy of Punishment for *Jus Cogens* International Crimes**

### *6.1 Philosophical Considerations*

History records the existence of some forty civilizations,<sup>51</sup> all of which developed laws and legal institutions irrespective of how we may judge them.<sup>52</sup> Each of these civilizations had its own notions of justice which evolved over the last 7,000 years.<sup>53</sup> These notions of justice encompassed a variety of dimensions, ranging from what would be considered in contemporary terms as individual justice in the civil and criminal contexts, to collective social justice.<sup>54</sup> Cultural anthropology also reveals the range of different approaches to modalities and techniques of providing justice through various mechanisms and processes employed by societies from the tribal to the modern state. The identification of the moral philosophical foundations of what constitutes justice in its different meanings in these

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49. See BASSIOUNI, *supra* note 1, at Chapter VI.

50. "An invasion of armies can be resisted, but not an idea whose time has come." VICTOR HUGO, *HISTOIRE D'UN CRIME* (1852), part II § 10.

51. See ARNOLD J. TOYNBEE, *A STUDY OF HISTORY*.

52. See HENRY WIGMORE, *A PANORAMA OF WORLD LEGAL SYSTEMS* (1936); JACQUES ELLUL, I, II *HISTOIRE DES INSTITUTIONS ET DES FAITS SOCIAUX* (1955); HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN TIMES* (1867).

53. See RENE A. WORMSER, *THE LAW: THE STORY OF LAWMAKERS AND THE LAW WE HAVE LIVED BY, FROM THE EARLIEST TO THE PRESENT DAY* (1949).

54. For a Western perspective of social justice, see DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* (1999). For an Islamic perspective, see SAYYID QUTB, *SOCIAL JUSTICE IN ISLAM* (1948).

civilizations, as well as in their applications to social processes, has historically been by reference to religious teachings and practices, and to the writings of philosophers, historians, and more recently, social scientists, who have described these moral philosophical foundations of justice. Invariably, however, what emerges from history is that law and legal institutions, when not imposed by a ruler's force, are an outgrowth of the social values which characterize these societies.

International criminal justice is still in its nascent stage and has not yet undergone the same evolution that national criminal justice systems have. The commonly shared values and interests of the international community, as discussed in Chapter I, are still being shaped. However, the era of globalization, as discussed in this chapter, will surely have a more significant impact upon the emerging philosophy of international criminal justice. The outcome of the globalization process can be predicted, but not with certainty. Nevertheless, because of the differences between the international and national legal orders,<sup>55</sup> international criminal justice is not likely to encompass the dimension of social justice that exists in national legal orders.<sup>56</sup> What can be identified with certainty, however, is that the philosophy of international criminal justice will be premised, as is the case of national criminal justice, on the individual, because individuals commit crimes, whether they be labeled national or international, and not abstract legal entities such as states.<sup>57</sup>

Notwithstanding the age-old debate about human nature's capacity for good and evil, right and wrong, passion and reason, and how to best control the impetus for individual negative impulses or tendencies, however described by philosophers of different schools, the question ultimately winds down to what means are necessary and appropriate to achieve behavioral and social control. That is why international criminal justice is on the same continuum of national criminal justice. The goals of both systems are to control individual aberrant behavior proscribed by legal norms. What the philosophy of international criminal justice must essentially answer are three questions: why, by what means, and to what

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55. See BASSIOUNI, *supra* note 1, at Chapter I.

56. Contemporary international law doctrine however seeks to establish a right to international economic justice. See GLOBAL JUSTICE (Thomas W. Pogge ed. 2001).

57. Robert Jackson as Chief U.S. Prosecutor at the IMT asserted in his opening statement that crimes are not committed by abstract entities called states, but by individuals, and that is the pragmatic philosophy of international criminal justice. See *The Trial of the Major War Criminals Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, vol. 1, p. 447 (22 vols. HMSO 1950).

end? Thus, is reason, individual values, or a combination thereof enough to control natural negative impulses, or is it means of social control and coercive sanctions?

The moral philosophical inquiry seeks *inter alia* to identify what is right and what is wrong and why. The social inquiry seeks *inter alia* to assess the significance of certain behavior, determine the necessary and appropriate control mechanisms, and appraise their expected outcomes. But moral philosophers and social scientists agree, no matter their differences, that a certain authority, whether subject to limitations or not, must exercise the power to insure compliance with moral and legal norms. Thus, whether we deem genocide, crimes against humanity, war crimes, torture and slavery to be moral or legal offenses or both, and whether we refer to them as “shocking to the conscience of humanity” or *jus cogens* international crimes, this conduct negatively affects national communities and the international community.<sup>58</sup> Consequently, whether for reasons of morality or policy, such aberrant behavior must be controlled, first by effective prevention and then by suppression, which in turn reinforces prevention. It is in this respect more than any other that international criminal justice is on the same track as the philosophy and policy of national criminal justice systems, their differences notwithstanding.

From Aristotle<sup>59</sup> to contemporary times, philosophers, behavioral and social scientists, and others acknowledge human nature’s tendency to inflict harm on others. But does the transformation from individual to collective behavior change its nature? Does the nature of aberrant individual and collective behavior differ depending on whether it is confined to a state’s territory or extending to the territory of other states? Does the artificiality

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58. For a policy-oriented analysis of human rights, see MYRES S. McDOUGAL, HAROLD D. LASSWELL & LUNG-CHEN CHUNG, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

59. For Aristotle, natural passions need to be controlled by reason, and reason needed to be enforced, for only fear of some form of retribution is a deterrent, see THE BASIC WORKS OF ARISTOTLE (Richard McKeon, ed. 1941); ARISTOTLE, ETHICS, II 1 (W.D. Ross, trans. 1954). His views, not only unlike those of some contemporary behaviorists, is that the human is subject to a constant thrust toward what the passions dictate and needs to be constrained by what reason dictates. Thus, he says, “None of the moral virtues arise in us by nature.” Thomas Hobbes considers the natural impulse as an inclination for the sordid, and that reason, backed by the sovereign’s power, must recuse us. See THOMAS HOBBS, LEVIATHAN 189 (1968). Immanuel Kant emphasizes that we have a duty to eschew these natural inclinations based on pure reason and that only through the collective power of the sovereign can that be achieved. Unlike Aristotle, he does not see it as a *desideratum*, but as a moral imperative. See IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (1985), translated by Kingsmill Abbott in *The Critique of Practical Reason and Other Ethical Treatises*, in GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins, ed. 1952).

of state boundaries cause a mutation in the essential characteristics of deviant or aberrant human behavior? The answer to those related questions is in the negative, though it should be noted that collective aberrant behavior frequently has a multiplier effect that goes beyond that of the sum total of its individual components, as is evidenced by the ferocity and cruelty of what occurs in the course of genocide<sup>60</sup> and crimes against humanity.<sup>61</sup> The tendency of humans, though at times sordid, is usually driven by base instincts. But these instincts become accentuated in collective behavior at times when social controls weaken or are no longer in effect, and that is when the worst atavistic instincts surface and produce devastating harmful results.<sup>62</sup> Experience reveals that the veneer of civilization is indeed thin.

Abstract entities called states, the community of states, or international organizations, exist only because they are created and managed by individuals. Thus, these entities are inexorably linked to human nature's basic instincts which have an impact on ultimate outcomes through the interactions of these entities' collective decision-making processes.<sup>63</sup>

Moral philosophers and social scientists perceive and describe differently the legal nectar of justice distilled from the alembic of values that they observe. For Aristotle,<sup>64</sup> it stems from ethics and reason, and for Aquinas and Christian naturalists,<sup>65</sup> as well from the perspectives of Judaism<sup>66</sup> and Islam,<sup>67</sup> it stems from The Creator. For the latter group, The Creator is not only integral to the process, but is the original source, even when acting through the agency of humans. For the naturalists,<sup>68</sup> law is divine in origin, unchallengeable, holistic, and needs positive law only to

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60. SAMANTHA POWERS, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002).

61. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (2d ed. 2002).

62. This was documented in detail in the conflict in the former Yugoslavia between 1991-94. See *Final Report, Commission of Experts; Annexes to Final Report, Commission of Experts*. For an insight into human behavior in war, see GEOFFREY BEST, *HUMANITY IN WARFARE* (1983). For studies on victimization in conflicts since WWII, see BASSIOUNI, *supra* note 1, at Chapter I, note 97.

63. The full complexity of these interactions and their internal interrelatedness is almost impossible to assess and retracing the specific impact of an individual's power or influence occurs mostly in dictatorial regimes. See MYRES S. MCDUGAL *ET AL*, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961).

64. See *supra* note 7.

65. See THOMAS AQUINAS, *SUMMA THEOLOGICA* (1485)

66. Judaic Law

67. See M. Cherif Bassiouni & Gamal Badr, *The Shari'ah: Sources, Interpretation and Rule-Making*, 1 *UCLA J. ISLAMIC & NEAR EASTERN L.* 135 (2002).

68. See A. PASSARIN D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (1965 ed.); LLOYD WEINREB, *NATURAL LAW AND JUSTICE* (1987).

make it more widely known. The ultimate enforcer is The Creator, even when humans enforce it on earth as vicars of God. For the positivists,<sup>69</sup> law is not immutable, but changeable. It is based on theories of utility, public interest, and the common good. It needs to be postulated and disseminated, and it is enforced by the state which has the monopoly of coercive means through the authoritative process of decision-making.<sup>70</sup> All of that does not mean that law is devoid of moral or ethical content.<sup>71</sup> A certain parallelism exists between these views insofar as legal experience reveals that enforcement is undertaken through social and legal institutions no matter how different.<sup>72</sup>

The fundamental difference between the various philosophical foundations of justice, including the methods employed to achieve it, is the recognition of power's extent and limitations. For the naturalists, power must be subordinated to the higher law. For the positivist, it is subordinated to the legal norm which is the product of the legal process. For the political realist, the anarchical stage of international relations, permits, if not justifies, the supremacy of power, tempered only by reason which identifies the outer limits of what power can secure.<sup>73</sup> If reason were to be the only guide for political realists, they would rejoin Aristotle. But for the political realists, it is not Aristotelian reason guided by ethics, or reason subject to divine dictates as for Aquinas, or reason subject to positive law's limitations as for the positivists, but reason, as in the analysis and predictability of political outcomes. In that respect, the political realists bring to international relations and thus to international law which reflects the practices of states, the antithesis of what the laboratory of human experience in national societies has produced over 7000 years of legal history,<sup>74</sup> namely the exclusion of legitimacy as a limitation on power. Even though, in international relations, time and again power without legitimacy has prevailed, while legitimacy meekly accommodated itself to the exigencies of power,<sup>75</sup> what realists fail to see is how the imposition of the

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69. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1954). For a utilitarian perspective, see H.L.A. HART, *THE CONCEPT OF LAW* (1961). For a philosophical perspective, see HANS KELSEN, *PURE THEORY OF LAW* (1970).

70. *Id.* For a utilitarian positivist approach to national criminal justice, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971, rev. ed. 1979).

71. See ROSCOE POUND, *LAW AND MORALS* (1969).

72. See *supra* notes 2 and 3.

73. See BASSIOUNI, *supra* note 1, at Chapter I.

74. See *supra* notes 1 and 2; CARL J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed., 1990).

75. Witness the U.S./U.K. military intervention in Iraq. For one of the advocates of U.S. war against Iraq irrespective of international legitimacy, see STEPHEN POLLOCK. For an opposing

rule of might unavoidably must also adjust itself to some form of legitimacy.<sup>76</sup> If tangible power is limited by the intangible influence of what morality brings to social values, then moral philosophy is relevant to international criminal justice.

Whether reason or faith motivates or guides humans' behavior, and how and to what extent it blends with learned experiences and social conditioning factors, the same set of questions are posed in the end, namely, the choice of social control means and the functions and goals of the coercive sanctions. From that perspective, the philosophy of international criminal justice is no different than that of national criminal justice systems, notwithstanding the different approaches of moral philosophers.

As stated above, experience reveals of existence of commonly shared values in every society from which moral and legal significance is extracted to become rights and obligations. These rights and obligations then become the basis for justified individual and social expectations and that impels institutional guarantees.<sup>77</sup> The incremental process of the identification and articulation of social values and their embodiment in prescriptive and proscriptive norms, as experienced in national societies, is repeated at the international level, though with the differences *inter alia* as to participants, processes, interactions, and connectivity.<sup>78</sup> In the end however, we see the emergence of international normative proscriptions,<sup>79</sup> which reflect social values transcending national contexts.

The history of ICL reveals that the philosophical foundations of international criminal justice rests on similar bases as those of national criminal justice systems, notwithstanding their differences and the distinctions between these legal orders.<sup>80</sup> But, at this historical stage, international criminal justice means essentially retributive justice for

view, see M. Cherif Bassiouni, *Bush Missed the Mark in Making Case for War*, CHI. TRIB. 9 March 2003, at Sec. 2, p. 1.

76. See, for example, post-conflict justice situations with all their limitations and flow. See BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 7; ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES (Jane Stromseth ed., 2003).

77. See e.g. JOHN O'MARNIQUE, *THE ORIGINS OF JUSTICE* (2003).

78. *Supra* note 7.

79. See M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights*, 8 YALE J. WORLD PUB. ORD. 193 (1982).

80. As is evident from the methods of enforcing ICL whether as part of the "direct enforcement system," discussed in Chapters VI and VII, or the "indirect enforcement system" discussed in Chapter V. International criminal justice is also essentially process-oriented. Process-oriented justice is discussed in John Rawls' seminal book, *A THEORY OF JUSTICE* (1971; rev. ed., 1999). See also *JUSTICE AS FAIRNESS: A RESTATEMENT – JOHN RAWLS* (Erin Kelly, ed. 2001).

certain international crimes. This is not easily reconcilable from the perspective of moral philosophy to alternative methods of accountability which do not necessarily include coercive sanctions. The explanation is that contemporary international criminal justice is still locked in struggle against the practices of *realpolitik* which reflect the political realist view of power's precedence over legal legitimacy.

International criminal justice seeks to enhance accountability and reduce impunity for international crimes, particularly *jus cogens* international crimes. It seeks to accomplish that by the techniques of direct and indirect enforcement.<sup>81</sup> Both techniques are complementary and rely on the maxim *aut dedere aut judicare*.<sup>82</sup> Since the goal of both techniques is accountability, the question of why punish discussed in this section is linked to the philosophy and policy of punishment which applies to national and international criminal justice systems. But since there are alternative accountability mechanisms in international criminal justice, they are also discussed in this article.

#### 6.1.1 *Moral and Social Philosophy*

As noted above, the international criminal justice system, like its counterpart the national criminal justice system, is based on a proposition which presupposes the existence of an implied "social contract." The "social contract" theory of international criminal justice establishes the individual's duty to obey its norms in exchange for the international community's duty to provide security for its inhabitants by exacting a punishment from those who transgress its norms. As a result, the international community takes from the individual the right to exact individual punishment or obtain personal vengeance.<sup>83</sup> Similarly, the state, acting on behalf of the community, reserved for itself the right to grant pardons. As a result, this reservation has historically hindered the pursuits

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81. See BASSIOUNI, *supra* note 1, at Chapters VI and VII and V.

82. See BASSIOUNI & WISE, *AUT DEDERE AUT JUDICARE*, *supra* note 3; BASSIOUNI, *supra* note 1, at Chapter 5, section 2.

83. Seeking personal vengeance is not only vindictive but it represents the emotional impulse that derives from the victimization incurred as a result of the transgression. Those in favor of vengeance align themselves with one of the following vindictive theories of punishment, which include: 1) the escape-value version, which finds that legal punishment is an orderly outlet for aggressive feelings that would otherwise demand satisfaction in socially disruptive ways; 2) the hedonistic version of the vindictive theory holds that the justification of punishment is in the pleasure it gives people to see the criminal suffer for the crime; and 3) the romantic version of the vindictive theory finds that the justification of punishment originates in the emotions of hate and anger it expresses; these emotions include those allegedly felt by all normal or right-thinking people. JOEL FEINBERG, *DOING AND DESERVING: THE CLASSIC DEBATE* 649-650 (1970).

of justice through the application of unjustified pardons. Pardons are justifiable only when the offender has already suffered enough, or stands to suffer too much, and when it is necessary to relieve some punishment or lingering consequences. Policy guidelines for the granting of pardons must be created, because it is the only way in which the international community will reach the theory of universal justice, and leave behind the notions of unequal application of the law, unfairness, and uncertainty of the law.

As the states have reserved the right to pardon, they have also reserved the right to prosecutorial discretion when handing down punishments, which is limited to certain types of crimes;<sup>84</sup> however, some states do not allow for this type of prosecutorial discretion. Historically, as the need to punish became imperative for the preservation of social order, several theories of punishment developed, such as retribution, just desert, deterrence, and rehabilitation. Because of the developmental stages of each system, the application of these punishment theories differs from national criminal systems to the international criminal justice system. An assumption of the national criminal justice system is the existence of a functioning legal system, checks and balances, no abuses, upheld values, and the achievement of public order. By contrast, the international criminal justice system, with its amorphous legal system and continuous battle with *realpolitik*, is currently developing processes designed to accomplish the goals of accountability, justice, and, in the future, deterrence.<sup>85</sup>

## 6.2 The Historic Premise of Punishment

### 6.2.1 Talion Law

To a large extent, the state's decision to take from the individual the right to exact individual personal vengeance is in part a consequence of the Talmudic "Talion law." "Talion law" gave rise to social disruptions as individuals, families, clans, tribes, and later nations sought to extract vengeance from one another in ways that often led to greater social harm and conflict than the original purpose of "Talion law" envisaged.<sup>86</sup> The

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84. See *infra* section 8.

85. See e.g., BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 7.

86. In contemporary legal systems, only a few traditionalist Islamic systems consider that *Qesas* still gives rise to a victim's individual right to secure "Talion" retribution against a perpetrator, or alternatively, to seek the *diyya* (victim compensation). With that exception, every contemporary legal system has separated the rights of victims as between the civil, which remains inherently the victim's right and the criminal, which passes on to the state acting on behalf of the victim, and which is either *de jure* or *de facto* promoted by the victim. See M. Cherif Bassiouni, *Les Crime relevant du précepte de Qesas*, 4 REVUE INTERNATIONALE DE CRIMINOLOGIE ET DE POLICE TECHNIQUE 485 (1989); Bassiouni, *Death Penalty and the Shari'a*, *supra* note 22.

prescription “thou shalt give life for life, eye for eye, tooth for tooth, burning for burning, wound for wound, stripe for stripe,” also found in the *Qu’r’n*,<sup>87</sup> is the essence of the right of retaliation, which Roman Law referred to as *ius taliones*.

For Jews and Muslims, as well as some Christian philosophers,<sup>88</sup> this equal retaliatory right is the fair and just penalty, both qualitatively and quantitatively. Its merit lies in its simple purity, strictness and equality. However, interestingly, both the Mosaic and *Qu’r’nic* prescriptions give the victim, and the victim’s heirs in lieu of death, the option to choose victim compensation, or the *diyya* in Islamic law, as an alternative to the penalty. Thus this practice reflects a sound policy that surely transcends the pure retributive theory.<sup>89</sup> Furthermore, the *Qu’r’n* also enjoins the believer to forgive, as that is the best course in the eyes of the Lord, who is the ultimate judge and avenger.<sup>90</sup> Earlier, Jesus Christ in the Sermon on the Mount declares:

that it hath been said, an eye for an eye, and a tooth for a tooth, but I say unto you that ye shall resist not evil, but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also.<sup>91</sup>

In Jesus Christ’s admonition one finds the same preference for forgiveness that is embodied in the *Qu’r’n*.<sup>92</sup> Metaphysically, vengeance is not part of human justice, however retributive it may be, and is evidenced in the Bible: “You shall not take vengeance, nor bear any grudge against the children of your people, but you shall love your neighbor as yourself.”<sup>93</sup>

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87. M. Cherif Bassiouni, *Qesas Crimes*, in ISLAMIC CRIMINAL JUSTICE SYSTEM 203 (M. Cherif Bassiouni ed., 1982).

88. See IMMANUEL KANT, THE CATEGORICAL IMPERATIVE (1797); THOMAS HOBBS, LEVIATHAN (A.R. Waller ed. 1904). See also, KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 28-31 (1989). Kant strongly believed that the law of retribution, returning an eye for an eye, is justified by the principle of equal freedom, which in essence represents the social contract theory. *Id.*

89. See *Surat al-Baqarah*, 2:178-179; *Surat al-Ma’ida*, 5:45; *Surat al-Nisa*, 4:92. See also Bassiouni, *Death Penalty in the Shari’a*, *supra* note 22; Bassiouni, *Qesas Crimes*, *supra* note 54; Bassiouni, *Les Crime relevant du précepte de Qesas*, *supra* note 54.

90. See Bassiouni, *Death Penalty in the Shari’a*, *supra* note 22; Bassiouni, *Qesas Crimes*, *supra* note 54; Bassiouni, *Les Crime relevant du précepte de Qesas*, *supra* note 54.

91. *Matthew* 5:38-5:40 (King James).

92. See Bassiouni, *Death Penalty and the Shari’a*, *supra* note 22; Bassiouni, *Qesas Crimes*, *supra* note 54; Bassiouni, *Les Crime relevant du précepte de Qesas*, *supra* note 54.

93. *Leviticus* 19:18.

Instead, vengeance belongs only to the Almighty. The Bible, according to St. Paul, commands: “for it is written, vengeance is mine, I will repay, saith the Lord.”<sup>94</sup> The *Qu’r’an* also refers to Allah as the avenger, a divine quality that is not that of humans.<sup>95</sup> Thus, the *lex talionis*, which was followed by the Greeks, the Romans, the Muslims, and all legal families for varying periods since then, represents retribution. Retribution then becomes a substitution for vengeance and not a philosophy of vengeance, although the two are frequently confused.

### 6.2.2 Just Desert

As the right to exact punishment devolved to the collectivity under the “social contract” theory, almost every national criminal justice system has been based in some way primarily on the notions of retribution or just desert. The goals of humanism and social rehabilitation, however, have only emerged in national legal systems as of the eighteenth century. The theories of just desert and retribution are based on philosophic premises similar to the one that gave the individual the right to unilateral vengeance or satisfaction under “Talion law.” The collectivity has simply assumed the individual’s prerogative, thereby also assuming the obligation to exercise that substituted prerogative as part of the “social contract.”<sup>96</sup> Therefore, based on the “social contract” theory, it can be concluded that “general principles” of international criminal justice exist. These general principles are namely that victims have both an inherent and inalienable right to expect that the legal order, whether national or international, shall judge and punish violators of certain norms.<sup>97</sup> Also, the legally system should provide the victims with the right to seek, and where meritorious, to obtain civil redress.<sup>98</sup>

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94. *Romans* 12:19.

95. See Bassiouni, *Death Penalty and the Shari’a*, *supra* note 22; Bassiouni, *Quesas Crimes*, *supra* note 54; Bassiouni, *Les Crime relevant du prècepte de Quesas*, *supra* note 54.

96. Roman justice was *sum cinque*, to each his due. See KANT and HOBBS, *supra* note 55; DAVID MILLER, *SOCIAL JUSTICE* (1976); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); LLOYD WEINREB, *NATURAL LAW AND JUSTICE* (1987); David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1626-1630 (1992).

97. See Edward M. Wise, *The International Criminal Court: A Budget of Paradoxes*, 8 *TULANE J. INT’L COMP. L.* 267-267 (2000).

98. See *supra* note 5. The victims’ right to a remedy includes: 1) access to justice; 2) reparation for harm suffered; and 3) access to factual information concerning the violations. The victims’ right to reparation entails the following forms: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. Specifically, restitution should involve the restoration of the victim to the original situation before the violations occurred, which may include the restoration of liberty, legal rights, social status, family life and citizenship, return to one’s place of residence, and restoration of employment and return

The legitimacy of punishment for international criminal law violations derives from: 1) its authoritative source, 2) the application of equal and fair penalties to all perpetrators, 3) the reciprocal and commensurate nature of the penalty in relation to the violation and extent of the harm produced, and 4) because it constitutes just desert. The notions of retribution and just desert are both a consequence of the first two factors, which constitute the underpinning of the legitimacy of punishment as well as a philosophical premise or social policy to legitimate society's right to punish.<sup>99</sup>

Legal philosophies and policies vary as to whether retribution constitutes an end in itself, or whether it also serves other goals such as deterrence, or perhaps rehabilitation. In some respects, retribution implies the just desert<sup>100</sup> end of legitimate punishment meted out by an authoritative source, which represents a social group's fulfillment of an implied "social contract." The inherently just nature of punishment as desert is at the heart of the retributive notion of punishment irrespective of the expediency or

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of property. Compensation should be provided for any economically assessable damage resulting from the violations, such as: physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation or dignity, and costs required for legal or expert assistance, medicines and medical services, and psychological and social services. Rehabilitation should involve medical and psychological care as well as legal and social services. Lastly, satisfaction and guarantees of non-repetition should include: cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; the search for bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families; an official declaration or a judicial decision restoring dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; apology; judicial or administrative sanctions against persons responsible for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations; and preventing the recurrence of violations. *Id.*

99. This was the position of KANT and HOBBS, *supra* note 55. See also MOORE, *supra* note 55. According to Kant, punishment is a "categorical imperative" based on the principle of equal freedom, thus the failure to punish is an injustice to all, even the perpetrator. Kant stated that:

The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it. . . .

*Id.* (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (John Lord trans., 1965)).

100. Exploring the basis of desert as a justification for punishment the author notes that: "Punishment is just when it is deserved, and it is deserved by the commission of an offense. The offense committed is the sole ground of the state's right and duty to punish. . . . Justice in these matters is to treat offenders according to their deserts, to give them what they deserve, not more, and not less." Dolinko, *Three Mistakes of Retributivism*, *supra* note 63, at 1628 (quoting IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* (1989)).

utility of punishment, which some scholars also see in the policy of retributive punishment.<sup>101</sup>

Even though retribution and just desert are based on the same philosophic premises, just desert, as opposed to retribution, predicates the violator's right to punishment on the need for individual redemption, which occurs only after the violator has fulfilled the requirements of the given punishment. As a result, the violator may re-enter society with the confidence that he has accepted and satisfied the requirements of his just desert, thereby emerging free from further punishment for his past violation. Theoretically, just desert provides the violator with a means to feel as if he has "paid his dues." However, in practice, society is less likely to accept a violator's completion of their given punishment as a means for personal redemption or vindication. In fact, depending on the social structure of a given society, violators continue to be punished, even after they have served their sentence. Continuing punishment is carried out through certain social and procedural mandates which label violators as lifetime "criminals."<sup>102</sup> As a result, the just desert nature of punishment is sometimes more severe and less deserved than what was theoretically intended.

### 6.2.3 Deterrence and Rehabilitation

In the opinion of this writer, retribution is not vengeance. Rather, it can produce utilitarian results and achieve humanistic goals, such as deterrence and rehabilitation.<sup>103</sup> Thus, even though the underlying philosophical premises differ, their outcomes are not inconsistent. The essential difference in these philosophical and policy views up to the eighteenth century was

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101. MOORE, *supra* note 55. The Kantian "categorical imperative" of punishment is not inconsistent with utilitarian policies. It should be noted that retribution is not vengeance and that certain forms of punishment are not "just desert" when they are applied to a given category of offenders irrespective of the individual actor's motives. *Id.*

102. For example, on May 17, 1996, President Clinton signed Megan's Law, which compels each state and federal government to register individuals who have been convicted of sex crimes against children. In most states, the registration requirement was extended to all sex offenders. As a result, all persons convicted of a sex crime are required to register as a "sex offender" within ten days of being released from prison, even though they have served their entire sentence in prison. This registration list is available to everyone and can be accessed on the Internet and found at your local post office. This practice clearly contradicts the theory of just desert by labeling the violator as a sex offender, which impairs his freedom, his ability to experience feelings of redemption, and his chance to rebuild his life. *Megan's Law in All 50 States*, at <http://www.klaaskids.org/pg-legmeg.htm>.

103. Deterrence theories justify punishment based on the good or desirable consequences that are derived from the punishment, while retributivism justifies punishment as a corollary of a transgression of a certain norm. Dolinko, *supra* note 63.

whether penalties should be commensurate with a social judgment of the gravity of the crime, or whether that penalty could be varied to fit certain characteristics pertaining to the violator, particularly the likelihood of rehabilitation.<sup>104</sup>

The philosophical debate about the purpose of punishment may be viewed as separate from whatever purpose it may fulfill.<sup>105</sup> However, both can also be viewed as being on the same continuum, which starts with punishment as an end in itself. Punishment, in this context, justifies its existence. It then progresses to serve another end, beyond punishment in itself, which is whether it can produce deterrence or rehabilitation. The compromise position is that utilitarian purposes do not take away from the pure retributive theory, rather, they add another dimension to it.

#### 6.2.4 *Punishment of Jus Cogens International Crimes*

The relevance of the debate between the purpose of punishment and whatever purpose it may fulfill to *jus cogens* international crimes depends on a number of facts and assumptions. Since the Second World War, *jus cogens* international crimes have produced an extraordinary number of victims,<sup>106</sup> and have caused the disruption of national orders and

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104. CESARE BECCARIA, *DEI DELITTI E DELLE PENE* 13 (Domenico Pisapia ed., 1964) (1764) was probably the first penal reformist of the 18th century. Jeremy Bentham was among his leading followers whose authoritative position in the English legal tradition had a profound effect on the family of common law systems. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (James H. Burns & Herbert L. A. Hart eds., 1970) (1780).

105. Because of the complexities involved with defining the “purpose” of punishment, such as the characteristics of human nature, various scholars differ as to the true purpose of punishment. See Wise, *supra* note 64. Wise, quoting Emile Durkheim, defines the true purpose of punishment as: “to maintain intact the cohesion of society by sustaining in all its vigor communal consciousness.” Thereby, the most important effect of punishment is that it reinforces collective beliefs on the differences between right and wrong, thus reaffirming the actions of honest, law-abiding people and helping hold the community together. In contrast, Durkheim questions the effectiveness of punishment in reforming those who commit crimes or deterring future crimes. *Id.*

See also MOORE, *supra* note 55, at 36, where Jeremy Bentham’s utilitarian justifications for punishment are recognized as: 1) states have the duty to achieve a specified object, 2) laws are used by states to reach its object, 3) infractions of the law frustrate the achievement of the object, and, lastly, 4) states have the right to punish infractions in order to achieve the object of punishment. *Id.* at 37. However, Moore points out that, according to the principles of utility, punishment shall not be inflicted where: 1) it would be ineffective in deterring crimes, 2) no mischief was caused, 3) education and social reorganization exist in order to stop crime, and 4) it would cause greater harm than the harm of not punishing. *Id.*

106. During the twentieth century, the world has witnessed more than 250 conflicts of different types, which resulted in the killing of an estimated 75-170 million persons; notably, in most of these cases, the perpetrators have benefited from impunity. See Bassiouni, *Combating Impunity For International Crimes*, *supra* note 18. See also Bassiouni, *Searching for Peace*, *supra* note 7; Jennifer L. Balint, *An Empirical Study of conflict, Conflict*

international peace. Nonetheless, the perpetrators of these crimes have faced impunity. Naturally, in the absence of justice, aggrieved groups seek vengeance and any hope of national reconciliation disappears. As a result, future disruptions of national and international public order, in addition to more victimization, are likely to occur. Consequently, punishment is as essential to world order as it is to the social order of national societies.

Punishment for *jus cogens* international crimes must, therefore, be essentially retributive, with a view toward future general deterrence, and only marginally concerned with the prospective expectation of rehabilitation of individual violators. Nevertheless, there is room for considering the assessment of punishment on the basis of the harm produced and the motives of the individual perpetrator. Even though this later qualification may appear philosophically incongruent with the pure retributive theory, it is nonetheless essential in light of other contemporary international community. The justification for this mixed theory of punishment lies in its value-oriented goals. Lastly, another metaphysical dimension exists where punishment for *jus cogens* international crimes helps restore the human dignity of the specific victim. Additionally, it symbolically reaffirms the value of human dignity of human genre and in the Kantian sense, it restores the human dignity of the perpetrator.<sup>107</sup> This is why punishment for such crimes cannot be compromised by the political practice of blanket amnesties. For the foregoing reasons, it is necessary to make a distinction between policy makers and senior executors of *jus cogens* international crimes and low-level executors.<sup>108</sup>

### 6.3 Universal Justice for Jus Cogens International Crimes

The notion of universal justice is not exclusively based on the Western philosophy of natural justice as so eloquently expressed by Cicero:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does

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*Victimization and Legal Redress*, 14 NOUVELLES ETUDES PENALES 101 (Christopher C. Joyner, special ed. & M. Cherif Bassiouni, general ed., 1998).

107. For a similar view see MOORE, *supra* note 55, at 47-49. Moore, quoting Hegel, states that punishment is a right that treats criminals as persons who have a right to act freely; therefore, failure to punish treats the offender as an object rather than a human being. Punishing offenders, in recognition that the criminal act does not conform to the state's rules, fulfills a public duty. *Id.*

108. M. Cherif BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (2d rev. ed. 1999), at 113-117.

not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different law now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.<sup>109</sup>

It is also based on the idea that law is part of any social order – whether divinely ordained or socially conceived. Its corollary is that normative principles arising out of *jus cogens* are universal because they apply to all persons similarly situated, irrespective of who they are or where they may be.

The international criminal justice system must, therefore, provide dual tracks of access to justice in cases involving violations of *jus cogens* international crimes.<sup>110</sup> This does not, however, mean that international judicial bodies must necessarily be the ones to administer these two tracks. Instead, as mentioned earlier, the international criminal justice system must operate in a complementary manner in order to cooperate with national criminal justice systems.<sup>111</sup> This complementarity can be analogized, with

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109. DE REPPUBLICA 3.22,33, (Clinton Walker Keyes trans., 1928). The same essential point is made repeatedly in the *Laws*. DE LEGIBUS 1-6.18-19, 2.4-9-10, 2.5.13-14, (Clinton Walker Keyes trans., 1928). See also LLOYD WEINREB, *NATURAL LAW AND JUSTICE* (1987), wherein he states:

It was a philosophy well adapted to the historical circumstances of an empire incorporating diverse nations and races, which governed by an accommodation of imperial hegemony and local difference. Greek speculative philosophy did so well in Rome because it supported practical objectives, not because it stimulated or satisfied the intellect. It remained for other writers to turn the attention of natural law again from the practical to the speculative, substituting Christian theology for Greek cosmology.

*Id.* at 41.

110. Among the twenty-eight categories of international crimes, only *jus cogens* crimes rise to that level. See Bassiouni, *The Sources and Content of International Criminal Law*, *supra* note 14.

111. This is the premise of the ICC. See *ICC Statute*, *supra* note 25; M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in 3 BASSIOUNI ICL, *supra* note 23, at 597; Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 BASSIOUNI ICL, *supra* note 23, at 693.

poetic license, to the different planets and stars of the solar system. The sun in this case is the common denominator of the planets and the stars, and it represents the central value of justice whose pursuit is carried out by the different planets and stars, which are part of the same constellation. Setting aside the jurisdictional connection between international judicial bodies and national ones, all of these systems should converge to produce the best possible results that they can, individually and collectively. In doing so, these systems can provide criminal accountability and punishment, which is a public function, and individual redress, which is a quasi-private function, supported by a public system.

The “social contract” theory requires that international criminal justice must pursue the goal of accountability for those who commit transgressions of certain norms of international criminal law. These norms apply particularly to *jus cogens* international crimes<sup>112</sup> because of their universal condemnation, and the large-scale harm they produce. For these reasons, *jus cogens* crimes require criminal prosecution and, in cases of a determination

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112. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, *supra* note 14. These very words “*jus cogens*” mean “the compelling law” and, as such, a *jus cogens* principle holds the highest position in the hierarchy of all other norms, rules, and principles. It is because of that standing that *jus cogens* principles have come to be known as “peremptory norms.” However, scholars are in disagreement as to what constitutes a peremptory norm and how a given rule, norm, or principle rises to that level. The basic reason for this is that the underlying philosophical premise of the scholarly protagonist view are different. These philosophical differences are also aggravated by methodological disagreements. Scholars differ as to *jus cogens* substance, sources, content (the positive or norm-creating elements), evidentiary elements (such as universality or less), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). The Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27) embodies customary rules which have emerged from international and national legal experience, as well as national legal principles of the law of contracts (this position is affirmed by the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) 102 (Tent. Draft No. 6, 1985)). It uses the term “peremptory norm” to mean inderogable. *Id.* Art. 53; *see, e.g.*, C. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976). The International Court of Justice, in its opinion in *Nicaragua v. United States: Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14. *See generally Appraisals of the International Court of Justice’s Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT’L L. 77 (1987).

In the *Barcelona Traction* case, the International Court of Justice stated:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Barcelona Traction (Belg. V. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, “the obligation(s) of a State towards the international Community as a whole.” *Id.* at 32.

of guilt, the application of punishment irrespective of the *realpolitik* considerations that may be advanced in opposition thereto. This determination is based on a value judgment that such crimes, because of their nature and consequences, require criminal sanctioning. Thus, the goals of desert and retribution are fulfilled, as well as the goals of deterrence and prevention irrespective of their effectiveness. Moreover, deterrence and prevention reduce harm and preserve world public order.<sup>113</sup> The higher nature of these goals and social interest they achieve warrant resolving the criminal sanctioning process at the national and international levels. The type of legal forum through which this sanctioning process is applied should be of no consequence on the ultimate goal that is to be pursued.

International *jus cogens* crimes are, at this point in time: genocide, crimes against humanity, war crimes, slavery and slave related practices, torture and, for historic reasons, piracy.<sup>114</sup> It is precisely because of the nature of these norms and their inderogability that certain legal consequences attach.<sup>115</sup> For instance, they are: the duty for any and all legal systems, whether national or international, to prosecute or extradite,<sup>116</sup> and when necessary to resort to universal jurisdiction,<sup>117</sup> to provide legal assistance to national or international legal orders undertaking the investigation, adjudication or prosecution of such crimes, not to recognize or apply statutes of limitations<sup>118</sup> and to recognize and enforce penal judgments arising out of such cases.<sup>119</sup>

Admittedly, different modalities as discussed may apply to different transgressions, depending upon the goals of justice and peace sought to be achieved through the international legal orders.<sup>120</sup> Indeed, not every

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113. See MYRES MCDUGAL, ET AL., *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961).

114. See Bassiouni, *Combating Impunity for International Crimes*, *supra* note 18, at 68.

115. *Id.* at 67.

116. BASSIOUNI & WISE, *AUT DEDERE AUT JUDICARE*, *supra* note 3.

117. See UNIVERSAL JURISDICTION FOR INTERNATIONAL CRIMES (Stephen Macedo ed., 2003); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001); *The Princeton Principles on Universal Jurisdiction* (Princeton University Program in Law and Public Affairs, 2001); MARC HENZELIN, *LE PRINCIPE DE L'UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL* (2000).

118. See Christine Van den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity-Are States Taking National Prosecutions Seriously?*, in 3 BASSIOUNI ICL, *supra* note 23, at 227.

119. See Bassiouni, *Combating Impunity for International Crimes*, *supra* note 18, at 65-66.  
120. In the past, the following accountability mechanisms have been employed: international prosecutions, international investigatory commissions, national investigatory and truth commissions, national prosecutions, lustration mechanisms, civil remedies, and mechanisms for victim compensation. See Bassiouni, *Combating Impunity for International*

transgression requires criminal prosecution. Similarly, not every criminal conviction requires a given penalty. The range of accountability modalities will vary depending upon the nature of the transgression, and the requirements of restoring the social order will occur either by achieving reconciliation between different social groups, or by reaching peace agreements between different states. Thus, a balance must exist between these collective interests and public order goals on one hand, and the rights and interests of the victims. The pursuit of peace and justice are not incompatible, however, they often times contradict one another. Therefore, legal criteria that provide consistency and predictability in the application of these modalities of accountability must be established.

Achieving accountability for international crimes will only evolve once an integrated and comprehensive strategy is developed where international and national institutions complement each other. This notion of complementarity is not limited to having alternative jurisdictional mechanisms as in the case of the ICC. Rather, complementarity can be based on a variable network of cooperating systems. Although different institutions within this global system such as the ICC, *ad hoc* tribunals, national criminal justice institutions and other international and regional mechanisms, function independently of one another, they are also increasingly cooperating with one another. In its initial stages, such a system will require integrated strategies to link international, regional, and national institutions. At the very least, it requires enhanced cooperation in penal matters, and national legal systems will be the essential enforcement organs of international crimes. To accomplish this, it will be necessary for national legal systems to develop new views on jurisdiction.

For an integrated system of international criminal justice to be effective, specific norms and criteria must exist in order to assist policy makers in selecting appropriate mechanisms in a post-conflict situation. These criteria must be flexible and take into consideration the *sui generis*

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*Crimes*, *supra* note 18, at 18-22, 67; RATNER & ABRAMS, *supra* note 22; Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

A parallel track to the criminal sanctioning process is the civil one which may be pursued by victims and their heirs, either before national or international administrative or legal bodies, in order to secure any of several modalities of redress. These modalities include monetary compensation, material and legal restitution, moral vindication, and also the right to have the legal system provide protection and prevention against potential future violations. Similar to what was said about the criminal sanctioning process, this civil track does not presuppose an allocation of jurisdictional competence as between national and international administrative and legal bodies. See *The Right to Restitution*, *supra* note 65; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, U.N. Doc. A/RES/40/34 (11 Dec. 1985).

nature of a given conflict. For example, the reparation scheme used by Chile and Argentina to compensate human rights victims is not appropriate for a state such as Rwanda that faces a very different economic reality and a larger number of victims and offenders.<sup>121</sup>

Accountability is an end in and of itself, but it is also a means to achieve other goals, such as the deterrence of future violations, making victims whole, and serving as a point of departure for reconciliation. Certainly, the criteria for accountability may change from conflict to conflict and evolve over time. Thus, the process of defining accountability and selecting the mechanisms employed to achieve it must: 1) be inclusive of all sectors of society; 2) emanate from or be acceptable to the given society, not just state actors, but their population; 3) incorporate international norms and standards, but reflect local characteristics; 4) be tailored to a given conflict, but within a general framework; and 5) look both to the short-term of cessation of conflict and to the long term of institution and society building.

However, if the enforcement of international criminal law is to be more than Potemkin justice, which merely provides moments of forced peace between conflicts, political negotiators must not be allowed to define accountability so as to leave it without meaning. Further, they must be prohibited from bartering away what they know to be their community's sense of justice. Indeed, the provision of blanket amnesties offends universal notions of justice. While a place exists within the framework of international criminal justice for amnesty, pardon, and mercy, these notions can only come after judgment or some acceptance of responsibility on the part of the offender.<sup>122</sup> For example, while the South African Truth and Reconciliation Commission contains provisions for amnesty, this amnesty is not blanket and is conditioned on the offenders participation in the

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121. In situations like Rwanda, where there exists hundreds of thousands of aggressors and approximately 800,000 murdered, the best accountability mechanism is difficult to find and apply to such post-genocidal societies. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, N.Y.U. L. REV. (2000); see also PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1998). Gourevitch, reflecting on the atrocities committed within the Republic of Rwanda, noted:

Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda. Although the killing was low-tech – performed largely by machete – it was carried out at dazzling speed. . . at least eight hundred thousand people were killed in just a hundred days. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.

*Id.*

122. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1999); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS & MERCY* (1988); MOORE, *supra* note 55.

process of accounting for the apartheid regimes past violations.<sup>123</sup> However, the mechanism was essentially predicated on a compromise whereby the offer of justice based on a process paved the way for reconciliation.<sup>124</sup> If this generation fails to achieve the expectations of international criminal justice, then the words of George Santayana represent reality, “those who cannot remember the past are condemned to repeat it,”<sup>125</sup> and our era of world civilization will have failed to achieve its most important global goal of justice.<sup>126</sup> However, through the consistent application of punishment for *jus cogens* international crimes, this generation will be one step closer to obtaining this goal of universal justice.

### Section 7. Accountability Mechanisms\*

International and national prosecutions are not the only methods of accountability. There are other options that must be examined, though in the opinion of this writer, there exists a duty to prosecute, whether at the international or national level, for genocide, crimes against humanity, war crimes, and torture.<sup>127</sup>

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123. The international community agrees that by creating the Truth Commissions, South Africa has made a good faith attempt to comply with international obligations of accountability. Garth Meintjes, *Domestic Amnesties and International Accountability*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT (Dinah Shelton ed., 2001). See also Lynn Berat & Yossi Shain, *Retribution or Truth-telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 1, 163 (1995); Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 28 COMP. & INT. L. J. S. AFRICA 338 (1995). See also William Finnegan, *The Poison Keeper*, NEW YORKER, January 15, 2001, at 58, where the author explores the life of the founder and leader of project Coast, a top-secret chemical- and biological-warfare program that Archbishop Desmond Tutu called “the most diabolical aspect of apartheid.” *Id.*

\* This section is based in part on M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 7, at 26.

124. Some scholars argue that granting amnesties in hopes of reconciliation may not be sufficient justification to validate the granting of such amnesty. See Naomi Roht-Arriaza, *Amnesty and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT (Dinah Shelton ed., 2001).

125. GEORGE SANTAYANA, *THE LIFE OF REASON: THE REASON OF COMMON SENSE* (1905), vol. 1 at chapter 12.

126. See Bassiouni, *Combating Impunity in International Crimes*, *supra* note 18.

127. Whether such cases should be prosecuted before an international or national body is essentially relevant to the issue of primacy of competence and to the issue of effectiveness and fairness of national prosecution. Another relevant question arises as to the prosecution of decision-makers, senior executors and perpetrators of particularly heinous crimes and other violators. A policy could be established to prosecute the former before an international criminal court as a first priority, leaving lesser violators to be prosecuted by national bodies.

Accountability measures fall into three categories: truth, justice, and redress.<sup>128</sup> Accountability must be recognized as an indispensable component of peace and eventual reconciliation. Accountability measures which achieve justice range from the prosecution of all potential violators to the establishment of the truth.

Accountability is the antithesis of impunity, which occurs either *de jure* through the granting of amnesties or *de facto* through the failure of a state to enforce legal norms either willingly or as a result of an insufficient legal infrastructure.

Amnesties are essentially a form of forgiveness,<sup>129</sup> granted by governments, for crimes committed against a public interest. While amnesty is a deliberate positive action, impunity is an act of exemption—an exemption from punishment, or from injury or loss.<sup>130</sup> Amnesty can occur after a person or a group of persons have been convicted, not beforehand. The recurrence of pre-prosecution amnesty is, therefore, an anomalous phenomenon developed as part of a policy of impunity.

Impunity can also result from *de facto* conduct, often occurring under color of law when, for example, measures are taken by a government to curtail or prevent prosecutions. As a *de facto* act, it can be the product of either the failure to act or the product of more deliberate procedural and practical impediments which can preclude prosecution.<sup>131</sup> It is also possible to achieve impunity through other practical impediments.<sup>132</sup> In the context

In addition, the question arises as to the possibility of lesser sentences or alternatives to traditional criminal sentences for lesser offenders and for national bodies to resort to various forms of conditional release, pardons or amnesties after conviction of lesser offenders. These measures would not be contrary to the principle of non-derogation from the duty to prosecute. 128. For a survey of various accountability measures from a criminological perspective, see Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. INQUIRY 7 (1995).

129. See *Forgiveness, Forgetfulness, or Intentional Overlooking*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 67 (Lesley Brown ed., 1993).

130. *Id.*

131. For example, a short-term statute of limitation can preclude prosecution.

132. For example, with respect to rape in the former Yugoslavia, prosecutions take place in the Netherlands while the victims are usually refugees in different countries. If the victims are required to travel to the Netherlands without speaking the language, without proper support (familial, social, psychological, medical, emotional), and are to be cross-examined there, then they may elect not to testify, resulting in impunity. M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (Occasional Paper #1, 1996, International Human Rights Law Institute, DePaul University). See also *Prosecutor v. Tadic*, Case No. IT-94-I-T (May 7, 1997) (McDonald, J., dissenting) (defendant was acquitted of charges of rape before the ICTY because the victims were fearful of testifying).

of accountability, the attainment of truth, justice, and redress raises a host of issues addressed by other studies.<sup>133</sup>

The accountability options include: a) international prosecutions; b) international and national investigatory commissions; c) truth commissions; d) national prosecutions; e) national lustration mechanisms; f) civil remedies; and g) mechanisms for the reparation of victims.

### 7.1 International Prosecutions

As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors.<sup>134</sup> This policy, however, does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.<sup>135</sup> There must be prosecution for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture. Prosecution at the international level is important because it is likely the only way to reach the leaders, senior executors, and policy makers, who may otherwise be *de facto* beyond the reach of local law. In addition, victims should also be allowed to participate in an international prosecution as *partie civile*, which is provided for in civilist legal systems, in order to have the right to claim compensatory damages.<sup>136</sup>

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133. See M. Cherif Bassiouni, *Accountability For International Crimes and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. (1996); *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1997*, 14 NOUVELLES ÉTUDES PÉNALES (Christopher C. Joyner Special Ed. & M. Cherif Bassiouni General Ed., 1998); 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995). These issues include: Can the need for redress always be found through traditional monetary or prosecutorial mechanisms? What level of compensation should be given, and to whom? Can it not, particularly in financially poorer countries, be achieved in a non-monetary form? Many of the crimes involve the potential accountability of many people, maybe large sectors of a society. How many people should be prosecuted in order to attain justice? How can the interest and support of the general population be maintained? For an account of these and other such problems that arose from the human rights trials in the wake of the restoration of democracy in Argentina, see generally NINO, RADICAL EVIL ON TRIAL, *supra* note 124.

134. See M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, COLUMBIA J. INT'L AFF. 795 (1999); See also Security Council Resolution 1329 (5 December 2000) ("Taking note the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors.")

135. It may be important, for example, to prosecute lower level actors in order to generate information regarding the actions and identities of higher level officials.

136. For example, while the ICC Statute contains several provisions providing victims an opportunity to participate in proceedings or to obtain compensations (e.g., Arts. 75, 79), similar provisions are lacking in the Statutes for the *ad hoc* Tribunals for the former Yugoslavia and Rwanda.

Presently, there are two existing *ad hoc* international criminal tribunals: the ICTY and the ICTR.<sup>137</sup> The jurisdiction of each of these tribunals is temporally and territorially limited to respond to the specific threat to peace and security that necessitated their respective creations; namely, the civil and ethnic wars ensuing the break-up of the former Yugoslavia and the four month intensive slaughter occurring in Rwanda. While each of these tribunals has concurrent criminal jurisdiction with national courts, the international tribunals nonetheless retain primacy and may request the deferral of a national proceeding at any stage in order to prosecute.<sup>138</sup>

Consistent with the two prior international prosecutions at Nuremberg and Tokyo, both of these tribunals have focused on the leaders and senior architects. Indeed, notwithstanding the fact that there are admittedly “thousands of significant targets,” the Prosecutor for these tribunals has selected less than 200 for each and does not anticipate prosecuting all of those.<sup>139</sup> As such, a significant amount of the prosecutorial work, including the prosecution of a number of important figures, will be left to the national courts.

In addition, other international efforts have been undertaken in both Sierra Leone and Cambodia. Agreements have recently been reached for the creation of an international tribunal with jurisdiction over the atrocities that occurred in that country after the 1996 peace accords.<sup>140</sup> In addition,

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137. See International Criminal Tribunal for Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993); International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

138. See *ICTY Statute*, *supra* note 137, at art. 9(2); *ICTR Statute*, *supra* note 137, at art. 8(2).

139. See Office of the Prosecutor, *Address By The Prosecutor of the International Criminal Tribunal For the Former Yugoslavia, Carla Del Ponte, to the UN Security Council, GR/P.I.S./642-e* (27 November 2001) (issued as a press release). Indeed, while there is still “much crucial work” left for the ICTY and ICTR, the Prosecutor has expressed that both Tribunals are beginning their “exit strategies” and will complete investigations by 2004 and prosecutions by 2008. *Id.*

140. For the Agreement on the Establishment of a Special Court for Sierra Leone and its annexed statute, see *Report of the Secretary General on the Establishment of a Special Court in Sierra Leone*, U.N. Doc. S/2000/915 (4 October 2000) (annex). This special tribunal will have an international prosecutor and deputy from Sierra Leone. It will only have jurisdiction over crimes committed after November 30, 1999. The crimes within the jurisdiction of the court include crimes against humanity, violations of common article 3 of the Geneva Conventions of 1949, other violations of international humanitarian law, and select domestic crimes. See also Security Council Resolution 1315 (14 August 2001) (requesting the Secretary General to negotiate an agreement with the Government of Sierra Leone to create an independent special court). With respect to the progress of other accountability efforts, including the creation of a Truth and Reconciliation Commission, see also *Twelfth Report of the Secretary General on the United Nations Mission In Sierra Leone*, U.N. Doc. S/2001.1195 paras. 67-68 (13 December 2001) (noting the preliminary selections of commissioners and an anticipated commencement of 2002), and *Note by the Secretary General, Situation of Human*

efforts continue in Cambodia to finalize plans for a special national tribunal, which will involve an international component.<sup>141</sup>

Future international prosecutorial efforts will for the most part occur before the ICC.<sup>142</sup> This court will have jurisdiction over the crimes of genocide, crimes against humanity, and war crimes.<sup>143</sup> Importantly, the ICC will only exercise its jurisdiction over individuals who are either nationals of a state party or who have committed a crime on the territory of a state party.<sup>144</sup> The ICC will also only exercise its jurisdiction prospectively.<sup>145</sup> This effectively precludes it from dealing with crimes committed on a state's territory or by one of its nationals prior to that state's ratification of the treaty embodying the ICC Statute.

The jurisdiction of the ICC may be triggered in three fashions: 1) state party's referral; 2) referral by the Security Council acting pursuant to Chapter VII of the United Nations Charter responding to a threat to peace and security; and 3) a *proprio motu* initiation by the prosecutor.<sup>146</sup>

A central tenet to the ICC is the principle of complementarity with national criminal jurisdictions.<sup>147</sup> In contrast with the Yugoslav and Rwandan Tribunals, national criminal jurisdiction almost always has

*Rights in Sierra Leone*, U.N. Doc. A/56/281 at paras. 40-53 (9 August 2001) (discussing the UN's efforts to assist Sierra Leone establish a truth and reconciliation commission and a national human rights commission). See BASSIOUNI, *supra* note 1, at Chapter VIII, section 5. 141. See *Note of the Secretary General, Situation of Human Rights in Cambodia*, U.N. Doc. A/56/209, at paras. 75-76 (26 July 2001), noting Cambodia's progress in the creation of a special tribunal, which will involve an international component, to try those responsible for crimes committed during the Democratic Kampuchea regime. The Secretary General likewise expressed his frustration at the delays in the process of the promulgation of a domestic law. See BASSIOUNI, *supra* note 1, at Chapter VIII, section 2.

142. The statute of the ICC came into effect on July 1, 2002, after 66 countries had ratified on April 11, 2002. See *ICC Statute*, *supra* note 23, at art. 126.

143. See *ICC Statute*, *supra* note 23, at arts. 6 (genocide), 7 (crimes against humanity), and 8 (war crimes). In addition, the statute envisions that the court will eventually exercise jurisdiction over aggression, once that crime is defined and added pursuant to the Statute's amendment procedure. See *ICC Statute*, *supra* note 23, at art. 5(1)(d). Other crimes may eventually be added as well, and there have been proposals for both the crimes of terrorism and drug trafficking.

144. See *ICC Statute*, *supra* note 23, at art. 12. However, the S.C. may refer a case involving a non-state party to the ICC acting under its authority pursuant to Chapter VII of the U.N. Charter in response to a threat to peace and security just as it has been able to create the *ad hoc* tribunals.

145. *Id.* arts. 11, 24.

146. See *Id.* art. 13.

147. For a discussion of the principle of complementarity, see John T. Holmes, *The Principle of Complementarity*, in Roy S. Lee, *The Rome Conference and its Contributions to International Law*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 41-78 (Roy S. Lee ed., 1999). See also Sharon A. Williams, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 383-394 (Otto Triffterer ed., 1999). See also BASSIOUNI, *supra* note 1, at Chapter VII, section 2.2.

priority over the ICC. Only in two situations may the ICC exercise primacy of jurisdiction, namely: a) when a national legal system has collapsed; or b) when a national legal system refuses or fails to carry out its legal obligations to investigate and prosecute persons alleged to have committed the three crimes presently within its jurisdiction or punish those who have been convicted.<sup>148</sup>

### 7.2 *International and National Criminal Investigatory Commissions*

International and national criminal investigatory commissions include internationally established commissions, or designated individuals, assigned to collect evidence of criminality, in addition to other fact finding information of a more general nature.<sup>149</sup> These commissions or specially designated individuals are important in providing the basis for future, and to be sure, timely, national and international prosecutions and in documenting violations of international humanitarian and human rights law.

Like the Commission of Experts for the former Yugoslavia,<sup>150</sup> these commissions or specially designated individuals are often actively investigating or collecting evidence during periods of open hostilities or ongoing human rights violations by repressive regimes. That is because the mandate of these entities and individuals is typically to evaluate a situation in the first instance in order to advise political decision-makers as to an

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148. See *ICC Statute*, *supra* note 23, at 17. The principles of the primacy of national legal systems and the ICC's complementarity are evident in other provisions of the Statute. Perhaps most indicative of these principles are the provisions of the Statute in Part 9 that require all requests for cooperation, including the arrest and surrender of an accused and the securing of evidence, to be directed to and executed by national legal systems. See M. Cherif Bassiouni, *Explanatory Note*, 71 *REVUE INTERNATIONALE DE DROIT PENAL* 1, 5 (2000).

149. The five international investigative commissions are: 1) The 1919 Commission on the Responsibilities of Authors of War and on the Enforcement of Penalties; 2) The 1943 United Nations War Crimes Commission; 3) The 1946 Far Eastern Commission; 4) The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia; and 5) The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda. See generally Bassiouni, *From Versailles to Rwanda*, at 11-49. The Commission on Human Rights and the Sub-Commission on Promotion and Protection of Human Rights have established, respectively, special experts and rapporteurs whose work and contribution over the years has proven invaluable.

150. See *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994); Annexes to the *Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994). See also, M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 *AM. J. INT'L L.* 784-805 (1994); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 *CRIM. L. F.* 279-340 (1994).

appropriate course of action to remedy the situation. Security Council Resolution 780 (1992), which created the Commission of Experts for the Former Yugoslavia is illustrative:

2. Requests the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, or other persons or bodies pursuant to Resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia;

...

4. Further Requests the Secretary-General to report to the Council on the conclusions of the Commission of Experts and to take account of these conclusions in any recommendations for further appropriate steps called for by Resolution 771 (1992).

Investigative commissions, however, play a role other than simply that of impartial analyst. Indeed, the evidence they collect and preserve will likely form the basis of any initial prosecutions, whether they be national or international in nature. For that reason, at times, some of the information that gives rise to a commission's conclusions may be kept under seal, at least in the beginning.

Investigative commissions are related and often share similar nomenclature and operating procedures with other accountability mechanisms such as truth commissions. While both of these mechanisms share the over-arching goal of ascertaining the truth about a given conflict, the principal distinction between these two types of bodies primarily lies in the timing of their establishment and their immediate purposes. Indeed, investigative commissions are focused on making an immediate assessment and initial record of what *is occurring*. In contrast, truth commissions are focused on making sense of what *has happened* and establishing somewhat of a permanent conclusion.

### 7.3 International and National Truth Commissions

Truth commissions or fact-finding investigative bodies are generally considered to have the following four attributes: 1) they focus on past

events; 2) they attempt to discern the overall picture of a conflict as opposed to a given event; 3) they exist for a finite period of time, generally ceasing with the publication of a report; and 4) they generally have some form of authority emanating from either an international or national mandate.<sup>151</sup> These commissions may be established internationally, regionally, or nationally. Truth commissions have been established in the aftermath of conflicts in countries including Uganda, Bolivia, Argentina, Uruguay, Zimbabwe, El Salvador, Chad, Chile, South Africa, and Ethiopia.<sup>152</sup>

Truth commissions serve the needs of accountability because they generally have the ambitious mandate to discover the entirety of the truth. They should not, however, be deemed as a sole substitute for prosecution of the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture. It is better perhaps that these commissions serve as a precursor or possibly operate in tandem with prosecutions. Indeed, their role is to establish a record of what has happened, and to disseminate this information widely at both the national and the international level.<sup>153</sup>

Essentially, their goals are to serve the end of peace and reconciliation, and may sometimes be less relevant to criminal justice, though by no means less important to that purpose. The advantage of these commissions is that they establish the broader context of a given conflict, thus eliminating the need at national and international prosecutions to provide that broader context<sup>154</sup> or to use a given trial as a means of establishing a historical context that could, in some cases, be deleterious to the case under prosecution or the due process quality of the trial. Trials are generally ill-suited to deal with the task of providing a complete history of past violations. This is specifically a result of their adversary nature where the duty of the prosecutor is to focus on limited facts relevant to the guilt of the individual before the court, and the duty of the defense is to challenge the admissibility of the essential information.<sup>155</sup> It is to be noted that an international or national truth commission is not necessarily a reconciliation

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151. See Hayner, *supra* note 2, at 599, 604; see also RATNER & ABRAMS, *supra* note 22, at 193.

152. *Id.*

153. See Hayner, *supra* note 2, at 607.

154. See GIDEON HAUSNER, JUSTICE IN JERUSALEM 3, 4 (1966) (commenting on the *Eichmann* case).

155. See Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet* (on file with author).

commission. Some of these commissions can also be of a hybrid nature, taking on investigative features.<sup>156</sup>

#### 7.4 National Prosecutions

Notwithstanding the interest of international civil society in the establishment of international criminal tribunals, national criminal jurisdictions remain the cornerstones of the prosecution of international crimes. This is only highlighted by the principle of complementarity found in the ICC Statute, which defers in most instances to national efforts and relies heavily on national systems and authorities for judicial assistance. The importance of national jurisdictions is further highlighted by their reach, as indeed, international tribunals generally focus only on the senior level decision makers and planners. National prosecutions should include all persons who have committed criminal acts, subject, however, to reasonable and justified prosecutorial discretion. This includes persons who have committed the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture. Furthermore, there should be a principle of no general amnesty for these four crimes.

For crimes other than the four mentioned above, the national system may develop criteria for selectivity or symbolic prosecution consistent with their laws, provided these criteria are not fundamentally unfair to the accused. This does not preclude prosecutorial discretion when the evidence is weak or the criminality tenuous, or when a plea bargain can lead to the prosecution of more culpable offenders. Such prosecutions must be subject to standards whereby the exercise of discretion against prosecution, unless legally or factually justifiable, should result in remanding the individual to another accountability mechanism. For example, persons may receive sentences other than the deprivation of liberty, including the personal payment of reparations or compensation to the victims, the undertaking of some form of community service, or the making of a public apology. Other options could include the serving of limited sentences, or the serving of only partial sentences, followed by an amnesty or pardon, provided there are no *a priori* blanket amnesties or pardons that fail to take into account the criminality of the act and the consequences applicable to each individual receiving such an amnesty or pardon. It is also suggested that victims be allowed to participate as *partie civile* in those legal systems that

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156. See, e.g., Berat & Shain, *supra* note 90, at 186.

recognize this action so as to accord them the right to claim compensatory damages in an appropriate legal forum.

National prosecutions may occur in several different contexts. They should first and foremost occur in the jurisdiction where the violations occurred, and indeed several states have attempted to prosecute crimes committed by previous repressive regimes.<sup>157</sup> In addition, prosecutions for international crimes also occur in states that have duly implemented international crimes within their domestic criminal codes.<sup>158</sup> In the years to come, a number of additional states will likewise empower their national systems to prosecute these crimes as a number of states seek to implement the provisions of the ICC.

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157. For example, ambitious national prosecutorial efforts have been undertaken in Ethiopia and Rwanda, but each has not been without a degree of criticism. See RATNER & ABRAMS, *supra* note 22, at 151-156. In addition, a series of high-level prosecutions occurred in Argentina in the late 1980s, which after conviction ultimately resulted in presidential pardon and the promulgation of amnesty laws. CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996). New complaints, however, have been lodged in 2001, and two chambers of a federal court in Argentina have declared these amnesty laws unconstitutional, paving the way for new prosecutions. The Haitian government has likewise prosecuted several of the major atrocities committed against its people during the *de facto* military rule of Raoul Cedras. The largest of these prosecutions involved the massacre at Raboteau, where more than twenty of the former military and paramilitary who executed the operation were convicted. In addition, the members of the high command were convicted in absentia. In addition, for the prosecution arising out of WWII concerning Touvier and Barbie in France, see SORJ CHALANDON & PASCALE NIVELLE, *CRIMES CONTRE L'HUMANITÉ: BARBIE, TOUVIER, BOUSQUET, PAPON* (1998); Leila Sadat, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

158. Belgium, perhaps, has been the most aggressive in prosecuting individuals based on principles of universal jurisdiction. See *Loi 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* (16 Jun. 1993); *Loi relative à la répression des violations graves de droit international humanitaire* (10 February 1999), reprinted in 38 I.L.M. 918 (1999); see also A. Andries, E. David, C. Van den Wyngaert, *Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves aux droit international humanitaire*, REVUE DU DROIT PENAL CRIMINEL 1114 (1994); Damien Vandermeersch, *La répression en droit belge des crimes de droit international*, 68 REVUE INTERNATIONALE DE DROIT PENAL 1093 (1997). Indeed, complaints have been lodged concerning the conflicts in Congo, Rwanda, as well as against leaders such as Pinochet and Ariel Sharon. Investigations have been based both on principles of universal jurisdiction, as well as on active and passive personality. For prosecution in Canada, see the 1994 case of *Regina v. Finta*. For prosecutions in Denmark of individuals based on the commission of international crimes, see the 1995 case of *Prosecutor v. Refic Saric*. See also Marianne Holdgaard Bukh, *Prosecution Before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law*, 6 EUROPEAN REVIEW OF PUBLIC LAW 339 (1994). For prosecutions in France, see Brigitte Stern, *Universal Jurisdiction Over Crimes Against Humanity Under French Law, Grave Breaches of the Geneva Conventions of 1949, Torture, Human Rights Violations in Bosnia and Rwanda*, 93 AM. J. INT'L L. 525 (1999). Finally, for the importance of implementing legislation prior to prosecuting international crimes, see *Nulyarimma v. Thompson*, reprinted in 39 I.L.M. 20 (2000) (Federal Court of Australia) (concluding that individuals may not be prosecuted for genocide in the absence of implementing legislation).

### 7.5 National Lustration Mechanisms

National lustration is a purging process whereby individuals who supported or participated in violations committed by a prior regime may be removed from their positions and/or barred from holding positions of authority in the future. These measures have been undertaken in many former communist bloc states such as Lithuania, Bulgaria, the Czech and Slovak Republics,<sup>159</sup> as well as other repressive regimes, such as Haiti after Duvalier<sup>160</sup> and Ethiopia after the *Dergue*.<sup>161</sup> Lustration measures include both efforts to prevent members of a repressive regime from becoming decision makers and bureaucrats in the new administration, but also seeks to remove known human rights abusers from the new security forces, as was the case in El Salvador and Haiti, but with scant success.

For the most part, these prohibitions often expire after periods ranging from five to ten years.<sup>162</sup> Nevertheless, in time, generational changes occur which resolve these problems. Though punitive in nature, these mechanisms are used essentially as a political sanction which carries moral, social, political, and economic consequences. The danger with such mechanisms is that they tend to deal with classes or categories of people without regard to individual criminal responsibility, and thus lustration may tend to produce injustice in any number of individual cases. Furthermore, when lustration laws result in the loss of any type of earning capacity, dependents of those individuals who fall within the ambit of the lustration legislation suffer when they may not have had any connection with the prior violations. Lastly, these laws tend to have a stigmatizing effect that

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159. See Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 7, at 345.

160. See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 *TEX. INT'L L.J.* 1, 4 (1996).

161. See Wondwossen L. Kidane, *The Ethiopian "Red Terror" Trials*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 7, at 667.

162. For example, the German Act for Liberation from National Socialism and Militarism (March 5, 1946) denied individuals for a period of five or ten years, depending on their offense, the opportunity to serve as an elected or appointed public official, vote, participate in a profession, or have a vehicle. The 1987 Haitian Constitution prohibited individuals associated with the prior dictatorship from holding public office for a period of ten years. The Czech and Slovak Lustration Law (October 4, 1991) created a mechanism to exclude certain individuals from almost all aspects of civil society, including the military, police, government, and professions such as law, media, banking, and commerce. In addition, another mechanism was set up to remove newly elected members of parliament who had served in the prior regime's security apparatus. In Lithuania, former KGB employees and informers were barred from government positions for a period of five years. See generally 3 *TRANSITIONAL JUSTICE*, *supra* note 100 (reprinting original instruments).

carries beyond those who may have deserved such stigmatization and can fall onto innocent third parties or family members.<sup>163</sup>

In short, lustration mechanisms are a form of collective punishment which also affects the families of those in the class of persons targeted. While it has the advantage of turning the page on a given era, it seldom closes the chapter in itself. To cure the apparent injustice of targeting an entire category of persons, two more selective techniques can be used. The first is referred to as “vetting,” which means screening persons who were part of a former regime. However, because such a category of persons may be very broad, it requires significant personnel and time. Even so, the subjectivity of the process is likely to be unfair. The second is the prohibition to hold public office or be active in political organizations similar to the banned ones. This was tried in various post-conflict political contexts with uneven results that cannot be assessed for lack of empirical data.

### 7.6 *National Civil Remedies*

National civil remedies are the development, within civil legislation, of the right to bring suit by victims and their heirs, which enables them to obtain certain civil remedies. For example, individuals should be able to institute legal actions to obtain compensatory damages or to receive some form of injunctive relief, such as to compel the inclusion of a person in national criminal prosecution or in the category of those subject to lustration laws.<sup>164</sup> Moreover, persons having certain rights under civil law should also be allowed to join in national prosecutions as *partie civile* in criminal proceedings.

Civil remedies should not be available to the victim exclusively in the jurisdiction where the violation occurred. However, while some states have opened their courts to victims of violations that occurred outside of their borders, this type of remedy is not without difficulties. As a general rule, the “courts of one country will not sit in judgment on the acts of the

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163. The Czech and Slovak Constitutional Court subsequently struck down portions of its lustration laws. In addition, in Bulgaria leading members of the Communist Party were prohibited from holding positions on the managerial bodies of banks for a period of five years. This provision was ultimately found to be unconstitutional and contrary to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Vienna Convention on the Right of Contracts. See generally 3 TRANSITIONAL JUSTICE, *supra* note 100.

164. But see *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), where the Court held that “in American Jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.”

government of another done within its own territory.”<sup>165</sup> Thus, with few exceptions,<sup>166</sup> this renders a foreign state immune for its conduct within another state’s domestic legal system, regardless of whether the action attributed to the state violates international law. For example, in *Siderman de Blake v. Argentina*, the court held that Argentina was immune for its alleged *jus cogens* violations of international law.<sup>167</sup> Notwithstanding, while states have been unwilling to pass judgment on the foreign sovereign, this rule has not prohibited them from sitting in judgment of the acts of the foreign state’s citizens, both state and non-state actors.<sup>168</sup> Thus, if the domestic legal system has an adequate basis to assert jurisdiction over the person, then the state of nationality may permit either a civil claim against the violator or a *partie civile* to complement its own criminal prosecution.

Under the Torture Victim Protection Act,<sup>169</sup> the U.S. provides jurisdictional grounds for its nationals to sue an individual for an official act of torture. However, this cause of action is limited by both the claimant’s ability to gain *in personam* jurisdiction over the defendant and her exhaustion of local remedies in the foreign jurisdiction. A requirement of personal jurisdiction over the offender constitutes a serious limitation with respect to the victim’s pursuit of a remedy, whether civil or criminal. Unless the offender happens to be in the jurisdiction by chance, this remedy is often meaningless. However, the national’s state could request extradition based on a protective interest theory. Nevertheless, if the victim was unable to obtain a remedy in the foreign state, it is doubtful that the state would either extradite the individual or enforce the foreign civil or penal judgment.

A state has limited ability to provide a remedy to non-national victims who were not injured in that state’s territory; still, a limited number of

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165. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

166. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts. This statute provides for only commercial suits against a state. See *Nelson v. Saudi Arabia*, 508 U.S. 349 (1993) (alleged acts of torture were not within the commercial exception to sovereign immunity).

167. See *Siderman de Blake v. Argentina*, 965 F.2d 699, 719 (9th Cir. 1992); see also *Hirsch v. Israel*, 962 F. Supp. 377, 385 (S.D.N.Y. 1997); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990). The reasoning in *Siderman de Blake* was also adopted in the English case of *Al Adsani v. Kuwait*, [QBD] 15 Mar. 1995, 103 I.L.R. 420.

168. See Malcolm D. Evans, *International Wrongs and National Jurisdiction*, in *REMEDIES IN INTERNATIONAL LAW* 173, 175, 182-189 (1998). Evans is of the opinion that the new emphasis in international law on individual responsibility obfuscates the need to hold states accountable for their failure to comply with their international obligations.

169. Torture Victim Protection Act, Pub. L. 102-256, Mar. 12, 1992 (codified at 28 U.S.C. § 1350).

national systems provide access to a remedy for alien victims. However, the exercise of these domestic remedies are quite limited as a result of both strict jurisdictional requirements and the reality of enforcing the judgment. The U.S. experience with the Alien Tort Claims Act<sup>170</sup> (“ATCA”) is illustrative of these limitations.

The ATCA states that “the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>171</sup> Over the past twenty years, claims have been filed under the ATCA by alien plaintiffs for genocide,<sup>172</sup> war crimes,<sup>173</sup> slavery,<sup>174</sup> torture,<sup>175</sup> forced disappearance,<sup>176</sup> arbitrary detention,<sup>177</sup> summary execution,<sup>178</sup> cruel, unusual, and degrading treatment,<sup>179</sup> and environmental damage.<sup>180</sup> Under the ATCA, only violators in their individual capacity can be named as defendants, and as such, a violator foreign state is immune.<sup>181</sup> Furthermore, the court must be able to exercise *in personam* jurisdiction over the individual defendant, which requires the defendant to be present in the U.S. at least for service of process. This requirement presents a unique challenge and severely limits the ability of a plaintiff to pursue a claim, as personal jurisdiction is often achieved only by chance. For example, in one case, a victim of torture in Ethiopia who was living in exile in the U.S. stumbled across her former torturer in a hotel in Atlanta where they both happened to work.<sup>182</sup>

One of the most important cases interpreting the ATCA is the *Kadic* case decided by the Second Circuit Court of Appeals in 1995.<sup>183</sup> In that case, two groups of victims from Bosnia and Herzegovina brought actions for damages (under the ATCA) against Radovan Karadzic, then President of the Serbian part of the Bosnian Federation called Republika Srpska. The victims and their representatives asserted that they were victims of various

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170. Alien Tort Claims Act, 28 U.S.C. § 1350.

171. *Id.*

172. *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

173. *Id.* at 242-243; *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998).

174. *Doe I v. Unocal*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).

175. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)

176. *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988)

177. *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Eastman Kodak v. Kavlin*, 978 F.Supp. 1078, 1092 (S.D. Fla. 1997)

178. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

179. *Id.* at 887.

180. *Aguinda v. Texaco, Inc.*, 1994 WL 142006 at \*1 (No. 93 Civ. 7527) (S.D.N.Y. April 11, 1994).

181. See Foreign Sovereign Immunities Act, *supra* note 157.

182. See *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

183. *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

atrocities including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution which were carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the war in former Yugoslavia.<sup>184</sup> Karadzic's liability was predicated on the fact that the plaintiff's injuries were committed "as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by military forces under his command."<sup>185</sup>

The suit was dismissed in September 1994 by a District Court judge who held that "acts committed by non-state actors do not violate the law of nations."<sup>186</sup> Finding that the "current Bosnian\_Serb warring faction" does not constitute a "recognized state,"<sup>187</sup> and that "the members of Karadzic's faction do not act under the color of any recognized state law," the District Judge found that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied" through the ATCA.<sup>188</sup>

The Court of Appeals reversed, holding that plaintiffs sufficiently alleged violations of customary international law and the war of law for purposes of ATCA. The Court dismissed the argument that the law of nations "confines its reach to state action."<sup>189</sup> Rather, the Court held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the "auspices of the state or only as private individuals."<sup>190</sup> Noting that the customary international law of human rights "applies to states without distinction between recognized and unrecognized states," the Court held that plaintiffs sufficiently alleged that Republika Srpska was a "state" and that Karadzic acted under color of law for purposes of international law violations requiring official action.<sup>191</sup> Finally, the Court held that Karadzic was not immune from personal service of process while invitee of the United Nations<sup>192</sup> and that the causes of action brought by the plaintiffs were not precluded by the political question

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184. *Kadic*, 760 F.3d at 236-37.

185. *Kadic*, 760 F.3d at 237.

186. 866 F. Supp. 734, 739.

187. *Id.* at 741.

188. *Id.* at 740-41.

189. *Kadic*, 760 F.3d at 239.

190. *Id.*

191. *Kadic*, 760 F.3d at 245.

192. *Id.* at 248.

doctrine.<sup>193</sup> As a result of these findings, the decision of the District Court was reversed and the cases were remanded for further proceedings.<sup>194</sup>

While the potential monetary judgments in ATCA cases are substantial, the actual likelihood of attaining full satisfaction from the defendant is minimal. For example, in *Mushikiwabo v. Barayagwiza*, over \$100 million was awarded to five plaintiffs against a single defendant arising out of the genocide in Rwanda.<sup>195</sup> Clearly, unless the defendant has significant assets in the jurisdiction or his state of nationality is willing to enforce the judgment, the victim will likely receive virtually no compensation. Thus, as the ATCA illustrates, the domestic remedy in a third state is a less than satisfactory remedy. However, it does serve the purposes of documenting the violations and providing, at the very least, a public forum for the victim to expose and denounce the perpetrator.

### 7.7 Mechanisms for the Reparation of Victims

The provision of a remedy and reparations for victims of these violations is a fundamental component of the process of restorative justice.<sup>196</sup> To this end, states and their national legal systems serve as the

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193. *Id.* at 249, 250. The court also noted that, as to the act of state doctrine, the doctrine was not asserted in the District Court and was, therefore, waived on appeal. *Id.* at 250.

194. Despite the Court's ruling, Karadzic did not submit to a requested deposition in the matter and the case was appealed all the way to the U.S. Supreme Court, which denied review. See 518 U.S. 1005 (1996). On February 27, 1997, without giving the requisite deposition, Karadzic notified his attorney Ramsey Clark that he no longer wanted to mount a defense to the suit. See Gail Appleson, *Karadzic Drops Human Rights Case Defense*, REUTERS NEWS SERVICE, Mar. 4, 1997. Following Karadzic's default, US District Court Judge Peter Leisure entered a default judgment against the former Bosnian Serb leader finding him liable for directing troops to terrorize the women of Bosnia and Herzegovina through an organized campaign of mass rape between 1991 and 1993. In August 2000, a jury awarded \$745 million to the plaintiffs. See Larry Freund, *Karadzic Verdict*, available at <http://www.hri.org/news/usa/voa/2000/00-08-10.voa.html#03> (last visited April 25, 2003).

195. *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 at \*3 (94 Civ. 3627) (S.D.N.Y. April 9, 1998) (not reported in F. Supp.). Other similar awards include an award of several million dollars per plaintiff against a single individual defendant in *Xuncax*, *supra* note 169, at 197-202, and a judgment of \$10 million against a defendant police inspector in *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

196. See BASSIOUNI, *supra* note 1, at Chapter II, section 9. See also generally M. Cherif Bassiouni, *Searching for Peace Achieving Justice: The Need for Accountability*, 14 NOUVELLES ÉTUDES PÉNALES 45 (1998); Yael Danieli, *Justice and Reparations: Steps in the Healing Process*, 14 NOUVELLES ÉTUDES PÉNALES 303 (1998); Theo van Boven, *Accountability for International Crimes: The Victim's Perspective*, 14 NOUVELLES ÉTUDES PÉNALES 349 (1998); Yves Sandoz, *Reflection on Impunity and the Need for Accountability*, 14 NOUVELLES ÉTUDES PÉNALES 381 (1998); Iris Almeida, *Compensation and Reparations for Gross Violations of Human Rights*, 14 NOUVELLES ÉTUDES PÉNALES 399 (1998); Peter Baehr, *How to Deal with the Past*, 14 NOUVELLES ÉTUDES PÉNALES 415 (1998).

primary vehicle for the enforcement of human rights and international humanitarian law. Accordingly, the existence of a state's duties to provide a remedy and reparations forms a cornerstone of establishing accountability for violations and achieving justice for victims.

While monetary compensation may certainly be central to this process, often victims or their survivors desire solely that their suffering be acknowledged as wrongful, their violators be condemned, and their dignity be restored through some form of public remembrance.<sup>197</sup> Thus, perhaps the most important goals of this process are the "re-humanization" of the victims and their restoration as functioning members of society. Achieving these restorative goals is certainly fundamental to both the peace and security of any state since it eliminates the potential of future revenge and any secondary victimization that may result from the initial violation.<sup>198</sup>

Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to either the victims or their families. This often results from the reality that the provision of remedies and reparations are undertaken by either the violator regime or a successor government that has treated post-conflict justice as a bargaining chip rather than an affirmative duty. However, the international community has become increasingly concerned with providing a legal framework that ensures the redress of violations of human rights and international humanitarian law norms. The 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>199</sup> ("*Basic Principles of Justice*") is perhaps the first expression of this desire. The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities continued the efforts to create a legal framework for the redress

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197. See also Danieli, *supra* note 148, at 308-312. With respect to refusing compensation out of principle, Danieli quotes an Israeli idealist who had previously fought against taking money from the Germans after WWII: "I refused. Today, I am sorry, because I concluded that I did not change anything by refusing. There are aging survivors who don't have extended family. The steady sum enables them to go on. The fact that I gave up only left the money in the hands of the Germans. We were wrong." See *id.* at 308. For further discussion of the forms of non-monetary victim reparation, see generally MINOW, *supra* note 89.

198. For example, the victims may be forced to flee their homelands or deprived of any means of providing for themselves or their families, which subsequently leaves them vulnerable to future victimization, including starvation, discrimination, and slave-like working conditions. See *Victims of Crimes: Working Paper Prepared by the Secretariat*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/Conf.121/6 (1 Aug.1985), in Symposium, *International Protection of Victims*, 7 NOUVELLES ÉTUDES PÉNALES 241 (1988).

199. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (29 Nov. 1985) [hereinafter *Basic Principles of Justice*].

of victims by producing Draft Guidelines on Victim Redress.<sup>200</sup> Moreover, the inclusion of provisions addressing the compensation of victims in the Rome Statute of the ICC<sup>201</sup> is further evidence of the growing interest in furnishing a remedy to these individuals. Most notably, the latest manifestation of this concern is evident in the 1998 resolution<sup>202</sup> of the United Nations Commission on Human Rights that expressed the importance of addressing the question of redress for these victims in a systematic and thorough manner at the national and international level. Pursuant to this mandate, this author has submitted to the Commission on Human Rights the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*.<sup>203</sup>

Victim reparation is essential to the process of restorative justice. Mechanisms for victim reparation include the above-mentioned accountability mechanisms. For example, compensation can be achieved through the execution of a civil judgment against a culpable individual or state. However, individuals or states are often either unable or unwilling to ensure either full or partial reparation. In such cases, other mechanisms should be considered, such as state or international trust funds for the purposes of compensating victims or providing them with essential social services. The *Basic Principles of Justice* encourages states to establish such funds. This call was heeded at the last Preparatory Committee meeting on the Establishment of an International Criminal Court held before the 1998 Rome Conference when Egypt proposed the inclusion of a connection between victim compensation and the establishment of criminal liability.<sup>204</sup>

Monetary compensation should not, however, be deemed the only available remedy. Non-monetary forms of compensation should also be developed, particularly in societies where the economy is unable to absorb the loss of large monetary sums. The various modalities of reparation do not exclusively involve some form of valuable consideration or social service to redress a past harm. Rather, reparation could also include an accurate historical record of the wrongful acts and a public

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200. For the latest version of these guidelines, see U.N. Doc. E/CN.4/1997/104 (16 Jan. 1997) [hereinafter Draft Guidelines for Victim Redress]. For earlier versions of these guidelines, see U.N. Doc. E/CN.4/Sub.2/1996/17 (24 May 1996); U.N. Doc. E/CN.4/Sub.2/1993/8 (2 July 1993).

201. See *ICC Statute*, *supra* note 23.

202. U.N. Commission on Human Rights Resolution 1998/43.

203. See *supra* note 10.

204. See *ICC Statute*, *supra* note 23, at art. 75.

acknowledgment of the violations. These more intangible forms of reparation are achieved through investigatory and truth commissions and domestic or international prosecutions. Also, guarantees against repeated violations are contemplated which result from either criminal sanctions against the violator as a result of prosecutions, removal from power as a result of lustration laws, or changes in a state practice pursuant to injunctive relief.

### *7.8 Policy Considerations*

Which of these accountability measures or what combination thereof is appropriate in light of the circumstances of a given conflict, the expectations of the parties to the conflict, and the anticipated outcomes, will depend on a variety of factors which must be considered in the aggregate. This is obviously not an easy task and is one that is both challenging and fraught with dangers affecting the lives and well-being of many. But it is a task that must be guided by legal, moral, and ethical considerations. Accountability is among these considerations. The accountability mechanisms described above are not mutually exclusive; they are complementary. Each mechanism need not be taken as a whole. Rather, a portion of one or more may be used and combined with others. No single formula can apply to all types of conflicts, nor can it achieve all desired outcomes. Just as there is a range in the types of conflict and types of peace outcomes, there is a corresponding range of accountability mechanisms. In the final analysis, whichever mechanism or combination is chosen, it is designed to achieve a particular outcome which is in part traditional justice, and wherever possible, reconciliation and ultimately peace. In this respect, we must not look at each mechanism exclusively from the perspective of a crime control model, but also as an instrument of social policy which is designed to achieve a particular set of outcomes which are not exclusively justice-based.

So far, however, there exist no set of international guidelines by which to match the type of conflicts, expected peace outcomes, and eventual accountability mechanisms. Such guidelines are needed in order to create common bases for the application of these mechanisms and to avoid abuses and denial of justice. What should be achieved is not only a sense of justice, but the elimination of a sense of injustice. In choosing from among the various procedures, it must be remembered that among the goals are to educate and prevent and to shake people from a sense of complacency, one that bureaucracies, including military and police bureaucracies, tend to

foster in a climate of silent conspiracy—the *omerta* of these bureaucracies must be eliminated.<sup>205</sup>

Accountability mechanisms, if they are to have a salutary effect on the future and contribute to peace and reconciliation, must be credible, fair, and as exhaustive of the truth as possible. The fundamental principles of accountability must, therefore, take into account:

- a) cessation of the conflict and thereby the ending of the process of victimization;
- b) prevention and deterrence of future conflict (particularly conflicts which may be initiated directly after the cessation of the conflict being addressed);
- c) rehabilitation of the society as a whole and of the victims as a group; and,
- d) reconciliation between the different peoples and groups within the society.

At a minimum, the establishment of truth, as relative as it may be, must be established in order to provide a historical record, so as to mitigate the simmering effects of the hardships and hardened feelings which result from violent conflicts that produce victimization, to dampen the spirits of revenge and renewed conflict, to educate people and, ultimately, to prevent future victimization.<sup>206</sup> Truth is, therefore, an imperative, not an option to be displaced by political convenience, because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict stemming from previous conflict) without justice (meaning at the very least, a comprehensive exposé of what happened, how, why, and what the sources of responsibility are). Forgiveness can most readily follow from the satisfaction of all parties, particularly those who have been victimized, after that truth has been established.

It should be noted, however, that in this context, there is a difference between the qualities of mercy and the qualities of forgiveness. Whereas forgiveness is a change of heart towards a wrongdoer that arises out of a decision by the victimized person, and is therefore wholly subjective, mercy, on the other hand, is the suspension or mitigation of a punishment that would otherwise be described as retribution, and is an objective action which can be taken not only by the victim but by those entrusted with

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205. See HANNAH ARENDT, *EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL* 14, 15 (1963).

206. See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 493 (1995).

government and the administration of justice.<sup>207</sup> Forgiveness is not a legal action, but is rather primarily a relationship between persons. The arena of resentment and forgiveness is individual and personal in a way that legal guilt and responsibility are not.<sup>208</sup> Institutions, states, and systems of justice cannot forgive; they can pardon and show mercy.<sup>209</sup> The act of mercy may arise out of feelings of compassion or pity for the wrongdoer; however, these feelings are to be distinguished from those of forgiveness, which belong to the victim.

### 7.9 Selecting the Appropriate Accountability Mechanism

Selecting the appropriate accountability mechanism in a post-conflict environment for violations of international humanitarian and human rights law norms requires the balancing of numerous factors. While accountability should never be bartered in a *realpolitik* fashion in order to arrive at political expediency at the expense of both the dictates of international law and the interests of the victims, that does not necessarily mean that every individual violator must be prosecuted in order to assure accountability. These factors, which should be balanced in deciding the most appropriate accountability mechanism include, but are not limited to:

- a) The gravity of the violation: for example, is it a *jus cogens* violation? (genocide, crimes against humanity, war crimes);
- b) The extent and severity of the victimization;
- c) The number of the accused;
- d) Those who are the accused (e.g., the senior architect, low-level executor, bureaucrat);
- e) The extent to which both sides are equally committed to international criminal standards;<sup>210</sup>
- f) The current government: is the violator regime still in power either *de jure* or *de facto*?;
- g) The competence and independence of the domestic judiciary;
- h) The evidentiary issues;
- i) The extent to which the conflict or violations have subsided;

207. See MURPHY & HAMPTON, *supra* note 89.

208. See *id.* at 33.

209. See KATHLEEN DEAN MOORE, PARDONS, JUSTICE, MERCY, AND THE PUBLIC INTEREST 181-97 (1989); see especially *id.* at 193.

210. The fact that there are violations on both sides should not operate to preclude accountability. Rather, the fact that there are violations on both sides of a conflict should influence the selection of an appropriate mechanism that will deal fairly with all violations in an impartial manner. See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 108, at 504-505 (discussing the inapplicability of the *Tu Quoque* defense to crimes against humanity).

- j) cultural concerns or “the will” of the community;
- k) nature of the conflict: international or internal armed conflict, or repressive regime.

None of the above listed factors should be exclusive in determining the appropriate accountability mechanism that should be employed in a post-conflict situation or a transition from a repressive regime. Each of the factors must be evaluated individually and collectively in conjunction with the above listed policy considerations. Ultimately, the selection of a given mechanism must be made in good faith in order to achieve a just result and should be transparent and justifiable. Moreover, the selection must be acceptable to the victims, interested states, and international civil society in light of applicable legal norms.

As a general rule, violations of *jus cogens* crimes should always be subject to prosecution. However, in deciding whether to prosecute at the international or domestic level, other considerations should be weighed. For example, if the government in power is the violator regime, an independent international prosecution might be favored. If, however, the domestic judiciary retains its independence and competence, then there might be little need to invoke international accountability procedures. In contrast, even if there is a commitment to prosecute, a significant breakdown in the local judicial infrastructure might necessitate international prosecutions, or at least an international investigative commission to collect and preserve evidence for later adjudication when the judiciary is again functioning.

Furthermore, large-scale victimization over a period of time would tend to suggest the need for some form of a truth commission in conjunction with prosecution in order to accurately chronicle the violations, whereas an accurate chronicle of a limited number of violations might be sufficiently made by the record at trial.

In addition, not every conflict situation requires the prosecution of every possible accused. Indeed, South Africa opted for a truth commission to provide accountability for past human rights violations. This decision was made not to allow *de facto* impunity for the prior regime, but rather based on the people’s determination that this was the best manner in which to put its past behind it. Secretary-General Kofi Annan, speaking on the ICC in the context of the South African experience, stated:

No one should imagine that [the clause which allows the Court to intervene where the state is unwilling or unable to exercise jurisdiction] would apply in a case like South Africa’s, where the regime and the

conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.<sup>211</sup>

The above factors should serve as a guide in selecting the most appropriate accountability mechanism for international humanitarian and human rights law violations. They should not, however, be manipulated in order to provide the international community and the victims with “Potemkin justice,” which is *de facto* impunity.<sup>212</sup> Thus, in the context of a mass campaign of genocide, it would be an “insult to justice” to preclude any form of prosecution in favor of only publishing an accurate chronicle of the abuses.

### 7.10 The Right to a Remedy and Reparation for Victims

#### 7.10.1 The Duty to Provide a Remedy

The state’s duty to provide a domestic legal remedy to a victim of violations of human rights and international humanitarian law norms committed in its territory is well grounded in international law. Provisions of numerous international instruments either explicitly or implicitly require this of states. Furthermore, a survey of contemporary domestic legislation and practice reveals that states endeavor to provide remedies for victims injured within their borders.

The existence of a state’s duty to provide a remedy is grounded in several international and regional conventions. With respect to violations of IHL, the following conventions implicitly recognize the right to a remedy since they impose a duty on the violating party to provide compensation for their violation: 1) The Hague Convention Regarding the Laws and

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211. See Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted*, *supra* note 149, quoting Kofi Annan in a speech delivered at Witwatersrand University Graduation Ceremony, 1 September 1998.

212. While speaking with respect to penalties for crimes, the following words of Pope Pius XII are also applicable with respect to the task of selecting an appropriate accountability mechanism:

It is possible to punish in a way that would hold the penal law up to ridicule . . . . In the case where human life is made the object of a criminal gamble, where hundreds and thousands are reduced to extreme want and driven to distress, a mere privation of civil rights would be an insult to justice.

See Pope Pius, *supra* note 31, at 18.

Customs of Land Warfare; 2) the Geneva Convention Relative to the Treatment of Prisoners of War; 3) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and 4) Protocol I Additional to the Geneva Convention.

With respect to violations of human rights norms, the ICCPR is perhaps illustrative. It declares at Article 2(3) that each state party to the convention undertake:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

While the ICCPR does not mandate a state party to pursue a specific course of action to remedy the violation of protected rights, the language of this provision clearly envisions that the remedy be effective, of a legal nature, and enforceable. Significantly, the ICCPR renders the “act of state” defense inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity. This limitation is fundamental in ensuring that human rights and international humanitarian law violations are remedied since these acts are often committed only by states.

The International Convention on the Elimination of All Forms of Racial Discrimination<sup>213</sup> also exemplifies an explicit requirement that states provide a remedy. This convention requires states parties to:

[A]ssure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his

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213. The International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res.2106A (XX), 21 Dec. 1965 660 U.N.T.S. 195 (entered into force 4 Jan. 1969).

human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>214</sup>

Similarly to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination envisions that the remedy be effective and carried out by competent tribunals and official.

Other conventions also explicitly require that a state provide a remedy for human rights violations. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families contains language identical to the above quoted provision of the ICCPR.<sup>215</sup>

The following instruments all contain provisions regarding the right to some form of reparation, which implies the right to a remedy: 1) Convention Concerning Indigenous and Tribal Peoples in Independent Countries;<sup>216</sup> 2) Convention Relating to the Status of Stateless Persons;<sup>217</sup> 3) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>218</sup> 4) Convention on the Rights of the Child;<sup>219</sup> 5) American Convention on Human Rights;<sup>220</sup> 6) European Convention for the Protection of Human Rights and Fundamental Freedoms;<sup>221</sup> and 7) African Charter on Human and People's Rights.<sup>222</sup>

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214. *Id.* art. 6.

215. See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, reprinted in BASSIOUNI, PROTECTION OF HUMAN RIGHTS, *supra* note 4, U.N. Doc. ST/HR/1/Rev.4 (1993), art. 83. Furthermore, the convention articulates an "enforceable right to compensation" with respect to unlawful detention or arrest. *Id.* art. 16(9). It requests states parties to provide assistance to the migrant workers or their families for the prompt settlement of claims relating to death. *Id.* 71(2). Also, the convention provides the right to "fair and adequate" compensation for the expropriation of the migrant's assets by the state. *Id.* art. 15.

216. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, reprinted in BASSIOUNI, PROTECTION OF HUMAN RIGHTS, *supra* note 4, U.N. Doc. ST/HR/1/Rev.4 (1993), at arts 15 - 16.

217. Convention on Relating to the Status of Stateless Persons, 28 Sept. 1954, 360 U.N.T.S. 65, art. 24, 9 (entered into force 11 Aug. 1958).

218. Torture Convention, *supra* note 39, art. 14

219. Convention on the Rights of the Child, G.A. Res. 44/25, 20 Nov. 1989, 44 U.N. GAOR Supp. (No. 49) 166, U.N. Doc. A/44/736, art. 39.

220. American Convention on Human Rights, 22 Nov. 1969, O.A.S.T.S. No. 36, p.1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6, arts. 63(1), 68.

221. ECHR.

222. African Charter on Human and People's Rights, 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, art. 21(2) (entered into force 21 Oct. 1986).

In addition to the conventional law, which creates a binding obligation on the part of states parties, numerous international declarations reaffirm the principle that a state has a duty to provide a remedy to victims of human rights abuses and international humanitarian law. A comprehensive treatment of this duty was found in the Basic Principles of Justice. In addition, a survey of contemporary state practice, as evidenced in the substantive laws and procedures functioning in their domestic legal systems, confirms the duty to provide a remedy to victims of these violations.

Several declarations of international and regional organizations reflect the principle that a state has the duty to provide a remedy. For example, the Universal Declaration of Human Rights plainly articulates that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>223</sup> The United Nations Declaration on the Elimination of All Forms of Racial Discrimination further reflects the concept that everyone shall have the right to an effective remedy and protection against any discrimination . . . through independent national tribunals competent to deal with such matters.”<sup>224</sup> In addition, the Declaration on the Protection of All Persons from Enforced Disappearance envisions a duty to provide “an effective remedy” as a means of determining the status of such disappeared individuals.<sup>225</sup> Furthermore, the declaration requires “adequate compensation” for the victims.<sup>226</sup> The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that the victim of official torture be “afforded redress and compensation in accordance with national law.”<sup>227</sup> The American Declaration on the Rights and Duties of Man provides that “every person may resort to the courts to ensure respect for his legal rights”<sup>228</sup> The Muslim Universal Declaration on Human Rights

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223. *Universal Declaration*. For the Declaration’s status as a source of customary law, see generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 316-351 (1996).

224. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, U.N. GAOR, 18th Sess., Supp. No. 15, art. 7(2).

225. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, 18 Dec. 1992, 47 U.N. GAOR Supp. (No. 49) 207, U.N. Doc. A/Res/47/133, art. 9.

226. *Id.* art. 19.

227. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1976), art. 11.

228. American Declaration on the Rights and Duties of Man, *reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS*, U.N. Doc. ST/HR/1/Rev.5 (1997), art. 18.

issued by the Islamic Council states that “every person has not only the right but also the obligation to protest against injustice; to recourse and to remedies provided by the Law in respect to any unwarranted personal injury or loss....”<sup>229</sup>

The Basic Principles of Justice set forth the first comprehensive details concerning a state’s duty to provide a remedy to individual victims.<sup>230</sup> Primarily, the Basic Principles of Justice provide that victims are entitled to redress and recommends that states establish judicial and administrative mechanisms for victims to obtain prompt redress.<sup>231</sup> However, it should be noted that since the Basic Principles are primarily concerned with victims of domestic crime, it is only applicable in the event that the domestic criminal law of a given state has incorporated the applicable human rights or international humanitarian norm.<sup>232</sup>

The contemporary state practice evident in a survey of various domestic legal frameworks reinforces the hortatory statements contained in the above declarations as a norm of customary international law.<sup>233</sup>

While the conventional and customary law do not impose an explicit duty to create special procedures, the language of the international instruments, noted above, contemplates that the remedy be “effective” and administered by “competent” tribunals and personal in order to provide

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229. See *Muslim Universal Declaration on Human Rights*, art. IV(b), reprinted in *JUSTICE AND HUMAN RIGHTS IN ISLAM 14* (Gerald E. Lampe ed., 1997).

230. See generally Symposium, *International Protection of Victims*, 7 *NOUVELLES ÉTUDES PÉNALES* (1988); *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, U.N. Doc. E/CN.15/1998/CRP.4 (17 April 1998).

231. *Id.* principles 4-5.

232. *Id.* principles 18-19.

233. For example, many states have extensive human rights protections within their national constitutions and provisions that create a remedy in cases of their violation. For example, in states such as Peru, Malta, Romania, Uruguay, and the U.S., the constitution contains either explicitly or implicitly an extensive list of human rights guarantees and provides a remedy for their violation. Other states perhaps lack specific legislation with respect to human rights violations; however, their legal systems contain other general remedies which encompass specific violations. For example, under Swedish and U.K. law, domestic tort law provides a remedy for the compensation of gross violations of human rights. In China, the State Compensation Act and Administrative Proceedings Act allows its citizens to receive compensation when they have been denied their civic rights. Still other states, such as Cyprus and Nepal, noted that they were in the process of enacting legislation with respect to redressing individual victims. For Romania, Togo, the U.K., see U.N. Doc. E/CN.4/1996/29/Add.3; Cyprus, Kuwait, see U.N. Doc. E/CN.4/1997/Add.1; Argentina, the Czech Republic, Chile, China, Colombia, Ghana, Mauritius, Namibia, Nepal, the Philippines, the Sudan, Sweden, see U.N. Doc. E/CN.4/1996/29; Peru, see U.N. Doc. E/CN.4/sub.2/1995/17/Add.1; China, Malta, Mexico, Uruguay, Yugoslavia, see U.N. Doc. E/CN.4/sub.2/1995/17/Add.2; Belarus, Netherlands, see U.N. Doc. E/CN.4/sub.2/1995/17; United States, see U.N. Doc. E/CN.4/1996/29/Add.2.

“just” and “adequate” reparations. Thus, to the extent that a state’s existing legal framework is inadequate to handle the claim, it would seem that the state is implicitly in violation of the requirements of the conventional law.<sup>234</sup>

Furthermore, even in instances where the judicial system has not collapsed, a state may find it advantageous to establish special procedures with respect to situations involving numerous claimants, or with respect to the settlement and distribution of the proceeds of lump sum agreements between states.<sup>235</sup>

The conventional and customary law reflects the principle that both a state’s nationals and aliens will equally have the right to a remedy for violations committed within the state’s territory. This is evident in the conventional law by the use of language such as “any persons”<sup>236</sup> and “everyone within their jurisdiction”<sup>237</sup> when referring to whom the state shall provide a remedy. Furthermore, state practice also reveals that aliens are generally accorded national treatment.<sup>238</sup> Moreover, it should be noted that failing to provide an alien an effective remedy amounts to a denial of justice, which subsequently gives rise to an international claim by the alien’s state of nationality. Thus, clearly a state must afford national treatment to aliens in the provision of remedies for violations committed within its territory.

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234. For example, Togo noted that during a period of internal strife, “*l’Etat avait perdu certaines de ses prérogatives: le gouvernement était impuissant à faire réprimer les actes délictuels ou criminels qui émaillaient cette période et la justice était loin de disposer des moyens d’agir.*” Specifically, Togo planned to create a ministry of human rights, adopt legislative measures aimed at compensating victims of socio-political problems, and ensure the independence of the judiciary and equal protection for all citizens.

235. See generally RICHARD B. LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* (1962); RICHARD B. LILICH, *INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE* (1967); *INTERNATIONAL CLAIMS: CONTEMPORARY EUROPEAN PRACTICE* (Richard B. Lillich & Bruce H. Weston eds., 1982).

236. See ICCPR, art. 2(3)(a)-(b).

237. See International Covenant on the Elimination of All Forms of Racial Discrimination, *supra* note 177, art. 6.

238. See generally *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (Richard B. Lillich ed., 1983); *INDIVIDUAL RIGHTS AND THE STATE OF FOREIGN AFFAIRS: AN INTERNATIONAL COMPENDIUM* (Elihu Lauterpact & John G. Collier eds., 1972).

### 7.10.2. Duty to Provide Reparation

A state's duty to make reparations for its acts or omissions is fairly well established in the conventional and customary law. For example, the Permanent Court of International Justice affirmed this proposition in *The Chorzów Factory Case* when it stated:

It is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.<sup>239</sup>

Notwithstanding this general proposition, specific language in international instruments specifically articulates the duty to provide reparations. With respect to violations of international humanitarian law, the major conventions which regulate armed conflict contain provisions both vesting individuals with the right to claim compensation against the state parties and requiring states to provide reparation for their breaches. For example, the Hague Convention Regarding the Laws and Customs of Land Warfare provides for the duty of a state to pay indemnity in cases of violations of its regulations.<sup>240</sup> Furthermore, the Four Geneva Conventions of 12 August 1949 contain similar provisions with respect to the grave breaches of the convention.<sup>241</sup> In addition, Protocol I provides that a state party shall be liable "to pay compensation" for violations of the convention.<sup>242</sup>

With respect to human rights abuses, both the conventions and declarations provide that their violations shall be remedied with some modality of reparations. Clearly, if the state is the author of the violation, the duty to make reparations can fall to no other. Furthermore, state practice reflects both the legal framework and practice of providing reparations to victims. For example, the U.S. government has provided redress to American citizens and permanent resident aliens of Japanese ancestry who

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239. See *The Chorzów Factory Case*, (Claim for Indemnity) (Jurisdiction), 1927 P.C.I.J. (Ser. A) No. 8, at 4, 21.

240. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 MARTENS NOUVEAU RECUEIL (ser. 3) 461, reprinted in 2 AM. J. INT'L L. 90 (1908), 1 FRIEDMAN 308, 1 BEVANS 631, art. 3.

241. See *Geneva Convention I*; *Geneva Convention II*; *Geneva Convention III*, art. 68; *Geneva Convention IV*, art. 55.

242. See Protocol I, art. 91.

were forcibly evacuated, relocated, and interned by the government during World War II.<sup>243</sup> In addition, Chile, in an effort to account for its human rights abuses of past decades, has created a national commission whose goal is to provide compensation to victims' families.<sup>244</sup> Reparations include monthly pensions, fixed sum payments, and health and educational benefits. It is thus perhaps well grounded in the conventional and customary law that a state is under a duty to provide reparations for its violations of human rights and international humanitarian law.

It is basic tort law that a non-state actor who authors a human rights and international humanitarian law violation is individually liable to make reparations to the victims.<sup>245</sup> A distinct question is raised, however, as to whether a state bears any responsibility to provide compensation for acts or omission of non-state actors.<sup>246</sup> While certainly a laudable aspiration, a state's duty to provide reparation or a remedy with respect to violations not attributable to the state is perhaps best described as somewhat of an emerging norm.

With respect to Europe, the European Convention on the Compensation of Victims of Violent Crimes<sup>247</sup> ("European Compensation Convention") mandates this principal in instances when the applicable human rights or international humanitarian law norms are incorporated within the domestic criminal law. Further, with respect to other states, the strongest support for this principle is similar provisions found in the Basic Principles of Justice.

The European Compensation Convention was established by the states of the Council of Europe to introduce or develop schemes for the compensation of victims of violent crime by the state in whose territory such crimes were committed, in particular when the offender has not been

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243. See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001).

244. See *Report of the Commission on Crime Prevention and Criminal Justice*, E/CN.15/1996/16/Add.3, at 55.

245. See also *TORTURE AS TORT* (Craig Scott ed., 2001).

246. The question posed is essentially different than that in *Velasquez Rodriguez*, where Honduras was found to bear responsibility for a failure to investigate and prosecute a crime committed by its agents. In that case, the state does in fact bear responsibility, but not simply for the underlying act committed by its agents, but rather for the distinct wrong, which is commonly characterized as a "denial of justice" in failing to properly investigate and bring the perpetrators to justice. See *Velasquez Rodriguez Case*, Preliminary Objections, Judgment of June 26, 1989, Inter. Am. Ct. H.R. (Ser. C) No. 1 (1994); *Velasquez Rodriguez Case*, Compensatory Damages, Judgment of July 21, 1989, Inter. Am. Ct. H.R. (Ser. C) No. 7 (1990).

247. European Convention on the Compensation of Victims of Violent Crimes, E.T.S. No. 116 (1983) [hereinafter *European Compensation Convention*].

identified or is without resources.<sup>248</sup> This convention does not mandate any particular compensation scheme; rather, its focus is to establish minimum provisions in this field.<sup>249</sup> As a result, there are several significant limitations that may be placed on the extent of the state's duty to provide compensation.

At a minimum, the European Compensation Convention mandates that compensation be paid to either victims who have sustained serious bodily injury directly attributable to an intentional violent crime or to dependants of persons who have died as a result of such crime when compensation is not fully available from other sources.<sup>250</sup> In these instances, compensation is to be awarded irrespective of whether the offender is prosecuted or punished.<sup>251</sup> However, as noted, a state may impose several limitations on its duty to provide compensation. For example, Article 3 provides that:

Compensation shall be paid by the State on whose territory the crime was committed: a) to nationals of the States party to the convention; b) to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.

Thus, a state party can seemingly deny compensation to a victim who is either a non-resident or a citizen of a state which is not a member of the Council of Europe. Furthermore, the states may limit compensation in situations where a minimum threshold of damages is not met<sup>252</sup> or based on the applicant's financial situation.<sup>253</sup> Moreover, compensation can be reduced or refused: 1) on account of the victims' conduct before, during, or after the crime; 2) on account of the victims' involvement in organized crime; or 3) if a full award is contrary to a sense of justice or public policy.<sup>254</sup>

With respect to countries that are not states parties to the European Compensation Convention, the Basic Principles of Justice provide a legal foundation for asserting that a state has a duty to provide a victim with reparations. The Basic Principles of Justice state that:

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248. *See id.* (preamble).

249. *Id.*

250. *Id.* art. 1.

251. *Id.*

252. *Id.* art. 5.

253. *Id.* art. 6.

254. *Id.* art. 8

[W]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

- a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of a serious crime;
- b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.<sup>255</sup>

While this recommendation envisions reparations to crime victims, it certainly would be applicable in cases where the applicable international violations had been incorporated into the domestic criminal law. A survey of national systems reflects this principle in the growing state practice of providing reparations to crime victims and their families when the perpetrator is unable.

In 1996, the U.N. surveyed state practices with respect to the implementation of the Draft Basic Principles and received responses from forty-four states.<sup>256</sup> In Cuba, Denmark, Finland, France, Mexico, Jordan, Romania, and Sweden, the state's financial compensation was 100% of the reparations that the victim could claim from the offender.<sup>257</sup> Furthermore, eighteen states reported that state funds for compensation to victims had been established pursuant to recommendations in the Basic Principles of Justice.<sup>258</sup> The concept of providing reparations from sources other than the violator has also been recognized at the international level in the ICC Statute.<sup>259</sup>

While the European Compensation Convention and the Basic Principles of Justice set an important precedent for establishing a duty of a state to provide reparations for the conduct of non-state actors, it should be noted that this duty is neither a universal norm nor without significant reservations. However, the principle is certainly being put into practice as evinced by efforts of individual states and the world community (*e.g.*,

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255. See Basic Principles of Justice, *supra* note 151, principle 12.

256. See Report of the Commission on Crime Prevention and Criminal Justice, *supra* note 197.

257. *Id.* par. 38.

258. The following are representative: Australia, Belgium, Canada, Cuba, Finland, France, Jordan, Luxembourg, Mexico, Netherlands, Oman, Peru, Philippines, Qatar, Republic of Korea, Romania, Spain, and Sweden. See *id.* par. 41.

259. See ICC Statute, *supra* note 23, art. 79.

through the trust fund contemplated by the ICC Statute).<sup>260</sup> Thus, the groundwork is certainly being laid for establishing collective responsibility that seeks to make victims whole again.

### 7.11 Social Policy Considerations

History reveals that crimes committed in the course of conflict typically occur after a breakdown in social controls. Some ascribe it to cultural factors and argue that some cultures have a tendency to be more cruel or violent than others.<sup>261</sup> It is difficult to say, however, whether these cultural factors are endemic, or whether they are produced by social and economic conditions and by the absence of effective legal and social controls. Accountability mechanisms are, therefore, important because they tend to shore up legal and social controls which are preventive, and they tend to support the hypothesis of deterrence.

Human nature also has its darker side, and while evil can emerge on its own without external inducement, it no doubt tends to emerge more harmfully when external controls are reduced and inducements offered. Impunity is certainly one of these inducements, as is the prospect of indifference and the expectation that the worst deeds may be characterized as justified, reasonable, acceptable, or normal.

Victimization frequently involves the dehumanization of the prospective victims, frequently after a stage of psychological preparation by the perpetrators. Anyone “less than human” can, therefore, be dealt with as an animal or an object to which anything can be done without fear or risk of legal or moral consequence. Another approach is for the perpetrators to characterize the victims as perceived threats, thus providing rationalization for the ensuing victimization. Such characterization can even rise to the level of self-defense against individuals and groups, portrayed or perceived as constituting a threat or danger to some degree of plausibility and immediacy. Thus, the victims can be perceived and portrayed as being responsible for the victimization inflicted upon them, as if they had done something to justify it, or had called for it by their conduct, or for that

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260. See *ICC Statute*, *supra* note 23, art. 79. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 150 (2001); Hakan Friman & Peter Lewis, *Reparation to Victims*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 474 (Roy Lee ed., 2001), at 487; Mark Jennings, *Article 79: Trust Fund*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1005 (Otto Triffterer ed., 1999).

261. See, e.g., GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994); JOHN KEEGAN, *A HISTORY OF WARFARE* (1993).

matter, as in the case of the Holocaust, by their very being.<sup>262</sup> This rationalization can even reach the point where the perpetrators can perceive themselves as forced to inflict the victimization. That reasoning can reach the absurd: the perpetrators become the victims by being “forced” by the actual victims to engage in victimizing conduct.

Such distorted intellectual processes may be the product of inherent evil. But, they are most frequently the product of evil manipulation by the few of the many. From the days of Goebbels’s and Streicher’s propaganda to the 1994 Rwanda Hutu incitements to kill the Tutsis, the use of propaganda has been the main incitement to group violence. Obviously, the less educated or the more gullible a society is, the more likely it is to be induced into such false beliefs. But, there are many other factors which influence the effectiveness of such techniques and which use the accumulation of uncontradicted falsehood over time to produce their deleterious effect. It is during that time that the international community should mobilize on the basis of certain early warning signals that group victimization is about to occur. Thus, the prevention of such forms of victimization must be developed.

Accountability mechanisms appear to focus on events after-the-fact and may appear to be solely punitive, but they are also designed to be preventive through enhancing commonly shared values and through deterrence. Accountability, therefore, has a necessary punitive aspect. However, it is also integrally linked to prevention and deterrence. The weakness in the accountability argument is that it is after-the-fact, but its strength is that it has a crucial role to play in the formation and strengthening of values and the future prevention of victimization within society.

As stated above, impunity is the antithesis of accountability. To foster or condone impunity is as illegal as it is immoral. Impunity is also frequently counterproductive to the ultimate goal of peace. Indeed, large-scale victimization arising out of international crimes is never safely hidden away in the limbo of the past. It remains fixed in time in an ongoing present that frequently calls for vengeance, and longs for redress. Victims need to have their victimization acknowledged, the wrongs committed against them decried, the criminal perpetrators, or at least their leaders, punished, and compensation provided to the survivors.

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262. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (3 Vols. 1985).

A more outcome-determinative consideration of the processes of peace and the prospects of justice is to limit the discretion of leaders who are involved in political settlement processes that are intended to bring an end to conflicts. These leaders' values, expectations, personal ambitions, positioning of power, the degree of public support they possess, and, above all, their responsibilities in connection with the initiation of the conflict and the conduct of the hostilities, particularly when international humanitarian law violations have occurred, affect the outcome of political settlements and bear the most on the subsequent pursuit and integrity of justice processes. Leaders involved in conflict situations are those who negotiate political settlements, usually through the mediation efforts of other leaders. Without the involvement of leaders in conflict situations, there can be no cessation of hostilities, and that is why they are essential to the pursuit of peace. But, conversely, they may also be opposed to the pursuit of justice. That is the essence of the mediator's dilemma—how to bring about peace without sacrificing justice. In most conflicts, that dilemma has been resolved at the expense of justice. To avoid this dilemma in the future, the peace negotiators, acting in good faith in the pursuit of peace, must be immune from the pressures of having to barter away justice for political settlements. That card must not be left for them to play in the course of negotiating political settlements. Impunity must, therefore, be removed from the “tool box”<sup>263</sup> of political negotiators.

### 7.12 *The Internationalization of National Criminal Justice*

The process of internationalization of criminal justice principles, once considered to be limited by national boundaries, brought with it the need to strengthen transnational crime prevention and criminal justice. International initiatives aimed at assisting states in the reduction of criminality, effective law enforcement, fair administration of justice, respect for human rights and fundamental freedoms and the promotion of high standards of professional conduct must be enhanced. The challenges posed by crime and justice in the future are at the very core of economic and social development and human

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263. W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995). Reisman notes that “[t]here is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on all the relevant goals of public order.” *Id.* at 185. The question is, to what extent are accountability mechanisms deemed a part of “public order?” *Id.* at 185. Where do such mechanisms rank, and what is their value?

security. Continued and improved coordination and cooperation in the administration of justice and crime prevention, particularly in judicial assistance between countries, are crucial in today's global society.

It appears a natural corollary that the internationalization of national criminal justice and increased inter-state cooperation in penal matters<sup>264</sup> should extend to restorative justice, particularly those measures aimed at providing redress for victims and other healing mechanisms discussed above. The establishment of victims and witnesses units in the ICTY and ICTR were positive developments, as it was positive that the Rome Statute of the ICC broadened the concept and obliged the Court "to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."<sup>265</sup> Victim compensation, when it is in the nature of a national or international program, and which allocates a certain amount to compensation, must provide for a fair administrative method to determine actual damages (as opposed to punitive damages). Monetary compensation should not be deemed the only outcome; non-monetary compensation should also be developed, particularly in societies where the economy is unable to sustain large monetary sums.

There exists an enormous disparity in the capacity of states to address their respective national problems of criminal justice. This is due to resources, professionally capable personnel, technological and logistical support, and the levels of priorities ascribed by politicians to criminal justice. Moreover, states that have these capabilities and resources do not provide those that do not with enough assistance and support. This is also evident in such post-conflict justice situations as Ethiopia, Somalia, Cambodia, Rwanda, and Afghanistan.

Some forty states fall in the category of Least Developed Countries (LDCs), and an estimated sixty states who are in the category of Developing Countries (DCs) are economically so marginal that they are borderline LDCs. Moreover, almost all other DCs are overwhelmed by their respective domestic crises of crime and corruption. This means that some two thirds of the world's criminal justice systems are unable to effectively cope with their domestic problems, let alone with the needs of international criminal justice. However, considering that ICL depends on the "indirect enforcement system,"<sup>266</sup> and that means reliance on national criminal justice systems, one

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264. See BASSIOUNI, *supra* note 1, at Chapter V.

265. See *ICC Statute*, *supra* note 23.

266. See *supra* BASSIOUNI, *supra* note 1, at Chapter V.

has to conclude that unless we can internationalize support and standards for national criminal justice systems, the international criminal justice system will not be effective, except occasionally and selectively.

### *Section 8. Amnesties and International Criminal Justice*

The existence of the “social contract” theory postulated herein is grounded in legal history and in the evolution of social values in national legal systems. It necessarily implies that the rights of victims, to the extent described above, are both inherent and inalienable, and, therefore, punishment must follow. That does not mean, however, that these victims’ rights are necessarily fixed in terms of their modalities, processes, and outcomes, which vary depending upon the nature of the transgression, as well as other social and legal factors. It does mean that the principles embodied in these rights cannot be abrogated by the collectivity because these rights are inherently those of the victim and the victim’s heirs. As a result, states do not have the right to provide blanket amnesty to transgressors of *jus cogens* international crimes, particularly leaders and senior executors.<sup>267</sup> Instead, they have the obligation to see to it that all the legal consequences pertaining to these crimes are carried out in good faith. Consequently, neither *de jure* nor *de facto* impunity can be provided to the transgressors of these *jus cogens* international crimes.

Alternative accountability measures for alleged perpetrators other than leaders and senior executives are not precluded by this postulate. Rather, a range of alternative measures exist. The application of these measures, however, will vary depending upon the nature of the transgressions and the overall social goal that is pursued.<sup>268</sup> It may, therefore, appear that a contradiction exists between the insistence on criminal punishment and the resort to alternative accountability measures for certain types of violations.

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267. The international community views domestic amnesties as instruments of impunity, not of justice. See Meintjes, *supra* note 90. See e.g., E.H. Guisse & L. Joinet, *Progress Report on the Question of Impunity of Perpetrators of Human Rights Violation*, U.N. Commission on Human Rights, Sub-Commission on the Prevention and Protection of All Minorities, 45th Sess., Item 10(a), U.N. Doc. E/CN.4/Sub.2/1993/6 (1993)(prepared pursuant to Sub-Commission Res. 1992/23); L. Joinet, *Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights): Final Report*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session, Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996)(prepared pursuant to Sub-Commission Resolution 1995/35); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 475 n.137 (1990); Scharf, *Swapping Amnesty for Peace*, *supra* note 160.

268. See, e.g., 3 TRANSITIONAL JUSTICE, *supra* note 100.

However, these alternatives should only be considered if they produce a certain type of punishment, or if they are in and of themselves a form of punishment.

If punishment is the international community's right by virtue of the implied "social contract," does it also include the right to pardon? It could be argued that the right to pardon is implied in the right to punish. However, if the right to punish is delegated from the victim to the international community, then the right to pardon remains that of the individual and not that of the international community.

Whether the "social contract" negates the international legal order's right of pardon for *jus cogens* international crimes is a question that remains in debate.<sup>269</sup> Thus, if the right of punishment originally belonged to the victim and the international legal community exercises it on behalf of the victim, it cannot be traded in for blanket amnesties or in exchange for political concessions.<sup>270</sup> However, this has been the case, from the granting of political asylum to the Kaiser of Germany in 1919, to the *de facto* immunity granted to Milosević in exchange for his signature on the Dayton Accords in 1994.<sup>271</sup> Political negotiators acting on behalf of major powers have compromised the victim's right and breached the "social contract" for international criminal justice by bartering accountability for political settlements. Admittedly, such settlements are often times necessary to end to conflicts that bring more victimization, harm, and destruction, especially when there is a legitimate interest in seeking such settlements. The question then becomes whether such pardons violate an inderogable right, or whether they are to be given in accordance with certain criteria which ensure that a greater benefit is achieved by providing this compromise.<sup>272</sup> The international legal order has yet to strike a compromise between the choice of an absolute application of blanket amnesties and politically motivated pardons without the democratically given consent of the victims. The choice between an absolute application of blanket amnesties and politically

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269. The right of pardon mentioned here refers to the victim's right of forgiveness, whereas Moore refers to the right of pardon in a more traditional light as the right of a state to reduce punishment. Moore instead recognizes mercy as the victim's right of forgiveness. See Moore, *supra* note 50, at 193-194; Minow, *supra* note 89; Murphy & Hampton, *supra* note 89.

270. See Bassiouni, *Combating Impunity for International Crimes*, *supra* note 18.

271. See PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* (2002).

272. MOORE, *supra* note 55; MINOW, *supra* note 89; MURPHY & HAMPTON, *supra* note 89. Reisman, *supra* note 26, at 177, finds that even though amnesties may facilitate the suspension of ongoing violations, they also undermine deterrence for the future, the law of state responsibility, and human rights. *Id.*

motivated pardons without the democratically given consent of the victims is a question that has yet to be decided by the international legal order.<sup>273</sup>

According to the principles of retribution, a pardon may be justified in the following circumstances: 1) the offender has already suffered enough, 2) the offender stands to suffer too much because of special circumstances, 3) to relieve any punishment that is too severe, or 4) to relieve the lingering consequences of criminal conviction.<sup>274</sup> Accordingly, the granting of amnesty is justified when it intends to correct an injustice. However, too often, little to no justification exists for the granting of amnesty, and those formerly charged are released from punishment and free from guilt. Therefore, if amnesty, in the nature of a pardon, is granted before conviction then all penalties are removed and the person is returned to the community as a new person, guiltless and without a criminal record.<sup>275</sup> Granting of pardons without justification clearly hinders the pursuit of justice because it destroys all beliefs of fairness, equality of application of the law, and certainty of the law. Lastly, it also eradicates hopes of deterring similar crimes from being committed in the future. In order for the right of pardon to co-exist with the theory of universal justice, the past political exploitations of pardon must be eliminated, or at least sharply circumscribed. The suggested policy guidelines proposed include: 1) pardons should only be granted after conviction and sentencing, 2) pardons should only be granted for specific crimes, and 3) pardons should be justified with reasons.<sup>276</sup> These limitations restore the theory of punishment as just desert by ensuring that a punishment is not granted to the undeserving, and blanket pardons are not granted either for unspecified crimes or unjustified reasons. In this respect it is necessary to distinguish between policy makers and senior executors on the one hand, and law level executors on the other.<sup>277</sup> It is also necessary to identify the social benefits of pardons for the latter category in light of the goals of peace, reconciliation, and justice.

International human rights law instruments contain a general provision that States parties are under an obligation to ensure respect of or secure the rights embodied in the respective instrument.<sup>278</sup> These provisions have been

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273. *Supra* note 31.

274. MOORE, *supra* note 55, at 98.

275. *Id.*

276. *Id.* at 219-221.

277. *See generally*, BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 108.

278. *Cf.* Article 2(1) ICCPR (“to respect and to ensure ... the rights...”); Article 1 ECHR (“shall secure”); Article 1(1) of the Inter-American Convention on Human Rights (“to respect

interpreted by international bodies to require that some violations, namely serious violations of physical integrity, such as torture, extra-judicial executions and forced disappearances, must be investigated and those responsible for them brought to justice. *A fortiori*, this applies to *jus cogens* international crimes.

The groundbreaking case in which such an interpretation was first adopted is the case of Velásquez-Rodríguez before the Inter-American Court of Human Rights.<sup>279</sup> The case concerned the unresolved disappearance of Velásquez-Rodríguez in Honduras in violation of Article 7 of the Inter-American Convention, which, according to the findings of the Inter-American Commission, was committed by persons connected to or acting in pursuance of orders from the armed forces. The Court interpreted Article 1(1) in conjunction with Article 7 to mean that "... States must prevent, *investigate, and punish any violation* of the rights recognized by the Convention and ... if possible to restore the right violated and provide compensation as warranted for damages resulting from the violation."<sup>280</sup> The Court furthermore indicated that:

[T]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out *a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.*<sup>281</sup>

According to the Court, the obligation not only entails "to effectively ensure ... human rights"<sup>282</sup> but also requires that investigations be conducted "in a serious manner and not as a mere formality preordained to be ineffective."<sup>283</sup> The Court concluded that "[I]f the State apparatus acts in such a way that the violation goes unpunished ... the State has failed to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction."<sup>284</sup> It is noteworthy from the perspective of transitional justice that the Court regarded this due diligence requirement

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and to ensure ..."); Article 1 of the African Charter on Human and Peoples' Rights ("shall recognize ... and shall undertake to adopt ... measures to give effect...").

279. Judgment of 29.7.1988, Inter-American Court of Human Rights, Series C, Decisions and Judgments, No. 4.

280. *Id.*, at para 166.

281. *Id.*, at para. 174, emphasis added.

282. *Id.*, at para. 167.

283. *Id.*, at para. 177.

284. *Id.*, at para. 176.

to be binding “independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal.”<sup>285</sup> Thus, the obligations are equally applicable to new governments which were not in power at the time the violation occurred. Furthermore, the holding of the Court suggests that it is applicable irrespective of the scale of violations and thus even covers cases of a single, isolated violation.<sup>286</sup>

While such interpretation was confirmed in later decisions of both the Inter-American Court and the Commission,<sup>287</sup> the exact scope of such an obligation to respect and ensure, however, is a matter of discussion, namely as regards the question whether it implies a duty to conduct criminal proceedings. Some warn not to read too much into the judgment, because the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance despite the fact that the lawyers for the victims’ families, the Inter-American Commission and a group of international experts acting as *amici curiae* had specifically made a request to that effect. In light of the absence of any express reference to criminal prosecution as opposed to other forms of disciplinary action or punishment, the obligation to investigate violations, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation thus does not appear to exclude non-criminal responses per se, as long as one assumes a broad notion of what constitutes “punishment.” On the other hand, the Inter-American supervisory organs have derived additional criteria for the permissibility of such non-criminal responses from the right to a remedy, as provided for in Article 25 of the Inter-American

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285. *Id.*, at para. 184.

286. Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 24 (Naomi Roht-Arriaza ed., 1995), at 31.

287. For decisions of the ICHR, see for example: Godínez Cruz, judgment of 20.1.1989, at para. 184 *et seq.*; Aloebotoe *et al.*, judgment of 4.12.1991, Annual Report IACtHR, 1991, at 76 *et seq.*; Gangaram Panday, judgment of 21.1.1994; El Amparo, judgment of 18.1.1995, Annual Report 1995, at 23 *et seq.*; Neira Alegria *et al.*, judgment of 19.1.1995, Annual Report 1995, at 41 *et seq.*; Caballero Delgado y Santana, judgment of 8.12.1995, Annual Report 1995, at 135 *et seq.*; Barrios Altos Case, judgment of 14.5.2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001), paras. 41-44, available at: <http://www1.umn.edu/humanrts/iachr/C/75-ing.html>; for decisions of the Inter-American Commission on Human Rights, see for example: cases No. 10.235, 10.454, 10.581, Annual Report IACmHR, 1992, at 27 *et seq.*; 1993, at 52, 61; cases No. 10.433, 10.443, 10.528, 10.531, Annual Report IACmHR 1992-93, at 110, 118, 128, 136; Report No. 1/99 of 27.1.1999, case 10.480: Lucio Parada Cea *et al.*, at para. 130; *see also*: Kai Ambos, *Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen*, 37 ARCHIV DES VÖLKERRECHTS 318 (1999) at 319-321, with further references.

Convention, and the right to a judicial process, contained in Article 8, read together with the obligation to ensure respect embodied in Article 1. According to the understanding of the Court and the Commission, the due diligence standard set forth by the Inter-American Convention excludes some non-criminal responses, namely blanket amnesties. Thus, when confronted with the permissibility of amnesty laws adopted in El Salvador,<sup>288</sup> Argentina,<sup>289</sup> Uruguay<sup>290</sup> and Peru,<sup>291</sup> the Commission determined that they were incompatible with the mentioned obligations flowing from the Inter-American Convention.<sup>292</sup>

While differing in the degree of permissible margins of appreciation in complying with the requirements flowing from the respective instruments, the jurisprudence of the Inter-American supervisory organs was confirmed by the European Court for Human Rights and the Human Rights Committee.

Thus, the Human Rights Committee concluded in its General Comment no. 20,<sup>293</sup> with respect to the prohibition of torture contained in Article 7 of the ICCPR, that amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom of such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible. The Human Rights Committee also confirmed its view that amnesties are incompatible with States' obligations under the ICCPR in a number of its communications.<sup>294</sup>

In contrast to the Inter-American human rights bodies and the Human Rights Committee, no jurisprudence with respect to amnesties has emerged in the European Court of Human Rights as of yet. However, the Strasbourg organs were confronted with the question whether and to what extent states parties to the ECHR are under an obligation to investigate and, if appropriate, prosecute violations of the rights guaranteed by the ECHR. In

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288. Inter-American C.H.R., Rep. 26/92 OEA/ser.L/V/II.82 (24 September 1992).

289. Inter-American C.H.R., Rep. 24/92, *ibid*, Doc. 24 (2 October 1992).

290. Inter-American C.H.R., Rep. 29/9, *ibid*, Doc. 25 (2 October 1992).

291. Barrios Altos Case, *supra* note 235.

292. For a detailed discussion of that jurisprudence, see Douglas Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & CONTEMP. PROBS., 197 (1996), at 208-219.

293. General Comment no. 20, adopted during the Committee's 44th session in 1992.

294. Cf. for example *Hugo Rodríguez v. Uruguay*, U.N. Doc. CCPR/C/51/D/322/1988, 2 IHRR (1995) 112, paras. 12.3-12.4, also available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/c6100f530629eae48025672300553422?OpenDocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/c6100f530629eae48025672300553422?OpenDocument).

Selmouni v. France,<sup>295</sup> the Court had to consider whether an inquiry for alleged acts of torture was effective. The Court affirmed earlier decisions<sup>296</sup> and stated that the notion of an effective remedy<sup>297</sup> entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.<sup>298</sup> In the recent decision of Al-Adsani v. United Kingdom, the European Court confirmed that approach.<sup>299</sup> However, it did not accept the applicant's claim that the U.K. was in breach of its obligations under the European Convention by granting State immunity to Kuwaiti authorities, at whose hands the applicant suffered from torture, thus precluding him from civil claims of compensation against the Kuwaiti authorities. While the Court accepted "[...] that the prohibition of torture has achieved the status of a preemptory norm in international law" it observed that the case at hand concerned the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State, rather than criminal liability of an individual for alleged acts of torture. In such a case, the Court considered itself "unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."<sup>300</sup> However, by stressing the difference between criminal and civil liability,<sup>301</sup> it might be argued that the European Court would have come to the conclusion that the U.K. was in breach of the ECHR, had it granted immunity from its *criminal* jurisdiction to individuals that were responsible for torturing the applicant.

Assuming that no blanket amnesties can be provided for *jus cogens* international crimes, which of the accountability measures described above should be applied, and do these measures satisfy the goals of accountability? So far, there are no explicit norms to answer this question

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295. Application no. 25803/94, judgment of 28/07/1999, available at <http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200109/selmouni%20-%20batj.doc>.

296. Among others, these include the following judgments: Aksoy v. Turkey case, judgment of 18 December 1996, *Reports* 1996-VI, at 2287, § 98; Assenov and Others v. Bulgaria, 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102; and, *mutatis mutandis*, Soering v. the United Kingdom, 7 July 1989, Series A no. 161, at 34-35, § 88.

297. Cf. Article 13 of the ECHR.

298. Judgment at para. 79.

299. Application no. 35763/97, Judgment of 21 November 2001, at 38-40, Available at: <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=5&Action=Html&X=225181707&Notice=0&Noticemode=&RelatedMode=0>

300. At para. 61.

301. For the Court's emphasis on this difference, see also para. 65.

and many other questions deriving from it. Nor is there sufficient international practice to evidence customary international law.

The dichotomy of peace versus justice is still debated, as are the merits of amnesty when they can achieve an immediate and certain result of bringing an ongoing conflict to an end, thus sparing many lives.

In the Iraq conflict, the U.S. offered Saddam Hussein amnesty if he abandoned power before the war started.<sup>302</sup> For sure, his departure from power would have saved thousands of lives killed in this conflict, and the destruction of the country. Who can say that upholding the principle of accountability would have been worth the deaths, injuries, and devastation brought by the war? Perhaps the answer is to split the political promise of amnesty from the eventual inevitability of the legal implications of accountability. After all, this is what happened with Slobodan Milosevi\_.<sup>303</sup> If it is only a question of time, the political promise may be upheld, and eventually the inevitability of accountability can follow.<sup>304</sup> But this is not always a certainty. General Raoul Cedras was given de facto amnesty in Haiti, and now lives in Panama,<sup>305</sup> and Idi Amin has been living in Saudi Arabia for almost forty years, having received amnesty from Uganda. There are many others, some like Mengitsu of Ethiopia,<sup>306</sup> others like Pinochet of Chile, and Habré of Chad.<sup>307</sup> For sure, they are all trapped and tracked, and that in itself is a measure of the world's condemnation.

## Section 9. Conclusion

The philosophy of international criminal justice is a reflection of certain values embodied in the historical experiences of national criminal justice systems. What emerges is at once complex, but can also be simple in

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302. For example, prior to military action in Iraq, there were rumors that Saddam Hussein might leave the country in search of a safe haven. Both President George W. Bush and Defense Secretary Donald Rumsfeld welcomed the prospect, even though the crimes committed by Hussein and his regime are quite significant. *See Remarks of President in Address to the Nation*, March 17, 2003; M. Cherif Bassiouni, *Post-war Justice, Justifying War*, CHI. TRIB. Mar. 30, 2003, at sec. 2, p. 1. *See also* BASS, *supra* note 2, in which he argues the difficult choice of not giving amnesty to certain leaders in exchange for peace, which also results in the saving of many lives.

303. *See* WILLIAMS & SCHARF, *supra* note 222; MICHAEL P. SCHARF: BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG (1997).

304. *See* Diane F. Orentlicher, *Settling Accounts—The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451, 475 n.137 (1990).

305. *See* Scharf, *Swapping Amnesty for Peace*, *supra* note 211.

306. *See* Kidane, *supra* note 126.

307. *See supra* BASSIOUNI, *supra* note 1, at Chapter II, section 4.

practice. This complexity is present because it reflects several philosophical premises that have developed in different cultures, and at different times. However, the philosophy is also simple, because it amounts to four essential value-oriented goals. They are:

- 1) prevention through deterrence and the strengthening of social values;
- 2) enhancement of peace by providing retribution and corrective justice which makes violators accountable and punishable, which in turn reduces the victims' needs for revenge; and
- 3) provide victims with redress which in some ways compensates them for the harm they have suffered and the losses they incurred;
- 4) recording history and making remembrance part of social reality.<sup>308</sup>

These four value-oriented goals of international criminal justice are reflected in almost all legal philosophies, irrespective of their differences. To attain these value-oriented goals, the international criminal justice system, as a whole and in part, must be impartial and fair in its processes. These notions of impartiality and fairness include three other unarticulated philosophical premises – equality, liberty and individual dignity, which are reflected in varying degrees in almost all legal systems throughout history, and evidence the philosophical understanding that human justice is achieved by processes that are perceived as impartial and fair because they uphold equality, liberty and human dignity. Experience also reveals that in order for legal processes to be impartial and fair, they must also be effective.

This conception of international criminal justice does not have to reach consensus on the metaphysical questions of what is justice, so long as it achieves fairness. Its value-oriented goals are broad enough to satisfy a wide range of metaphysical conceptions of justice, yet narrow enough to avoid the contrasting aspects of these metaphysical conceptions. Thus, for example, international criminal justice does not need to address whether justice is divinely inspired or human-made, or whether it is the product of authority or of a natural order; whether it is a moral virtue or a social policy; whether it fulfills social or individual needs; whether it achieves individual or inner happiness or satisfaction or socio-political objectives;

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308. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. 463 (1995); Martha Minow & Ruth G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L. J. 356 (2002).

whether it is designed to achieve or support a given form of government or satisfy some socio-political or economic ideology; or, whether it achieves certain ends, or conforms with certain forms. It can encompass these ideals without having to confine itself to any one of them. In short, it is a pragmatic, humanistic,<sup>309</sup> utilitarian, and process-oriented – one which modestly aims at the attainment of certain value-oriented goals that reflect a wide consensus among national collectivities and international civil society.

The challenges to international criminal justice are in part posed by globalization, which make local crime capable of being transnational, and which facilitates the commission of international crimes.<sup>310</sup> However, since it can easily be predicted that most states will be unable to cope with the challenges of crime in the era of globalization because of the reasons mentioned in section 7.12, the danger will be to the preservation of international human rights standards. Already, we have witnessed the erosion of civil liberties in the U.S. since 9/11. Those, who for ideological reasons have opposed the human rights movement, will seize upon the dangers of crime to fan the fears of people, and thus to justify serious infractions of what we have come to consider as fundamental fairness and due process of law. Human experience evidences that curtailing due process has never benefited security, but has always enhanced dictatorships. The words of Benjamin Franklin inscribed on the Statue of Liberty are more eloquent today than ever: “They that can give up essential liberty to obtain a little safety, deserve neither liberty nor safety.”

As to another aspect of international criminal justice, impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation. Accountability and victim redress are also fundamental to post-conflict justice, as the re-establishment of a fair and functioning criminal justice system in the aftermath of conflicts is the only means to avoid impunity and ensure a lasting peace, which only a viable criminal justice system can protect and guarantee.

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309. The term humanistic encompasses human rights, including compassion for the victims of crime, be it national or international.

310. For example, Liberia and Sierra Leone’s internal wars which caused a cumulative estimated 600,000 to 800,000 victims was financed by the illicit diamond trade, which rebels sold to major Western companies. The proceeds were then laundered through Western banks, and with it, weapons were bought in the Ukraine and Russia and smuggled through other African countries to cause the mayhem the world witnessed with if not indifference, at least inaction.

To remember and to bring perpetrators to justice is a duty we also owe to our own humanity and to the prevention of future violations of international humanitarian and human rights law.<sup>311</sup> To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences. The reason for our commitment to this goal can be found in the eloquent words of John Donne:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main . . . Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee. . .<sup>312</sup>

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311. In the classic and profoundly insightful characterization of George Orwell, "Who controls the past, controls the future. Who controls the present, controls the past." Thus, to record the truth, educate the public, preserve the memory, and try the accused, makes it possible to prevent abuses in the future. *See* Cohen, *supra* note 122, at 49.

312. JOHN DONNE, *DEVOTIONS UPON EMERGENT OCCASIONS XVII* (London, 1626).



# Les valeurs, politiques et objectifs du droit pénal international à l'heure de la mondialisation

Eric David\*

Le thème des travaux du présent panel - « valeurs, politiques et objectifs du droit pénal international à l'heure de la mondialisation » - suggère deux questions:

- le droit pénal international relève-t-il d'une politique particulière, répond-il à certains buts précis et correspond-il à des valeurs ? (I.)
- le droit pénal international est-il affecté par la mondialisation ? (II.)

## **I. Le droit pénal international relève-t-il d'une politique particulière, répond-il à certains buts précis et correspond-il à des valeurs ?**

En partant de la distinction classique droit international pénal/droit pénal international qui sera conservée ici par souci de facilité et de clarté, on constate que si le premier ne répond pas à un projet politique cohérent et concerté (A.), il en va autrement du second (B.).

*A. Le droit international pénal ne répond pas à un projet politique précis et ne poursuit pas un but cohérent*

Lorsqu'on considère le droit international pénal, c.-à-d., celui élaboré par les Etats agissant collectivement pour incriminer certains faits et assurer leur répression (traités créant des incriminations internationales et des juridictions pénales internationales), on constate que la discipline a l'allure d'une construction désordonnée, constituée de strates successives qui ne répond à d'autre logique que celle des exigences de l'actualité. Quelques exemples: y a-t-il une quelconque logique dans le fait que la répression de la piraterie est immémoriale, que celle des dommages causés aux câbles sous-marins remonte à la Convention de Paris du 14 mars 1884 et qu'on ne s'est véritablement intéressé à la répression des crimes contre l'humanité qu'à partir de la 2<sup>e</sup> guerre mondiale ? La réponse est évidemment simple. La logique est purement historique: ces phénomènes n'ont troublé l'opinion qu'au moment de leur apparition, et comme il s'agissait de problèmes à dimension internationale, la communauté internationale a admis, explicitement ou implicitement, qu'il fallait adopter des solutions pénales pour prévenir ou réprimer les comportements en cause.

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Les exemples sont multiples: les conventions de 1937 sur le terrorisme répondent aux attentats dont avaient été victimes le Premier ministre français, P. Barthou, et le roi Alexandre III de Yougoslavie à Marseille, en 1934; les Tribunaux militaires internationaux de Nuremberg et de Tokyo répondent aux atrocités de la 2<sup>e</sup> guerre mondiale ; les TPI répondent aux horreurs des conflits yougoslave et rwandais dans les années 90 ; la convention européenne du 23 novembre 2001 sur la cybercriminalité répond à de nouveaux défis criminels liés au développement de la technologie moderne, etc.

Dans son exposé introductif, le Prof. C. Bassiouni rend bien compte de cette réalité lorsqu'il décrit la discipline en termes de : « Different building blocks which come in different sizes and shapes. Some of these blocks may be vertically related, others horizontally. »<sup>1</sup>

Cette construction erratique du droit international pénal ne signifie pas que celui-ci soit dépourvu de valeurs ou de buts. Ses valeurs sont celles qui sous-tendent les instruments qui le composent : la dignité de l'homme, sa vie, son intégrité physique et morale (protégées, e.a., par les Conventions de Genève du 12 août 1949 sur la protection des victimes de la guerre, la Convention du 17 décembre 1979 contre la prise d'otages, la Convention du 10 décembre 1984 contre la torture, les peines et traitements cruels, inhumains ou dégradants, etc.), la protection de l'Etat (protégé à travers la répression de l'agression dans les statuts des TMI de Nuremberg et de Tokyo, les instruments réprimant le terrorisme international, conventions de La Haye du 16 décembre 1970, de Montréal du 23 septembre 1971, de N.Y. du 14 décembre 1973, etc., les instruments réprimant la corruption comme la Convention de Strasbourg du 27 janvier 1999), la liberté du commerce (protégée, e.a., par la répression de la piraterie dans la Convention de Montego Bay du 10 décembre 1982), la préservation de l'environnement (protégé par la Convention MARPOL de Londres du 2 novembre 1973, la répression des atteintes à la pollution dans la Convention de Montego Bay du 10 décembre 1982, etc.), etc.

On le voit, le droit international pénal se forme par sédimentation de règles qui se suivent et se superposent en couches sans guère d'ordre et de concertation : c'est le droit du coup par coup, le droit du hasard et de la nécessité, certainement pas celui du « grand horloger » de Leibniz ...

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1. « The Discipline of ICL », World Conference on ICL, 28 Nov. - 4 Dec. 2002, Sect. 5.

*B. Le droit pénal international poursuit un but politique précis lié à l'idéologie dominante de l'Etat*

Tableau très différent du droit pénal international considéré *stricto sensu*, c.-à-d., les règles adoptées par les Etats agissant individuellement (lois prévoyant des compétences extraterritoriales) et collectivement (traités d'entraide judiciaire et d'extradition) pour réprimer des infractions de droit interne présentant un élément d'extranéité. Ici, le but politique de la discipline se confond dans une large mesure avec celui du droit pénal interne: il s'agit de protéger pénalement les valeurs essentielles d'une société (vie, intégrité physique, propriété, honneur, etc.) qui sont, bien sur, le reflet de l'idéologie dominante qui traverse cette société. Or, pour protéger cette idéologie, l'Etat doit mettre en œuvre des stratégies dont le droit pénal international n'est qu'une des manifestations.

Dans cette perspective, l'objectif du droit pénal international consiste pour l'essentiel à compléter les objectifs du droit pénal interne en surmontant les obstacles liés à l'existence de frontières et de souverainetés cloisonnées par celles-ci. L'attribution au juge de compétences extraterritoriales et le développement de l'entraide judiciaire majeure et mineure en matière pénale répondent à ce souci de dépasser les frontières et d'assurer la répression d'infractions qui scandalisent la société d'un pays. Cette volonté quasi-« impérialiste » de l'Etat d'exercer une répression sans faille s'inscrit donc dans une politique beaucoup plus cohérente que celle que le droit international pénal est supposé refléter.

Le droit pénal international continue à se développer, que ce soit dans l'extension des compétences pénales extraterritoriales ou dans le resserrement de la coopération interétatique. Dans un cas, cela se traduit par l'admission, dans certains Etats, de la compétence universelle par défaut, dans l'autre, par la création d'espaces judiciaires transnationaux dont les réalisations les plus spectaculaires se situent en Europe avec l'adoption de la Convention d'application de l'Accord de Schengen du 19 juin 1990 sur la suppression graduelle des contrôles aux frontières communes et l'adoption, le 13 juin 2002, par le Conseil de l'UE, de la décision cadre sur le mandat d'arrêt européen.

En conclusion, si l'on ne peut donc certainement pas parler de véritable projet politique en matière de droit international pénal, en revanche, on trouve un tel projet en matière de droit pénal international en tant qu'appendice du droit pénal interne, même si, pour l'essentiel, ce projet se résume à démanteler les frontières qui perturbent l'efficacité de la répression.

## II. Le droit pénal international est-il affecté par la mondialisation ?

La notion de mondialisation a une double signification: soit, démantèlement des frontières étatiques et des barrières protectionnistes pour faciliter le commerce au plan international et mondial (c'est le « laissez faire, laissez passer » de Gournay et de ses collègues, les économistes physiocrates du 18<sup>e</sup> siècle) ; soit domination du commerce mondial par les multinationales. Prig dans un sens ou dans l'autre, le droit pénal international entretient certaines relations avec le phénomène.

### A. La mondialisation, expression du laissez faire, laissez passer, présente des analogies avec le droit pénal international

En tant qu'expression de la liberté commerciale et de la suppression des entraves étatiques à la libre circulation des personnes, des biens, des services et des capitaux, la mondialisation présente des analogies avec le droit pénal international, en ce sens que ce dernier lutte aussi pour la suppression progressive des frontières perçues comme des obstacles à la répression. On en a vu des manifestations particulières dans le cadre de la construction européenne: développement de l'entraide judiciaire, mineure et majeure, en matière pénale, création d'espaces judiciaires transnationaux avec possibilité, dans certaines conditions, pour les forces de l'ordre d'un pays de se rendre sur le territoire d'un autre pays (*e.g.*, traité Benelux d'extradition et d'entraide judiciaire du 27 juin 1962, art. 27; convention d'application de l'accord de Schengen du 19 juin 1990, art. 40-41) ou pour les autorités judiciaires de communiquer directement avec leurs homologues sans devoir passer par la voie diplomatique (convention de Schengen précitée, art. 52-53) ou *via* des officiers spécialisés (convention EUROPOL du 26 juillet 1995, art. 4 ss.), substitution du mandat d'arrêt européen à la procédure d'extradition entre Etats membres de l'UE à partir du 1<sup>er</sup> janvier 2004 (décision cadre UE du 13 juin 2002, art. 34), etc.

Autres phénomènes de mondialisation judiciaire: la création, par le Conseil de sécurité, des TPI (S/Rés. 827, 25 mai 1993; S/Rés. 955, 8 novembre 1994), leur importante activité jurisprudentielle, et l'adoption du statut de la CPI (Rome, 17 juillet 1998; entrée en vigueur, le 1<sup>er</sup> juillet 2002). Dans la mesure où ces organes transcendent les frontières, ils sont aussi une manifestation de la mondialisation.

Il demeure toutefois une différence majeure entre la mondialisation des marchands et celle de la justice: la première ne répond qu'au souci de l'intérêt privé alors que la seconde est destinée à servir l'intérêt public.

*B. La mondialisation, expression de la domination mondiale des multinationales, échappe dans une large mesure au droit pénal international*

Les sociétés multinationales peuvent, parfois, être elles-mêmes impliquées, à titre d'auteurs ou de complices dans des infractions internationales. Certaines conventions internationales en tiennent compte dans la mesure où elles demandent aux Etats de prévoir la responsabilité pénale des personnes morales (*e.g.*, convention européenne sur la corruption du 27 janvier 1999, art. 18; convention des N.U. du 10 janvier 2000 pour la répression du financement du terrorisme, art. 5; convention des N.U. du 12 décembre 2000 contre la criminalité transnationale organisée, art. 10; etc.). Solution juridique classique à un problème factuel qui l'est tout autant et qui n'a pas beaucoup de rapport avec la mondialisation.

Le problème pénal que posent les sociétés multinationales dans le cadre de la mondialisation n'est pas celui de leur participation à une infraction internationale à titre d'auteur, de co-auteur ou de complice direct; au plan pénal, cette participation ne soulève que la question de l'imputation d'un crime ou d'un délit à une personne morale, question résolue dans le droit d'un certain nombre d'Etats (*cf* code pénal belge, art. 5). Le vrai problème soulevé aujourd'hui par les sociétés multinationales est celui de leur complicité indirecte ou « objective » dans les violations graves des droits de l'homme et les crimes de droit international humanitaire commis par les régimes dictatoriaux dans les pays où ces sociétés sont implantées. Dans la mesure où ces sociétés développent leurs activités sans considération de frontières, en fonction des seuls critères de rentabilité, et dans la mesure où elles apportent, inévitablement, un soutien moral et matériel à ces régimes - ne fût-ce qu'en payant des impôts -, ces sociétés ne deviennent-elles pas, indirectement, complices des crimes commis par ces régimes ?

Si l'on s'en tient aux critères classiques de la complicité en droit pénal – contribution matérielle à l'infraction, contribution apportée en connaissance de cause, contribution commise dans l'intention de faciliter l'infraction -, la réponse doit rester négative: même s'il sait que les impôts sont utilisés par le régime en place pour rémunérer les fonctionnaires et agents qui commettent des atrocités, le débiteur d'impôts ne devient pas pour autant complice de ces atrocités : d'une part, il est obligé de payer ses impôts, d'autre part, il est généralement difficile de prouver que les impôts ont été payés dans l'intention de faciliter les dites atrocités. Faute de

satisfaire le critère intentionnel, la société multinationale n'apparaît pas, sur un plan strictement pénal, comme complice des faits en cause.

Mais attention: tout cela n'est jamais qu'une question d'interprétation du critère de l'intention; il n'est pas exclu qu'un jour, la justice d'un Etat, sous l'influence de la société civile et des dénonciations par celle-ci des activités d'une multinationale dans un Etat où les droits de l'homme sont notoirement violés puisse considérer, d'abord au plan civil, que cette société commet une faute en investissant massivement dans cet Etat et en apportant à ce dernier un soutien matériel qui est loin de se diluer dans la masse des millions d'autres contribuables, puis au plan pénal, que la négligence de la société à l'égard des conséquences prévisibles de cet investissement en termes de soutien aux atrocités commises par le régime en place équivaut à une intention criminelle et est constitutive de complicité pénale ... On en est encore loin, mais les idées évoluent vite ...

En attendant, si une société multinationale participe plus concrètement aux crimes d'un gouvernement – par exemple, en s'associant aux décisions qui se rapportent à ces crimes, ou en fournissant à ce gouvernement des armes pour les commettre, ou en engageant des éléments armés qui commettent ces crimes-, la complicité pénale de la société risque alors d'être mise en cause. Les actions judiciaires dirigées, au civil, contre Unocal aux E.-U.,<sup>2</sup> au pénal, contre Total Fina Elf en Belgique<sup>3</sup> et en France<sup>4</sup> pour la participation de ces sociétés à des violations de l'interdiction du travail forcé au Myanmar, voire à leur complicité dans des homicides et des viols, en sont des exemples.

Il n'y a pas de rapport direct entre droit pénal international et mondialisation à part des rapports de comparaison – existence de similitudes entre la mondialisation du commerce (en tant que phénomène de suppression des barrières étatiques) et la mondialisation de la justice, même si leurs fondements respectifs (l'intérêt privé, d'un côté, l'intérêt public, de l'autre) sont radicalement différents - et l'aptitude de la norme pénale internationale à saisir des comportements induits par un autre aspect de la mondialisation, à savoir, l'indifférence de certaines multinationales aux conséquences d'une stratégie sans frontière, basée uniquement sur la loi du profit maximal...

2. Voy. U.S. Ct. of App., 9th Cir., 18 Sept. 2002, II, A, §§ 10-14, [www.laborrights.org/projects/corporate/unocal/unocal091802.pdf](http://www.laborrights.org/projects/corporate/unocal/unocal091802.pdf).

3. *Le Soir* (Bruxelles), 8 mai 2002 ([www.lesoir.be/](http://www.lesoir.be/)).

4. [www.liberation.fr/page.php?Article=60227](http://www.liberation.fr/page.php?Article=60227).

# **The Values, Policies and Goals of ICL in the Age of Globalization: Report**

**Bruce Broomhall\***

Rather than summarize what was a rich introductory panel, this report will elaborate four points that arose in its course: these are the needs (1) to deepen and systematize theoretical aspects of international criminal law in both a practically-oriented and an interdisciplinary way, (2) to develop the capacity of domestic institutions to address international crimes, (3) to use ICL for addressing resource conflicts and other corporate abuses, and (4) to develop a coherent justice policy at all relevant levels. Each of these will be central to the development of the ‘values, policies, and goals’ of international criminal law, and each warrants future elaboration.

The panel consisted (in order) of Professor M. Cherif Bassiouni, President of the Association International de Droit Pénal and – as President of Siracusa’s Institute for Higher Studies in Criminal Sciences – host of the present conference, who set the context with a presentation (immediately preceding this report) detailing the complexities that confront any attempt to forge a coherent discipline for international criminal law; Dean Raul C. Pangalangan (Philippines, Dean and Professor of Law, University of Philippines College of Law); Professor Éric David (Belgium, Professor of International Law, University of Brussels Faculty of Law); Professor William Schabas (Canada, Professor of Law and Director, Irish Centre for Human Rights, National University of Ireland; Member, Sierra Leone Truth and Reconciliation Commission); and H.E. Giuliano Vassalli (Italy, President Emeritus, Constitutional Court of Italy; Former Minister of Justice; Former Senator; Emeritus Professor of Criminal Law, The University of Rome; Honorary President, ISISC; Honorary Vice-President, AIDP).

The first of the points to be identified here is that there is a need for a significantly deeper and more fully realized doctrinal or theoretical elaboration of the field of international criminal law. This need was underscored by both Professors Bassiouni and Schabas. In some ways, as

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\* Assistant Professor of International Law, Central European University (Budapest, Hungary); Senior Legal Officer for International Justice, Open Society Justice Initiative. The rapporteur’s analysis of some of the issues presented in this report are developed at greater length in BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* (2003).

much as the pace of recent developments in the field have outpaced expectations, its doctrinal and theoretical underpinnings are often unclear or inchoate. This leaves major areas of uncertainty in the scope of criminal responsibility and applicable defenses, as in the areas of command responsibility and joint criminal enterprise, as well as countless problems of practical application. As an amalgamation of several disciplines, international criminal law is, as Professor Bassiouni remarked, frequently awkward in design, uneven in development, and diverse in its internal developmental dynamics. The fact that, both procedurally and substantively, ICL will be governed by a plethora of national and international instruments, and will be interpreted and applied by a plethora of institutions at both levels, ensures that its development will be slow and uneven.

Nonetheless, the Nuremberg Principles, as elaborated up to the Rome Statute and its Rules of Procedure and Evidence and Elements of Crime, continue to provide a sufficiently clear core of international law for this field, even as the consequences of their oft-claimed *jus cogens* status remain to be secured, and as incorporation into national law either remains inadequate or throws up peculiarities of principle, emphasis and terminology from jurisdiction to jurisdiction. The establishment of both the *ad hoc* tribunals for the Former Yugoslavia and Rwanda and of the ICC, as well as related domestic legal developments, both ensure an increased pace of developments in this field and add urgency to a coherent doctrinal elaboration that will guide rather than follow events.

While the fact that international criminal law develops within a complicated web of institutions does not mean that efforts to elaborate more coherent and detailed theoretical and doctrinal foundations for the field are futile or should be deferred, it does have real implications for how such work is undertaken. Importantly, it should be recognized that if ICL is to be a practical endeavor, contributing to justice for victims of crime and to international peace and security, then the field as a field of inquiry and as a source ultimately of principled solutions should be a rigorously interdisciplinary one. This means building bridges with, at least, international relations, political science, criminology, institutional sociology, therapeutic psychology and other fields. Exploration of these connections have been woefully inadequate so far.

Moving to the second point, there is a critical need for the norms of ICL to be rooted firmly in domestic institutions. Without such roots, the work of the ICC and the efforts of intergovernmental organizations – however

heroic, however astute – will never establish a practice strong enough to lay the foundations for anything resembling the rule of law for the worst of crimes. Dean Pangalangan tellingly linked his acknowledgement that the substantive norms of ICL have been affirmed universally with a call for the use of the complementarity mechanism as a means to promote the development of domestic institutions and, indeed, of social values of accountability.

The ICC will undoubtedly have a major impact on such developments, and is designed precisely with the aim of so doing. States' desire to avoid the attention of the ICC gives them an incentive to pass the laws and take the action necessary to meet the complementarity test. Non-governmental and inter-governmental organizations actively lobby and advise governments on these issues, as will the Assembly of States Parties and perhaps even the ICC Office of the Prosecutor in future. While their contribution has been meager to date, an active and high-profile ICC is likely to prompt international development agencies to add their considerable financial resources and expertise into appropriate support for domestic institutions in this area. Even where domestic institutions are too weak to respond effectively, compromise arrangements like the 'hybrid' tribunal at work in Sierra Leone or the 'internationalized' process envisioned for Cambodia may step into the breach, relieving the burden on the ICC and offering at least some hope that domestic actors will develop the expertise needed for more effective future action.

Even if government action against impunity is limited at first to efforts that do the bare minimum to avoid the ICC taking jurisdiction, even such actions and related legislative developments, when paired with civil society advocacy, encourage a public discourse favouring accountability. A strengthened international culture of accountability is the foreseeable result. *How much* strengthened will be the pivotal question—and the answer will depend, in no small measure, on how the ICC Office of the Prosecutor, and ultimately the ICC Appeal Chamber, comes to draw the dividing line between national and international jurisdiction in interpreting the complementarity provisions (esp. arts. 17-20) of the Statute. Without a relatively vigorous interpretation that is actively supported by the core of Like Minded Countries driving the Assembly of States Parties, much of the potential positive impact of the Rome Statute regime on domestic systems may never materialize.

The third point is that international criminal law will need to address the root causes of conflicts and the dynamics that characterize conflict and

mass atrocity in the contemporary world. This requires an engagement with the fact of globalization, not just as a normative phenomenon (of which ICL is one example) but as an economic and political one. With the failure of the international community to address poverty, social instability, and weak states will come the certainty of ongoing conflicts and abuse in the future. International criminal law can make its own – not decisive, but important – contribution to this area by linking its work to these issues.

Both Prof. David and His Excellency Mr. Vassalli made remarks to the effect that, so long as corporate liability lies beyond the scope of ICL, this field will be in danger of neglecting a major dynamic of contemporary life under globalization. Rather than take these remarks as an invitation to despair pending major and unforeseeable developments to the field, it would be best to identify the potential for addressing these issues through the norms and structures adopted by the process so far. It is true that ICL in general, and the Rome Statute in particular, is focused on the responsibility of individuals, that is, of natural and not of legal persons. At the same time, there is room within the emerging framework of the ICC cogently to address important issues linked to economic actors.

The paradigmatic example of the late 20th and early 21st centuries is the Democratic Republic of the Congo, where millions are estimated to have died as a result of a conflict that has drawn in many of DRC's neighbours. The conflict has been sustained by fighters, traders, international business interests, and government officials both inside and outside the DRC determined to exploit the vast natural inheritance of Africa's most resource-rich country, or to put into power those that will help them do so. For countless observers – and disproportionately in the developing world – it is awareness of the economic framework of this conflict that makes paramount the issues of poverty and exploitation, and highlights the need for transparent governance and the rule of law.

Is the mandate of the ICC too narrow to impact on these issues? What can it contribute? Four potential opportunities reveal themselves:

- a) The prosecution of environmental damage resulting from resource exploitation is to be extremely exceptional. The Statute does list environmental war crimes, but the threshold is too high to be often met, let alone in resource-extraction situations.
- b) The joint criminal enterprise, aiding and abetting, and other criminal participation provisions in art. 25 of the Statute leave room to seek the indictment of those involved in natural resource exploitation, related corruption, etc., where the requisite subjective element of the crime (knowledge/purpose) can be made

out. If the ICC were ultimately to convict actors engaged in resource exploitation (whether military planners, low-level traders, their international buyers and suppliers, or foreign government officials), it would contribute to an important legal development, and one already broached by the Special Court for Sierra Leone (where the first wave of indictments consistently refers to the intent of rebel commanders and their Liberian backers to exploit the diamond wealth of that country). The high level of knowledge required presents a major challenge: just as it is difficult to obtain evidence of the internal military communications so often needed to prove command responsibility, so will the closed nature of commercial enterprises make low-level buyers or suppliers easier to convict than their wealthier international buyers, unless the testimony of ex-insiders or internal documents can be secured.

- c) The indictment of those involved in war crimes and crimes against humanity, where those crimes are committed with the aim of seizing or maintaining control of territory in order to open it up to exploitation, could also have a positive impact in deterring those that would profit from brutal repression. The factual background of the indictment or judgment and surrounding communications work of NGOs would make clear the nexus to the economic activity, ensuring that ICC activity reinforces UN and other efforts to draw attention to resource conflict issues, even if the relevant economic actors could not be shown to have the requisite *mens rea*.
- d) Ultimately, if convictions were to result by whatever of the above three means, one could seek to use indicted individuals tied to economic actors as 'deep pockets' for purposes of victim compensation, using the reference to "forfeiture of proceeds, property and assets derived directly or indirectly from that crime" in art. 77 as a basis for getting at profits derived from the exploitation made possible by the crimes. This is obviously highly contingent – depending in part on how widely the word 'indirectly' is interpreted, and on whether the assets in question are held by the convicted individual or another entity – but it promises, even where strong legal links cannot be established, to be an area in which moral taint and public shaming have the potential to stimulate major 'voluntary contributions' to the Trust Fund for Victims by corporate actors eager to protect their image.

By pursuing the potential just indicated, the ICC will greatly enhance its legitimacy in the eyes of the developing world, will significantly reinforce international efforts aimed at resource conflicts, and will advance the boundaries and the relevance of ICL, even as it produces at least some potential deterrence.

The fourth and final point drawn from this panel discussion is the need, identified by Professor Bassiouni, to develop what might be called an international *politique criminelle* or 'politics of legality' – an internationally supported criminal justice policy framework that situates international criminal law firmly within international decision-makers' conception of how the imperative for accountability relates to efforts to maintain and restore international peace and security. As articulated by Schabas, it will be addressing the 'peace and justice/peace vs. justice' question in a concrete and satisfying manner that presents one of the greatest challenges to ICL in the immediate future. In the eyes of ICL supporters, this question involves placing a legal logic above political expediency (as Prof. Bassiouni and Dean Pangalangan expressed it), as well as specifically how the ICC will deal with the policy question of how much and when to intervene in complex and acrimonious political situations. To be specific, the Office of the Prosecutor, in applying the principle of complementarity, is instructed to do so, under the terms of art. 17, with respect to specific *cases* (as opposed to wider situations). Yet just to give one possible scenario, national authorities may be leaving aside the investigation and prosecution of a case in the context of a truth-for-amnesty trade, as was done under the auspices of South Africa's Truth and Reconciliation Commission. In such a situation, the Statute (art. 53) and Rules (R.48) instructs the Prosecutor to consider whether, having regard to the interests of victims, it is in the interests of justice to proceed. There will be a wide range of factors figuring in this 'interests of justice' calculation, including the impact of prosecuting the case on the situation of the country, the likelihood of getting the required cooperation from the international community, and the opportunity costs in terms of other cases arising at that time. There is an opportunity here for the Court to shape the factors that States take into account in striking a balance between peace and justice in post-conflict situations. This will have an impact far beyond the ICC on how States set policy through the Security Council, through multilateral peacekeeping operations, through their own exercise of universal jurisdiction, and so on. The establishment of a framework for this notoriously difficult calculation has been undertaken before, including at this Institute in Siracusa, but

the new institutional context that we find ourselves in warrants a new return to these questions.

Of course, it will not be only the ICC that must undertake the work of establishing a global *politique criminelle*. In the present, decentered state of international life, it is also the ICJ, national and regional courts and institutions, national legislatures, and intergovernmental organizations like NATO, European institutions, and the U.N. As we have seen in the tumultuous development of international approaches to the issue of immunities, this institutional diffusion is certain to make progress uneven. To make matters worse (at least for the immediate present), the unfavourable international context of the 'war on terror' that has flowed from the events of September 11, 2001 has made progressive policy developments, which take their strength consensus among States, all the more difficult to promote. Efforts to promote such policy developments have no choice but to take these circumstances into account.

Given the tension between the self-interest of sovereign States and the normative impulses of International Criminal Law that informs the emerging system of international justice at every level, the developments of the coming years cannot help but be profoundly challenging and strenuously contested. Given what is at stake in human terms, they are also crucially important. By addressing, *inter alia*, the four points raised above, those engaged in the field of international criminal law would take a significant step in the direction of making international criminal justice a practical reality.



**International Criminal Law: Quo Vadis?**

**29 November 2002**

**Panel 2 – The International criminal justice system:  
Complementarity between international  
and national institutions**

*Chair:* H.E. Alvaro Gil-Robles (France)  
High Commissioner for Human Rights,  
Council of Europe

*Presenter:* Professor André Klip (The Netherlands)  
Professor of Criminal Law, Criminal Procedure &  
International Criminal Law, Maastricht University

*Panel of Experts:*

H.E. Christine Van den Wyngaert (Belgium), Professor of Criminal Law and Procedure, University of Antwerp; Judge *Ad Litem*, International Criminal Tribunal for the former-Yugoslavia; Former *Ad Hoc* Judge, International Court of Justice; Member, Conseil de Direction, AIDP

Professor Albin Eser (Germany), Professor of Criminal Law, Albert Ludwig University Faculty of Law; Director, Max Planck Institut for International and Comparative Criminal Law; Member, Conseil de Direction, AIDP

*Rapporteur:* Dr. Marc Henzelin (Switzerland)  
Lecturer in Criminal Law, University of Geneva Faculty of Law; Attorney at Law

**Panel Questions:**

1. To what extent do post-conflict justice considerations determine the relationship between international and national justice institutions?
2. What is the relationship between internationally established justice-related bodies and mixed international/national justice institutions? Do they supercede national justice systems?
3. Is the jurisprudence of the ICTY's and ICTR's binding? In what way?
4. To what extent does *non bis in idem* apply as between national and international justice systems, and between national justice systems enforcing international criminal law?

# Complementarity and Concurrent Jurisdiction

André Klip\*

## 1. Introduction

The ICC Statute is an intriguing document. It establishes for the first time in history an international criminal court in advance of the crimes for which it will be competent. However, the competence or jurisdiction of the ICC is not exclusive. On the contrary, the jurisdiction of the ICC stems from the presumption that states have jurisdiction as well. The Statute therefore contains provisions that deal with the relationship between state jurisdiction and the jurisdiction of the ICC. This is expressed by the principle of *complementarity*. In the following paper, I will demonstrate the interrelation between complementarity and concurrent jurisdiction. I will also analyse the consequences of the system chosen, highlight some difficulties and problems before finally presenting several conclusions and recommendations.

## 2. Complementarity and universal jurisdiction

The ICC Statute does not define complementarity. It mentions “complementary jurisdiction” only twice: in paragraph 10 of the Preamble and in Article 1. From the reference to these two sources in Article 17 ICC Statute, it becomes clear that the interpretation of the complementarity principle forms the key to the admissibility of cases before the ICC.

What is complementarity? This can only be understood if we take note of the fact that it presupposes the existence of a concurring national jurisdiction. As such, we recognise concurrent or multiple jurisdiction on an interstate level with respect to hijacking, drugs offences and other international crimes. However, the Statute has added an additional aspect to it.<sup>1</sup> The ICC Statute calls for positive jurisdictional conflicts by reminding states to prosecute the crimes listed in the Statute and to establish

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1. There is no complementarity without concurrent jurisdiction. However, concurrent jurisdiction does not require the application of the complementarity principle.

jurisdiction.<sup>2</sup> Opinions differ on the question of whether the ICC Statute requires or allows states to expand their territorial jurisdiction extraterritorially or even universally.<sup>3</sup> States have interpreted the Statute on this point in different ways. Some have established universal jurisdiction, others have vested rather limited forms of extraterritorial jurisdiction, for instance by requiring the presence of the accused on its territory. I have been unable to find an obligation for states to establish universal jurisdiction in the ICC Statute. However, it is clear that the ICC Statute does allow for it: states have the discretion to vest any extraterritorial jurisdiction as they may deem fit. The ICC itself does not dispose of an unconditional universal jurisdiction.<sup>4</sup> The result of this is that we may find two different kinds of overlapping or concurring jurisdictions. The first is the *vertical concurrent* jurisdiction, where both the state and the ICC have jurisdiction. The second could be called *horizontal concurrence*, in which two or more states may have jurisdiction.<sup>5</sup>

### *Priority in jurisdiction?*

One of the criticisms of the system of concurrent jurisdiction without the use of any criteria of priority is that it does not necessarily lead to the most appropriate state prosecuting the crime.<sup>6</sup> Complementarity implicitly regards the first state prosecuting or investigating a crime as the most suitable and presumes that the “best state” will automatically start an investigation in order to become the “first state.” In such a case it excludes the ICC as well as the different forms of international cooperation. By doing this, the “best place for the prosecution” is determined by the time factor only. This places a considerable responsibility on the shoulders of the first state. In this sense, the approach of the ICC Statute is somewhat old-fashioned. The co-existence of extradition, mutual legal assistance, transfer

2. The ICC Statute does not oblige states to criminalise.

3. See Netherlands government, Parliamentary Documents II, 2000-2001, 27484 (R1669), nr. 3, at.25. Strijards deducts an obligation to vest the same jurisdiction as the ICC from the complementarity principle itself. See G.A.M. STRIJARDS, EEN PERMANENT STRAFHOF IN NEDERLAND 66-68 (2d ed. 2001).

4. See Articles 11-15 ICC Statute.

5. See also Bert Swart, *Universaliteit*, in IETS BIJZONDERS, LIBER AMICORUM PROF. JHR. MR. M. WLADIMIROFF, 'S-GRAVENHAGE 254-257 (2002).

6. See on priorities and decision making in situations involving positive jurisdictional conflicts, Otto Lagodny, *Empfiehl es sich, eine europäische Gerichtskompetenz für Strafgewaltkonflikte vorzusehen?*, GUTACHTEN IM AUFTRAG DES BUNDESMINISTERIUMS DER JUSTIZ 99-113 (Berlin März 2001).

of proceedings and transfer of judgments allows for the determination of the most appropriate state to prosecute in each individual case. This can be done by safeguarding the interests of the world community with prosecution, the interests of the accused of a fair trial and the interests of victims and witnesses with compensation and prosecution. Therefore, the view of the Statute could be characterised as narcissistic. It is the narrow view that if a state has jurisdiction, then this jurisdiction will be exclusive and other states may only be asked to assist the state having jurisdiction. The ICC Statute does not establish relations between concurring states. It approaches jurisdiction from the perspective of state sovereignty, not from the perspective of fair administration of justice.

It is remarkable that there is no reference to priorities in jurisdictional principles as the Statute acknowledges that there are different jurisdictional principles.<sup>7</sup> In referral cases which are in accordance with Article 13, the ICC Statute could be interpreted in the sense that it gives some rules of priority without clearly indicating what these are. Article 18, paragraph 1 speaks of “those States which, would normally exercise jurisdiction over the crimes concerned.”<sup>8</sup> Which states are meant here? Is it the territorial state, the state whose national is the perpetrator or the victim? Paragraph 2 of the same article gives the impression that it is the state whose national is under investigation or the state in which jurisdiction the suspect finds himself. These references must be regarded as factual, not normative. The ICC will accept any jurisdictional claim, regardless of its jurisdictional principle. The ICC Statute does not provide for any mechanism where states can inform each other of the possible emergence of a jurisdictional conflict as well as a *ne bis* problem.<sup>9</sup> Thus, it does not solve problems resulting from horizontal concurrent jurisdiction. However, it does provide for such a mechanism if the Prosecutor initiates an investigation (Art. 18, par. 1).

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7. See on the hierarchy of jurisdictional principles, MARC HENZELIN, *LE PRINCIPE DE L'UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL* 227-232 (Genève 2000).

8. Some have argued that this means that a state which claims jurisdiction on the basis of universal jurisdiction would not be such a state. See Simon N.M. Young, *Surrendering the accused to the International Criminal Court*, *BRITISH YEARBOOK OF INTERNATIONAL LAW* 325 (2000) at note 32.

9. The ICC Statute did not take into account the resolution of Section IV B.1 of the XVth International Congress of Penal Law: “The Congress does not recommend universal jurisdiction (including regional universal jurisdiction) for new and complex crimes or for any other crime. Insofar as states nonetheless assert such jurisdiction, it should be combined with a compulsory international *ne bis in idem* protection.”

*First task lies with the states*

The ICC Statute gives a preferential right to states that have jurisdiction instead of the ICC. As mentioned before, this could, in theory, result in a situation where several states are literally competing to investigate or prosecute the same offence at the same time. However, one may question whether the concurrent jurisdiction of states is really competitive in the sense that states feel an incentive to initiate any investigations. In the end, states don't actually do much. One may question whether that many states having jurisdiction over the crimes contributes to the actual use of jurisdiction. On evaluation, the Statute offers more to those that want to obstruct prosecution than to those that want to prosecute. Universal jurisdiction has an adverse consequence,<sup>10</sup> which may often result in a so-called "bystander-effect."<sup>11</sup> If many are responsible nobody will feel the individual need to act. By analogy, if somebody is drowning in a pond, hundreds of people may be watching the scene without taking action. If the same incident takes place in the presence of one person, it is very likely that that person will act. Consequently, the record of national prosecutions is disappointing. Virtually no state has formally entrusted a prosecutor or a police unit with the task of prosecuting and investigating war crimes. The few "successful" cases (in the sense that a conviction could be obtained) is as much a result of luck as a systematic approach. However, what is evident regarding persons suspected of having committed war crimes is the application of Article 1 subparagraph f of the Refugee Convention, which leads to deportation and expulsion, but certainly not to prosecution.<sup>12</sup>

The ICC Statute does not facilitate national prosecution. Especially when the crime has been committed abroad, it is likely that the prosecuting state may feel the need for extraterritorial investigations (e.g. hearing of witnesses' on-site investigations) into the crime. Despite the permission under the Statute to apply its substantive law outside its borders, there is no indication at all that the Statute would also allow states to use their penal

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10. Bassiouni observes that it is "doubtful that the small number of divergent national enactments purporting to apply universal jurisdiction are sufficient to satisfy the elements of consistent state practice necessary to constitute customary international law." See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes*, reprinted in POST-CONFLICT JUSTICE 985 (M. Cherif Bassiouni ed., 2002).

11. A. H. Klip, *Strafrechtelijke reactie op ernstige schendingen van mensenrechten in het buitenland*, in C.H. BRANTS ET AL., ER IS MEER 106 (Utrecht 1996).

12. See also A. BEIJER, A. KLIP, M. OOMEN, M. VAN DER SPEK, OPSPORING VAN OORLOGSMISDRIJVEN (Utrecht 2002). It is concluded that most states formally have announced a "no safe haven" policy. In practice, they adhere to a "not in my backyard" policy, see p.63.

enforcement power outside their own territory. If states then have to rely on the cooperation of other states that obviously did not feel the need to prosecute themselves (or might even have jurisdiction themselves and are unable/unwilling to prosecute), the chances for fruitful cooperation are not good.

The question of what may be expected of states is related to the issue of whether the ICC Statute contains an obligation to prosecute. Whatever may be said about the reference to “a duty” in the preamble of the Statute, there is no binding obligation for states to prosecute.<sup>13</sup> If such a duty existed, there would not have been any reason for the establishment of the Court. The Court was created precisely because States do not assume their responsibilities.<sup>14</sup> In the absence of a legally binding duty, we are left with a moral duty only.

The system of complementary jurisdiction does not lead to a situation in which it is abundantly clear who is responsible for the prosecution. However, there are some examples of attempts to provide for a priority of jurisdictional principles. The drafters of the Statute for instance could have looked at the “pecking order” of the use of jurisdiction as expressed in status of forces agreements, such as the NATO-SOFA.<sup>15</sup> However, that treaty limits the number of states that can claim jurisdiction over an offence to two: the sending state and the state on which territory the offence happened (receiving state).<sup>16</sup> It gives the primary state an absolute right to use its primacy. Article VII, paragraph 3 (c) reads: “If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.”<sup>17</sup> The most interesting aspect of this type of treaty is not the overlapping

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13. Some argue that the Statute “presupposes such an obligation” which is formally absent. See Helen Duffy & Jonathan Huston, *Implementation of the ICC Statute: International Obligations and Constitutional Considerations*, in 1 THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 31 (Claus Kreß & Flavia Lattanzi eds., 2000).

14. William A. Schabas, *Follow up to Rome: Preparing for Entry into Force of the Statute of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 204 (Mauro Politi & Giuseppe Nesi eds., 2001).

15. Article VII, paragraph 3.

16. See also EXTRATERRITORIAL CRIMINAL JURISDICTION, EUROPEAN COMMITTEE ON CRIME PROBLEMS, COUNCIL OF EUROPE (Strasbourg 1990).

17. See further SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 160-208 (Leyden 1971).

jurisdiction of several states, but its regulation of positive jurisdictional conflicts.<sup>18</sup> The Treaty nominates an individual responsible state, but the ICC Statute does not do so. One may seriously question whether, in practice, responsibility for *all* leads to responsibility for *no one*.

*Focus on vertical concurrence in the Statute*

The ICC Statute basically deals with the existence of concurrent jurisdiction in one relationship only: the ICC *vis à vis* the states. It does not deal with the consequences of horizontal concurrence and there is no single jurisdiction “states.” However, there are hundreds of individual state jurisdictions. By not dealing with horizontal concurrent jurisdiction, the Statute leaves that matter completely unregulated and in a state of anarchy.<sup>19</sup> By emphasizing that the first task lies with the states, the ICC Statute encourages states to investigate and prosecute independently. This may lead to two extremes: multiple investigations and scattered efforts to prosecute or no initiative at all.<sup>20</sup>

An example: Imagine that the ICC was already in existence when the conflict in Yugoslavia took place. Several citizens of Serb origin in the former Yugoslavia are suspected of having committed war crimes and crimes against humanity in western Bosnia. These cases, which involve camp leaders and temporary mayors, are being investigated by the authorities of Bosnia-Herzegovina because the atrocities took place there. They are also being investigated by the authorities of Croatia as a significant number of the victims were of Croat origin and also by the German authorities, because some of the suspects have fled to Germany and are now there as refugees. Finally the Costa Rican authorities are investigating, because this country applies an unlimited universal

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18. Other SOFA agreements provide for similar regulations. See JOSEPH W. DODD, CRIMINAL JURISDICTION UNDER THE UNITED STATES-PHILIPPINE MILITARY BASES AGREEMENT 108-112 (The Hague 1968).

19. H. VAN DER WILT, HET INTERNATIONAAL STRAFHOF EN DE NEDERLANDSE RECHTSORDE 285 (Rechtsgeleerd Magazijn Themis 2000). See also M. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, 23 HUM. RTS. Q. 951 (2001).

20. Only in Article 19, paragraph 7 are ICC Statute multiple investigations avoided, after which the Prosecutor will suspend investigations. See further John T. Holmes, *The Principle of Complementarity*, in ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE 68 (1999); Albin Eser, *Harmonisierte Universalität nationaler Strafgewalt: ein Desiderat internationaler Komplementarität bei Verfolgung von Völkerrechtsverbrechen*, in FESTSCHRIFT FÜR STEFAN TRECHSEL ZUM 65 GEBURTSTAG 224-226 (Andreas Donatsch et al eds., 2002).

jurisdiction principle, regardless whether it has any ties with the underlying offences. The ICC and its prosecutor will do nothing other than wait and see what develops.<sup>21</sup> All five states take a similar approach. Apart from Germany which has custody over the suspects, the others may investigate either in the hope that they somehow will obtain custody over the accused, or allow for trials in absentia.<sup>22</sup> If these states were to cooperate in their efforts they could jointly collect the evidence, determine the best place for prosecution and obtain the best possible result. If they do not assist each other, none of these states can rely on the assistance of a state or states that could potentially help in the best manner. Therefore, none of these states acting individually will be able to successfully (in the sense of a conviction) bring a case against such an accused whereas a joint effort could. After such unsuccessful efforts, there is also no room for the ICC to do anything, if at least one of the cases in the five countries has resulted in an acquittal (due to lack of evidence).<sup>23</sup>

### 3. Admissibility of cases before the ICC

#### *Impediments to admissibility before the ICC*

One can deduce from the complementarity principle that it contains two impediments to prosecution by the international criminal court. Firstly, there is a temporal element, underlining that the first task of the prosecution lies with the states, not with the ICC. The very first thing the Prosecutor of the ICC should do after a crime has been committed is wait and see what happens.<sup>24</sup> One could also call this a temporal *non-bis-in-idem*. Pending the

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21. Does the Prosecutor have the right to investigate cases that are under investigation by states in order to assist these authorities in the collection of evidence on the basis of Article 93, paragraph 10? Who may cooperate, the Court, the prosecutor or both?

22. Does the ICC Statute presume that only a state that has the custody over the accused will prosecute and that trials in absentia will not be held? If so, it is not realistic in light of the fact that prosecutions in most civil law jurisdictions do not necessarily depend on the presence of the accused.

23. The ICC Statute limits the possibilities of a revision to Article 84 in situations after a trial before the ICC came into existence.

24. States have many legal ways (based on the Statute) to prevent the Court from operating. They can considerably defend their sovereignty. See G. Hafner, *The Status of Third States before the ICC*, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 253 (Mauro Politi & Giuseppe Nesi eds., 2001); NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE (Herwig Roggemann & Petar ?ar?evi? eds., 2002); Claus Kre?, *Vorbemerkungen zu dem Römischen Statut des Internationalen Strafgerichtshofes*, in GRÜTZNER PÖTZ, INTERNATIONALER RECHTSHILFEVERKEHR IN STRAFSACHEN 26 (Heidelberg 2003), at margin number 30.

investigation by the state, the ICC Prosecutor may not bring the case before the ICC.<sup>25</sup> Secondly, it contains a final impediment in the sense that if a state has taken action and the national case has come to an end; the case has also come to an end before the ICC, unless one of the criteria for a second prosecution apply. So in the end, the application of the complementarity principle leads to the establishment of a *non-bis-in-idem*. As such, this is a logical consequence. If the jurisdiction of the ICC and a state is concurrent and thus on equal terms, it does not matter who will exercise this jurisdiction. If then either the ICC or a state deals with the matter, the result must be recognized by the other jurisdiction as well. Only the finding that the state or states are unable or unwilling triggers the role of the ICC. It brings in an element of primacy in the sense that the ICC determines the existence of such a situation and may overrule the relevant state.

### *Investigation or prosecution by a State*

The first decisive criterion is whether “the case is being investigated or prosecuted by a State which has jurisdiction over it.” No indication has been given in the Statute as to the criteria which will determine whether either of these two (investigation or prosecution) applies. Should Part 5 Statute apply *mutatis mutandis* or do national qualifications of “investigation” and “prosecution” prevail?<sup>26</sup> Does it matter whether it is an investigation or a prosecution and if so, where is the dividing line between the two?<sup>27</sup> Does it matter on what jurisdictional grounds a state may have

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25. The term was used in order to give the ICC the possibility to subject states' behaviour to a subjective test. See Sharon A. Williams, *Commentary to Article 17*, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 392 (Otto Triffterer ed., 1999), at margin number 22. Hafner emphasized the importance of paragraphs 2 and 3 saying “that Article 18 gives a State the right to request a delay of the investigations for six months if the prosecutor wants to act either upon referral of a situation by a Party State or *proprio motu*.” Hafner 2002, p.249. It is my opinion that this cannot be read from Article 18.

26. The Rules of Procedure and Evidence contain the ambiguous stage of “initiation of investigations” (Rules 46-50). See further Jürg Lindenmann, *The Rules of Procedure and Evidence on Jurisdiction and admissibility*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW, BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITÄREN VÖLKERRECHT BAND 44 173-189 (Horst Fischer, Claus Krefß, & Sascha Rolf Lüder eds., Berlin 2001); and in the same volume Håkan Friman, *The Rules of Procedure and Evidence in the Investigative Stage*, at 191-217.

27. According to Broomhall, an amnesty granted by a truth commission could qualify as an investigation. See Bruce Broomhall, *The International Criminal Court, A Checklist for National Implementation*, 13 quater NOUVELLES ÉTUDES PÉNALES 144 (1999).

jurisdiction?<sup>28</sup> How does the ICC know that a state is investigating or prosecuting? These are important questions that will certainly arise. Although the ICC will answer these questions, it is already clear that this process will be rather time consuming.

### *Unwilling or unable*

Since these two qualifications are an exception to the rule that the first task lies with the state, it is vital to determine its meaning.<sup>29</sup> The Statute does not make it clear which state is relevant in order to determine whether a state is unwilling or unable.<sup>30</sup> Are all states that theoretically have jurisdiction relevant here?<sup>31</sup> Is it sufficient that one state that has jurisdiction does not undertake any action? It seems logical to understand the Statute in the way that this will encompass situations in which a prosecution or investigation has been conducted, situations where such prosecutions or investigations are pending and situations where nothing happened at all. The complementarity principle applies to all states, regardless of whether they are a party to the ICC or not.<sup>32</sup> The result of this rule will be that for each crime outlined in the Statute, a different picture will emerge of the states that have jurisdiction over the offence and may prosecute. It is also unclear whether this ground should be applied if there is an alternative state, willing and able. Or what happens if the inability can easily be solved by handling over the accused to that state? In my opinion, the ICC ought to look for alternative states here, because in relation to the presence of the accused, it will not be in a better position than individual states. Are other international tribunals or internationalised tribunals in a better position to see whether the ICC may not prosecute? If we take the Statute literally it seems that only states are relevant here. The question is whether that serves a purpose. In this respect, one must also point at an imbalance between Articles 17 and 20. A pending investigation/prosecution before an ad hoc or

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28. Does this mean that we deal here with separate grounds: one on investigation and prosecution and the other on jurisdiction? One could regard this as an academic question; in practice it will lead to a situation that all potential jurisdictions must be examined.

29. Please note that Article 17, paragraph 1 deals with grounds for inadmissibility. If no state investigates at all, none of the circumstances mentioned in paragraph 1 apply and the ICC may admit the case.

30. Art.17, par.1, sub a refers to "a State which has jurisdiction over it."

31. Is the ICC competent to determine whether a state has jurisdiction or not? This can only be done on the basis of national law.

32. See Article 18, par. 1, which states that, "all States Parties, and those States which, would normally exercise jurisdiction over the crimes concerned."

international tribunal does not declare the case inadmissible before the ICC. However, a final decision by such a court does.<sup>33</sup>

### *The unwilling state*

The most important category is that of the unwilling state. How is this determined? Does the absence of prohibitions, defences, general principles and sentences support a finding of unwillingness?<sup>34</sup> If so, it would mean that complementarity would oblige states to criminalise under exactly the same circumstances. I am unable to conclude that the Statute carries such an obligation. Paragraph 2 of Article 17 gives further hints as to what constitutes unwillingness. In order to determine unwillingness in a particular case, the Court shall take into consideration the principles of due process recognized by international law, whether one or more of the three different categories exist.

One of the explanations of the unwilling state is a process designed “for the purpose of shielding from criminal responsibility” (Art. 17, par. 2 sub a and 20, par. 3 sub a). What is most important is the exact evidence which is needed to arrive at such a conclusion? As such, the fact that prosecution takes place on charges of having committed an ordinary crime does not justify the conclusion that the person is shielded. A prosecution for murder may lead to life imprisonment. Alternatively, an undisputable procedure and verdict may be followed by a lenient execution of the sentence.<sup>35</sup> This means that unwillingness may come up years later.

A further category is “unjustifiable delay” (Art. 17, par. 2 sub b). Does this suppose that the relevant state will oppose the admissibility and will this justify unsuccessfully the delay in proceedings? The last category is that the procedures were “not conducted independently or impartially and were conducted in a manner which, in the circumstances was inconsistent with an intent to bring the person concerned to justice” (Art. 17, par. 2 sub c and Art. 20, par. 3 sub b).

It will be rather complicated to apply these provisions because these are all states that were active in their own way regarding international crimes.<sup>36</sup> What is the relationship between the three forms of unwillingness? The

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33. This is stipulated twice. See Articles 20, paragraph 3 and 17, paragraph 1, sub c.

34. Broomhall argues that it could lead to a finding of unwillingness, p.148-149.

35. See the execution of Hitler’s sentence after the coup d’état of 1923. He was sentenced to five years and released after 8 months.

36. The more often the ICC will determine that a state is unwilling or unable and this view is not shared by that state, other states will be less enthusiastic to prosecute.

various elements of this provision each individually qualify for unwillingness to be applied. The reference in the first sentence of paragraph 2 to norms of due process raises the question whether it protects the accused as well. This is strange because the three grounds (exclusive or just examples: it is not clear) are all situations in which the accused's interest would be served by the state continuing its casual efforts. Can a case be admissible if the state has arrested an accused and keeps him on remand without any indication that he will ever be brought to trial? Can Article 17 be applied when an impartial trial is being held which is to the detriment of the accused? That would mean that the ICC Statute would protect against further violations of his rights. Is that also in compliance with the complementarity principle?

*Unwillingness: time passes by...*

How long may a state take to see whether it is genuinely prosecuting? The Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with Article 17 (Art.19, par.7). Paragraph 8 of Article 19 allows for necessary investigative steps to be taken by the Prosecutor on condition that permission by the Court is given.<sup>37</sup> As an example of these kinds of problems or conflicts, we could examine the efforts of Libya in investigating the Lockerbie disaster. Libya did refuse to extradite its citizens and stated that it was investigating the matter. It had nominated an examining magistrate who was unable to find evidence due to a refusal by the United States and the United Kingdom to assist in the collection of evidence. The dispute as to whether Libya was entitled under the Montreal Convention to refuse extradition and to prosecute itself pended before the ICJ for more than ten years.<sup>38</sup> It is a tremendous obstacle that the complementarity principle partly relies on the willingness and abilities of non-party states.<sup>39</sup>

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37. It is unclear from Article 15 what the Prosecutor may do before the Pre-Trial Chamber has authorised the investigation. Before the Prosecutor may present his request, he must collect some material. How much may he do during this preliminary examination?

38. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamhiriya v. United Kingdom and United States). On 10 September 2003, the case was removed from the Court's List at the joint request of the Parties.

39. In this context it is difficult to understand the U.S. position. Even as a non-party it can prevent the ICC from becoming active by prosecuting itself genuinely. *See also* C. STAHN, GUTE NACHBARSCHAFT UM JEDEN PREIS? EINIGE ANMERKUNGEN ZUR ANBINDUNG DER USA AN DAS STATUT DES INTERNATIONALEN STRAFGERICHTSHOFES, 646-647 (ZaÖRV 2000). More

On the other hand, a willing State may be unable, but we only know this after some time has lapsed. In fact, the time it takes to find a state that is unwilling or unable may take longer with an apparently willing state than one which seems unwilling. The ICC Statute distinguishes itself from the ICTY Statute on this point. If the ICC had been in existence when the Tadić case was decided, a different decision would have been taken. In 1994-1995, the defence argued before the ICTY that as long as the German authorities were diligently prosecuting, there was no reason for the ICTY to use its primacy. The ICC Statute now has accepted this argumentation.<sup>40</sup> Does the fact that a state is investigating or prosecuting hinder the prosecutor from collecting evidence as well? What is the prosecutor unable to do? To what extent may he/she collect evidence in order to establish whether a state fulfils its obligations under the Statute or whether a state has dealt with all offences that could be prosecuted? It seems obvious that the Prosecutor may collect information that enables her to verify the intentions of the investigating or prosecuting state. If the Prosecutor finds that more states are prosecuting, he/she should try to coordinate and concentrate the state efforts. A further question is with whom the burden of proof rests. As originally speculated, in the case of a preliminary ruling, the Prosecutor has the burden, while in accordance with Article 19, it is the challenging party who has the burden?<sup>41</sup>

### *Unable*

The second grounds for admission of the case under Article 17, paragraph 1 sub a is that a state is genuinely unable to carry out the investigation or prosecution. Inability is further described in paragraph 3. This amounts to extreme situations in which the infrastructure has completely collapsed. An example of this is Rwanda. After the devastating genocide in 1994, approximately 120, 000 persons were imprisoned. The authorities are willing but unable to prosecute them all and have resorted to

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specifically on the position of third states or non-party states, Gerhard Hafner, *The Status of Third States before the International Criminal Court*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 239 (Mauro Politi & Giuseppe Nesi eds., 2001).

40. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *YALE J. INT'L L.* 436 (1998). In fact, this narrow interpretation of primacy is supported by the Security Council, See Brown, at 431.

41. See Young, at 328.

other procedures.<sup>42</sup> The inability of obtaining the accused or the necessary evidence and testimony must be caused by “a total or substantial collapse or unavailability of its national system.” It means that the simple refusal of a third state not to extradite the accused to the state willing to prosecute is insufficient because it has nothing to do with the infrastructure in the willing state.<sup>43</sup> The fact that a State has not criminalised the crimes of the Statute does not fall into the category of ‘unable.’ However, it would neither qualify as ‘unwilling.’ So what happens if such a state prosecutes a crime under national law? It could be that some states may ratify the ICC Statute because they do not have the means to prosecute crimes themselves. By ratifying, they bring their country under the protection of the ICC.

The other category that renders a state ‘unable’ is “a decision not to prosecute by a state” (Art. 17, par. 1 sub b). This category presumes that there will always be a *decision* from which it is clear that the state will not prosecute and if such a decision was taken, that it will be public. The question is whether that is a realistic view, regarding the confidentiality of attempts to arrest an accused. The Prosecutor with the ICTY, for instance, has held that she does not have to justify her reasons for not prosecuting, neither does she have to publish that she decided not to prosecute. So even if there are decisions not to prosecute, we may not be aware of that. One exception to this was made regarding the NATO air strike against Yugoslavia.<sup>44</sup> It is interesting to see that a national prosecutorial decision has been accepted as an official impediment to further prosecution before the ICC. There is an obvious danger in this. A state that investigates the matter over which it has jurisdiction and subsequently decides not to prosecute due to lack of evidence or on the grounds that the alleged offence is not a crime could thus create grounds for inadmissibility, even when acting in full integrity.

Are other reasons for which a prosecution in one state may no longer take place relevant? One may think of the application of the statute of

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42. See William A. Schabas, *The Rwanda Case: Sometimes It's Impossible*, in POST-CONFLICT JUSTICE 499 (M. Cherif Bassiouni ed., 2002).

43. See further John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE 48 (Roy S. Lee ed., 1999).

44. See *Press Release, Prosecution's Report on the NATO Bombing Campaign, 13 June 2000*, in 5 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2000-2001 11 (André Klip & Göran Sluiter eds., 2003).

limitations,<sup>45</sup> early release or pardon and amnesty. In the context of war crimes, the question is whether reconciliation procedures via truth commissions and similar forms cause an impediment to the ICC. It is an entirely different question when other ways of responses than criminal law have been applied (reconciliation). This is a more existentialistic question, which also attempts to discover whether a process of reconciliation would be relevant in determining whether a state is diligently “prosecuting” the offences committed. Can we, for instance, say that South Africa and Chile dealt with the crimes committed in their country in an appropriate way that would fulfil the requirements of complementarity under the Statute, if that were applicable?<sup>46</sup> The influence of post-conflict situations on the selection of cases/suspects could thus be tremendous. But what if the new accused cooperated in the truth commission on the assurance that no criminal prosecution would ever take place, in other words, they were literally shielded from criminal responsibility

#### *Moment of judging the admissibility*

It is important to emphasize that Article 17 applies before the case has been admitted to the Court. If grounds for inadmissibility surface later, it is Article 19 which should be applied. The ICC Statute does not oblige states to report that they are prosecuting ICC crimes. Article 19 notes that a state “may challenge” on the ground that it is investigating/prosecuting itself. However, there is no obligation for the state to do so. This may raise the question as to whether such grounds should be invoked *proprio motu*. There seems to be an imbalance here. ICC jurisdiction depends on the absence of state activity. However, if an active state does not inform or challenge the admissibility, the ICC may continue and two prosecutions may take place at the same time.

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45. The French Constitutional Council is of the opinion that not respecting amnesty and the application of the statute of limitations would infringe upon national sovereignty. See Conseil Constitutionnel, Décision no.98-408 DC du 22 janvier 1999, *Traité portant Statut de la Cour pénale internationale*.

46. See Afshin Ellian, *Een onderzoek naar de Waarheidsen Verzoeningscommissie van Zuid-Afrika*, Nijmegen (2003); Benjamin N. Schiff, *Do Truth Commissions Promote Accountability or Immunity? The Case of the South African Truth and Reconciliation Commission*, in *POST-CONFLICT JUSTICE* 325 (M. Cherif Bassiouni ed., 2002). In the same volume, see Paul van Zyl, *Unfinished Business: Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, at 745-760.

#### 4. Some concluding remarks on concurrent jurisdiction and complementarity

The consequence of a finding that a state is unwilling or unable does not mean that such a state will stop all efforts to prosecute and investigate. It may lead to parallel investigations or prosecutions. In the case that such a state has power over the accused, it will be able to block the ICC's efforts. This could be especially true in the case of non-party states. The complementarity system also leads to a situation in which the court needs the assistance of those states that in earlier stage were found to be unwilling or unable to carry out the investigation itself. That does not give much hope for good cooperation.<sup>47</sup>

One may question the necessity of having two separate rules: complementarity/admissibility and *non bis in idem*. Article 17 and Article 20, paragraph 3 ICC Statute basically deal with the same issue. There is no ground for their separate existence. Having two separate grounds can only be explained by the successful struggle of states to prevent the ICC from being effective. Thus the interests of states (Art.17) are mixed with those of the accused (Art.20). This results from the fact that the accused of the crimes for which the ICC shall have jurisdiction will be found in the leadership of the state. Cassese said regarding this element: "Complementarity might lead itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence of national authorities."<sup>48</sup>

If prosecution can be activated both at the level of national jurisdictions as well as before the ICC, there is a severe risk that it will lead to division *de facto* of cases of a certain type. The high-profile cases dealing with civil and military commanders who actually planned the crimes and now enjoy immunity, will go to the ICC. The less important cases involving those who did not plan but actually killed, raped and plundered, will be left to the national courts. The ICC's case law would thus not offer guidance for all types of cases. It is an effect already in evidence at the ICTY. Only the cases involving the most responsible are undertaken by the ICTY itself; the other cases are referred back to national jurisdictions.

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47. See Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE ICC 138 (Herman von Hebel et al eds., 1999).

48. See Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, EJIL 159 (1999).

The Prosecutors of the ICTY and ICTR are required to be selective as to what cases are brought before the Tribunals. They should select the “most important” cases.<sup>49</sup> What then will be the influence of the UN Security Council?<sup>50</sup> The Prosecutor of the ICC will hardly be able to follow any policy and Arsanjani mentions that this issue was evaded at the Rome Conference. However, Article 53 allows the Prosecutor not to continue with an investigation if it did not serve the interests of justice.<sup>51</sup> It is unlikely then that Tadić and Erdemović, if brought before the ICTY today, would be prosecuted in The Hague. Indeed, none of the current cases will be able to give any guidance to national courts on the issue of the defence of duress as, for example, handled in Erdemović.<sup>52</sup> In addition, one may question whether the Appeals Chamber would take the same view in a subsequent case. However, it is unlikely that the ICTY or the ICC will have the opportunity to do this.

## 5. National prosecutions and immunity

The purpose of prosecuting international crimes is to bring those most responsible for the atrocities to justice. As established earlier, it is likely that in many cases accused will play, or have played, an important role in the State. Therefore, one of the problems that will certainly arise is the influence of immunities under international law on initiatives at a national level. I am aware that immunities *vis-à-vis* national prosecutions is a substantial topic; thus, my ambitions here are more modest and are only to demonstrate the interrelatedness of immunity law with complementarity and concurrent jurisdiction.

With its decision of 14 February 2002 in the Congo-Belgium case, the International Court of Justice has not encouraged, to put it euphemistically, national authorities to become active in this respect.<sup>53</sup> Regarding the ICC, the question is whether complementarity is only relevant for prosecution and

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49. See M. Bergsmo, C. Cissé, & C. Staker in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 135 (L. Arbour, A. Eser, K. Ambos & A. Sanders eds. 2000).

50. See ICTY Press Release 696E of 1 October 2002, following a Statement by the President of the Security Council to concentrate on the prosecution of leaders rather than on minor actors (S/prst/2002/21, 23 July 2002), the ICTY judges amended the RPE ICTY in order to refer cases back to national courts. The Prosecutor subsequently withdrew some indictments.

51. See Arsanjani, at 75-76.

52. See ICTY, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A.Ch., 7 October 1997, Klip/Sluiter ALC-I-537.

53. ICJ, Judgment 14 February 2002, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium). On 9 December 2002, the Congo brought before the ICJ a dispute between itself and France regarding proceedings for crimes against humanity

jurisdiction or also for related issues such as immunities. Does complementarity for instance mean that a state may only prosecute under the same rules as the ICC? Could it thus abolish immunity?<sup>54</sup> Or would immunity make the state unwilling or unable to prosecute and subsequently trigger the ICC's competence? This is a question where the effect of complementarity on concurrent jurisdiction is measured. Are states really concurring where the most important accused are concerned? Or should we conclude that the ICC has exclusive jurisdiction in cases that concern heads of states and others who enjoy immunity. I will deal with immunity because it is likely that states will follow the Judgement of the International Court of Justice.

### *Immunities and international crimes*

The question of immunities can basically be approached in two ways. One could be characterised as an approach based on international law, the other based on substantive international criminal law. In its decision in the case of Congo versus Belgium, the International Court of Justice limited itself to the first approach and negated the second.<sup>55</sup> It concentrated on the obligations that derive from the recognition of immunities without taking into consideration what obligations international law imposes in relation to the adjudication of international crimes. It is astonishing that it does not even refer to its own decisions in the Barcelona Traction case and the Genocide case.<sup>56</sup> Would it not have been more appropriate to refer to the guidelines in these decisions to make it clear once and for all what a state

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and torture committed, *inter alia*, against the Congolese Minister for Interior, Mr. Pierre Oba, in connection with the issuing of a warrant for the witness hearing of the President of the Republic of the Congo, Mr. Denis Sassou Nguesso.

54. The question relates to what must be deduced as obligations deriving from the complementarity principle. It is relevant for all aspects, for instance, whether defences applicable under the Statute should be implemented into national law. Duffy and Huston seem to argue that states may be wise to alter applicable defences to those recognised in the Statute in order "to safeguard against questions being raised as to whether domestic proceedings were genuine." See Duffy & Huston, at 33.

55. See par. 59 where the court holds that immunities "remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions." However that does not explain why a specific rule (prosecution for a limited number of international crimes) would not prevail over a general rule (no prosecution of immunity holders). Ad hoc Judge Van den Wyngaert criticises this, see her Dissenting Opinion, paragraph. 28.

56. ICJ, Judgement 5 February 1970, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Reports 1970, p. 4, par. 34 and 91. See also International Court of Justice, 11 July 1996, Case Concerning Application of the Convention

may do when investigating international crimes on the territory of another state?

From a perspective of substantive criminal law, one must ask whether there is still room for immunities when the offence was deliberately formulated in such a way that it covers those who are in positions of responsibility.<sup>57</sup> For instance, with the crime against humanity, a certain “policy” plays a role. In other words, the description of the crime is tailored to the role of the accused in a state policy. The crime of torture was introduced to cover state officials and has been interpreted by the ICTY in the *Furundžija* case as allowing prosecution despite the fact that a national legal provision would prevent prosecution.<sup>58</sup> War crimes vest a specific responsibility for commanders and others in command. Thus, one can conclude that it was meant to criminalize the behaviour of these persons regardless of their position. As Lord Brown-Wilkinson said in the *Pinochet* case before the House of Lords, “Yet, if the former head of State has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.”<sup>59</sup>

Contrary to the tendency in international criminal law that individualises perpetrators of international crimes and regards the offence separately from their relationship with the state, the International Court of Justice returns to

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on the Prevention and Punishment of the Crime of Genocide, paragraph 31: “The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”

57. See Joint Separate Opinion Judges Higgins, Kooijmans and Buergenthal, par. 74-75. See Manfred Mohr, *Strafrechtliche Verantwortlichkeit und Staatenverantwortlichkeit für internationale Verbrechen – Wechselwirkung statt Konfusion*, in STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN 411 (Gerd Hankel & Gerhard Stuby eds., 1995); R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte *Pinochet Ugarte* (No. 3), 24 March 1999, 2 WLR 827 (H.L. (E) 1999). Lord Millet held in this case: “The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offences can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.”; Further Lord Phillips of Worth Matravers: “Once extra-territorial jurisdiction is established it makes no sense to exclude from it acts done in an official capacity.”

58. ICTY, Judgment, *Prosecutor v. Furundžija*, 10 December 1998, Case No. IT-95-17/1-T, T.Ch. II, in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999 685 (André Klip & Göran Sluiter eds.) at par. 155.

59. House of Lords, *Pinochet* case, see *supra* note 57.

(or stays with) a traditional and formal international legal point of view that stresses sovereignty.<sup>60</sup> Despite the fact that accused held high positions in the state, they stand trial *individually* before the ICTY and ICTR, and not the countries under their rule. By emphasizing Yerodia's function in the service of the state, the Court fails to recognise that international criminal law calls upon *all* individuals to respect life. The act-of-state doctrine, traditionally protecting incumbent heads of state and others within their official capacity is no longer generally recognised in international criminal law.<sup>61</sup> In this context, it is irrelevant whether adjudication takes place before an international or a national court, but that it concerns *international* crimes.<sup>62</sup> For this reason, these treaties have limited the recognition of extraterritorial jurisdiction to a limited number of international crimes.

It is regrettable that the International Court of Justice did not see any relevance in distinguishing for what crimes immunities may be applicable, nor did it look at the question of temporary protection of immunities. In the eyes of the Court, it does not make a difference whether it concerns a violation of traffic regulations or a crime against humanity. To treat all crimes in the same manner, regardless of their status as international or national crime, does not correspond to their differences.<sup>63</sup> The Court was unable to deduce from state practice or the statutes of the international criminal tribunals that "there exists under customary international law any form of exception to the rule according to immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."<sup>64</sup> The abolition of immunities as they appear in the statutes of the

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60. See especially the Separate Opinion of President Guillaume, who seems to argue that, in any case, criminal law is national law that may not be extended extraterritorially.

61. See Mohr, *supra* note 57, at 401-428. He mentions a "Doppelnatur von Handlungen und Handlungsträgern" (double nature of acts of officials, p. 405). See also Lord Millet in the Pinochet case: "The idea that individuals also commit crimes recognised as such by international law may be held internationally accountable for their actions is now an accepted doctrine of international law."

62. On the other hand, there is a French decision from the Cour de Cassation, 13 March 2001, involving criminal proceedings against Gaddafi: "quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice." In Germany: Oberlandesgericht Köln, Beschl. v. 16.5.2000 - 2Zs 1330/99, NSTZ 2000, 667. In this case, the Court of Appeal held that a prosecution of President Saddam Hussein of Iraq was inadmissible, as long as he held office.

63. In their Joint Separate Opinion (paragraph 60), Judges Higgins, Kooijmans and Buergenthal hold that universal jurisdiction is allowed only for international crimes.

64. See paragraph 58. International law makes a difference between "inviolability" and "immunity." The first prohibits searches on the body, premises and property. "Immunity"

international criminal tribunals only have regard to these tribunals (but they also bind non-party states). In her Dissenting Opinion, *Ad hoc* Judge van den Wyngaert refers to the absence of any state practice regarding the prosecution of ministers of foreign affairs. In her view, this cannot be considered as evidence that they enjoy these immunities.<sup>65</sup> The Permanent Court of Justice held in the *Lotus* case in 1927 that, “for only if such abstention were based on their being consensus of having a duty to abstain would it be possible to speak of an international custom.”

The International Court of Justice holds that, “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”<sup>66</sup> The ICJ does not differentiate between whether the person enjoying immunity is in the state prosecuting or not. Another difference with its predecessor is striking. Where the Permanent Court of Justice in the *Lotus* case in 1927 sharply distinguished between the extraterritorial application of substantive norms and the extraterritorial application of investigation and procedural acts,<sup>67</sup> the International Court of Justice fails to pay attention to this issue at all. In *Lotus*, it was held that the extraterritorial application of the jurisdiction to prescribe is, in principle, acceptable,<sup>68</sup> extraterritorial investigations and arrests are, in principle, prohibited.<sup>69</sup> The International Court of Justice does not even refer to this famous case.<sup>70</sup> This would have been more than appropriate since the crime in the *Lotus* case was an ordinary crime, whereas the crime allegedly committed by Yerodia was an international

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protects against procedures. See A. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 3 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1994), at 51-54 and 105-110.

65. Dissenting Opinion of *Ad hoc* Judge Van den Wyngaert, paragraph 13. However, Lord Goff of Chieveley states that, “a trap would be created for the unwary, if state immunity could be waived in a treaty *sub silentio*.”

66. See paragraph 51.

67. The application of the penal law requires a “permissive rule”; though “it does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.” The Case of S.S. *Lotus*, Judgment 7 September 1927, PCIJ Series A, No.10.

68. See G.A.M. STRIJARDS, INTERNATIONAAL STRAFRECHT, STRAFMACHTSRECHT, ALGEMEEN DEEL 142-166 (Arnhem 1984). See also the same author Een permanent strafhof in Nederland, Den Haag 2001, at 172-174.

69. See also the Dissenting Opinion of Van den Wyngaert, paragraph 49.

70. See HENZELIN *supra* note 7, at 138-148.

crime. If extraterritorial jurisdiction is already allowed for ordinary crimes this would be even more so for international crimes. Alternatively, could we explain the absence of any reference to this case by its minimal majority: casting vote of the president?

The Congo-Belgium case raises the question of what states still may do. What is a violation of an immunity? This question is still unanswered. In paragraph 70, the Court states regarding the arrest warrant that “the mere issue violated the immunity which Mr. Yerodia enjoyed.” Yerodia was never arrested, interrogated or stopped, although he did refrain from travelling abroad, fearing that he might be arrested.<sup>71</sup> But is this something for which Belgium is accountable? In the eyes of the Court it is, despite the fact that an eventual arrest is the responsibility of a third state. This raises the question of whether investigations that take place without any involvement of or hinder the accused are allowed.<sup>72</sup> This is even more so because the Court rejects the Belgian argument that the arrest warrant as such can not lead to an arrest but needs the assistance of a third state.<sup>73</sup> On the other hand, the Court emphasises in paragraph 60, “Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.” This argument is the result of an inconsistent use of the various aspects of jurisdiction. The Court thus mixes extraterritorial jurisdiction, extraterritorial investigations and individual criminal responsibility.<sup>74</sup>

Further uncertainties exist regarding those who may claim immunity. These result from the condemnation of Belgium, despite the fact that Yerodia was no longer Foreign Affairs Minister at the time the warrant was issued. Is the protection functional or is a former official still entitled to its protection? The way the Court recognises an absolute immunity for heads of state, ministers of foreign affairs and diplomats has led some to fear that even more may enjoy its protection. The Court did not discuss other relevant

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71. For this reason, Judge Oda regarded the whole matter as premature. He voted against all parts of the dictum. See the Dissenting Opinion of Judge Oda.

72. See also Dissenting Opinion of *ad hoc* Judge van den Wyngaert, paragraph 75, who asks what the Court means when it refers to “inviolability” as distinguished from “immunity.”

73. See paragraph 71.

74. See Albin Eser, *Harmonisierte Universalität nationaler Straf Gewalt: ein Desiderat internationaler Komplementarität bei Verfolgung von Völkerrechtsverbrechen*, in Festschrift für Stefan Trechsel zum 65. Geburtstag 226-228 (Andreas Donatsch et al eds., 2002).

cases, such as the Senegalese criminal proceedings against former Chad President Habré.<sup>75</sup>

It is unlikely that governments which are responsible for crimes will initiate prosecution.<sup>76</sup> And if they do, one may seriously doubt whether the proceedings are fair. This immediately places the first responsibility upon a foreign state. A disadvantage here is that this results in judging the foreign government and raises the issue of immunities. In this sense, it can be predicted that there will only be a selected number of national prosecutions of international crimes. If they take place, it is more likely that leaders of small and powerless countries will be prosecuted than those of the major powers in the world. Not every state will be willing to sacrifice its international relations for that purpose. However, it must be emphasised that the international crimes are committed by those who hold high positions in the state.<sup>77</sup> Such accused will very often claim immunities. If such immunities would be an impediment for prosecution, one may question what is then left to prosecute and what would be the meaning of concurrent jurisdiction? On the other hand, one cannot exclude that states will prosecute in a *male fide* way. Universal jurisdiction as such is neutral as to the state that exercises it. This calls for reluctance when prosecuting crimes committed elsewhere.<sup>78</sup>

Article 98 of the Statute for the International Criminal Court leaves immunities based on international law unaffected, despite the firm words of Article 27 of the ICC Statute. This will hamper any initiative for prosecution.<sup>79</sup> How to get out of this awkward position? Of course the relevant state may be requested to waive the immunity, but I believe this

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75. See on this case Reed Brody & Helen Duffy, *Prosecuting Torture Universally: Hissène Habré, Africa's Pinochet?*, in *International and National Prosecution of Crimes Under International Law* 817-842 (Horst Fischer, Claus Krefß & Sascha Rolf Lüder eds., 2001); Reed Brody, *The Prosecution of Hissène Habré - An "African Pinochet,"* 35 *NEW ENG. L. REV.* 321 (2001).

76. See Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 *NEW ENG. L. REV.* 337 (2001).

77. See the application for criminal proceedings against the President of Sri Lanka on an official visit to the Netherlands. This was rejected because of lack of evidence, before the question of immunity could be examined. See G.A.M. STRIJARDS, *EEN PERMANENT STRAFHOF IN NEDERLAND* 160 (2001).

78. See Dissenting Opinion, paragraph 56.

79. See Commentary ON THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT, (Otto Triffterer ed., 1999), margin number 24 at Article 27: "However, a failure to proceed successfully according to article 98 may in *practice* and contrary to the wording of article 27 "bar the Court from exercising its jurisdiction over such a person," if the court cannot secure the attendance of the person in any other way because the Rome Statute does not provide a trial *in absentia*."

unlikely to happen.<sup>80</sup> In my opinion, the greatest possible danger for unilateral prosecutions is the subjective character of its interference - a state will always feel offended by such a prosecution. This can be alleviated by creating a system by which the ICC would give leave for prosecution of incumbents.<sup>81</sup> If the jurisdiction of the ICC and states complement each other, the ICC could thus remove impediments to the exercise of jurisdiction by states.<sup>82</sup> On the basis of Articles 17 and 19 ICC, the state prosecuting could challenge the same case before the ICC.<sup>83</sup> Thus, we could have a system in which the ICC would directly give leave to such a prosecution because it will then determine that issues of immunity do not lead to inability of the state as meant by Article 17. However, there is a problem in that a state cannot influence the kinds of cases which will be brought before the ICC. This means that some consultations must take place between the Prosecutor and the relevant state.

## 6. *Non bis in idem*

When we discussed concurrent jurisdiction, we dealt with the more theoretical aspects of the existence of overlapping jurisdictions. We tried to identify the way the complementarity principle works. Similar issues may arise as a consequence of the use by one authority of existing jurisdiction through investigating, prosecuting, convicting or executing for the exercise of jurisdiction by other authorities.<sup>84</sup> Questions relating to *non-bis-in-idem* are inherent to overlapping jurisdiction.<sup>85</sup>

80. See further Bruce Broomhall, *The Future of Immunities in International Criminal Law*, in POST-CONFLICT JUSTICE 1007 (M. Cherif Bassiouni ed., 2002).

81. At the same time the ICC will then determine whether the person is entitled to an immunity.

82. See Broomhall, *supra* note 80, at 1021.

83. In addition, there is no rule under international law that binds the ICC to decisions of the ICJ.

84. J.A.W. Lensing, *Ne bis in idem in strafzaken, Een rechtsvergelijkende en internationaal strafrechtelijke oriëntatie*, PREADVIES NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING, NO. 60 91-211 (Deventer 2000).

85. Gradually they come up more and more in an interstate context. See Christine van den Wyngaert, *General Report, The transformations of International Criminal Law in Response to the Challenge of Organized Crime*, 70 REVUE INTERNATIONALE DE DROIT PÉNAL 173 (1999). In German literature, in particular, various articles have been written on the issue of recognition of foreign *res judicata*. See HANS-HEINER KÜHNE, *NE BIS IN IDEM IN DEN SCHENGENER VERTRAGSSTAATEN* 876-880 (1998); HENNING RADTKE & DIRK BUSCH, *TRANSNATIONALER STRAFKLAGEVERBRAUCH IN DEN SOGENANNTEN SCHENGEN-STAATEN?* EuGRZ 421-31 (2000); LAGODNY & VAN DEN WYNGAERT, *STRAFKLAGEVERBRAUCH DURCH BELGISCHE TRANSACTIE NSIZ* 149-154 (1998). See for the Netherlands Klip, *Ne bis in idem en Bouterse*, NJB 2069-2075 (1998); J.M. SJÖCRONA & A.M.M. ORIE, *INTERNATIONAAL STRAFRECHT VANUIT NEDERLANDS PERSPECTIEF* 420-430 (Deventer 2002).

It is important here to note that the concept of *non-bis-in-idem* in civil law countries and double jeopardy in common law countries differs tremendously.<sup>86</sup> Whereas common law countries in principle provide for one trial on the facts, civil law countries may regard an appeal on the facts as included in the concept “one trial”. In addition, many will provide for an appeal by the prosecutor against an acquittal. These differences of opinion as to the extent of the protection of the principle or rule are important in the understanding of the principle as it emerges from national law or as it appears in Statutes of international criminal tribunals. By the phrase “except as provided in this Statute,” Article 20 ICC excludes the application of the rule on subsequent proceedings in one case, such as appeal or revision (Articles 81-85 ICC Statute).<sup>87</sup>

Article 17, paragraph 1, sub b ICC Statute extends the recognition of the *non bis in idem* principle as expressed in Article 20: “The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.” This shows that impediments may also result from the exercise of jurisdiction. However, the fact that the Statute uses five different terms for “idem” does not offer the best opportunity for a reasonable interpretation of Article 20. What is “the case” in Article 17, paragraph 1 sub a? It must be distinguished from “the crime” in Article 20 and “the situation” in Article 13 and 14, as well as “the conduct” in Article 17, paragraph 1 sub c. Article 20, paragraph 1, further mentions “conduct which formed the basis of crimes for which the person has been considered or acquitted by the Court.”

It may suffice here to briefly sketch the relationship between *non bis in idem* and complementarity. It demonstrates that, in applying the principle of complementarity, the ICC will also have to interpret the *non bis in idem* principle. By doing this, it will further clarify the relationship between the ICC and the states.

## 7. Conclusions and Recommendations

On various occasions, we found that the entity first assuming jurisdiction may not be in the best position to do this. That brings us to a situation in which it is necessary to have consultations aimed at determining the best place for the prosecution as well as providing the most appropriate

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86. See The Law Commission, *Double Jeopardy*, Consultation Paper No.156, 1999 and Lensing, o.c.

87. See Tallgren at 426, margin number 12.

assistance to each other.<sup>88</sup> The ICC Statute left this matter completely unregulated. However, that does not mean that states and the ICC should refrain from dealing with the consequences of both horizontal and vertical concurrent jurisdiction.<sup>89</sup> I consider it as inherent to complementarity that, on one hand, the ICC may be complementary to state jurisdictions, where as in other circumstances, the states may function complementary to the jurisdiction of the ICC. International law offers some experience in regulating positive conflicts of jurisdiction in its use of transfer of proceedings. This mechanism ensures that crimes are not left unprosecuted whilst it respects the interest of the states involved, as well as those of victims and the accused. The ICC must take the initiative and assume a coordinating role in this respect. In the end, it is not that important in what forum an accused stands trial, but the fact that he *will* stand trial.

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88. See on the necessity of avoiding conflicts of competence Albin Eser, *Harmonisierte Universalität nationaler Strafverfolgung: ein Desiderat internationaler Komplementarität bei Verfolgung von Völkerrechtsverbrechen*, in Festschrift für Stefan Trechsel zum 65. Geburtstag 236 (Andreas Donatsch et al eds. 2002).

89. See with a slightly different emphasis: Henzelin: “le principe de l’universalité déléguée met l’accent sur les tâches de coordination et de coopération du droit international et préserve au mieux la souveraineté des Etats.” HENZELIN, *supra* note 7, at 449.



**International Criminal Law: Quo Vadis?  
30 November 2002**

**Panel 3 - International Crimes: Criteria for their  
identification and classification, and future developments**

*Chair:* H.E. Pierre Joxe (France)  
Member, Constitutional Council, France; Former Minister of  
Defense; Former Minister of Interior; Former Member of  
Parliament

*Presenter:* H.E. Sharon Williams (Canada)  
Judge *Ad Litem*, International Criminal Tribunal for the  
former-Yugoslavia; Professor of International Criminal  
Law, Osgoode Hall Law School

*Panel of Experts:*

Professor Bert Swart (The Netherlands), Judge, Court of Appeals  
(Amsterdam); Professor of Criminal Law, University of Amsterdam Faculty  
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**Panel Questions:**

1. What are the criteria for international criminalization?
2. Should there be different categories such as: international crimes, or *jus cogens* crimes, transnational crimes and international delicts?
3. Should some international crimes be redefined (i.e. aggression/slavery)?
4. Should there be a new comprehensive convention on terrorism?
5. Should international harmful conduct not yet criminalized be the subject of specialized articles in a criminal law convention, i.e., a) cyber-crime, b) economic crimes, c) crimes against the environment, d) trafficking of women and children for sexual exploitation, and e) the use of weapons of mass destruction, whether by state or non-state actors?
6. Is there a need for a comprehensive convention on the law and customs of armed conflicts?
7. What are the prospects of international criminal law codification, i.e. topical, comprehensive and otherwise?

# International Crimes: Present Situation and Future Developments

Bert Swart\*

## Sources of incrimination

Until recently, the criminal nature of the acts that we usually call international crimes derived from international treaties or from customary international law.<sup>1</sup> Numerous conventions carry an obligation for the contracting parties to criminalize specific conduct in their domestic laws; their number has increased rapidly in the past decades and will continue to increase in the future. The criminal nature of a number of other acts is determined by customary international law, either because this part of international law declares the acts to constitute crimes under international law (aggression, war crimes, genocide, crimes against humanity) or because it obliges or authorizes all states to criminalize them in their domestic laws (slavery, piracy). Some international crimes have their origin in treaties as well as in customary law.

In September 2001, the Security Council of the United Nations effected a change in that situation. Stating that any individual act of international terrorism constitutes a threat to international peace and security it has imposed an obligation on all States to criminalize terrorist acts as well as the financing of these acts.<sup>2</sup> In its Resolution 1373 (2001), the Council seems to have acted as a legislator. The step taken in the Resolution culminates a development in which the Security Council has become increasingly involved in problems of international criminal law. In the recent past, for instance, the Council has, on a number of occasions, obliged States to surrender individual persons to other States for the purpose of their

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1. Leaving aside the possibility that some international organizations may oblige member states to criminalize certain acts, as is, for instance, the case for the European Union. Under the Treaty on European Union, however, the adoption of so-called framework decisions still requires unanimity.

2. S.C. Resolution 1373 (2001) of 28 September 2001. *See also* S.C. Resolution 1390 (2002).

prosecution,<sup>3</sup> repeatedly stressed that violators of international humanitarian law must be brought to justice and, in some instances, decided to establish international criminal tribunals for that purpose<sup>4</sup> or to lend its support to the establishment of internationalized criminal tribunals.<sup>5</sup> It remains to be awaited whether the unprecedented step taken by the Council in September 2001 will remain an isolated event, to be explained by the need to take emergency measures absent an effective system of international treaties on international terrorism, or will be followed by other resolutions carrying the obligation for States to criminalize still other acts. However, the second possibility cannot be ruled out completely.

### **Categories of international crimes**

For the purpose of this paper “international crimes” may be defined as all forms of conduct the criminal nature of which has its origin in international law, whether directly or through mediation of national law. In this definition, a given conduct may be considered an international crime if States have assumed an obligation to criminalize that conduct in conventions that they have concluded between them and that have entered into force, or if customary law (or any other source of international law, such as Security Council resolutions) authorizes or obliges them to do the same. Conduct may also be considered an international crime if individual criminal responsibility of the actor directly derives from international law without there being a need to criminalize the conduct in national law.

This definition of international crimes is wide. It does, for instance, include conduct that has been proscribed in conventions drafted by regional international organizations or conventions that are, for some other reason, not open for ratification to all States. It also includes conduct proscribed in a convention that can be ratified by all States regardless of the actual number of ratifications, provided that the convention has entered into force. On the other hand, it does exclude human conduct that is not considered to be criminal in any international convention or by virtue of other sources of international law. It also excludes conduct that has been declared illegal without having been declared criminal.

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3. S.C. Resolutions 748 (1992) and 1192 (1998) (Libya); 1044 (1966), 1054 (1996) and 1070 (1996) (Sudan); 1214 (1998), 1267 (1999) and 1333 (2000) (Afghanistan).

4. S.C. Resolutions 808 (1993) (former Yugoslavia); 955 (1994) (Rwanda).

5. S.C. Resolutions 1272 (1999) (East Timor); 1315 (2000) (Sierra Leone).

International crimes are, for varying purposes, often divided into different categories. The purpose of classification may, for instance, be to clarify and elucidate differences in character between various international crimes or to uncover differences in legal consequences. Or it may, for instance, serve the legal-political goal of finding general criteria for making forms of human conduct international crimes, or for deciding whether international criminal courts should have jurisdiction over them. Whatever the purpose of a given classification, it may be useful to briefly review the most important classifications that have been accepted or proposed in the recent past.

Perhaps the most frequently made distinction is the one between crimes against the peace and security of mankind on the one hand and other international crimes on the other. Crimes against the peace and security of mankind threaten basic values and interests of the community of nations. Their unique feature is that the characterization of certain types of conduct as criminal does not depend on national law but has its direct and immediate basis in international law. Here, individual criminal responsibility is solely determined by international law. This is why, since 1946, they are usually also referred to as “crimes under international law.” Secondly, there are international crimes which harm the interests of individual States or groups of States and with regard to which an agreement has been reached that the conduct to be prevented and repressed will be made a criminal offence under the domestic laws of the States that are parties to the agreement. That agreement primarily serves the purpose of facilitating prevention and repression at the national level through mutual cooperation in criminal matters. Here, the characterization of a type of conduct as criminal depends on national law. Often these crimes are referred to as “transnational crimes,” “conventional crimes,” or “crimes under treaty.”

It is obvious that both the 1991 and the 1996 International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind are based on this distinction. Both drafts do not intend to cover international crimes other than crimes against the peace and security of mankind. The distinction can also be found in a resolution adopted by members of the AIDP in 1989.<sup>6</sup> In the literature, the most important proponent of this distinction is Triffterer, who has, in many ways, emphasized the importance of the distinction between the criminal law of

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6. 61 REVUE INTERNATIONALE DE DROIT PÉNAL 131-134 (1990).

the international community as such on the one hand and the criminal law of States on the other.<sup>7</sup>

A fundamentally different approach has been adopted by Bassiouni in his various books and other publications on international criminal law.<sup>8</sup> As a theoretician of international criminal law, Bassiouni has always refused to make a sharp distinction between crimes under general international law and other international crimes, and has showed himself to be an advocate of a unitary approach. After summarizing his earlier research into the criminalization of twenty-five different international crimes he recently wrote: “Presumably, all international crimes are of equal standing and dignity, irrespective of the international interests they seek to protect and the international harm they seek to avert.”<sup>9</sup> There is, therefore, no compelling theoretical reason to make distinctions between international crimes according to their legal character, nor to attach much weight to the number of States that have become parties to multilateral conventions carrying the obligation to criminalize certain conduct. If it may, nevertheless, be useful to establish a certain hierarchy between different categories of international crimes, that hierarchy could serve a number of limited purposes, for instance with regard to penalties.<sup>10</sup> On the basis of a set of parameters for assessing their relative seriousness, Bassiouni, therefore, divides the twenty-five international crimes into three groups: international crimes (most of which are part of *jus cogens*), international delicts, and international infractions.<sup>11</sup> As is already apparent to some extent from the quotation above, Bassiouni’s efforts to systematize and categorize

7. See OTTO TRIFFTERER, *DOGMATISCHE UNTERSUCHUNGEN ZUR ENTWICKLUNG DES MATERIELLEN VÖLKERSTRAFRECHTS SEIT NÜRNBERG* (1965); *Efforts to Recognize and Codify International Crimes, General Report to the 14th International Congress of the AIDP*, 61 *REVUE INTERNATIONALE DE DROIT PÉNAL* 31 (1990). See also Victoria Abellán Honrubia, *La responsabilité internationale de l'individu*, 280 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL* 139 (1999).

8. See especially M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987); M. Cherif Bassiouni, *The Sources and Content of an International Criminal Law: A Theoretical Framework*, in 1 *International Criminal Law* 3 (M. Cherif Bassiouni ed., 2d ed. 1999).

9. See Bassiouni, *Sources and Content*, *supra* note 8, at 96. As Bassiouni is the first to admit, some of the crimes of his list have not (yet) been recognized as international crimes in international instruments, or only in specific situations. This is true for unlawful human experimentation, destruction and/or theft of national treasures, and unlawful acts against certain internationally protected elements of the environment. The 2000 United Nations Convention against Transnational Organized Crime and its protocols will perhaps inspire him to include new crimes in his list.

10. In his *DRAFT INTERNATIONAL CODE*, the hierarchy proposed also determined the forms of state responsibility; see BASSIOUNI, *supra* note 8, at 57-58.

11. Bassiouni, *Sources and Content*, *supra* note 8, at 96-100.

international crimes and to develop criteria for their criminalization is strongly influenced by his belief that all international crimes, whatever their character or seriousness, are ultimately harmful to the society of States or, even more importantly, the international community of mankind.

A third classification is that of the International Law Commission's 1994 Report outlining the structure of a permanent international criminal court<sup>12</sup> and that of the 1998 Rome Statute of the International Criminal Court. In its report, the International Law Commission made a distinction between "(the most) serious crimes of concern to the international community as a whole" on the one hand and other international crimes on the other.<sup>13</sup> The same expression can be found in the Preamble as well as in Articles 2 and 5 of the Rome Statute. The expression covers the traditional crimes against the peace and security of mankind as well as a number of other international crimes. In both texts, the need for a co-ordinate expression is explained by the fact that one did not wish to limit *a priori* the jurisdiction of a permanent international criminal court to the traditional international core crimes. Both the ILC Draft and the Rome Statute, therefore, purposely avoid the expression 'crimes under international law.' In the approach of the International Law Commission, crimes of concern to the international community as a whole includes conduct which States are obliged to criminalize in conventions which are open for signature by all States and which have been "widely ratified." The Annex to the ILC's Report sums up nine different categories of crimes (included in fourteen different conventions), all of which, with the exception of two, have regard to international crimes other than crimes against the peace and security of mankind. As far as the Rome Statute is concerned, it only includes the traditional core crimes. However, Article 123 of the Statute leaves open the possibility that the Statute will be amended in order to expand the list of crimes.

It is clear from the ILC Report and, to a lesser extent, the Rome Statute that, while distinguishing between crimes against the peace and security of mankind and other international crimes of concern to the international community as a whole, they nevertheless place the two categories on the same footing. In this respect, their approach does not differ in principle from that of Bassiouni. However, the ILC Report refuses to accept that all international crimes are *ipso facto* crimes of concern to the international

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12. GAOR A/49/10.

13. Article 53 of the Vienna Convention on the Law of Treaties and former Article 19 of the Draft Articles on State Responsibility may have inspired the ILC to coin this phrase, although it gave it a wider meaning in its proposal.

community as a whole. For the purpose of being included in the statute of an international criminal court, the international convention creating an international crime must be open for signature to all States and have been widely ratified. Here, the universal character of a convention and the number of ratifications determines the transformation of a “transnational crime” into a crime of concern to the international community as a whole.

On the basis of the foregoing, it seems to me that, for the purpose of a discussion on the criminalization and codification of international crimes, it may be of some use to distinguish between three categories of crimes: crimes against the peace and security of mankind, other crimes of concern to the international community as a whole, and crimes of concern to (individual) States.

### **Crimes against the peace and security of mankind**

Crimes against the peace and security of mankind threaten the very fundamentals of the international society. In the archetypical situation of the Second World War these crimes were either committed by state agents or their commission promoted, encouraged, or facilitated by the State. A third traditional characteristic is that the State that can be held responsible for these crimes will, as a rule, not be prepared or care to repress them. The second and third characteristics justify that crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.<sup>14</sup>

Crimes against the peace and security of mankind are crimes under customary international law. Moreover, in the hierarchy of international norms the prohibition against these crimes belongs to the peremptory norms of general international law. It has a *jus cogens* character. One could, therefore, in a metaphorical way, speak of *jus cogens* crimes.<sup>15</sup> In addition, special rules apply to the international responsibility of States for crimes against the peace and security of mankind, as is apparent from Articles 40 and 41 of the International Law Commission’s 2001 Draft Articles on State Responsibility.

A set of legal consequences attach to the fact that a specific conduct constitutes a crime against the peace and security of mankind. Not only is

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14. Article 1 of the 1996 Draft Code of the International Law Commission.

15. Cf. Bassiouni, *Sources and Content*, *supra* note 8, at 38-44. The reverse (every violation of a rule of *jus cogens* creates individual criminal responsibility under international law) is not true.

the criminal character of the conduct solely determined by international law, the same is, to an ever growing extent, also true with regard to general principles of (substantive) criminal law. Here, one may, for instance, think of criteria with regard to the determination of principals and accessories, responsibility of superiors, justifications and excuses, irrelevance of official capacity, statutes of limitation.<sup>16</sup> At the same time, it is increasingly believed that States have an international duty either to extradite or to prosecute persons suspected of having committed crimes against the peace and security of mankind, that they may not refuse cooperation in criminal matters on the ground that the offence is a political one, and that they may apply universal jurisdiction to these crimes with regard to persons found on their territory. Finally, the Security Council's approach to armed attacks and violations of international humanitarian law in the past decade perhaps makes it possible to state that every crime against the peace and security of mankind constitutes a threat to international peace and security, enabling the Council to take action under Chapter VII of the United Nation's Charter, regardless of the actual danger created by the offence.<sup>17</sup> Moreover, this interpretation finds support in its recent resolutions with regard to international terrorism.<sup>18</sup>

It is, of course, well known that the definition of what conduct may constitute a crime against the peace and security of mankind has expanded considerably since Nuremberg and Tokyo. To mention the most important developments only: international humanitarian law now applies in principle to internal armed conflicts as well as to international armed conflicts, the link between war crimes and crimes against humanity has been severed, crimes against humanity now include phenomena that were not known in 1945 (e.g. *apartheid*, enforced disappearances), crimes against the peace and security may also be committed by non-state actors. There seems to have been a constant process of expansion.

The question is whether this process has reached its conceptual and political limits. In my opinion, the starting point for any discussion could be that the concept of crimes against the peace and security is not static but flexible and open-ended. It lends itself to new interpretations that reflect the needs of a constantly evolving international society. Both in 1991 and in

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16. For a thorough study, see KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS, ANSÄTZE EINER DOGMATISIERUNG (2002).

17. For an analysis of the relationship see Honrubia, *supra* note 5, at 296-298.

18. See especially Resolutions 1373 (2001), 1438 (2002) (Bali), 1440 (2002) (Moscow). See also Jurij Daniel Aston, Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Maßnahmen des Sicherheitsrates – Resolution 1373 (2001) im Kontext, 62 ZaöRV (2002) 257.

1996 the International Law Commission recognized this point of view by stating that its two proposals for a Draft Code of Crimes Against the Peace and Security of Mankind did not intend to cover exhaustively all crimes against the peace and security of mankind nor to preclude further developments. Since 1996, however, no substantial progress seems to have been made in this field, all the energy of the main international actors in the field of international criminal law probably having been absorbed by the effort to create a permanent international criminal court. Meanwhile, three avenues for new developments seem to offer themselves here.

The first is related to the seriousness of the conduct to be prohibited. Drawing its inspiration from former Article 19 of the Draft Articles on State Responsibility the 1991 Draft Code aimed at including new international crimes which, in its view, could be put on the same footing with already recognized international crimes in their potential to “affect the very foundations of human society,” in particular with regard to their widespread or systematic nature.<sup>19</sup> This led the International Law Commission to include in its proposal the crimes of threat of aggression, intervention, colonial domination and other forms of alien domination, the recruitment of mercenaries, international terrorism, illicit traffic in narcotic drugs, and willful and severe damage to the environment. The 1991 Draft Code got a cool reception, the main objections being that its provisions creating new offences were too vague and too innovative to be acceptable to States.<sup>20</sup> The 1996 Draft Code was far more cautious in its approach with a view to obtain more support from Governments. The only innovation in this Draft consisted in including in it crimes against United Nations and associated personnel. Six years later, one may again pose the question of whether or not there is sufficient merit in the approach of the 1991 Draft.

The second question concerns the merits of criminalizing conduct which makes the committing of traditional crimes against the peace and security possible. In particular, one may think of the development of weapons of mass destruction by States; in the view of the Security Council such State polices may, in themselves, threaten international peace and security.<sup>21</sup> It has been rightly stated that there are significant gaps in the international control

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19. Report of the International Law Commission (1991) at p. 2.

20. See M. Cherif Bassiouni, *The Draft Code of Crimes Against the Peace and Security of Mankind*, in M. Cherif Bassiouni (ed.), *International Criminal Law*, 2d. ed., Ardsley, New York 1999, Vol. I, at 298-299; M. Cherif Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 11 *NOUVELLES ÉTUDES PÉNALES* (1993).

21. Cf. S.C. Resolutions 687 (1991) and 1441 (2002) with regard to the situation in Iraq.

of weapons of mass destruction.<sup>22</sup> No international convention criminalizes the production and the use of nuclear weapons. Provisions criminalizing the production of bacteriological weapons are absent in the 1972 Bacteriological Weapons Convention, while those on the production of chemical weapons in the 1993 Chemical Weapons Convention are weak.<sup>23</sup>

The third and last question concerns individual violations of human rights by States as international crimes. Two specific recent developments may be noted here. Firstly, it is now recognized that a single act of torture by or at the instigation of state officials in time of peace is a crime under general international law, irrespective of whether it forms part of a widespread or systematic practice of torture within a State, and that the prohibition of torture has acquired the status of a peremptory norm.<sup>24</sup> Secondly, in the recent past the Security Council has repeatedly held that any act of international terrorism constitutes a threat to international peace and security and that its perpetrators must be brought to justice. More often than not acts of terrorism involve the violation of rights of individual persons. It is of some importance to compare the two situations. While every single act of torture is now considered to constitute a “crime under international law,”<sup>25</sup> the question of whether it also constitutes a crime against the peace and security of mankind or a threat to international peace and security has not been answered. On the other hand, while any act of international terrorism must now be considered a threat to international peace and security, the Security Council did not declare that its perpetrators are guilty of a crime against the peace and security of mankind nor that they are criminally responsible under international law irrespective of whether they are punishable under national law. In both situations, the hitherto seemingly inextricable link between the concepts of “crimes against the peace and security of mankind,” “international peace and security,” and “crimes under international law” appears to have been severed, although in different ways.

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22. See M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. J. INT'L L. 83 (2002), at 90.

23. See TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS WITH SPECIAL REFERENCE TO THE CHEMICAL WEAPONS CONVENTION (Rodrigo Yepes-Enríquez & Lisa Tabassi eds., 2002).

24. See *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-05-17/1-T, Trial Chamber II ICTR 10 December 1998, and *Al-Adsani v. The United Kingdom*, ECHR 21 November 2001. See also *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, House of Lords 24 March 1999.

25. See ANTONIO CASSESE, INTERNATIONAL LAW (2001), at 246, 254-256.

It is hard to predict whether these recent developments constitute the beginning of a process that may end in the recognition as crimes under international law of all violations of individual rights that would, when committed on a large scale or in a systematic manner, have constituted crimes against humanity, or, even more far-reaching, of every violation of human rights by state actors or by persons who may be assimilated to state actors.<sup>26</sup> Whatever personal wishes and preferences one may cherish, the process of formation of crimes under general international law is a difficult and precarious one. Having their basis in customary international law and protecting peremptory norms of international law they cannot be created without the long-term and consistent support of a very large majority of States. History also shows that the starting point of that process usually consists in the adoption of multilateral international treaties. In other words, they must first become crimes of concern to the international community as a whole before transformation into crimes under general international law may take place.

### **Other crimes of concern to the international community as a whole**

Crimes of concern to the international community as a whole other than crimes under international law have in common with these crimes that they, in some way or another, affect the interests or values of the whole international society, not only the interests of a particular State or of a limited group of States. At the same time, they can be distinguished from crimes under international law in various respects. They are usually committed by private persons although, both in theory and in actual practice, this does not exclude involvement of State actors in specific instances. Similarly, they are not characterized by the fact that States systematically refuse to repress them, although this, too, may happen on occasion. Thirdly, the fact that such a crime has been committed does not automatically jeopardize international peace and security, enabling the Security Council to interfere. Again, however, that may occur in some situations. All this may well explain why, so far, it has not become necessary to make the criminal character of any given conduct which may be considered to be harmful to the international society independent from

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26. For a discussion of similar questions see Steven R. Ratner, *The Schizophrenia of International Criminal Law*, 33 TEXAS L. REV. 257 (1998); ILIAS BANTEKAS, SUSAN NASH & MARK MACKAREL, INTERNATIONAL CRIMINAL LAW (2001), at 12-13.

national law. It also explains why the need has not been felt, or perhaps one should say not yet been felt, to develop a set of international principles with regard to individual criminal responsibility, a truly “general part.” This is true for conventional international crimes as well as for the few international crimes that have their basis also in customary law.

The Annex to the ILC’s 1994 Report outlining the structure of an international criminal court sums up seven different categories of conventional crimes which it considers to be crimes of concern to the international community as a whole without constituting crimes against the peace and security of mankind.<sup>27</sup> The Report uses purely formal criteria to select them. To be recognized as crimes of concern to the international community as a whole, international crimes must satisfy two criteria: there must be an international convention that is open for signature by all States and that convention must have been widely ratified. Any international crime satisfying the two criteria amounts to a crime of concern to the international community as a whole. There are, therefore, no substantive criteria enabling one to distinguish, on the basis of their nature, crimes of concern to the international community as a whole from crimes that merely harm the interests of individual States. Nor do these criteria answer the legal-political question of what international crimes would deserve to be recognized as crimes of concern to that community. In this respect, they are, so to speak, empty.

An attempt to do what the ILC refrained from doing has been made by Bassiouni in his various publications. The twenty-five international crimes identified by him in 1999 include crimes against the peace and security of mankind as well as other international crimes.<sup>28</sup> On the basis of an analysis of all twenty-five crimes, Bassiouni distinguishes four “elements of criminalization,” four parameters for making human conduct an international crime. Firstly, a reason for making human conduct an international crime appears to be that “the prohibited conduct affects a

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27. The list includes the unlawful seizure of aircraft, crimes against the safety of civil aviation, crimes against internationally protected persons, hostage-taking and related crimes, torture, crimes against the safety of maritime navigation, drug crimes. Resolution E, attached to the Final Act of the 1998 Rome Diplomatic Conference, makes mention of terrorist crimes and drug crimes as serious crimes of concern to the international community.

28. Bassiouni, *Sources and Content*, *supra* note 8, at 48, 96-100. International crimes not included in the ILC Report are crimes against United Nations and associated personnel, unlawful possession and/or use of weapons, theft of nuclear material, mercenarism, slavery, unlawful human experimentation, piracy, unlawful use of the mail, destruction/theft of national treasures, unlawful acts against the environment, international traffic in obscene materials, falsification and counterfeiting, unlawful interference with international submarine cables, bribery of foreign public officials.

significant international interest (including threats to peace and security).” The second motive is that “the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community (including conduct shocking to the conscience of humanity).” In addition, human conduct may also have been made an international crime if “the prohibited conduct involves more than one state (transnational implications) in its planning, perpetration or commission either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries.” The fourth and last reason for criminalization consists in the fact that “the conduct bears upon an internationally protected interest that does not rise to the level required by” (the first two criteria) “but that cannot be controlled without its international criminalization.”<sup>29</sup>

It would seem that the third and the fourth criteria for criminalization explain why specific human conduct has been made a “transnational crime,” a “crime of concern to States,” but do not in themselves automatically warrant the conclusion that the crime in question should also be considered to be a crime of concern to the international community as a whole.<sup>30</sup> Be that as it may, one may readily accept that all twenty-five international crimes can already, *lege lata*, be considered to be of concern to the international community as a whole or would deserve to be recognized as such, either because most of them have “human rights dimensions”<sup>31</sup> or for other cogent reasons.

The list of international crimes that may harm the interest of the international community as a whole while not, or not yet, amounting to crimes against the peace and security of mankind, and the types of crimes that may be considered to do so, continues to grow. Building upon Bassiouni’s work, one may, by way of example, mention the following categories:

- crimes against the proper functioning of international diplomacy and international institutions (e.g. crimes against diplomats, U.N. and associated personnel);

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29. See Bassiouni, *Sources and Content*, *supra* note 8, at 33, 96.

30. See also BASSIOUNI, *supra* note 8, at 36, where a distinction is made between the “International Element,” the “Transnational Element,” and the “Necessity of International Cooperation Element.” See also Barbara. M. Yarnold, *The Doctrinal Basis for the International Criminalization Process*, in 1 INTERNATIONAL CRIMINAL LAW 127 (M. Cherif Bassiouni ed., 2d ed. 1999).

31. See Bassiouni, *Sources and Content*, *supra* note 8, at 46.

- crimes which facilitate the commission of crimes against the peace and security of mankind (e.g. the production of weapons of mass destruction, mercenarism, illicit trafficking in small firearms, terrorism);
- crimes which disrupt international communications and pose a danger to individual persons (piracy, hijacking, and other crimes against the safety of international transport at sea and in the air);
- crimes jeopardizing the integrity of national or international institutions (e.g. bribery of foreign public officials and of international civil servants);
- crimes disrupting the international financial system or international business (e.g. counterfeiting money);
- last but not least: crimes infringing upon basic individual rights of persons (e.g. slavery, taking of hostages, trafficking in persons, child prostitution and child pornography, terrorism). It is, of course, possible to add other categories to the list.<sup>32</sup>

Drawing inspiration from the distinction in national systems between offences against public interests and offences against private interests, one might distinguish here between, on the one hand, treaties whose primary purpose is to protect the interest of the international community as such and, on the other hand, treaties which, by protecting state interests, also indirectly protect the interests of that community. An example of the first type of treaties would be the 1994 United Nations Convention on the Safety of United Nations and Associated Personnel, an example of the second the 2000 United Nations Convention against Transnational Organized Crime. However, the analogy makes clear that the interests of the international community are at stake in both situations. It is, for instance, difficult to deny that the 2000 United Nations Convention, with its new international crimes, may serve to protect interests of the international community as much as the interests of individual states.<sup>33</sup> As that community is slowly but inexorably evolving towards a *civitas maxima*, there is less and less reason to attach importance to the distinction. The criteria of the ILC for identifying crimes of concern to the international community as a whole may nevertheless be useful here to the extent that they provide a yardstick for measuring a degree

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32. For a slightly different classification of protected interests see BASSIOUNI, *supra* note 8, at 100.

33. Participation in an organized criminal group (Article 5), laundering of proceeds of crime (Article 6), corruption (Article 8), obstruction of justice (Article 23). The second and third crimes have already been criminalized in a number of international conventions that are not open for signature to all States.

of consensus among States that an international crime does indeed harm collective interests.<sup>34</sup>

### **Crimes of concern to States**

International conventions criminalizing conduct harming the interests of States are characterized by the fact that criminalization primarily serves the purpose of facilitating international cooperation in criminal matters. Common definitions of prohibited conduct facilitate cooperation, for example by eliminating problems with regard to the traditional requirement of double criminality. At the same time, they ensure reciprocity and limit the extent to which the contracting parties assume obligations to cooperate. An example of this type of convention is the 2000 United Nations Convention against Transnational Organized Crime where the definitions of participation in an organized criminal group, laundering of proceeds of crime, corruption, and obstruction of justice are concerned. Another recent example is provided by the definitions of prohibited conduct in the 2001 Council of Europe Convention on Cyber-Crime. This is not to deny that, as a by-product, international conventions of this type often oblige contracting parties to criminalize conduct that may not yet have constituted a criminal offence under their national laws. One of the various forms this may take is the obligation for a contracting party to assimilate conduct harming the interests of other contracting parties to conduct harming its own interests. Recent international conventions on bribery and corruption, for instance, create obligations of this type.<sup>35</sup> There is no limit to the types of conduct that States may mutually decide to cover in common definitions with a view to facilitating international cooperation in criminal matters. It is, therefore, not possible to suggest criteria for criminalization.

### **Codification of international crimes**

Finally, a few sketchy remarks on the codification of international crimes. The purpose of codification may be to achieve “a republication in systematic form of already existing rules on particular matters” or, more far-

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34. Although the way the ILC itself made use of these criteria is far from consistent.

35. The 1997 OECD Convention on combating bribery of foreign public official in international business transactions, the 1997 European Union Second Protocol to the Convention on the protection of the European Communities' financial interests, the 1999 Council of Europe Criminal Law Convention on Corruption.

reaching, to “formulate a coherent set of principles meant to break with pre-existing law and furnish a basis for legal developments along new lines.”<sup>36</sup> In actual practice, many codifications reunite elements of both. This is, for instance, the case for the Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, drafted by Bassiouni in 1980 and revised in 1987.<sup>37</sup> It is an all embracing attempt at codification in that it not only envisages codification of all existing international crimes but also contains a General Part on the general principles of criminal law and on penalties that applies to all of them, as well as an Enforcement Part which covers all forms of interstate cooperation in criminal matters and cooperation between States and the International Tribunal.

Bassiouni’s proposal for an International Criminal Code, as well as the 1994 Report of the ILC and the Rome Statute, give rise to the question of whether the aim should be to codify all international crimes in one single code and apply to them rules of substantive and procedural law which are basically similar for all international crimes, or whether a topical codification should be preferred. Intellectually, the first option certainly is the more interesting and challenging one. In terms of international politics the second option has a better chance of being realized. Whatever the choice may be, any codification should, in my opinion, not completely ignore the differences in character between crimes under international law and other crimes of concern to the international community as a whole.

As far as crimes under international law are concerned, crucial developments have taken place in the last decade which have revolutionized the repression of this category of crimes at the international level. Two *ad hoc* international tribunals are involved in adjudicating these crimes and they are joined by the International Criminal Court as of 1 July 2002. The case law of the tribunals is already rich where the contents of these crimes is concerned while they have been defined in considerable detail in the Rome Statute of the International Criminal Court. The same is true for the general principles of criminal law. Moreover, special rules and principles have been developed with regard to the obligation of States to assist the tribunals and the Court. Finally, many States which have become a party to the Rome Statute have been, or still are, engaged in revising and modernizing their domestic legislation with regard to crimes under international law. Due, however, to the absence of a Code of Crimes Against

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36. See Edward M. Wise, *Perspectives and Approaches*, in 1 INTERNATIONAL CRIMINAL LAW 287 (M. Cherif Bassiouni ed., 2d ed. 1999).

37. See BASSIOUNI, *supra* note 8.

the Peace and the Security of Mankind one important lacuna has remained to exist: a specific international regime for horizontal cooperation between States which recognizes the special character of these crimes.<sup>38</sup> The case of *Pinochet*, for instance, well illustrates the negative and slightly absurd consequences of applying the traditional requirement of double criminality to crimes under international law.<sup>39</sup> The adoption of a Code remains important in other respects too. There still remains the open question of whether crimes against the peace and security other than the traditional core crimes could and should be codified. Moreover, a Code may have special relevance for those States that do not wish to become a party to the Rome Statute. Finally, it may provide a solid conventional basis for applying universal jurisdiction to these crimes as well as for applying the principle of *aut dedere aut judicare* to them.<sup>40</sup>

A solid case can also be made in favour of a Code dealing with other crimes of concern to the international community as a whole, in particular if an international criminal court were to receive jurisdiction to adjudicate them. For instance, the advantages of such a Code in terms of harmonization, elimination of overlaps, the filling of gaps and loopholes are indeed obvious.<sup>41</sup> However, the difference in character with crimes under international law would suggest that its contents do not necessarily have to be the same in each and every respect. In my view, this is especially true for general principles of criminal law. One can imagine a Code pursuant to which, for instance, matters pertaining to justifications and excuses, or statutes of limitation, largely remain to be governed by national law.<sup>42</sup> After all, crimes of concern to the international community as a whole remain, in a technical sense, crimes under national law, although there is an increasing tendency in recent conventions to define more detailed common criteria for establishing individual criminal responsibility. A Code could especially help to strengthen the framework of interstate cooperation in criminal matters. In the case of some conventions, the 1993 Chemical Weapons Convention for

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38. Articles 9 and 10 of the 1996 Draft Code are concerned with these matters.

39. See *supra* note 17. For an analysis see Bert Swart, *Arrest and Surrender*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1653-54 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

40. Article 8 of the 1996 Draft Code.

41. See BASSIOUNI, *supra* note 9, at 59.

42. For a more thorough discussion see Thomas Weigend, *Comments on a Draft International Criminal Code, General Part*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 499-502 (1981).

instance, the system really is too weak to guarantee adequate responses to all problems that may arise.<sup>43</sup>

Finally, there is, I believe, no need for a Code covering all aspects of crimes against the interests of States only. If there is a need for common international standards, that need may exist where interstate cooperation in criminal matters is concerned. Notwithstanding its limitations, the 2000 United Nations Convention against Transnational Organized Crime already provides a solid backbone for international cooperation in the repression of crimes against the interests of States, which could be the basis for further developments in the form of a Code.

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43. See Bert Swart, *The Chemical Weapons Convention and International Cooperation in Criminal Matters*, in Yepes-Enríquez & Tabassi, *supra* note 15, at 21-23.



# Selected Issues Regarding the ‘Core Crimes’ in International Criminal Law

Kai Ambos\*

## Summary

The paper, part of a broader research project of the Max Planck Institute for Foreign and International Criminal Law,<sup>1</sup> analyses the core crimes as codified in Art. 6 to 8 of the ICC Statute addressing some selected issues. This analysis will demonstrate that these crimes, although for the first time comprehensively codified, still generate a lot of complex and delicate questions of interpretation and therefore require further reflection and refinement.

## 1. The Crime of Genocide

### A. *Legal history*

Genocide developed from a category of crimes against humanity to an autonomous crime after WW II.<sup>2</sup> With the definition of the crime of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 October 1948<sup>3</sup> and its incorporation in the statutes of the *ad hoc* criminal tribunals created by the Security Council to judge those accused of genocide and other crimes in the former Yugoslavia and Rwanda<sup>4</sup> and the Rome Statute of the International Criminal Court<sup>5</sup> there is a widely accepted basis for the prosecution of the “crime of crimes.” Yet, the application of the definition still poses a whole host of problems. As

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1. See <http://www.iuscrim.mpg.de/forsch/straf/referate/sach/intstraf.html>.

Johanna Rinceanu and Tobias Wenning are researchers of this project, and have made valuable contributions to this paper.

2. See Cassese, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 336-7, 339-40 (Cassese et al. eds., 2002); Mettraux, *Crimes Against Humanity in the Jurisprudence of the ICTY and ICTR*, 43 HARV. INT'L J. 237, 302-6 (2002); Kai Ambos/Wirth, *The Current Law of Crimes against Humanity*, 13 CRIM. L. F. 1, 2-13 (2002).

3. 78 UNTS 277 (1951), entered into force 12th Jan. 1951.

4. Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY Statute), U.N. Doc. S/RES/827 (1993), annex; Statute of the International Criminal Tribunal for Rwanda (hereinafter: ICTR Statute), U.N. Doc. S/RES/955 (1994), annex.

5. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, as adopted 17 July 1998 (hereinafter ICC Statute).

opposed to some of the case law<sup>6</sup> genocide may be characterized by three constitutive elements:<sup>7</sup>

- the *actus reus* of the offence, which consists of one or several of the acts enumerated under Article 6(2) ICC Statute (see *infra* II.);
- the corresponding *mens rea*, as described in Art. 30 ICC Statute (III. 1.);
- the intent to destroy, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such as an extended mental element (III. 2.).

## B. *Actus reus*

### 1. The protected groups

Although frequently criticized,<sup>8</sup> it is now settled that *political*, *economic*, and *cultural* groups were intentionally left out when drafting the Genocide Convention.<sup>9</sup> While this clearly follows from the *travaux* as the expression of the will of the parties, it may also be deduced from the concept of “group, as such.” This concept only embraces “stable” groups and distinguishes them from “mobile” groups, i.e., political, economic and cultural groups.<sup>10</sup> This is basically the position that can be found in various judgements of the *ad hoc* Tribunals.

In *Akayesu*, an ICTR Trial Chamber referred to ‘stable groups,’ i.e., groups “constituted in a permanent fashion and membership of which is

6. In *Prosecutor v. Krstic*, Judgment of 2 August 2001 (IT-98-33-T), para 542, ICTY Trial Chamber I holds that there are only two elements, namely, the *actus reus* and the intent to destroy. *Concurring: Prosecutor v. Kayishema and Ruzindana*, Judgment of 21 May 1999 (ICTR-95-1-T), para. 90.

7. See Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEID.JOURN.INT.L 399 *et seq.* (2001); *Prosecutor v. Bagilishema*, Judgment of 7 June 2001 ICTR-95-1A-T, paras. 56, 60.

8. See *esp. Van Schaack*, 106 YALE L.J. 2259 (1997). See also Cassese, *supra* note 2, at 336; Heintze, *Zur Durchsetzung der UN-Völkermordkonvention*, 13 HUV-I 225, 227 (2000); Gómez-Benítez, *El exterminio de grupos políticos en el Derecho penal internacional etc.*, REVISTA DE DERECHO Y PROCESO PENAL No. 4, 147, at 148 *et seq.* (2000); Lyal Sunga, *The Crimes within the Jurisdiction of the ICC (Part II, Art. 5-10)*, 6 EUR. J. CRIME CR. L. CR. J. 377, 383 (1998), pointing out that the systematic targeting of a group on the basis of nationality, ethnicity, race or religion, tends to carry a much stronger potential for massive violations, for the very reason that the intended victims can be singled out from the rest of the population with particular ease, on account of their relatively immutable difference.

9. Cf. Schabas, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed., 1999), Art. 6 mn. 6.

10. See Cassese, *supra* note 2, at 345; *crit. Ntanda Nsereko in 1 McDONALD/SWAAK-GOLDMAN, SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* 113, 130 (2000), pointing out that it is inconsistent to include religious but exclude political groups since in both cases the membership “is a matter of will or choice.”

determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups.”<sup>11</sup> A common criterion in the groups protected by the Convention is that “membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.”<sup>12</sup> In a similar vein, in *Rutaganda* it was stated that political and economic groups have been excluded from the protected groups because they are considered to be “mobile groups.”<sup>13</sup> In *Jelusic*, a Trial Chamber of the ICTY, referred to “stable” groups “objectively defined and to which individuals belong regardless of their own desires” thereby excluding political groups.<sup>14</sup>

The *Jelusic* decision also invoked for the first time explicitly a so called *subjective* – instead of an *objective - criterion* to define a group as national, ethnical etc.<sup>15</sup> For it would be a “perilous exercise” to determine a group with purely objective and scientifically irrefragable criteria, it is “more appropriate” to evaluate its status from the perspective of those persons “who wish to single that group out from the rest of the community,” i.e., from the perspective of the alleged perpetrators. This criterion goes back to the ICTR’s *Kayishema* decision where a Trial Chamber distinguished between the “self-identification” of a group or its “identification by others.”<sup>16</sup> In the parallel *Rutaganda* judgment, however, this criterion was apparently understood more restrictively: While it was recognized that membership is in essence a subjective concept it was also held that a “subjective definition alone” is not enough.<sup>17</sup> Finally, in the most recent *Krstic* judgment, the first ICTY conviction on genocide, the subjective criterion again prevailed identifying the relevant group by way of its stigmatisation by the perpetrators.<sup>18</sup> Although it is doubtful whether the subjective approach contributes to more legal certainty, from a purely technical perspective it may be argued that it is a consequence of the structure of the genocide offence as a specific intent crime (see *infra* II. 2.). For if the dominant element of the offence is the perpetrator’s specific intent to destroy a certain group, that is, her state of mind with regard to a certain

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11. *Prosecutor v. Akayesu*, Judgment of 2 September 1998 (ICTR-96-4-T), para. 511.

12. *Prosecutor v. Akayesu*, *supra* note 11, para. 511. *Prosecutor v. Rutaganda*, Judgment of 6 December 1999 (ICTR-96-3-T), para. 56.

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14. *Prosecutor v. Jelusic*, Judgment of 14 December 1999 (IT-95-10-T), para. 69.

15. *Ibid.*, para. 70.

16. *Prosecutor v. Kayishema*, *supra* note 6, para. 98.

17. *Prosecutor v. Rutaganda*, *supra* note 13, paras. 55-6.

18. *Prosecutor v. Krstic*, *supra* note 6, para. 557. At para. 556 “scientifically objective criteria” were considered “inconsistent with the object and purpose of the Convention.”

group, this group may also be defined in accordance with this state of mind, i.e., from the subjective perspective of the perpetrator.<sup>19</sup>

*In sum*, political, economic and cultural groups are not protected by the Convention nor by genocide provisions in the Statutes of the International Tribunals. The resulting loophole may, however, be filled by the crime of persecution which, in any case, was already employed in some cases to punish the extermination of the Jews and other ethnic or religious groups in Nazi Germany.<sup>20</sup> We will come back to this crime later.

## 2. The specific forms of genocide

The ICC Statute lists in Article 6 the following specific forms of genocide: killing members of a protected group (a), causing serious bodily or mental harm to members of the group (b), deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (c), imposing measures intended to prevent births within the group (d) and forcibly transferring children of the group to another group (e). This list is exhaustive and therefore precludes states from any extension to other forms of genocide;<sup>21</sup> this also applies to the so-called “ethnic cleansing” (*infra f*).

The victims of the specific acts must be members of the national, racial, ethnic or religious group that is the target of the genocide in question.<sup>22</sup> While it is clear that the perpetrator must – subjectively - *intend* or *seek* to destroy a significant number of the members of the group, objectively it is only required that she attacks successfully at least two members. The structure of the genocide offence as a specific intent crime even admits the view that the perpetrators – objectively - only kills etc. one member of the group.<sup>23</sup> The problem with this interpretation, however, is that the underlying acts refer to *members of the group* (para. (a) and (b)) and *children of the group* (para. (e)) in plural, i.e., a strict interpretation requires, objectively, at least two victims.<sup>24</sup>

19. For the same view, without reasoning however, *Gómez-Benítez*, *supra* note 8, at 149.

20. See Cassese, *supra* note 2, at 336.

21. See Ntanda Nsereko, *supra* note 4, at 128; MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE ICC (2002), para. 415; for cultural genocide, see *infra* A. III. 2. b)(i).

22. *Prosecutor v. Akayesu*, *supra* note 11, para. 712: “such acts as committed against victim V were perpetrated against a Hutu and cannot, therefore, constitute a crime of genocide against the Tutsi group.”

23. *Prosecutor v. Akayesu*, *supra* note 11, para. 521; Ntanda Nsereko, *supra* note 10, 125-6; WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 158 (2000); Art. 6 of the Elements of Crimes as adopted at the First Session of the *Assembly of State Parties* (3-10 Sept. 2002) - ICC-ASP/1/3 - states as the first element of all the five alternatives: “The perpetrator (killed etc.) one or more persons.”

24. *Conc.* Cassese, *supra* note 2, at 345.

a) *Killing members of the group*

There is little controversy regarding the *actus reus* of the act of “killing members of the group.”<sup>25</sup> The Elements of Crimes state: “The perpetrator killed one or more persons.”<sup>26</sup> A footnote adds that the term “killed” is interchangeable with the term “caused death.”<sup>27</sup> This is supported by the case law of the *ad hoc* Tribunals.<sup>28</sup> The causation of death is usually accomplished by mass killings, torching the houses belonging to members of the group, destroying the infrastructure and other life-support systems, and forcing members of the group into so called “protected” or concentration camps where they are massacred or left to die.<sup>29</sup>

b) *Causing serious bodily or mental harm to members of the group*

According to the *Eichmann* Judgment, the following acts may constitute serious bodily or mental harm: “the enslavement, starvation, deportation and persecution and the detention of individuals in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture.”<sup>30</sup> The ICTR Trial Chamber takes causing “serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution” just as acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death.<sup>31</sup> In *Krstic*, ICTY Trial Chamber I holds that “inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.”<sup>32</sup> “Causing serious mental harm” may involve forcing members of the target group to use narcotic drugs in order to weaken the members of the group mentally.<sup>33</sup>

25. The relevant writings and case law concentrate, therefore, on the subjective side of this alternative, see, e.g., SCHABAS, *supra* note 23, at 157, 158, 441, 442; BOOT, *supra* note 21, at 441-443 and *infra* III. 1. a).

26. Elements of Crimes, *supra* note 23, Art. 6 (a).

27. *Id.*, fn. 2.

28. *Prosecutor v. Akayesu*, *supra* note 11, para. 500; *Prosecutor v. Rutaganda*, *supra* note 13, para. 50; *Prosecutor v. Musema*, Judgment of 27 January 2000 (ICTR-96-13-T), para. 155.

29. See Ntanda Nsereko, *supra* note 4, at 128.

30. *The Israeli Government Prosecutor General v. Adolph Eichmann, Jerusalem District Court, 12 December 1961*, in INTERNATIONAL LAW REPORTS (ILR), vol. 36, 1968, p. 340.

31. *Prosecutor v. Akayesu*, *supra* note 11, para. 504, 706, 707; *concurring: Prosecutor v. Kayishema*, *supra* note 6, para. 108; *Prosecutor v. Bagilishema*, *supra* note 7, para. 59.

32. *Prosecutor v. Krstic*, *supra* note 6, para. 513.

33. See Ntanda Nsereko, *supra* note 4, at 129.

The term “serious bodily or mental harm” leaves room for divergent opinions as to the *seriousness of the harm* inflicted upon the individuals concerned. Must the harm be permanent and irremediable? Whereas it seems well accepted that *physical* harm need not be permanent, there is controversy with respect to *mental* harm.<sup>34</sup> The *Krstic* Judgment held “that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”<sup>35</sup> The *Bagilishema* Trial Chamber held that “serious harm entails more than minor impairment on mental or physical faculties, but it need not amount to permanent or irremediable harm.”<sup>36</sup> The case law of the *ad hoc* tribunals determines the seriousness on a case-by-case basis.<sup>37</sup>

It is irrelevant whether the bodily or mental harm inflicted on the members of the group is sufficient to threaten the destruction of the group.<sup>38</sup> Such a requirement would go beyond the plain words of the text. Neither is such an interpretation of the Rome Statute supported by the *travaux préparatoires*. It would also confuse the *actus reus* and the *mens rea* requirements.<sup>39</sup>

*c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*

This form of genocide refers to the destruction of a group by “slow death.”<sup>40</sup> This includes methods such as denying members of a group nutrition (food and water), subjecting a group of people to systematic

34. See SCHABAS, *supra* note 23, at 162.

35. *Prosecutor v. Krstic*, *supra* note 6, para. 513.

36. *Prosecutor v. Bagilishema*, *supra* note 7, para. 59.

37. *Prosecutor v. Kayishema*, *supra* note 6, paras. 108-113; *Prosecutor v. Rutaganda*, *supra* note 13, para. 51; *Prosecutor v. Musema*, *supra* note 28, para. 156; *Prosecutor v. Krstic*, *supra* note 6, para. 513.

38. See SCHABAS, *supra* note 9, Art. 6 mn. 10; *id.*, *supra* note 23, at 161; Boot, *supra* note 21, para. 417; *but see* Report of the ILC on the Work of its Forty-Eighth Session 6 May-26 July 1996, U.N. Doc. A/51/10, at 91.

39. See SCHABAS, *supra* note 9, Art. 6 mn. 10; *id.*, *supra* note 23, at 161.

40. See Ntanda Nsereko, *supra* note 10, at 129, gives a classic example: “when Germans drove the Hereros of Namibia into the arid and waterless Omaheke Desert and then, sealing it off by a 250-kilometre cordon, made it impossible for anyone to escape it” (citing *Horst Drechsler*, *Let us die Fighting: Struggle of the Herero and the Nama against German Imperialism* (1884-1915), London (1980), at 156, who recounts the consequences as follows: “This cordon was maintained until about mid-1905. The bulk of the Hereros met a slow, agonising death. The Study of the General Staff noted that the Omaheke had inflicted a worse fate on the Hereros than German arms could ever have done, however bloody and costly the battle.”).

expulsion from homes and the reduction of essential medical services below a minimum vital standard, excessive work or physical exertion.<sup>41</sup> It is clear that the methods of destruction need not immediately kill any member of the group, but must (subjectively) be calculated to, ultimately, physically destroy the (members of the) group.<sup>42</sup> According to the German courts, it suffices that the methods are (objectively) apt (“geeignet”) to destroy the group; yet, this interpretation is based on a wrong translation of the term “calculated to” into the German term “geeignet” which only requires acts causing abstract danger for the legal interests protected.<sup>43</sup> The Ad Hoc Tribunals and the *Elements of Crimes* are silent on the matter.<sup>44</sup> The Preparatory Commission rejected the U.S. proposal to require “that the conditions of life contributed to the physical destruction of that group.”<sup>45</sup> The Prosecution in the *Kayishema* case submitted that Article 2 (2)(c) ICTR Statute applies to situations *likely* to cause death regardless of whether death actually occurs.<sup>46</sup> This is similar to the German approach.

*d) Imposing measures intended to prevent births within the group*

The words “imposing measures” indicate the necessity of an element of coercion.<sup>47</sup> The prevention of births within the group, the so-called biological genocide, is accomplished by denying the group the means of self-propagation. The measures usually include forced sterilisation of the sexes, sexual mutilation, forced birth control, separation of the sexes and prohibition of marriage.<sup>48</sup> The *Akayesu* Trial Chamber stated that

“[i]n 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

41. *Prosecutor v. Akayesu*, *supra* note 11, para. 506; *Prosecutor v. Kayishema*, *supra* note 6, para. 115, 116; *Prosecutor v. Rutaganda*, *supra* note 13, para. 52; *Prosecutor v. Musema*, *supra* note 28, para. 157.

42. *Prosecutor v. Akayesu*, *supra* note 11, para. 505.

43. Cf. Kai Ambos & Wirth, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 769* (Horst Fischer, Claus Kreß, & Lüders eds., 2001), at 784-789.

44. *Elements of Crimes*, *supra* note 23, Art. 6 (c).

45. See Rückert & Witschel, in Fischer, Kreß, & Lüder, *supra* note 43, 59, at 68.

46. *Prosecutor's Closing Brief*, 9 October 1998, at 28 (emphasis added).

47. See *BOOT*, *supra* note 21, para. 422.

48. *Prosecutor v. Akayesu*, *supra* note 11, para. 507; *Ntanda Nsereko*, *supra* note 10, at 129. *Nsereko* gives the example of German occupied Poland where “marriage between Poles was forbidden without permission from the German Governor. An indirect method of lowering the birth rate of the Poles was to underfeed parents, thus lowering the survival capacity of the children of such parents.”

to have her give birth to a child who will consequently not belong to its mother's group."<sup>49</sup>

Furthermore, the Chamber notes that

“measures intended to prevent births within the group may be physical, but can also be mental. 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>50</sup>

*e) Forcibly transferring children of the group to another group*

This form of genocide is a very controversial one. As will be discussed below<sup>51</sup> some scholars argue that the general tenor and the aim of the law of genocide is the protection of the right of the group to *physical* but not cultural or other forms of *existence*. Non-physical forms of a group's existence are (primarily) protected under international human rights and minority rights law. Thus, apparently acts aimed at destroying the *identity* of a group, without physically destroying its members, cannot be considered as genocide. Applied to the forcible transfer of children it may be argued that the transfer leads to a loss of cultural identity by assimilation of the children of one group to another group, but it does not *per se* lead to physical destruction of the group. In fact, the transfer is a form of cultural genocide and thereby contrasts the decision of the drafters to exclude cultural genocide from the scope of the Convention.<sup>52</sup> The *Akayesu* Trial Chamber holds that

“as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”<sup>53</sup>

If the purpose of the transfer of the children to another group is to subject them to slave labour, this would amount to imposing on the group conditions of life calculated to bring about its physical destruction and therefore fall under alternative c) discussed above.<sup>54</sup>

49. *Prosecutor v. Akayesu*, *supra* note 11, para. 507.

50. *Id.*, para. 508.

51. *See infra* A. III. 2. b) (i).

52. *See BOOT*, *supra* note 21, para. 422.

53. *Prosecutor v. Akayesu*, *supra* note 11, para. 509; *concurring: Prosecutor v. Kayishema*, *supra* note 6, para. 118; *Prosecutor v. Rutaganda*, *supra* note 13, para. 54; *Prosecutor v. Musema*, *supra* note 28, para. 159.

54. Ntanda Nsereko, *supra* note 10, at 130.

f) *The so called “ethnic cleansing”: an additional form of genocide?*

The term “ethnic cleansing” was deliberately omitted in Art. 6 of the Rome Statute and therefore does, technically speaking, not constitute genocide.<sup>55</sup> The expression “ethnic cleansing” is relatively new and its origin is difficult to establish. It appeared in 1981 in the Yugoslav media talking of “ethnically clean territories” in Kosovo<sup>56</sup> and in documents of international bodies in 1992. Since then there have been a number of attempts to define the term.<sup>57</sup> According to the Commission of Experts’ Report “ethnic cleansing” includes murder, torture, arbitrary arrest and detention, extra-judicial executions, and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian populations, deliberate military attacks or threats of attack on civilians and civilian areas, and wanton destruction of property.<sup>58</sup> The Special Rapporteur of the Commission on Human Rights, *Tadeusz Mazowiecki* equates ethnic cleansing with “a systematic purge of the civilian population with a view to forcing it to abandon the territories in which it lives.”<sup>59</sup>

It was always debated whether ethnic cleansing constitutes genocide.<sup>60</sup> Taken the available definitions together, ethnic cleansing is aimed at displacing a population of a given territory in order to render the territory ethnically homogeneous. Thus, ethnic cleansing pursues a different aim as genocide, it is not directed at the destruction of the group.<sup>61</sup> While the

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55. Although the U.N. General Assembly stated in paragraph 9 of its Resolution 47/121 of 18 December 1992: in pursuit of the abhorrent policy of ‘ethnic cleansing,’ which is a form of genocide.”

56. See Petrovic, *Ethnic Cleansing – An Attempt at Methodology*, 5 EJIL 342, 343 (1994).

57. See SCHABAS, *supra* note 23, at 190.

58. First Interim Report of the Commission of Experts, 10 February 1993, U.N. Doc. S/25274 (1993), para. 56.

59. Periodic Reports on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Sixth Report, 21 February 1994, E/CN.4/1994/110, para. 283. The Prosecutor of the ICTY defined ethnic cleansing as: “a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated. It means a practice that aims at such and such a territory be, as they meant, ethnically pure. [I]n other words, that that territory would no longer contain only members of the ethnic group that took the initiative of cleansing the territory;” *Prosecutor v. Karadzic and Mladic*, Transcript of hearing, 28 June 1996 (IT-95-18-R61, IT-95-5-R61), at 128. Cassese, *supra* note 2, at 338 defines ‘ethnic cleansing’ as “the forcible expulsion of civilians belonging to a particular group from an area, village, or town.”

60. On this debate, see also JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (2d ed. 2000, at 99-102; *Schabas, supra* note 9, Art. 6 mn. 8.

61. See SCHABAS, *supra* note 23, at 199.

material acts performed to commit these crimes may often resemble each other, the main difference lies in the different specific intents: ethnic cleansing is intended to displace a population, genocide to destroy a population.<sup>62</sup> Thus, it is clear that “ethnic cleansing” need not *per se* amount to genocide.<sup>63</sup> Ethnic cleansing remains, of course, punishable as a crime against humanity and a war crime.

### 3. A. Context Element in Genocide?

Although the wording of Art. 6 ICC Statute clearly does not require a context element, the Elements of Crimes as adopted by the Assembly of State Parties (ASP) state at the end of each of the definitions of the specific forms of genocide:

“The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”<sup>64</sup>

Also the German Oberlandesgericht (Appeals Court) Düsseldorf argued in *Jorgic* that genocide requires a “structurally organized centralized guidance.”<sup>65</sup> The German Federal Constitutional Court (*Bundesverfassungsgericht*) adopted the same view.<sup>66</sup> Although this requirement will be present in most cases, it is neither required by international law nor is there a need for such an (additional) element.<sup>67</sup> Thus, the *ad hoc* Tribunals have repeatedly and correctly affirmed that the existence of a plan or policy is not a legal ingredient of the crime of genocide; it may only become an important factor to prove the specific intent.<sup>68</sup> As a consequence the Elements are in violation of Art. 9 (3) ICC Statute and should, therefore, be considered void.<sup>69</sup>

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62. *Id.* at 200.

63. See Cassese, *supra* note 2, at 342.

64. Elements of Crimes, *supra* note 23.

65. OLG Düsseldorf, Judgment, 26 September 1997, 2 StE 8/96, unpublished typescript (on file with the author) at 162 (“strukturell organisierte zentrale Lenkung”); on the German case law see Ambos & Wirth, *supra* note 43, at 769.

66. BVerfGE, Judgment, 12 December 2000 – 2 BvR 1290/99, at III. 4 a), available at: [www.bverfg.de/entscheidungen/frames/2000/12/12](http://www.bverfg.de/entscheidungen/frames/2000/12/12) = EuGRZ 2001, 76-82; crit. Ambos & Wirth, *supra* note 43, at 789-90.

67. Ambos & Wirth, *supra* note 43, at 789, 790; Triffterer, *supra* note 7, at 406-408.

68. *Prosecutor v. Jelusic*, Judgment (IT-95-10-A) 5 July 2001, para. 48; *Prosecutor v. Jelusic*, *supra* note 14, paras. 100, 101; *Prosecutor v. Kayishema & Ruzindana*, Judgment of 1 June 2001 (ICTR-95-1-A), para. 138; *Prosecutor v. Kayishema*, *supra* note 6, para. 276.

69. See Ambos & Wirth, *supra* note 43, at 790.

### C. *Mens rea*

#### The general mental element

According to Art. 30 ICC-Statute “a person shall be criminally responsible and liable for punishment for a crime (...) only if the material elements are committed with intent and knowledge.” Notwithstanding the complex questions involved in the interpretation of this provision and the mental element in criminal law in general,<sup>70</sup> it suffices for our purposes to state that “genocide,” i.e., the chapeau and the different forms of commission, must be performed with intent and knowledge. In other words, the perpetrator’s intent and knowledge must cover all (material) elements of the chapeau and the specific act. According to the case law, the perpetrator must, on the one hand, know that the victim is a member of the group<sup>71</sup> and, on the other, act with the intent to further the destruction of the group.<sup>72</sup> While the former requirement refers to the general *mens rea* since the membership of the group is a material element in the form of a circumstance and as such the perpetrator must be aware of it (Art. 30 (3) ICC-Statute), the intent to further the destruction of the group apparently belongs to the specific intent discussed below (2.). The problem is that the Tribunals do not precisely distinguish between the *general mens rea* and the *specific* intent as an additional mental element (*subjektives Tatbestandsmerkmal*).<sup>73</sup>

If the perpetrator lacks the knowledge of a circumstance she normally incurs in a mistake of fact and criminal responsibility would be excluded (Art. 32 (1) ICC-Statute). If, for example, the perpetrator kills – objectively - a Jew but she does – subjectively - not know that the victim belongs to this religious group, she acts without knowledge of the circumstance “member of a religious group” and this mistake would “negate the mental element”, or, more exactly, a part of the mental element. Thus, the mistake of fact is only the other side of the coin of (the existence of) *mens rea*. Another question, not to be treated here, is if it is not too strict to declare, in principle,

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70. See for a detailed analysis Albin Eser, in Cassese et al., *supra* note 2, at 889 et seq.; Kai Ambos, *DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS* (2002), at 757 et seq.; Triffterer, *supra* note 7, at 400.

71. *Prosecutor v. Rutaganda*, *supra* note 13, para. 60; *Prosecutor v. Musema*, *supra* note 28, para. 165; *Prosecutor v. Bagilishema*, *supra* note 7, para. 61; *Prosecutor v. Jelusic*, *supra* note 14, para. 66. - Triffterer, *supra* note 7, at 400 requires knowledge of the membership of the victim of the group and that the victim is ‘attacked in this capacity by the perpetrator.’

72. Cf. *Prosecutor v. Kayishema*, *supra* note 6, para. 91: accordingly, by his act “the perpetrator does not [...] only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the [...] group of which the victim is a member.” See also *Prosecutor v. Jelusic*, *supra* note 14, para. 79.

all mistakes as irrelevant that do not negate the mental element (Art. 32 (2) ICC Statute).<sup>74</sup>

*a) Killing members of a group*

The term “killing” is broader than the term “murder” since the latter requires, according to some national laws, more than the intention to cause death, namely premeditation.<sup>75</sup> As to the English and French versions of the wording of alternative a) ICTR Trial Chamber held in *Kayishema* “that there is virtually no difference between the term ‘killing’ ... and ‘meurtre’ ...,” but as killing or meurtre should be considered along with the specific intent of genocide both concepts require intentional homicide.<sup>76</sup> Other Chambers argued that “[t]he concept of killing includes both intentional and unintentional homicide, whereas *meurtre* refers exclusively to homicide committed with the intent to cause death”. These Chambers, however, came to the same result considering that “pursuant to the general principles of criminal law, the version more favourable to the Accused [i.e. the requirement of intent] must be adopted.”<sup>77</sup> Hence, the killing must be committed - in accordance with Art. 30 ICC-Statute – with intent though not necessarily with premeditation.<sup>78</sup>

*b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*

By using the term “deliberately” the drafters of the Convention wanted to express that this specific form of genocide does not only require general intent but a kind of plan or prior reflection within the meaning of the French concept of “premeditation.”<sup>79</sup> However the term ‘deliberately’ only refers, as the French and Spanish translations show (“intentionnelle,” “intencional”), to the general intent requirement.<sup>80</sup>

As a consequence, the keyword is “*calculated*.”<sup>81</sup> It indicates that the imposition of the said conditions must be the principal mechanism used to

73. See *supra* fns. 71 and 72.

74. See AMBOS, *supra* note 70, at 805 *et seq.* (822-24).

75. See SCHABAS, *supra* note 23, at 241; BOOT, *supra* note 21, para. 416.

76. *Prosecutor v. Kayishema*, *supra* note 6, para. 104.

77. *Prosecutor v. Bagilishema*, *supra* note 7, paras. 57, 58; *Prosecutor v. Akayesu*, *supra* note 11, para. 501; *Prosecutor v. Rutaganda*, *supra* note 13, para. 50; *Prosecutor v. Musema*, *supra* note 28, para. 155. See also AMBOS, *supra* note 70, at 795, 796.

78. See BOOT, *supra* note 21, para. 416.

79. See ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* (1960), at 60; SCHABAS, *supra* note 23, at 243.

80. See Ambos & Wirth, *supra* note 43, at 785; Ambos, *supra* note 70, at 796.

81. *The Elements of Crimes*, *supra* note 23, do not even mention this term.

destroy the group, rather than some form of ill-treatment that accompanies or is incidental to the crime.<sup>82</sup> The ICTR requires that the “methods of destruction (...) are, ultimately, aimed at their [the group members’] physical destruction.”<sup>83</sup>

*c) Imposing measures intended to prevent births within the group*

Any measures imposed must be “intended” to prevent births. It is not necessary that the perpetrator had the intent to prevent births completely. It suffices that partial birth prevention is the purpose of the measures in question.<sup>84</sup>

Although public birth control programmes are indeed intended to (partially) prevent births, they do not fall under the provision as long as they are voluntary, i.e., do not exert undue pressure or coercion. Even if they are compulsory – as, for example China’s one-child policy – they do not constitute genocide since the perpetrators do not intend to destroy a group.<sup>85</sup>

*d) Forcibly transferring children of the group to another group*

If one conceives this alternative as a form of cultural genocide<sup>86</sup> it may be argued that the perpetrator’s intent only needs to refer to destruction of the group in a cultural sense, not necessarily in a biological sense.<sup>87</sup> This would imply, however, that the nature of the specific intent depended on the underlying form of commission. As will be shown below,<sup>88</sup> the nature of the destruction depends on the interpretation of the term “destroy” and the interest or object protected by the offence. This approach is more convincing because it relates the perpetrator’s conduct to the crime of genocide as a whole and not only to the – sometimes accidental – performance of one or the other alternative.

## 2. The specific intent requirement

*a) General considerations*

Genocide requires the “specific” or “special” intent<sup>89</sup> to destroy one of the protected groups. In common law, the concept of specific intent is used

82. *Schabas, supra* note 23, at 243.

83. *Prosecutor v. Rutaganda, supra* note 13, para. 52; *Prosecutor v. Musema, supra* note 28, para 157; *similar: Prosecutor v. Akayesu, supra* note 11, para. 505.

84. *Boot, supra* note 21, para. 422.

85. *Schabas, supra* note 23, at 244.

86. See *supra* II. 2. e).

87. *Schabas, supra* note 23, at 245, 228-230.

88. See *infra* A. III. 2. b) (i).

89. *Triffterer, supra* note 7, at 399, 400, considers the expression “genocidal intent” for the special intent requirement as “deceiving.” The problem is that there is no better expression.

to distinguish offences of “general intent,” i.e., offences for which no particular level or degree of intent is required. In the civil law tradition, specific intent corresponds to *dolus directus* of first degree, i.e., it emphasizes the volitive element of the *dolus*. It has been said that a specific intent offence requires performance of the *actus reus* but in association with an intent or purpose that goes beyond the mere performance of the act (“überschießende Innententenz”<sup>90</sup>).<sup>91</sup> Or that it consists of “an aggravated criminal intent that must exist in addition to the criminal intent accompanying the underlying offence.”<sup>92</sup> Yet, details are highly controversial. If one takes the quite successful cognitivist theory<sup>93</sup> seriously, the volitive element is no longer part of at least the *dolus eventualis* and, consequently, the specific intent only implies (positive) knowledge of the constituent elements of the *actus reus*. This theory is, in fact or by accident, the basis of the different and diverse attempts by some writers to lower the subjective threshold of genocide by way of a “knowledge-based interpretation.”<sup>94</sup> This interpretation also led to a proposal during the negotiations of the *elements of crimes* of the ICC Statute which only required that the perpetrator “knew or should have known” that her conduct would destroy a group.<sup>95</sup> Although this proposal was finally rejected, the discussion is by no means over since the followers of the knowledge-based interpretation would argue that the issue is not one of *rewriting* the genocide offence but only of correctly *interpreting* the specific intent requirement.

As to the *case law*, in its first decision in *Akayesu*, the ICTR defined “special intent” as the “specific intention [...] which demands that the perpetrator clearly seeks to produce the act”<sup>96</sup> or “have the clear intent to cause the offence.”<sup>97</sup> A specific intent offence is “characterized by a psychological relationship between the physical result and the mental state of the perpetrator.”<sup>98</sup> In a similar vein, the *Kambanda* Trial Chamber

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90 See *Ambos*, *supra* note 70, at 789.

91. *Schabas*, *supra* note 23, at 218; *Triffterer*, *supra* note 7, at 402: “so-called crimes with an extended mental element.”

92. *Cassese*, *supra* note 2, at 338.

93. See the fundamental work of *Wolfgang Frisch*, *Vorsatz und Risiko* (1983), 101-2, 255 *et seq.*, 300 *et seq.* and *passim*.

94. ALICIA GIL GIL, *DERECHO PENAL INTERNACIONAL* (1999), at 231 *seq.*, 236 *seq.*; Greenwalt, 99 COLUM. L. REV. 2259, 2265 *et seq.* (1999); *Triffterer*, *Festschrift Roxin*, 1422, 1438 *et seq.*, 1441 *et seq.* (2001); *Vest*, *Genozid durch organisatorische Machtapparate*, at 101 (2002); summarizing: *Ambos*, *supra* note 70, at 790-5.

95. U.N. Doc. PCNICC/1999IWGEC/RT.1.

96. *Prosecutor v. Akayesu*, *supra* note 11, para 497.

97. *Ibid.*, para 518.

98. *Id.*, para 518.

referred to the “element of *dolus specialis*,”<sup>99</sup> *Kayishema* to the requirement of “specific intent.”<sup>100</sup>

The ICTY took a more sophisticated approach. In *Jeliscic*, the special intent was defined with regard to the discriminatory nature of the acts, i.e., the selection of the victims because of their membership in a protected group.<sup>101</sup> As to the degree of intention required, the Chamber, in fact, rejects a knowledge-based interpretation, brought forward by the Prosecution, and follows the traditional specific intent requirement developed by the *Akayesu* Trial Chamber.<sup>102</sup> Indeed, the Chamber absolves the accused of genocide since “he killed arbitrarily rather than with the clear intention to destroy a group.”<sup>103</sup> The App. Ch. confirmed the Trial Chamber’s narrow concept of specific intent and explicitly rejected the Prosecution’s broader definition including knowledge.<sup>104</sup> In *Krstic* – in its first genocide conviction – the ICTY distinguished “between the individual intent of the accused and the intent involved in the conception and commission of the crime.”<sup>105</sup> Thus, the Chamber refers, on the one hand, to the collective act of genocide which is motivated by the specific intent to destroy and which “must be discernible in the criminal act itself;”<sup>106</sup> and, on the other hand, to the individual acts of the participants in the collective act of genocide. While the individual participants may have different intentions and motives, each participant must share “the intention that a genocide be carried out” in order to be prosecuted for genocide.<sup>107</sup> The intent to destroy presupposes that the victims were chosen “by reason of their membership in the group whose destruction was sought.” Mere knowledge of this membership is not sufficient.<sup>108</sup> Similarly, foreseeableness or probability of the destruction of the group – in the sense of the mentioned knowledge-based interpretation – is not sufficient since, according to the Chamber, it is not clear whether this

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99. *Kambanda*, Judgment of 4 September 1998 (ICTR 97-23-S), para. 16.

100. *Prosecutor v. Kayishema*, *supra* note 6, para. 89.

101. *Prosecutor v. Jeliscic*, *supra* note 14, para. 67

102. *Ibid.*, paras. 84 et seq. (86).

103. *Ibid.*, para. 108.

104. *Prosecutor v. Jeliscic*, *supra* note 14, paras. 41 et seq. (46: “[...] seeks to achieve the destruction [...]”). The Appeals Chamber also stated (para. 45 with fn. 81) that when using the term specific intent it “does not attribute to this term any meaning it might carry in a national jurisdiction.” Yet, this is neither helpful nor true since the Chamber cannot completely separate international from national criminal law and less so as far as the general principles are concerned.

105. *Prosecutor v. Krstic*, *supra* note 6, para. 549.

106. *Id.*

107. *Id.*

108. *Id.*, para. 561.

standard reflects customary law and therefore genocide still must be understood in the sense of encompassing only acts “with the *goal* of destroying all or part of the group.”<sup>109</sup> Thus, in fact, the Chamber follows the earlier case law. Also, as this case law, it does not analyse in detail the concrete proposals of the knowledge-based approach nor does it sufficiently distinguish between the different scholarly views.<sup>110</sup>

It is clear that the major problem in cases of genocide is *to prove* the specific intent. The Prosecution wants to overcome this problem by *lowering the standard* or degree of intent required. It should suffice that the accused “consciously desired” the destruction of the group or that “he knew his acts were destroying” the group.<sup>111</sup> In other words, as has been said before, the Prosecution defends what since *Greenwalt’s* illuminating paper<sup>112</sup> may be called a “knowledge based interpretation” or “standard.”

But the lowering of mental thresholds in criminal offences is a doubtful way to overcome problems of evidence. In any case, it is not the only one. The other possibility is a procedural one, i.e., to draw *inferences* or conclusions from certain *indicia* based on objective facts and circumstances, statements of witnesses etc.<sup>113</sup> The absence of direct evidence, e.g., a confession of the accused that she acted with specific intent, forces any court, no matter whether it operates on the national or international level, to analyse the available *indicia* and, as the case may be, infer from them the specific intent of the accused. The case law used this method already in the – almost forgotten - Rule 61 decision in *Karadzic and Mladic*. ICTY T. Ch. I then referred to “a certain number of facts,” e.g., the general political doctrine which gave rise to the specific acts and to the “combined effect of speeches or projects” laying the groundwork for the acts.<sup>114</sup> The *Akayesu* Chamber adopted this approach invoking “a certain number of presumptions of fact” such as the general context of the perpetration, the scale of atrocities etc.<sup>115</sup> Similarly, the *Jelusic* App. Ch. refers to “a number

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109. *Id.*, para. 571 (emphasis in original).

110. *Id.* The Chamber quotes in fn. 1276 authors who defend very different alternative concepts.

111. *Cf. Prosecutor v. Jelusic*, *supra* note 68, para. 42; *Prosecutor v. Krstic*, *supra* note 6, para. 569.

112. *See supra* note 94.

113. *Cf. Volk*, *Dolus ex re*, in: Festschrift Arthur Kaufmann, 611, 613 *et seq.*, 619 (1993), on its original derivation from the “*dolus ex re*,” i.e. from the intent which follows from a particular (external) commission of an offence. See also *Ntanda Nsereko*, *supra* note 10, at 126.

114. *Prosecutor v. Karadzic and Mladic*, Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence (IT-95-5-R61 and IT-95-18-R61), paras. 94-5.

115. *Prosecutor v. Akayesu*, *supra* note 11, para 523 and in para. 524 quoting *Prosecutor v. Karadzic and Mladic*, *supra* 114, para. 94; *see also Prosecutor v. Rutaganda*, *supra* note 13, para 61.

of facts and circumstances” and lists, *inter alia*, the general context, the perpetration of other acts against the same group, the scale of atrocities committed etc.<sup>116</sup> *In casu*, the T.Ch. established the “discriminatory intent” of *Jelusic*, although not his intent to destroy the group,<sup>117</sup> referring not only to the general context but also to his deeds and statements.<sup>118</sup> The *Krstic* Chamber refers to simultaneous attacks on cultural and religious property as well as houses of members of the group as (indirect) evidence for a genocidal intent of the accused.<sup>119</sup> Generally speaking, all acts directed against a protected group which occur during a certain period in a certain geographical area, i.e., *in casu*, the killing of 7000-8000 Bosnian Muslim men of military age in 7 days in Srebrenica,<sup>120</sup> are strong indicia for specific intent on the part of the perpetrators.

The consequence of the strict distinction between the *actus reus*, the corresponding *mens rea* and the special intent as an extended mental element is that it is irrelevant for the completion of the crime whether the perpetrator is in any way successful in destroying the group (in whole or in part).<sup>121</sup> She needs only intend to achieve this consequence or result. As the definition of genocide refers to *any of the following acts* of which only the first (“killing”) has the victims’ death as the essential consequence, it follows that not a single person must die for an act of genocide to have been (completely) perpetrated.<sup>122</sup> Only if one of the five specific acts listed in the Convention as well as in the ICTY, ICTR and ICC Statutes is not completed but only attempted with the necessary special “intent to destroy,” an *attempted* genocide exists.<sup>123</sup>

There is a final problem which only will be mentioned here since it has been discussed in depth elsewhere.<sup>124</sup> It is the problem of the *mens rea* of *participants* in genocide, especially accomplices and commanders/superiors. The case law does not yet offer convincing solutions in this respect. In our view, all forms of direct perpetration, i.e., the direct and

116. *Prosecutor v. Jelusic*, *supra* note 68, para. 47.

117. *See, supra* note 103 and text.

118. *Prosecutor v. Jelusic*, *supra* note 14, para. 73 *et seq.*

119. *Prosecutor v. Krstic*, *supra* note 6, para. 580.

120. *Id.*, paras. 594, 598.

121. *Triffterer, supra* note 7, at 402; *Prosecutor v. Akayesu, supra* note 11, para. 497: “Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy [...] a [...] group.”

122. *Sunga, supra* note 8, at 383.

123. *Triffterer, supra* note 7, at 402.

124. *Ambos, supra* note 70, at 792 *et seq.*; for the case law 413-7; see also *Schabas, supra* note 23, 259, 264-266, 275, 300-303, 304-313. See also Ambos, in *Triffterer* (ed.), *Commentary on the ICC Statute*, 2<sup>nd</sup> ed., Art. 25 (2003, forthcoming)

immediate perpetration, co-perpetration and (indirect) perpetration by means, as well as similar forms of intellectual and/or psychological domination/control of the crime (instigation, inducement, incitement, conspiracy) require specific intent. Accomplices need only positive knowledge of the genocidal intent of the perpetrators. In the case of superiors or commanders one must distinguish on what basis they are held liable. Commission by omission on the basis of the superior or command responsibility doctrine only requires knowledge or even negligent failure to know of genocidal acts.<sup>125</sup> If the superior is directly involved in the commission of genocide by positive acts, e.g., by ordering genocidal acts or inducing them, the specific intent, as in the other cases, is required. All these questions deserve further reflections though.

*b) The specific elements of the specific intent*

*(i) "to destroy"*

The specific intent must be directed at the destruction of the relevant group. The destruction is the object of the specific intent. It need not – objectively – occur but only – subjectively – be intended by the perpetrator. While this clearly follows from the wording of article II of the Genocide Convention and subsequent provisions, it is less clear whether “destruction” requires the *physical* or *biological* destruction of the group. This restrictive interpretation is defended by the ILC<sup>126</sup> and by some writers.<sup>127</sup> They rely on the travaux of the Convention and argue that cultural genocide in form of destroying a group’s national, linguistic, religious, cultural or other existence was finally – despite a proposal by the Ad Hoc Committee – not included in the Convention.<sup>128</sup> Although the destruction of a people does not automatically imply its physical extinction and having in mind that destruction of peoples often begin with vicious assaults on culture, particular language, religious and cultural monuments and institutions, the

125. For the same view apparently *Schabas*, *supra* note 9, Art. 6 mn. 4; against *Schabas* but apparently misreading him *Cassese*, *supra* note 2, at 348.

126. See 1996 ILC Report, *supra* note 38, at 90-91: “As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.”; see also the earlier statement in: Report of the ILC to the General Assembly on the Work of its Forty-First Session, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (part 2), p. 102, para. (4) (cited according to *Schabas*, *supra* note 91, at 229, 230).

127. See, e.g., *Schabas*, *supra* note 23, at 229-3; Barboza, *International Criminal Law*, 278 RdC 9, 59 (1999); Steven Ratner, *The Genocide Convention After Fifty Years*, 92 ASIL Proceedings 1, 2 (1998).

128. *Boot*, *supra* note 21, paras. 413-4; *Schabas*, *supra* note 23, at 187; see for further references *Ambos/Wirth*, *supra* note 43, at 791-2.

drafters of the ICC-Statute excluded acts of cultural genocide as a specific form of genocide from Article 6 ICC-Statute with the exception of “forcibly transferring children of the group to another group.”<sup>129</sup> More recently, the *Krstic* Trial Chamber, invoking the *nullum crimen* principle, took the same view limiting genocide to “acts seeking the physical or biological destruction of all or part of the group.”<sup>130</sup>

As has been argued elsewhere,<sup>131</sup> it is doubtful, however, if this restrictive interpretation is compatible with the wording of the Convention and all subsequent genocide provisions since they clearly refer to the “group, as such.” In other words, the crime of genocide is intended to protect not only the physical existence of the individual members of the group but the group as a *social entity*. This supra-individual concept of genocide, developed and defended above all by the German Supreme Court (*Bundesgerichtshof*) and the Federal Constitutional Court (*Bundesverfassungsgericht*),<sup>132</sup> implies that the *intent* to destroy “extends beyond physical and biological interpretation.”<sup>133</sup> This does not mean, however, as the *Krstic* Chamber apparently misreads,<sup>134</sup> that the German Courts deny that Art. II (c) of the Convention requires – objectively – a physical destruction. Rather, a distinction between the *actus reus* and the *mens rea* of the crime of genocide must be drawn and the latter does not limit the offence to the physical destruction of the group. The fact that the states parties to the Genocide Convention were not willing to include cultural genocide in the Convention as one of the specific forms of the *actus reus* does not necessarily influence the interpretation of the specific intent requirement.<sup>135</sup> Therefore, the *Bundesverfassungsgericht* correctly affirms that the “text of the law does not [...] compel the interpretations that the culprit’s intent must be to exterminate physically [...] members of the group.”<sup>136</sup>

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129. See *supra* II. 2. e) and *Schabas, supra* note 23, at 179-89: The issue of including acts of cultural genocide within Article 6 of the Rome Statute was a very delicate one, as “countries who were conscious of problems with their own policies towards minority groups, specifically indigenous peoples and immigrants,” saw their sovereignty endangered.

130. *Prosecutor v. Krstic, supra* note 6, para. 580.

131. See Ambos & Wirth, *supra* note 43, at 791 et seq.

132. For references see Ambos & Wirth, *supra* note 43, at 791 in fn. 122.

133. BVerfG, *supra* note 66, para. 22 (English translation quoted according to *Prosecutor v. Krstic, supra* note 6, para. 579).

134. *Prosecutor v. Krstic, supra* note 6, para. 579 quoting the BVerfG only selectively.

135. *Ntanda Nsereko, supra* note 10, at 128, states that “these acts [that constitute genocide] underscore the fact that the essence of genocide is the *physical destruction* or decimation of the group.” Whatever “the essence of genocide” is, according to the authors it is not possible to project elements of the *actus reus* on the special intent requirement as an element of the *mens rea*.

136. BVerfG, *supra* note 66, para. (III)(4)(a)(aa).

Historically the notion “as such” was – at least as intended by Venezuela, which suggested the amendment - meant to express the concept of motive.<sup>137</sup> *Schabas* therefore distinguishes “between what might be called the collective motive and the individual or personal motive” and requires “a racist or discriminatory motive, that is, a genocidal motive.”<sup>138</sup> Be that as it may, it does not preclude the interpretation of the group as social entity as the protected legal good of the crime of genocide.

(ii) “*in whole or in part*”

While there was disagreement as to the requirement of the intent to destroy the *whole* group during the negotiations of the Convention,<sup>139</sup> it is now clear from the wording of Art. II and the subsequent provisions that it is sufficient that the intent be directed at the destruction of the group “in part.” It is still unclear, though, what exactly a “destruction in part” means, i.e., how many members of the group must be potentially targeted. The following questions may be formulated:

Is it necessary to intend the destruction of a *significant number* of members of the group (*quantitative* element)?

Would it be sufficient to intend to destroy a *significant section* of the group, e.g., the leaders (*qualitative* element)?

Would it be sufficient to intend to destroy a reasonably significant number or section of a *part* of a group?

As to the *first question* the answer must be clearly in the affirmative. Already in 1960 *Nehemia Robinson* defined genocide as aimed at destroying “a multitude of persons of the same group,” as long as the number is “substantial.”<sup>140</sup> The Whitaker 1985 Expert Report referred to “a reasonably significant number, relative to the total of the group as a whole.”<sup>141</sup> These definitions were in fact adopted by the subsequent statements of the international authorities. The ILC refers to a “substantial part of the group.”<sup>142</sup> The ICTR speaks, *inter alia*, of a “considerable number of individuals.”<sup>143</sup> During the ICC Preparatory Commission negotiations it was noted that “[T]he reference to ‘intent to destroy, in whole or in part [...]’ was understood to refer to the specific intention to destroy

137. On this concept see *Schabas*, *supra* note 23, at 245 – 256; *BOOT*, *supra* note 21, para. 388.

138. *Schabas*, *supra* note 23, at 255.

139. See *Schabas*, *supra* note 23, at 230 *et seq.*

140. *Robinson*, *supra* note 79, at 63.

141. *Benjamin Whitaker*, Revised and Updated Report on the question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, p.16, para. 29.

142. Draft Code 1996, at 89.

143. *Prosecutor v. Kayishema*, *supra* note 6, para 97; see also *Prosecutor v. Bagilishema*, *supra* note 7, para. 64: “at least a substantial part.”

more than a small number of individuals [...]”<sup>144</sup> Critics of this quantitative requirement often do not sufficiently distinguish between the objective and subjective level.<sup>145</sup>

In this context it was also argued that it is not necessary “to intend to achieve the complete annihilation of a group from every corner of the globe.”<sup>146</sup> From this it follows that it is sufficient to intend to destroy a geographically limited part of a group.<sup>147</sup> The *Krstic* Trial Chamber considers as the decisive factor that the perpetrators seek “to destroy a *distinct part* of the group as opposed to an accumulation of isolated individuals within it” and that they “view the part of the group they wish to destroy as a *distinct entity* which must be eliminated as such.”<sup>148</sup> If this is the case, “the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide [...]”<sup>149</sup> In turn, if the members of the group were only killed selectively over a broad geographical area, the specific intent requirement would not be shown.<sup>150</sup>

Also, the *second question*, regarding the qualitative element, has been answered in the affirmative already by the Whitaker Report referring explicitly to “a significant section of a group, such as its leadership.”<sup>151</sup> This statement has been adopted by the Prosecutor<sup>152</sup> and the Chambers<sup>153</sup> of the ICTY. However, it is doubtful whether the intention to destroy the leadership of a particular group constitutes genocidal intent if it remains an isolated act, i.e., if it does not entail the complete disappearance or end of the group. In other words, the consequences for the group as such must be taken into account. One may, in accordance with the 1994 Report of the Commission of Experts, argue that “the attack on the leadership must be

144. Draft Statute for the ICC. Part 2. Jurisdiction, Admissibility and Applicable Law’, UN Doc. A/AC.249/1998/CRP.8.p.2, n.1. See also *Schabas*, *supra* note 9, Art. 6 mn 5 with references.

145. See as an example the discussion of the problem by *Cassese*, *supra* note 2, at 347-8 referring to Leila Wexler Sadat & Jordan Paust, *Model Draft Statute*, 13ter NOUVELLES ÉTUDES PÉNALES (1998), at 5.

146. Draft Code 1996, at 89.

147. *Prosecutor v. Jelusic*, *supra* note 14, para. 83; *Prosecutor v. Krstic*, *supra* note 6, para. 560, 589; BGHS 45, 64 (81); BVerfG, *supra* note 66, para 22-24.

148. *Prosecutor v. Krstic*, *supra* note 6, para. 590 (emphasis added).

149. *Id.*

150. *Ibid.*

151. *Whitaker*, *supra* note 141, para. 29.

152. *Prosecutor v. Karadzic and Mladic*, Transcript of hearing of 27 June 1996 (IT-95-18-R61, IT-95-5-R61), p. 24.

153. ICTY Trial Chamber, *Prosecutor v. Sikirica et al.*, Judgment on Defence Motions to Acquit of 3 September 2001 (IT-95-8-T), para. 65, 76; *Prosecutor v. Jelusic*, *supra* note 14, paras. 79-82; *Prosecutor v. Krstic*, *supra* note 6, para. 587.

viewed in the context of the fate of what happened to the rest of the group.”<sup>154</sup> In this sense, the attack concerns only a *significant* section of the group if it entails serious consequences for its existence.

The *third question* came up in *Krstic*. The Chamber, taking the Bosnian Muslims as the protected group,<sup>155</sup> had to decide whether the Bosnian Muslim men of military age of the town of Srebrenica “represented a sufficient part of the Bosnian Muslim group so that the intent to destroy them qualifies as an ‘intent to destroy the group in whole or in part.’”<sup>156</sup> In the light of the criterion mentioned above it answered this question in the affirmative since the “Bosnian Serb could not have failed to know [...] that this selective destruction of the group would have a lasting impact on the entire group,” they “had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society [...]” It was sufficient that “[t]he Bosnian Serb forces knew [...] that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.”<sup>157</sup> In fact, the Chamber referred to a “part” of the group of the Bosnian Muslims in the form of the Bosnian Muslims of the Srebrenica community. Thus, the question arises how small a “part” of a protected group can possibly be to constitute the object of protection of the crime. It is clear that by narrowing down the concept of group to very small parts or units of a broader group the scope of the crime may become in fact unlimited. By considering the Bosnian Muslim men of Srebrenica as part of the group of the Bosnian Muslims, the Chamber, in fact, performed a double reduction of the *actus reus*: It reduced the Bosnian Muslims to the ones living in Srebrenica and further to the Bosnian Muslim men of Srebrenica. Thus, in fact, the Chamber analysed whether the Serbs intended to destroy a part – the Bosnian Muslim men of Srebrenica - of a part – the Bosnian Muslims of Srebrenica - of the group of the Bosnian Muslims. One could even argue that it constitutes a further reduction of the group concept if the Chamber refers to the *Bosnian* Muslims instead of the Muslims as a religious group as such.

Be that as it may, the discussion shows that it is necessary to delimitate more clearly what is meant by “in whole or in part.” This is even more true if one, once again, keeps in mind the structure of the offence as a crime of

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154. Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, para. 94 (emphasis added).

155. *Prosecutor v. Krstic*, *supra* note 6, para. 591.

156. *Id.*, para. 581.

157. *Id.*, para 595.

intention (*Absichtsdelikt*), i.e., an offence where the *mens rea* of the perpetrator is dominating and prevails over the *actus reus*. Once again, the perpetrator need not objectively destroy a group “in whole or in part” but only intend to do so.

(iii) “a group”

The perpetrator’s intent must be directed towards the destruction of a “group”. Groups consist of individuals, and therefore, destructive action must ultimately be taken and directed against individuals. However, these individuals are not *per se* important but only as members of the group to which they belong.<sup>158</sup> They must be targeted because of their membership in the group.<sup>159</sup> In other words, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.<sup>160</sup> As has been said before (*supra (i)*), the crime of genocide protects the group as a social, supra-individual entity, it protects the group “as such.” While ordinary criminal law protect the rights and legal interests of individuals, e.g. their right to life, to physical integrity, to property, etc., the crime of genocide protects the right of certain groups to exist.<sup>161</sup>

## 2. Crimes Against Humanity

### A. *The context element*

#### 1. Widespread or systematic attack

##### a) *Attack*

The case law defines attack as the *multiple commission of acts* which fulfil the requirements of the inhumane acts enumerated in Art. 5 ICTY Statute and Art. 3 ICTR Statute.<sup>162</sup> This is a solid and convincing definition which excludes isolated and random acts<sup>163</sup> and, in addition, concurs with

158. *Robinson*, *supra* note 79, at 58.

159. *Prosecutor v. Akayesu*, *supra* note 11, para 521: “Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.” See also *Prosecutor v. Kayishema and Ruzindana*, *supra* note 6, para 97.

160. ICTY Trial Chamber, *Prosecutor v. Sikirica*, *supra* note 153, para 89.

161. Correctly *Ntanda Nsereko*, *supra* note 11, at 124: “While the aim of the law of homicide is to protect the right of an individual to live, that of genocide is to protect the right of groups to physically exist as such.”

162. See *Ambos & Wirth*, *supra* note 2, at 16 with further references; see also *Mettraux*, *supra* note 2, at 259-61.

163. See Roger Clark, *Crimes Against Humanity and the Rome Statute*, in *ESSAYS IN HONOUR OF GEORGE GINSBURGS* 139, 152 (Clark, Feldbrugge, & Pomorski eds., 2001); *Dixon*, in:

Art. 7 (2)(a) Rome Statute referring to “a course of conduct involving the multiple commission of acts referred to in paragraph 1.” Thus, the attack is not limited to a military attack but also comprises rather peaceful or non-violent means such as imposing a system of apartheid.<sup>164</sup> Conversely, a military operation is not necessarily an attack unless it is directed against the civilian population (see *infra c*).<sup>165</sup> On the other hand, the multiple commission of *other* acts than the ones enumerated in the Statutes, i.e., human rights violations such as the denial of fair trial, the infringement of property etc., cannot, as a rule, constitute an “attack.” However, such violations may be included in the catch all provision of “other inhumane acts of a similar character” (Art. 7 (2)(k) Rome Statute).<sup>166</sup>

The *mode of commission* is not strictly defined. A multiple commission of acts may be performed by one single perpetrator or by various perpetrators acting at one time or at various times. If a death squad kills the members of the political opposition during a long period of time its members commit multiple killings through various acts at different times. Also, a single perpetrator who throws a bomb in a crowd of people or poisons the drinking water of a village commits multiple killings but she only resorts to a single act; still the multiple killings constitute a “multiple commission of acts” within the meaning of an attack. Similarly, if a terrorist group flies a plane in a civilian building and thereby causes the death of various persons, its members commit multiple killings, with one single act. If the same crime is committed with various planes against different buildings, the group, in addition to the multiplicity of killings, uses various acts at one time instead of only one single act.

#### *b) Widespread or systematic*

A *widespread* attack requires a large number of victims which, as pointed out above, may either be the result of multiple acts or a single act “of extraordinary magnitude.”<sup>167</sup> The common denominator of a *systematic* attack is that it is “carried out pursuant to a preconceived policy or plan.”<sup>168</sup>

Triffterer (ed.), *supra* note 9, Art. 7 mn. 4; Gómez-Benítez, *Elementos comunes de los crímenes contra la humanidad en el Estatuto de la CPI etc.*, 7 CUADERNOS DE DERECHO JUDICIAL (Escuela Judicial. Consejo General del Poder Judicial) 9 (2001), at 21.

164. See already *Prosecutor v. Akayesu*, *supra* note 11, para. 581. See also *Mettraux*, *supra* note 2, at 246; *Dixon*, *supra* note 163, Art. 7 mn. 8.

165. Cf. *Mettraux*, *supra* note 2, at 246.

166. Cf. Ambos & Wirth, *supra* note 2, at 83-4.

167. *Prosecutor v. Blaskic*, Judgment of 3 March 2000 (IT-95-14-T), para. 206; *Prosecutor v. Vasiljevic*, Judgment of 29 November 2002 (IT-98-32-T) para. 35. See also Ambos & Wirth, *supra* note 2, at 20-1, 30, 34 with further references; conc. Gómez-Benítez, *supra* note 163, at 30.

168. *Prosecutor v. Bagilishema*, *supra* note 7, para. 77; *Prosecutor v. Vasiljevic*, *supra* note 167, para. 35. See also Ambos & Wirth, *supra* note 2, at 18-20, 30 with further references.

The attack is systematic if it is based on a policy or plan which serves as a guidance for the individual perpetrators as to the object of the attack, i.e., the specific victims.

While these definitions as such are more or less clear, it is a complicated question how these elements are interrelated, i.e., whether the attack must be either widespread *or* systematic (*alternative* approach) or *both* (*cumulative* approach). At first sight, the case law<sup>169</sup> and some codifications, such as the ILC Draft Code 1996,<sup>170</sup> UNTAET Regulation 15/2000<sup>171</sup> and the Special Court Statute for the Special Court for Sierra Leone<sup>172</sup> seem to adopt the alternative approach. The doctrine normally follows this approach<sup>173</sup> without, however, discussing the issues involved adequately. On the other hand, Art. 7 (2) (a) ICC Statute requires that the “multiple commission of acts” be based (“pursuant to or in furtherance of”) on a certain policy and, therefore, seems to opt for the cumulative approach.<sup>174</sup> How can these apparent contradictions be reconciled? More concretely, is there a possibility to interpret Art. 7 (2) (a) in accordance with the alternative approach which is explicitly adopted by Art. 7 (1)?

The solution to this problem lies in the *function* accorded to the policy element. Whereas article 7(2)(a) of the ICC Statute expressly requires this element, the question whether it is required under customary international law is subject of ongoing debate.<sup>175</sup> In fact, the policy element is the international element of crimes against humanity, it converts otherwise ordinary criminal acts into crimes against humanity. In essence, the policy element only requires that the acts of individuals alone, which are isolated, uncoordinated, and haphazard, be excluded.<sup>176</sup> Such ordinary criminal

169. See the references in Ambos & Wirth, *supra* note 2, at 18 with fn 81.

170. Art. 18: “[...] in a systematic manner or on a large scale [...]” (1996 ILC Report, *supra* note 38; GAOR, Fifty-first Session, Supplement No. 10 (A/51/10), at 14 *et seq.* (paras. 50 *et seq.*)).

171. Available at <http://www.un.org/peace/etimor/untaet/r/r-2000.htm>. See also Ambos & Wirth, *supra* note 2, at 26, 88 and Ambos/Othman (eds.), *New approaches in international criminal justice*, Freiburg i. Br. 2003 (forthcoming).

172. Statute of 22 January 2002.

Available at <http://www.specialcourt.org/documents/Statute.html>. See also Ambos/Othman, *supra* note 171.

173. See, e.g., Swaak-Goldman, *Crimes Against Humanity*, in McDonald & Swaak-Goldman, *supra* note 10, 141, at 157.

174. For this view see Clark, *supra* note 163, at 155.

175. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW*, 243 *et seq.* (2d ed. 1999); Cassese, *supra* note 2, at 360; BOOT, *supra* note 21, paras. 458 *et seq.*; Ambos & Wirth, *supra* note 2, at 26, 28 *et seq.* with further references; *Prosecutor v. Kunarac*, *supra* note 215, para. 98; *Prosecutor v. Vasiljevic*, *supra* note 167, para. 36.

176. Dixon, *supra* note 163, Art. 7 mn. 92; 1996 ILC Report, *supra* note 38, at 94; See also *Prosecutor v. Dragan Nolic*, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995 (IT-94-2-T), para. 26.

offences, even if committed on a widespread scale, do not constitute crimes against humanity if they are not, at least, tolerated by a State or an organisation.<sup>177</sup> While the policy element is already part of the definition of the term “systematic,” this is not the case with regard to the notion of “widespread.” According to the definition set out above, “widespread” only requires a large number of victims. Such a pure *quantitative* standard would not, however, provide for a clear cut delimitation between ordinary domestic and international crimes. It would, in fact, put on an equal footing ordinary crimes and crimes against humanity and thereby eliminate the international element which makes the difference between the two.<sup>178</sup> Thus, to constitute crimes against humanity, crimes committed on a widespread scale must be *linked*, in one way or the other, *to state or organisational authority*; they must, at least, be *tolerated* by such authority. For the interpretation of the controversial formulation of Art. 7 (2) (a) ICC Statute this means that it need not be interpreted in the sense of the cumulative approach but only as an expression of the - generally recognized - need of the policy element in both the systematic and widespread alternative of crimes against humanity.<sup>179</sup>

The question remains what exactly is required by a *policy* to commit crimes against humanity? While it is beyond controversy that an implicit or *de facto* policy is sufficient,<sup>180</sup> it was hotly debated in Rome and New York whether mere *toleration* of the crimes by the State or organisation would be sufficient. As is well known, the Elements of Crimes offer a contradictory proposal: On the one hand, it is required that “the State or organisation *actively* promote or encourage” the acts, on the other, it is admitted, in a footnote, that such a policy may, in exceptional circumstances, “be implemented by a *deliberate failure to take action*.” It is clear that the former “active” approach would make it difficult, if not impossible, to consider widespread crimes as crimes against humanity since active promotion or encouragement by the entity behind these crimes can hardly be proven. Apart from this rather strategic argument the substantive issue is whether such a high threshold is compatible with customary international law and whether such a restrictive understanding of crimes against humanity makes sense at all. In our view, the answer must be clearly in the negative. Customary international law does not require an *active* policy. On the basis of national and international case law and practice since Nuremberg, it may

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177. *Cassese, supra* note 2, at 356.

178. *Cf. BASSIOUNI, supra* note 175, at 245.

179. *Conc. Gómez-Benítez, supra* note 163, at 27-8. *See also* sect. 7 of the German *Völkerstrafgesetzbuch* (*infra* note 289) only requiring “a widespread or systematic attack.”

180. *See Ambos & Wirth, supra* note 2, at 27-8; *Dixon, supra* note 163, art.7 mn. 93; both with further references.

even be argued, as *Mettraux*<sup>181</sup> recently did, that this requirement is not relevant at all and only serves as “one of the factors which a court can take into account to conclude that an attack was directed upon a civilian population [...]”<sup>182</sup> While this may go too far in light of the explicit wording of Art. 7 (2) (a) ICC Statute, more than toleration or implicit approval need not exist.<sup>183</sup> If it were otherwise the widespread element would be eliminated from Art. 7 (1) ICC Statute for a whole range of cases where the entity behind these crimes would not actively promote or further them.<sup>184</sup> Thus, Art. 7 (2) (a) ICC Statute must be *interpreted restrictively* in that it does not require an active policy of the State or organisation to promote and/or encourage the crimes but that a toleration of these crimes, at least in the widespread alternative, is sufficient.

## 2. Directed against any civilian population

This requirement is a reminiscence of the war crimes legacy of crimes against humanity.<sup>185</sup> The reference to “*population*” is identical to the element of attack in that it implies a multiplicity of victims excluding isolated and random acts.<sup>186</sup> It adds something new, though, in that it refers to “a self-contained group of individuals, either geographically or as a result of other common features.”<sup>187</sup> However, this additional element should not be interpreted too restrictively, e.g., requiring that the population must be targeted indiscriminately rather than selectively.<sup>188</sup> This would conflict with some of the underlying offences which, in practice, have been committed selectively, think for example of the practice of disappearances in South America or the persecutions of the political opposition on the same continent as well as in Asia and Africa.

The qualifier “*any*” makes clear that the victims may possess the same nationality as their perpetrators, i.e., crimes against humanity are not

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181. *Mettraux*, *supra* note 2, at 270-82: “In fact, this requirement appears to be contradicted by almost all relevant writing on the subject and by the overwhelming practice.” (270).

182. *Mettraux*, *supra* note 2, at 282.

183. *Cf. Prosecutor v. Kupreskic et al.*, Judgment of 24 January 2000 (IT-95-16-T), paras. 552, 555 requiring toleration, “implicit approval or endorsement.” *Cf. also Cassese*, *supra* note 2, at 375-6; Alicia Gil Gil, *Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermords im Römischen Statut des Internationalen Strafgerichtshofs*, 112 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 381, 385-6 (2000); BOOT, *supra* note 21, para. 462; *Gómez-Benítez*, *supra* note 163, at 22 *et seq.* with a teleological interpretation.

184. *See Ambos & Wirth*, *supra* note 2, at 33.

185. *Bassiouni*, *supra* note 175, at 18 *et seq.* *See also Mettraux*, *supra* note 2, at 299-301 indicating the distinctions between crimes against humanity and war crimes.

186. *See Ambos & Wirth*, *supra* note 2, at 21-2 with further references.

187. *Mettraux*, *supra* note 2, at 255; *also* at 250: not only “a loosely connected group of individuals.”

188. *Mettraux*, *supra* note 2, at 255.

limited, as war crimes, to crimes against nationals of a foreign State.<sup>189</sup> The acts must be “*directed against*” the population, i.e., it must be “the primary object of the attack.”<sup>190</sup>

The relationship with the laws of war is still more obvious in the case of the requirement that the victim must be a “*civilian*.”<sup>191</sup> There is general agreement that the definition of the term in humanitarian law serves as a guidance or, at least, starting point, for crimes against humanity committed during *armed conflict*. Consequently, in this situation, civilians are all persons who are non-combatants in the sense of common article 3 of the Geneva Conventions. More concretely speaking and following the Blaskic Trial Chamber definition, a civilian is everyone who is no longer an active combatant in the “specific situation” at the time of the commission of the crime.<sup>192</sup> This includes former combatants and members of a resistance movement that are “no longer taking part in the hostilities [...]”<sup>193</sup> One may also include members of the police since they are in charge of the *civil* order and as such non-combatants.<sup>194</sup>

The situation is different, though, *in times of peace*. In this moment humanitarian law is not applicable and therefore the law of crimes against humanity must afford a broader protection.<sup>195</sup> Since there are no “combatants” during peace time, it would make no sense to follow the humanitarian law definition of the term “civilian” and exclude combatants from the scope of application of crimes against humanity. Consequently, everybody, including the police,<sup>196</sup> is a “civilian” and may be the victim of crimes against humanity. Only such a broad definition takes sufficiently into account the underlying rationale of crimes against humanity, i.e., the penal protection of the human rights of *all* human beings against widespread and systematic violations of certain fundamental rights. At the same time, such a broad definition enables the courts, at least in peace time, to overcome the unnecessary and harmful restriction of the offence by the inclusion of the

189. See Ambos & Wirth, *supra* note 2, at 22 with further references; Mettraux, *supra* note 2, at 254, 256, 299-300; Dixon, *supra* note 163, Art. 7 mn. 13.

190. *Prosecutor v. Kunarac*, Judgment of 22 February 2001 (IT-96-23-T), para. 421. See also Mettraux, *supra* note 2, at 247 and 253 with further references.

191. See Ambos & Wirth, *supra* note, at 22-6. For a good discussion see also Swaak-Goldman, *supra* note 173, at 154-155.

192. *Prosecutor v. Blaskic*, *supra* note 167, para. 214.

193. *Prosecutor v. Blaskic*, *supra* note 167, para. 214. See also Cassese, *supra* note 2, at 375; Dixon, *supra* note 163, Art. 7 mn. 13. On the broader post WW II national case law see Ambos/Wirth, *supra* note 2, at 23 with references.

194. See Ambos & Wirth, *supra* note 2, at 25.

195. See Ambos & Wirth, *supra* note 2, at 24 with references.

196. In the contrary: *Prosecutor v. Kayishema*, para. 127; *concurring* with the judgment: Mettraux, *supra* note 2, at 257.

element “civilian.” Obviously, this definition cannot be transferred easily to the situation of armed conflict. Here, the definition derived from humanitarian law and the existence of combatants makes it difficult, if not impossible, to employ a definition which, in fact, ignores the wording of the international instruments. The best to be achieved is the broad definition<sup>197</sup> adopted by the Tribunals which, *inter alia*, implies that the character of a predominantly civilian population is not altered by the presence of certain non-civilians in their midst.<sup>198</sup> Ultimately, the only effective remedy for the situation of armed conflict is to remove the word “civilian” as soon as possible from Art. 7 ICC Statute.

### 3. The nexus between the individual acts and the context element

Certainly, there has to be a link between the individual criminal acts and the context of a widespread or systematic attack. The wording of the chapeau of article 3 of the ICTR Statute and article 7(1) of the Rome Statute provide that the enumerated criminal act must be “committed as part of a widespread or systematic attack” (emphasis added). Article 5 ICTY Statute provides that a person is responsible “for the following crimes when committed in armed conflict [...] and directed against any civilian population.”

The individual, underlying acts must be *part* of the overall attack. They must be “part of a pattern of widespread and systematic crimes directed against a civilian population.”<sup>199</sup> This nexus requirement excludes isolated acts, e.g., the single killing of a member of the victim group in her place of exile if they are too remote from the core of the attack. It does, however, not, as has been pointed out above, exclude single acts *per se* if they only form part of the overall attack. In other words, the commission of a single underlying act may constitute a crime against humanity if it fits into the pattern of a widespread or systematic commission.<sup>200</sup>

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197. See *Ambos/Wirth*, *supra* note 2, at 22 with references; *Mettraux*, *supra* note 2, at 256-57 with fn. 91.

198. See the references in *Ambos/Wirth*, *supra* note 2, at 26 with fn 124; *Mettraux*, *supra* note 2, at 257 with fn 95.

199. *Prosecutor v. Tadic*, Judgment of 15 July 1999 (IT-94-1-A), para.248, 255. See also *Mettraux*, *supra* note 2, at 251-2; *Dixon*, *supra* note 163, Art. 7 mn. 10; *Ambos/Wirth*, *supra* note 2, at 35-36.

200. *Prosecutor v. Mrksic*, Review of the Indictment Pursuant to Rule 61 of Rules of Procedure and Evidence, 3 April 1996 (IT-95-13a-R61), paras. 29-30; *Prosecutor v. Tadic*, Opinion and Judgment, 7 May 1997 (IT-94-1-T), para. 649; *Prosecutor v. Kayishema*, *supra* note 6, para. 135; *Prosecutor v. Kupreskic et al.*, *supra* note 183, para. 550; *Prosecutor v. Kunarac*, *supra* note 190, para. 417; *Prosecutor v. Kordic and Cerkez*, Judgment of 26 February 2001 (IT-95-4/2-T), para. 178; *Prosecutor v. Bagilishema*, *supra* note 7, para. 82. See also *Mettraux*, *supra* note 2, at 251; *Dixon*, *supra* note 163, Art. 7 mn. 9; *Gómez-Benítez*, *supra* note 163, at 32.

The *case law* requires two “elements” with regard to the nexus: On the one hand, “the crimes must be committed in the context of widespread or systematic crimes against a civilian population” (material element); on the other, “the accused must have *known* that his acts, ‘fitted into such a pattern’” (mental element).<sup>201</sup> Additional elements are regarded irrelevant. With regard to the material element – for the mental element see *infra* 4. - both *ad hoc* Tribunals made clear that the underlying offence need not constitute the attack.<sup>202</sup>

“[t]he crimes themselves need not contain the three elements of the attack (...), but must form *part of* such an attack.”<sup>203</sup>

“It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity.”<sup>204</sup>

A more precise definition of the required link may be derived from the *rationale* of crimes against humanity. It consists in the protection against the particular dangers of multiple crimes supported or unopposed by the authorities. Thus, an adequate test to determine whether a certain act was part of the attack is to ask whether the act would have been less dangerous for the victim if the attack and the policy had not existed.<sup>205</sup>

In contrast to the crime of genocide, the victim of the individual act of a crime against humanity need not necessarily be a member of a specifically targeted group. The Prosecution only needs to prove that the victim was targeted as part of an attack against a civilian population.<sup>206</sup> It is unnecessary “to demonstrate that the victims are linked to any particular side of the conflict.”<sup>207</sup> Finally, the perpetrator may also be a member of the targeted group itself.<sup>208</sup>

201. *Prosecutor v. Kordic*, *supra* note 199, para. 187; *Prosecutor v. Tadic*, A.Ch. Judgment, *supra* note 199, paras. 248, 255; *Prosecutor v. Kupreskic*, *supra* note 183, para. 556.

202. *Prosecutor v. Kunarac*, *supra* note 190, para. 417; *Prosecutor v. Kunarac*, Judgment of 12 June 2002 (IT-96-23 & IT-96-23/1-A), para. 85; *Prosecutor v. Tadic*, A.Ch. Judgment, *supra* note 199, para. 248; *Prosecutor v. Bagilishema*, *supra* note 7, para. 82.

203. *Prosecutor v. Kayishema*, *supra* note 6, para. 135.

204. *Prosecutor v. Kunarac*, *supra* note 190, para. 419.

205. *Ambos/Wirth*, *supra* note 2, at 36. See for examples where this is not the case: *Mettraux*, *supra* note 2, at 251, 252.

206. *Mettraux*, *supra* note 2, at 256, gives the example of a German who is detained or tortured for hiding a Jewish friend during World War II even though he was not part of the targeted Jewish population.

207. *Prosecutor v. Kunarac*, *supra* note 190, para. 423; *Prosecutor v. Akayesu*, Judgment of 1 June 2001 (ICTR-96-4-A), para. 437.

208. *Mettraux*, *supra* note 2, at 256.

#### 4. The mens rea

It is clear from the wording of the ICC Statute (“Knowledge of the attack”) that each perpetrator must *know* that there is an *attack* on the civilian population. The perpetrator must also know that her individual act forms part of that attack. Both elements are usually dealt with jointly and concurrently.<sup>209</sup>

While it is clear that the knowledge requirement in crimes against humanity is specific in that it only refers to the “attack” and as such must not be confused with the general intent requirement which applies to the underlying acts of crimes against humanity,<sup>210</sup> it is less clear whether the general mental element, as now codified in Art. 30 ICC Statute, in particular the definition of knowledge in para. 3, must be taken into account for the determination of the knowledge requirement. If this were the case, i.e., if one conceives the knowledge requirement not as a specific subjective or mental element of crimes against humanity but only as the *expression of a general intent requirement*,<sup>211</sup> Art. 30 (3) ICC Statute would apply and the perpetrator would need to be “aware” of the attack. If, on the other hand, one considers that the knowledge requirement is a *specific subjective element* of crimes against humanity which must be defined on the basis of customary international law, independent of the general definition laid down in Art. 30 (3) ICC Statute,<sup>212</sup> one arrives at a broader definition of knowledge as developed by the case law of the *ad hoc* Tribunals. While the *Tadic* Appeals Chamber still spoke of knowledge of the attack, without qualifying the requirement further,<sup>213</sup> the *Blaskic* Trial Chamber introduced what one could call a “*risk orientated approach*.” Accordingly, knowledge “also includes the conduct of a person taking a deliberate risk in the hope that the risk does not cause injury.”<sup>214</sup> This approach was most recently confirmed by the *Kunarac* Appeals Chamber<sup>215</sup> adopting the Trial Chamber’s view that the perpetrator must “take the risk that his act is part of the attack.”<sup>216</sup>

At first sight, it appears as if these two standards, knowledge in the sense of Art. 30 (3) ICC Statute and the risk-orientated approach, seem

209. *E.g. Boot*, *supra* note 21, para. 467; *Mettraux*, *supra* note 2, at 261-263.

210. *See also Mettraux*, *supra* note 2, at 254.

211. *Cf. Ambos*, *supra* note 70, at 774.

212. *Ambos/Wirth*, *supra* note 2, at 39.

213. *Prosecutor v. Tadic*, A.Ch. Judgment, *supra* note 199, para. 271

214. *Prosecutor v. Blaskic*, *supra* note 167, para. 254 quoting *Desportes/Le Gunehec* in fn. 483.

215. *Prosecutor v. Kunarac*, *supra* note 202, para. 102; conc. *Prosecutor v. Vasiljevic*, *supra* note 167, para. 37.

216. *Prosecutor v. Kunarac*, *supra* note 190, para. 434. *See also Mettraux*, *supra* note 2, at 261.

incompatible. Indeed, it has been argued elsewhere that knowledge according to Art. 30 (3) ICC Statute does not embrace awareness of a mere risk.<sup>217</sup> Consequently, if one considers the knowledge requirement in crimes against humanity as a general intent requirement the risk orientated approach would not be applicable. It would then only help to invoke the “unless otherwise provided” formula of Art. 30 ICC Statute and argue that the knowledge requirement in crimes against humanity is *lex specialis* and as such derogates the *lex generalis* of Art. 30 (3) ICC Statute.<sup>218</sup> Yet, there may be another way of reconciling the apparently contradictory interpretations of the knowledge requirement. One could *redefine Art. 30 (3)* ICC Statute in the light of the risk orientated approach. This would mean that knowledge as a general mental element always must be understood in the sense of awareness of the risk of one’s conduct, more concretely speaking, being aware of the risk that the conduct could fulfil a circumstance which would convert the act into an international crime. This interpretation would be supported by the already mentioned cognitivist theory since this theory conceives intent (*dolus*) as knowledge of the risk that a certain conduct will lead to a certain offence.<sup>219</sup>

This risk-orientated approach is complemented by the standard of “*constructive knowledge*” which, according to the case law, forms part of the definition of knowledge.<sup>220</sup> This highly controversial concept imputes knowledge on the basis of certain indicia and constitutes a mere negligence standard in the sense of a wilful blindness<sup>221</sup> and “should have known” standard known from the superior responsibility doctrine.<sup>222</sup> While the use of certain indicia to infer knowledge is generally recognized in the law of evidence and a necessary technique to prove a (specific) mental element (also adopted by the *ad hoc* Tribunals<sup>223</sup>), one must not confuse this technique with the “construction” of knowledge on the basis of mere assumptions and suspicions. Such an imputation of objectively non-existing knowledge operates on a fictional basis and violates the principle of guilt. All the more caution is necessary in the light of the generally low standard applied by the Tribunals with regard to the *scope of the knowledge* required.

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217. *Ambos/Wirth, supra* note 2, at 39.

218. *See Ambos/Wirth, supra* note 2, at 39.

219. Cf. *Frisch, supra* note 93, at 341 *et seq.* (341: “Notwendig ist das Wissen um das der Handlung eignende und (normative) ihre Tatbestandsmäßigkeit begründende Risiko [...]”).

220. *See Ambos/Wirth, supra* note 2, at 38 with references in fn. 178.

221. *See R. v. Finta* [1994] S.C.R. 701, 812; *Ambos/Wirth, supra* note 2, at 38-9.

222. *See Ambos, supra* note 70, at 696-7, 699-700; *id.*, in: Cassese, *supra* note 2, 823, at 864 *et seq.*

223. *See Mettraux, supra* note 2, at 262 with fn. 124 and *supra* A. III. 1. c).

The perpetrator need neither know the details of the attack nor the details of the underlying plan or policy.<sup>224</sup>

## II. The individual acts

### 1. The mental state required with regard to the individual criminal acts

Apart from the general intent as defined in Art. 30 ICC Statute there is no other mental requirement with regard to the individual criminal acts of crimes against humanity. In particular, since the Appeal Chamber decision in *Tadic*, it is clear that crimes against humanity in general need not be committed with a *discriminatory intent*.<sup>225</sup> This also applies to Art. 3 ICTR Statute since the reference to certain discriminatory grounds can be read as a characterization of the attack rather than of the *mens rea* of the perpetrator.<sup>226</sup> The sole category in which discrimination comprises an integral element of the prohibited conduct is the crime of “persecution.”

By the same token, in principle, *motives* (as distinct from the intent) of the accused do not form part of the mental element.<sup>227</sup>

### 2. The individual acts

#### a) Murder

Article 7(2) of the Rome Statute does not explain the term “murder.” It was regarded as a concept sufficiently well-understood in all legal systems as not to require further elaboration.<sup>228</sup> Still, national legal systems do vary to some extent with regard to the doctrinal details.<sup>229</sup> According to *Bassiouni* state practice defines murder in its “*largo sensu*” meaning as including the

224. *Prosecutor v. Kunarac*, *supra* note 215, para. 102-4. *See also Ambos*, *supra* note 70, at 774 *et seq.*; *Ambos/Wirth*, *supra* note 2, at 41-2 both with references; *Mettraux*, *supra* note 2, at 262 with fn. 123; *Dixon*, *supra* note 163, Art. 7 mn. 15.

225. *Prosecutor v. Tadic*, A.Ch. Judgment, *supra* note 199, para. 305. *See also Ambos/Wirth*, *supra* note 2, at 43-5; *Mettraux*, *supra* note 2, at 268-9; *Dixon*, *supra* note 163, Art. 7 mn. 16; *Swaak-Goldman*, *supra* note 173, at 160 *et seq.*; *Cassese*, *supra* note 2, at 369.

226. *Prosecutor v. Bagilishema*, *supra* note 7, para. 81; *Prosecutor v. Akayesu*, *supra* note 207, paras. 467-469. The *Akayesu* A.Ch., however, held that “Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed [...] on discriminatory grounds” (para. 469). *See also Ambos & Wirth*, *supra* note 2, at 44.

227. *Prosecutor v. Tadic*, A.Ch. Judgment, *supra* note 199, paras. 270, 272; *Prosecutor v. Kupreskic*, *supra* note 183, para. 558 (noting that the issue was “free from dispute”); *Prosecutor v. Kunarac*, *supra* note 190, para. 433; *Prosecutor v. Kordic*, *supra* note 199, para. 187; *Prosecutor v. Vasiljevic*, *supra* note 167, para. 37; *see also Ambos & Wirth*, *supra* note 2, at 45; *Mettraux*, *supra* note 2, at 268-9; *Swaak-Goldman*, *supra* note 173, 160-164; *Gómez-Benítez*, *supra* note 8, at 151.

228. *Robinson*, *The Elements of Crimes against Humanity*, in: Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, 57, at 80 (2001).

229. For an analysis of the differences, *see Heine/Vest*, in: McDonald/Swaak-Goldman (eds.), *supra* note 10, 175, 176 – 182.

creation of life endangering conditions likely to result in death according to reasonable human experience.<sup>230</sup> Thus, murder includes a closely related form of unintentional but foreseeable death which the common law labels as voluntary and involuntary manslaughter and which the Romanist-Civilist-Germanic system consider homicide with *dolus* (*Vorsatz*) and homicide with *culpa* (*Fahrlässigkeit*).<sup>231</sup>

The case law defines murder by three requirements: first, the victim died, second, the victim's death resulted from an act of the accused and, finally, the accused must have been motivated by the intent to kill the victim or to cause grievous bodily harm with the reasonable knowledge that the attack was likely to result in death.<sup>232</sup> Although there has been some controversy in the *ad hoc* Tribunals' jurisprudence as to the meaning to be attached to the discrepancy between the use of the word "murder" in the English text of the Statute and the use of the word "*assassinat*" in the French text, it is now settled that premeditation is not required.<sup>233</sup>

#### b) *Extermination*

"Extermination" is defined in Article 7(2)(b) of the Rome Statute to include the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.<sup>234</sup> According to the *Akayesu* Trial Chamber "[e]xtermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder."<sup>235</sup> In this regard extermination is closely related to the crime of genocide as

230. *Bassiouni*, *supra* note 175, at 300-302.

231. *Ibid.*

232. *Prosecutor v. Akayesu*, *supra* note 11, para. 589; *Prosecutor v. Kupreskic et al.*, *supra* note 183, para. 560; *Prosecutor v. Blaskic*, *supra* note 167, para. 217; *Prosecutor v. Rutaganda*, *supra* note 13, para. 80; *Prosecutor v. Musema*, *supra* note 28, para. 215; *Prosecutor v. Vasiljevic*, *supra* note 167, para. 205.

233. *Prosecutor v. Kordic*, *supra* note 199, para. 235; *Prosecutor v. Akayesu*, *supra* note 11, para. 587-589; *Prosecutor v. Rutaganda*, *supra* note 13, para. 79; *Prosecutor v. Musema*, *supra* note 28, para. 214-215; *Prosecutor v. Jelusic*, *supra* note 14, paras. 35, 51; *Prosecutor v. Blaskic*, *supra* note 167, para. 216; *disagreeing: Prosecutor v. Kayishema*, *supra* note 6, para. 140; *Prosecutor v. Kupreskic*, *supra* note 183, para. 561.

234. In *Prosecutor v. Kayishema*, *supra* note 6, para. 144 the elements of extermination have been further specified: "The actor participates in the mass killing of others or in the creation of conditions of life that lead to mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event; where, his act(s) or omission(s) forms part of a widespread or systematic attack against civilian population on national, political, ethnics, racial or religious grounds."

235. *Prosecutor v. Akayesu*, *supra* note 11, para. 591.

both crimes are directed against a large number of victims. However, unlike genocide extermination as a crime against humanity covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared.<sup>236</sup> A single killing may qualify as extermination if it was part of a mass killing event, and if the perpetrator knowingly committed her act in this context.<sup>237</sup> While extermination generally involves a large number of victims the mass killing event need not destroy a specified proportion of the targeted population.<sup>238</sup> It is the combined effect of a vast murderous enterprise and the accused's part in it, in contrast to a simple murder, which gives the crime its specificity and distinctiveness.<sup>239</sup>

### c) *Enslavement*

The main element of the definition of “enslavement” is the right of ownership exercised by one over another person (Article 7(2)(c)). The *Kunarac* Trial Chamber finds that “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>240</sup> Indicia of enslavement include: “the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>241</sup> The *mere ability* to buy, sell, trade or inherit a person or his or her labours or services is insufficient, but such actions actually occurring could be a relevant factor.<sup>242</sup>

The Appeals Chamber follows this definition stressing that “it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea.”<sup>243</sup> It further

236. See 1996 ILC Report *supra* note 38, at 97.

237. *Mettraux*, *supra* note 2, at 284-5; *Prosecutor v. Kayishema*, *supra* note 6, paras. 146-7. This view is sustained by the wording of Art. 7(1)(b) of the Elements of Crimes, *supra* note 23. But now see *Prosecutor v. Vasiljevic*, *supra* note 167, para. 227-229, stating “that the *Kayishema and Ruzindana* Trial Chamber omitted to provide any state practice in support of its ruling on that point, thereby very much weakening the value of its ruling as a precedent” (fn. 586).

238. *Mettraux*, *supra* note 2, at 285, *criticising Prosecutor v. Krstic*, *supra* note 6, para. 501-503, but apparently misinterpreting it.

239. *Mettraux*, *supra* note 2, at 285.

240. *Prosecutor v. Kunarac*, *supra* note 190, para. 539.

241. *Prosecutor v. Kunarac*, *supra* note 190, para. 543; see also *Prosecutor v. Krnojelac*, Judgment of 15 March 2002 (IT-97-25-T), para. 350.

242. *Prosecutor v. Kunarac*, *supra* note 190, para. 543.

243. *Prosecutor v. Kunarac*, *supra* note 215, para. 119.

considers that lack of consent of the victims is not an element of the crime since enslavement flows from claimed rights of ownership.<sup>244</sup> The required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership.<sup>245</sup>

*d) Deportation or forcible transfer of population*

According to the definition in Article 7(2)(d) of the Rome Statute “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. The *Nicolic* Rule 61 decision suggested that the conditions of transfer could transform a legal transfer into an illegitimate and possibly criminal one.<sup>246</sup>

Whereas the term “deportation” carries with it the connotation that people are moved beyond national boundaries, “forcible transfer” relates to displacements within a State.<sup>247</sup> However, the *Krstic* Trial Chamber held, that forcible transfer (which is not covered by Art. 5(d) ICTY Statute), “in the circumstances of this case, still constitutes a form of inhumane treatment covered under Article 5” [(i) ICTY Statute].<sup>248</sup>

*e) Imprisonment or other severe deprivation of liberty*

Whereas the *Kordic* Trial Chamber held that for imprisonment the same conduct is required as for the war crime of unlawful confinement,<sup>249</sup> the *Krnojelac* Trial Chamber considered that “the definition of imprisonment is not restricted by the grave breaches provisions of the Geneva Conventions.”<sup>250</sup> However, it concluded that the deprivation of an individual’s liberty is only arbitrary if it is imposed without due process of law in the light of the relevant international instruments. Analysing these instruments, both judgments finally come to the same result.<sup>251</sup> Therefore, imprisonment is the arbitrary “deprivation of liberty of the individual

244. *Ibid.* para. 120.

245. *Prosecutor v. Kunarac*, *supra* note 190, para. 540; *Prosecutor v. Kunarac*, *supra* note 215, para. 122; *Prosecutor v. Krnojelac*, *supra* note 241, para. 350.

246. *Prosecutor v. Nicolic*, *supra* note 176, para. 23, *see also* Ambos & Wirth, *supra* note 2, at 60.

247. *Clark*, *supra* note 163, at 148; *Prosecutor v. Krstic*, *supra* note 18, para. 531-2.

248. *Prosecutor v. Krstic*, *supra* note 18, para. 532; *see also* *Prosecutor v. Kupreskic*, *supra* note 183, para. 566. However, *Prosecutor v. Nicolic*, *supra* note 176, para. 23 stated that the unlawful transfer of detainees from Susica camp to Batkovic could be characterised as deportation, although both places lie within the the same country (Bosnia and Herzegovina).

249. *Prosecutor v. Kordic*, *supra* note 199, para. 301-302.

250. *Prosecutor v. Krnojelac*, *supra* note 241, para. 111.

251. *See* Ambos & Wirth, *supra* note 2, at 63.

without due process of law, i.e. if no legal basis can be called upon to justify the initial deprivation of liberty.”<sup>252</sup> If national law is relied upon as justification, the relevant provisions must not violate international law.<sup>253</sup>

The procedural safeguards of Geneva law as well as the ICCPR’s<sup>254</sup> provisions on *fair trial* apply to both the initial decision to deprive a person of liberty and the subsequent review.<sup>255</sup> If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment.<sup>256</sup> It is worth mentioning that the Working Group on Arbitrary Detention of the Commission of Human Rights has pointed out that a deprivation of liberty is also illegal if it is imposed solely because the victim exercised her human rights.<sup>257</sup> Thus, imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law covers gross violations of human rights characterized by arbitrary imprisonment.<sup>258</sup>

Although not expressly required by *Krnojelac* and *Kordic*, a deprivation of liberty must be *severe* to be criminal under international law. This follows from the formulation in Art. 7(1)(e) ICC Statute “imprisonment or *other severe* deprivation of liberty” (emphasis added).<sup>259</sup>

#### f) Torture

“Torture” means, within the understanding of Article 7(2)(e) of the Rome Statute, the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. The expression “severe pain or suffering” conveys the idea that only acts of *substantial gravity* may qualify as torture.<sup>260</sup> While this definition adds a so called *control* requirement,<sup>261</sup> the relevant case law requires a *specific purpose*, i.e., that the act must aim at obtaining information or a confession, or at punishing, intimidating, or coercing the victim or a third person, or at discriminating,

252. *Prosecutor v. Kordic*, *supra* note 199, para. 302; *Prosecutor v. Krnojelac*, *supra* note 241, para. 114.

253. *Prosecutor v. Krnojelac*, *supra* note 241, para. 114.

254. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171.

255. *See Ambos & Wirth*, *supra* note 2, at 63-64.

256. *Prosecutor v. Krnojelac*, *supra* note 241, para. 114.

257. Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44, Annex I, para. 8.

258. *See Clark*, *supra* note 163, at 148.

259. *See Ambos & Wirth*, *supra* note 2, at 65.

260. *Prosecutor v. Delalic*, *supra* note 263, para. 461-469; *Mettraux*, *supra* note 2, at 289.

261. *See Ambos & Wirth*, *supra* note 2, at 67.

on any ground, against the victim or a third person.<sup>262</sup> However, the conduct need not be solely or predominately perpetrated for one of the prohibited purposes; they need only be part of the motivation behind the conduct.<sup>263</sup>

The requirement of a specific purpose must be rejected. It was deliberately omitted from the Rome Statute as well as from Art. 7(1)(f) of the Elements of Crimes. A footnote to the Elements reads: “It is understood that no purpose need be proved for this crime.”<sup>264</sup> This is goes hand in hand with a recent judgement of the German Supreme Court according to which torture is infliction of “most severe physical or mental suffering” and does not require an additional purpose but only the intent to inflict the said treatment.<sup>265</sup> As a result, torture does not require any (additional) purpose or special intent which would go beyond the mere intent to inflict severe pain.<sup>266</sup>

*g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*

According to the definition in Article 7(2)(f) of the Rome Statute “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. Article 7(2)(f) of the Rome Statute states further that this definition shall not in any way be interpreted as affecting national laws relating to pregnancy. The expressions “Rape,” “sexual slavery,” “enforced prostitution,” “enforced sterilization,” “or any other form of sexual violence of comparable gravity” have not been defined within Article 7(2)(f) of the Rome Statute.<sup>267</sup>

The Chambers of the two *ad hoc* tribunals distinguish between a *conceptual* and a *mechanical* definition of rape. Some consider:

“that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture (...) does not catalogue specific acts in its definition of torture, focusing rather on the conceptual

262. *Prosecutor v. Kunarac*, *supra* note 190, para. 497; *Prosecutor v. Akayesu*, *supra* note 11, para. 594; *Prosecutor v. Furundžija*, Judgment of 10 December 1998 (IT-95-17-T) para. 162.

263. *Prosecutor v. Kunarac*, *supra* note 190, para. 486; *Prosecutor v. Delalic*, Judgment of 16 November 1998 (IT-96-21-T), para. 470 ; *Mettraux*, *supra* note 2, at 290.

264. Elements of Crimes, *supra* note 23, article 7(1)(f), fn. 14.

265. Judgment of 21 February 2001 (*Sokolovic*) – 3 StR 372/00, 4. d) aa) = NStZ 2001, 658 (661).

266. Cf. Kai Ambos, *Immer mehr Fragen im internationalen Strafrecht*, NStZ 2001, 628 (632).

267. These acts are defined in the Elements of Crimes, *supra* note 23.

framework of state sanctioned violence. This approach is more useful in international law.”<sup>268</sup>

Rape was, therefore, defined as

“a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>269</sup>

The *Furundzija* Trial Chamber held “that the following may be accepted as the objective elements of rape:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.”<sup>270</sup>

The *Kunarac* Trial Chamber adopted this view with regard to the elements listed under (i) but held that under (ii) it was only necessary that

“such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”<sup>271</sup>

Thus, apparently, the consent is considered an element of the *actus reus* and not a defence. This corresponds to the German distinction between “Einverständnis” and “Einwilligung,”<sup>272</sup> the former eliminating the *actus reus* and the latter the unlawfulness of the act. The distinction has substantive and procedural consequences. As to the latter, it is clear that the existence of the *actus reus* must be proved by the prosecution while the burden of proof with regard to a defence rests, as a rule, with the defence.

268. *Prosecutor v. Akayesu*, *supra* note 11, para. 597; *Prosecutor v. Delalic*, *supra* note 263, paras. 478-479; *Prosecutor v. Musema*, *supra* note 28, paras. 220-229.

269. *Prosecutor v. Akayesu*, *supra* note 11, para. 598; *Prosecutor v. Delalic*, *supra* note 263, paras. 478-479; *Prosecutor v. Musema*, *supra* note 28, paras. 220-229.

270. *Prosecutor v. Furundzija*, *supra* note 262, para. 185. Article 7(1)(g)-1 (1) of the Elements of Crimes, *supra* note 23, follows this “mechanical” definition.

271. *Prosecutor v. Kunarac*, *supra* note 190, para. 460. Article 7(1)(g)-1 (2) of the Elements of Crimes, *supra* note 23, requires “that the invasion was committed by force, threat of force or coercion [...], or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.”

272. *Cf. (crit.)* ROXIN, 1 STRAFRECHT ALLGEMEINER (3d ed. 1997), at § 13 mn. 1 *et seq.*

As to the substance, complex issues of mistake may arise. If, as to *mens rea*, it is not only required that the perpetrator intends to effect the sexual penetration, but also acts with the *knowledge* that it occurs without the consent of the victim,<sup>273</sup> he may invoke a mistake of fact if he believed that the victim consented to sexual intercourse. This mistake would negate the mental element within the meaning of Art. 32 (1) ICC-Statute since the perpetrator would lack the necessary knowledge as to an element of the *actus reus*. If, on the other hand, one considers the consent a defence the perpetrator would, believing that the victim consents, err about the factual elements of this defence, more exactly, about a justification (“*Erlaubnissachverhaltsirrtum*” = putative justification).<sup>274</sup> Depending on the theory one follows this would either negate the mental element or only the blameworthiness of the conduct.<sup>275</sup> In the former situation the perpetrator would be – in accordance with Art. 32 (1) ICC Statute – exempted from punishment, in the latter situation the mistake would be irrelevant according to the *error iuris* rule contained in Art. 32 (2) ICC Statute.<sup>276</sup> Still another situation could occur if the perpetrator is ignorant of the requirement of consent (or of a certain defence); this would constitute an irrelevant mistake of law (Art. 32 (2) ICC Statute).

#### *h) Persecution*

Persecution is defined in Article 7(2)(g) of the Rome Statute as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. According to the case law

“[T]he crime of persecution consists of an act or omission which

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).”<sup>277</sup>

Persecutory acts can take many forms and do not require any link to other crimes enumerated elsewhere in the Statute. They can consist of acts enumerated in other sub-clauses of Article 5, of acts mentioned elsewhere in

273. *Prosecutor v. Kunarac*, *supra* note 190, para. 460.

274. Cf. *Fletcher*, Basic concepts of criminal law, 1998, at 158 et seq. (159-60).

275. The correct view is to treat the “*Erlaubnissachverhaltsirrtum*” as a mistake of fact, see *Ambos*, *supra* note 70, at 808 et seq.

276. ~~Crit. on the strict standard of Art. 32(2) *Ambos*, *supra* note 70, at 822-4.~~

277. *Prosecutor v. Vasiljevic*, *supra* note 167, para. 244; *Prosecutor v. Krnojelac*, *supra* note

the Statute, or of acts not explicitly mentioned anywhere in the Statute.<sup>278</sup> The deprivation of rights must be severe, i.e. it must reach "the same level of gravity as the other acts prohibited in Article 5."<sup>279</sup>

The additional element of discriminatory intent for persecution "amounts to an *aggravated criminal intent (dolus specialis, dol spécial)*. In the case of persecution, the intent must be to subject a person or group to discrimination, ill-treatment, or harassment so as to bring about great suffering or injury to that person or group on religious, political or other such grounds."<sup>280</sup> This persecutory *mens rea* is the distinctive feature of the crime of persecution that "sets the crime of persecution apart from other Article 5 crimes against humanity."<sup>281</sup> This led the *Kupreskic* Trial Chamber to draw parallels between genocide and persecution:<sup>282</sup>

"[I]t can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide."<sup>283</sup>

#### *i) Enforced disappearance of persons*

Article 7(2)(i) of the Rome Statute offers, for the first time, a definition of enforced disappearances which complies with minimum standards of legal certainty. Accordingly, the conduct is characterized by the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization and the subsequent refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The crime goes back to the Latin American experience which led to its qualification as a crime against humanity by the Inter-American Convention on Forced Disappearance of Persons of 1994.<sup>284</sup> The inclusion in the Rome Statute converts it into a truly international crime. Still, there is no case law in international criminal but only in human rights law, in particular the

241. para. 431.

278. *Mettraux*, *supra* note 2, at 292 with references.

279. *Prosecutor v. Kupreskic*, *supra* note 183, paras. 620-621; *Ambos/Wirth*, *supra* note 2, at 74 *et seq.* with further references.

280. *Cassese*, *supra* note 2, at 364.

281. *Prosecutor v. Kordic*, *supra* note 199, para. 212.

282. *Prosecutor v. Kupreskic*, *supra* note 183, para. 636: Both offences belong "to the same genus."

283. *Id.*

284. OEA/Ser. P, AG/doc. 3114/94 rev. 1.

famous *Velásquez Rodríguez* case of the Inter American Court of Human Rights (San José, Costa Rica).<sup>285</sup> But this and other human rights decisions<sup>286</sup> did not develop the elements of the crime of forced disappearance.<sup>287</sup> Nor did the national law of some Latin American States (*inter alia* Peru, Venezuela, Mexico, Guatemala, Paraguay and Colombia) offer a convincing definition.<sup>288</sup> Most recently the German *Völkerstrafgesetzbuch* (Code of Crimes against International Law - CCAIL), which entered into force 30 June 2002,<sup>289</sup> proposed the following definition on the basis of Art. 7 (2) (i) ICC Statute and the Elements:

“ ... with the intention of removing him or her from the protection of the law for a prolonged period of time,

(a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person’s fate and whereabouts, or

(b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,“

While subpara. (a) adopts the combination of deprivation of freedom and the subsequent refusal to supply (truthful) information as known from the ICC Statute, subpara. (b) criminalizes the mere refusal of immediate information or the giving of false information implying a kind of collusion with the State or organisation responsible for the deprivation of liberty.<sup>290</sup>

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285. *Velásquez Rodríguez* was – together with *Godínez Cruz* and *Farén Garbi/Solís Corrales* – the first of three cases in which the Court held a State party (Honduras) to the Inter American Human Rights Convention accountable for the forced disappearance of persons (Judgments of 29 July 1988, 20 January 1989, 15 March 1989, Series C, No. 4). These decisions were followed by several others: *Neira Alegría et al.* (Series C No. 20); *Caballero Delgado y Santana* (22); *Garrido y Baigorria* (26); *Castillo Paéz* (34); *Blake* (36); *Trujillo Oroza* (64); *Durand y Ugarte* (68); *Bámaco Velásquez* (70).

286. See the various judgments of the Eur. Court of Human Rights: *Kurt v. Turkey*, judgment 25 May 1998; *Cakici v. Turkey*, judgment 8 July 1999; *Timurtas v. Turkey*, judgment 13 June 2000; *Cicek v. Turkey*, judgment 27 February 2001; *Tas v. Turkey*, judgment 14 November 2001.

287. Cf. KAI AMBOS, *IMPUNIDAD Y DERECHO PENAL INTERNACIONAL* (2d. ed. 1999), at 66 *et seq.* (77 *et seq.*, 113 *et seq.*).

288. *Id.*, at 403 *et seq.*

289. *Bundesgesetzblatt 2002 I 2254*, translations available at [www.iuscrim.mpg.de/forsch/online\\_pub.html](http://www.iuscrim.mpg.de/forsch/online_pub.html).

290. Cf. *Motives, Draft of the CCAIL*, 28 December 2001, at 46-7; available at [www.iuscrim.mpg.de/forsch/online\\_pub.html](http://www.iuscrim.mpg.de/forsch/online_pub.html).

Thus, it is clear, notwithstanding the difficult details,<sup>291</sup> that the crime can only be committed by state agents or with their consent or acquiescence<sup>292</sup> and consists of two interrelated acts.

*j) The crime of apartheid*

“The crime of apartheid,” as defined in Article 7(2)(h) of the Rome Statute, means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.<sup>293</sup> For reasons of legal certainty, the CCAIL construes the crime of apartheid as a qualification to the other individual acts contained in sect. 7 (1) CCAIL. In other words, the perpetrator of one of the underlying acts of crimes against humanity receives a stronger sentence if she commits these acts with the (additional) intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other.<sup>294</sup>

*k) Other inhuman acts*

The expression “other inhuman acts of a similar character intentionally causing great suffering, or serious injuring to body or mental or physical health” is not defined in Article 7(2) of the Rome Statute. The Elements of Crimes for article 7(1)(k) require that:

- “1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character seminal to any other act referred to in article 7, paragraph 1, of the Statute.”<sup>295</sup>

A footnote clarifies: “It is understood that ‘character’ refers to the nature and gravity of the act.”<sup>296</sup> The *ad hoc* Tribunals require that the act or omission must be of similar seriousness as in the other alternatives, and the act or omission must have caused serious mental or physical suffering or injury or constituted a serious attack on human dignity.<sup>297</sup> To assess the

291. See for a detailed comparative and international analysis the forthcoming work of *Christoph Grammer*, *Der Straftatbestand des zwangsweisen Verschwindenlassens von Personen* (doctoral thesis, University of Mainz, Germany).

292. *Hall* in Triffterer, *supra* note 9, art. 7 mn. 124; *Boot*, *supra* note 21, para. 502.

293. On the differences of the definitions in the Rome Statute and article II of the Apartheid Convention see *Hall* in Triffterer, *supra* note 9, Art. 7 mn. 116-122.

294. *Cf. Motives*, *supra* note 290, at 49-50.

295. *Elements of Crimes*, *supra* note 23.

296. *Id.*, fn. 30 to Element 2 of Art. 7(k).

297. *Prosecutor v. Vasiljevic*, *supra* note 167, para. 234; *Ambos/Wirth*, *supra* note 2, at 83 with further references.

seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.<sup>298</sup> Examples for such “other inhuman acts” could be unlawful human experimentation and particularly violent assault.<sup>299</sup>

### 3. War Crimes

#### A. General observations

##### 1. Structure of Art. 8 ICC Statute

Although Art. 8 of the ICC Statute recognizes the existence of “war crimes” in non-international armed conflict and this is certainly an improvement,<sup>300</sup> it does not “assimilate” the crimes committed in international conflict to the ones committed in non-international armed conflict<sup>301</sup> by way of the creation of a category of “armed conflict crimes.”<sup>302</sup> On the contrary, Art. 8 ICC Statute maintains the traditional *two box approach* separating “international” and “non-international crimes” in four subparagraphs (para. 2 (a), (b) versus (c), (e)). Moreover, it does not provide – as the Statutes of the Ad Hoc Tribunals do – for an opening formula (“[s]uch violations shall include, but not be limited to [...]”) but rather presents a *closed and exhaustive list* of the crimes.<sup>303</sup> While this technique

298. *Prosecutor v. Vasiljevic*, *supra* note 167, para. 234 with further references.

299. See Roger Clark, *supra* note 163, at 152 referring to Robinson, *Defining Crimes against Humanity at the Rome Conference*, 93 AM. J. INT’L L. 43 (1999).

300. Zimmermann, in: Otto Triffterer (ed.), COMMENTARY ON THE ROME STATUTE OF THE ICC, Art. 8, mn. 238, 289.

301. Crit. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 199(1998), at 232-3; Zimmermann, *supra* note 300, Art. 8 mn. 235.

302. See Claus Kress, *War Crimes committed in non-international Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISR. Y.B. HUM. RTS. 103, 132 (2000) questions whether there is really a trend towards the complete elimination of the dichotomy between crimes committed in international and non-international armed conflicts. He refers, at 132, to *Prosecutor v. Tadić*?, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (IT-94-1-AR72), para. 126, where it was stated that “[t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”

303. See also Condorelli, *War Crimes and Internal Conflicts in the Statute of the ICC*, in THE ROME STATUTE OF THE ICC 107, 112 (Mauro Politi & Giuseppe Nesi eds., 2001).

of codification may be welcomed in light of the principle of legality (*nullum crimen sine lege certa*),<sup>304</sup> it has the disadvantage to be static and, thereby, to preclude judicial interpretation to fill alleged lacunae in the codification of war crimes, especially with regard to the ones committed in a non-international conflict. As a consequence, the alleged shortcomings of Art. 8 ICC Statute compared to customary international law,<sup>305</sup> may only be remedied by amendments to the ICC treaty according to Art. 121 *et seq.* of the Statute. In addition, Art. 8 ICC Statute has been further restricted by the introduction of a previously unknown *context element* taken from crimes against humanity (“in particular when committed as part of a plan or policy or [...] large-scale commission of such crimes”).<sup>306</sup>

The German CCAIL<sup>307</sup> abolishes the traditional distinction and creates one *category of armed conflict crimes* taking into account the current status of customary international law, referring in particular to relevant statements by States in international organisations or as expressed in military manuals.<sup>308</sup> Chapter 2 follows a differentiation according to the legal interests or objects protected: war crimes against *persons* (Section 8),<sup>309</sup> against *property* and other rights (Section 9), against *humanitarian operations and emblems* (Section 10), consisting in the use of prohibited *methods of warfare* (Section 11), and finally consisting in employment of prohibited *means of warfare* (Section 12). This approach reflects the distinction between the protection of persons and property on the one side (Geneva law) and the limitation of the use of certain methods and means of warfare (Hague law) on the other side.<sup>310</sup> However, where the status of customary law does not allow international and non-international armed

304 Similarly William Schabas, *Follow up to Rome: Preparing for Entry Into Force of the International Criminal Court Statute*, 20 HUM. RTS. L.J. 157, 163 (1999).

305. See Fischer, in: Festschrift Ipsen, 77, 86 *et seq.* (2000); see also Sunga, *supra* note 8, at 395; Askin, *Crimes within the Jurisdiction of the ICC*, 10 CRIM. L.F. 33, 57 (1999); Condorelli, *supra* note 303, at 111 *et seq.*

306. Against this requirement for war crimes clearly *Prosecutor v. Tadić?*, Judgment of 7 May 1997 (IT-94-1-T), para. 573; *Prosecutor v. Delalić et al.*, *supra* note 263, para. 195; *concl. Prosecutor v. Blaskić?*, Judgment of 3 March 2000 (IT-95-14-T), para. 70. See also Sunga, *supra* note 8, at 392; Fenrick, in: Triffterer (ed.), *Commentary on the Rome Statute of the ICC*, Art. 8 mn. 4; Fischer, *supra* note 305, at 85; Ambos, *supra* note 70, at 779. For an explanation in the light of the complementarity principle see Bothe, *War Crimes*, in: Cassese et al. (eds.), *supra* note 2, 379, 380-81.

307. See *supra* note 289.

308. See *Motives*, *supra* note 290, at 51.

309. Subpara. (6), no. 1 defines persons to be protected under international humanitarian law in an international armed conflict as “persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions (Protocol I) [...], namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;”

310. See *Motives*, *supra* note 290, at 52.

conflicts to be treated equally, the differences have been retained by including particular elements within the different Sections of Chapter 2.<sup>311</sup> Whereas Sections 10 and 12 treat international and non-international armed conflicts equally, Sections 8, 9 and 11 take a differentiated approach. Thus, for example, Section 8, subparas. (1) and (2) deal with war crimes against persons in connection with both an international and a non-international armed conflict while subpara. (3) only criminalizes acts committed in an international armed conflict.

The German approach is compatible with the Rome Statute since, according to Article 10 ICC Statute, “[n]othing [...] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” In other words, State parties may incriminate certain acts committed during non-international armed conflicts as international crimes in accordance with the existing customary international law.<sup>312</sup>

## 2. Existence of an armed conflict

There is no positive definition of “armed conflict” in international law. There are some indications, though. Common Art. 2 of the four Geneva Conventions (hereinafter “GC I – IV”) makes clear that there are other armed conflicts than “cases of declared war.” From the famous negative definition in Art. 1 (2) of AP (“AP II”), taken up in Art. 8 (2)(d) and (f) of the ICC Statute, follows that “internal disturbances and tensions” do not amount to an armed conflict.

The notion “armed conflict” presupposes the resort to armed force or armed violence between different (state or non state) actors.<sup>313</sup> To distinguish this situation from ordinary criminality, unorganized and short-lived insurrections or terrorist activities, the *intensity* of the conflict and the *organization* of the parties must be evaluated.<sup>314</sup> The ascertainment of the intensity of a non-international conflict does not depend on the subjective

311. *Ibid.*

312. Cf. *Montaz*, War crimes in non-international Armed Conflicts under the Statute of the International Criminal Court, 2 Y.B. INT'L HUMANIT. L. 177, 188 (1999). See also *Boot*, *supra* note 21, at para. 594.

313. *Prosecutor v. Tadi?*, T.Ch. Judgment, *supra* note 306, para. 561; *Prosecutor v. Tadi?*, Decision on Jurisdiction, *supra* note 302, para. 70; conc. *Prosecutor v. Kupreski? et al.*, *supra* note 183, para. 545; *Prosecutor v. Bla?kic*, *supra* note 167, para. 63. See also *Prosecutor v. Akayesu*, T.Ch. Judgment, *supra* note 11, para. 620: “existence of hostilities between armed forces organized to a greater or lesser extent.” See also *Ipsen*, *Völkerrecht*, (4<sup>th</sup> ed. 1999), § 65 mn. 9, § 66 mn. 7; *Greenwood*, in: Fleck (ed.), *Handbook of armed conflict*, No. 202, at 35-6.

314. *Prosecutor v. Akayesu*, T.Ch. Judgment, *supra* note 11, para. 620, 625; *Prosecutor v. Tadi?*, T.Ch. Judgment, *supra* note 306, para. 562; *Prosecutor v. Musema*, *supra* note 28, para. 256.

judgment of the parties to the conflict but must be assessed objectively on the basis of the conditions laid down in Common Article 3 and AP II.<sup>315</sup> If the application of international humanitarian law depended on the discretionary (subjective) judgment of the parties in most cases there would be a tendency for the conflict to be minimized so as not to apply the humanitarian rules. As a consequence, the very purpose of international humanitarian law, that is the protection of the victims of armed conflicts, would not be achieved.<sup>316</sup>

The parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, “armed forces” is to be defined broadly, so as to cover all armed forces as described within national legislations.<sup>317</sup> The dissident armed forces must be under responsible command, i.e., there must be some degree of *organization* but this does not necessarily mean that there must be a hierarchical system of military organization similar to that of regular armed forces: “It means an organization capable of, on the one hand, planning and carrying out sustained and concerted military operations- operations that are kept up continuously and that are done in agreement according to a plan, and on the other, of imposing discipline in the name of the *de facto* authorities.”<sup>318</sup> The dissident armed forces must further be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to be in the position to implement the Protocol.<sup>319</sup>

As to the *period* or time frame the armed conflict starts with the first use of armed force and ends, at earliest, with the end of the hostilities. While this follows from Art. 3 (b) API, some writers require the reestablishment of the previous (peaceful) situation.<sup>320</sup> The Tadi? App. Ch. also extended the period beyond the pure cessation of hostilities and required that “a general conclusion of peace” or, in the case of a non-international conflict, “a peaceful settlement” be achieved.

As to the *geographical extension* of the hostilities it is sufficient to establish the existence of the conflict for a whole region of which certain municipalities are a part without the necessity to have an armed conflict

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315. *Prosecutor v. Akayesu*, T.Ch. Judgment, *supra* note 11, para. 603.

316. *Id.*

317. *Prosecutor v. Akayesu*, T.Ch. Judgment, *supra* note 11, para. 625; *Prosecutor v. Musema*, *supra* note 28, para. 256.

318. *Prosecutor v. Musema*, *supra* note 28, para. 257.

319. *Prosecutor v. Musema*, *supra* note 28, para. 258.

320. *Ipsen*, *supra* note 313, § 68 mn. 1 *et seq.*, mn. 4 *et seq.*; *Doehring*, *Völkerrecht*, (1999), § 11 Rn. 646 *et seq.*

within each municipality concerned.<sup>321</sup> If the existence of an armed conflict for a certain territory is established, international humanitarian law is applicable in all parts of this territory whether or not actual combat takes place there.<sup>322</sup> It is not necessary that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment.<sup>323</sup>

The question arises whether this quite liberal determination of the geographical requirements can be transferred to large Federal States like the U.S., Mexico or Brasil. In other words, would an armed conflict in one state of a Federation amount to an armed conflict in the whole Federal State? Let us, for the sake of the argument, suppose that the situation in the Mexican State of Chiapas amounts to an armed conflict in the sense of humanitarian law, could we then say that in Mexico as a whole exists an armed conflict? My answer would be in the negative and my main argument would be that Chiapas is a too small part of Mexico to turn the whole country into an armed conflict scenario. But still, the question remains if it were not reasonable to allow for the application of humanitarian law in this particular State of the Federation, i.e., for a kind of partial or geographically limited application of the law where the situation this requires.

### 3. “Internationalisation” of an armed conflict

While it is clear that an armed conflict is *international* if it takes place between two or more states and that it is *non-international* if it takes place within a territory of a state between forces belonging to that state,<sup>324</sup> it is less clear if and how a foreign intervention or participation in a conflict taking place in one territory may “*internationalise*” this conflict. The correct answer is that such an internationalisation occurs if the acts of one of the parties to the conflict must be attributed to a foreign State, i.e., if the individuals or groups taking part in the conflict are *de facto organs* of this State<sup>325</sup> or if their conduct can be imputed to this State by other criteria. These criteria, however, are hotly disputed and it would exceed the scope of

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321. *Prosecutor v. Blaski?*, *supra* note 306, para. 64.

322. *Prosecutor v. Tadi?*, Decision on Jurisdiction, *supra* note 302, at para 70; *Prosecutor v. Blaski?*, *supra* note 306, at para. 64.

323. *Prosecutor v. Blaski?*, *supra* note 306, para. 69.

324. Cf. Kai Ambos, *Zur Bestrafung von Verbrechen im internationalen, nicht-internationalen und internen Konflikt*, in *HUMANITÄRES VÖLKERRECHT* (Hasse, Müller, & Schneider eds., 2001), at 331, 338.

325. *Prosecutor v. Tadi?*, A.Ch. Judgment, *supra* note 199, para. 104.

this paper to offer a profound analysis going beyond the presentation of the positions of the Chambers of the ICTY.<sup>326</sup>

The Tadić Trial Chamber followed the *effective control* test as developed by the ICJ in the Nicaragua case<sup>327</sup> and required that the foreign State exercise effective control of a military or paramilitary group with respect to the specific operations of this group and by the issuance of specific instructions.<sup>328</sup> This test was rejected by the Celebici T.Ch. and the Tadić App. Ch. since, *inter alia*, it was considered not appropriate for the question at hand, i.e., the question of individual criminal – not State – responsibility.<sup>329</sup> Instead, it was distinguished between the persons or groups object of the control of the foreign State. In case of *military* or paramilitary *groups*, the foreign State need not only equip and finance the group, but also coordinate or help in the general planning of its military activity, i.e., an *overall control* is necessary but also sufficient. In particular, the foreign State need not issue specific instructions to the head or members of the group.<sup>330</sup> In the case of *individuals* or *not militarily organized groups* the foreign State must issue *specific instructions* or directives aimed at the commission of specific acts or publicly approve the commission of such acts.<sup>331</sup> In addition, it may also happen that certain individuals *assimilate* to organs of a foreign State on account of their *actual behaviour* within the structure of that State (and regardless of any instructions of that State) and, as a consequence, their behaviour may be attributed to this State.<sup>332</sup>

#### 4. Different forms of non-international armed conflicts

In addition to the restrictions described above (1.), the ICC Statute introduces a new type of non-international conflict for the “serious violations of the laws and customs” of war (Art. 8 (2)(e)), namely it requires that such conflicts be “*protracted*” (Art. 8 (2)(f)). Thus, a new overlapping

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326. For such a profound analysis see De Hoogh, Articles 4 and 8 of the 2001 ILC Articles on State Responsibility etc., 72 BYIL 255 (2001/2002), arguing at 264 *et seq.* (275-6) that the Bosnian Serb army VRS and the Republika Srpska were de facto organs of the FRY since “they operated within the organic structure of the FRY.” He further examines (at 277 *et seq.*) the question in light of Art. 8 of the ILC’s 2001 Draft of State Responsibility showing that the ILC does not follow the Tadić. Ap. Ch. See also Kress, L’organe de facto en droit international public etc., 105 RGDIP 93 (2001).

327. *Military and Paramilitary Activities in and Against Nicaragua*, Judgment, ICJ Reports 1986, 14 = International Law Reports 76, 349.

328. ICJ, *supra* note 327, para. 115; *Prosecutor v. Tadić*, T. Ch. Judgment, *supra* note 306, para. 585.

329. *Prosecutor v. Delalić et al.*, *supra* note 263, paras. 262-263; *Prosecutor v. Tadić*, A. Ch. Judgment, *supra* note 199, para. 103.

330. *Prosecutor v. Tadić*, A. Ch. Judgment, *supra* note 199, paras. 131, 137.

331. *Id.*, paras. 132, 137.

332. *Id.*, paras. 141 *et seq.*

distinction of “normal” and “protracted” non international conflicts has come into existence. In the latter type, both serious violations of Common Article 3 and serious violations of the laws and customs of war qualify as war crimes. In “normal” non-international conflicts, serious violations of the laws and customs of war are not to be considered war crimes. This has been criticized as “a patent absurdity”<sup>333</sup> and it is indeed difficult to understand why assaults to sanitary units, mass rapes, deportation or intentional mutilation would constitute war crimes only when the non-international conflict is “protracted,” and not when it is just a “normal” non-international conflict. In fact, the distinction recalls bad memories of the classical distinction between international and non-international conflict crimes and deserves therefore the same criticism as being arbitrary and contravening the *raison d’être* of international humanitarian and criminal law, that is, the protection of all persons who do not actively take part in the conflict.

It must not be overlooked, however, that the term protracted was not invented by the drafters of the Rome Statute but was first mentioned by the Tadić App. Ch. when it determined that an armed conflict exists when there is “protracted armed violence [...] within a State.”<sup>334</sup> It may be argued that the term finds the basis in the notion “sustained and concerted military operations” as contained in Art. 1 (1) of AP II. This does not imply, however, that the operations must go on continuously; rather, it is sufficient, as the French version makes clear (“de manière prolongée”), that the armed conflict operates a certain time.<sup>335</sup> Thus, in fact, the difference between a “normal” and “protracted” armed conflict is a pure time difference which, however, is not precisely enough defined. Given the arbitrariness of the distinction a restrictive interpretation of the term protracted is called for.

##### 5. Relationship between armed conflict and individual crimes, in particular mental requirements

As in the case of crimes against humanity, the question arises how the individual acts or crimes relate to the context element, i.e., to the existence of an armed conflict. The case law quite unanimously requires that there must be an “evident nexus between the alleged crimes and the armed conflict as a whole.”<sup>336</sup> Such a nexus exists if the “crimes were closely related to the hostilities occurring in other parts of the territories controlled

333. See Condorelli, *supra* note 303, at 113.

334. *Prosecutor v. Tadić*, Decision on Jurisdiction, *supra* note 302, para. 70; conc. *Prosecutor v. Delalic et al.*, *supra* note 263, para. 183 ; *Prosecutor v. Furundžija*, *supra* note 262, para. 59.

335. See Zimmermann, *supra* note 300, Art. 8 mn. 334.

336. *Prosecutor v. Blaskić*, *supra* note 167, para. 69.

by the parties to the conflict.”<sup>337</sup> It is not necessary that the alleged crimes occur in the midst of battle or that the “armed conflict was occurring at the exact time and place of the proscribed acts,”<sup>338</sup> but it suffices if a relationship between them and the conflict can be established.<sup>339</sup>

Yet, a much more complex, but not duly addressed question is how the context element must be legally qualified and what consequences this entails for possible mental requirements. If one understands the context element as a purely objective, *jurisdictional* element it need not be covered by the perpetrator’s intent. If, however, one conceives the context element as a “*circumstance*” within the meaning of Art. 30 (3) ICC Statute the perpetrator must know of its existence.<sup>340</sup> When this eminently practical question was first discussed – at the intersessional meeting of the Preparatory Commission in Siracusa, Italy, in February 2000 – two positions emerged. I would call them an *objective public international law* approach and a *subjective criminal law* approach (hereinafter “objective” and “subjective” approach). The *objective* approach<sup>341</sup> argued that the purpose of international humanitarian law is to counter the increased risk of factual non-prosecution of serious crimes during an armed conflict by creating a supra-national criminal law regime to replace imperfect national criminal prosecutions. This humanitarian law regime, so the argument goes on, constitutes only a parallel regime of competence to the national law. Accordingly, to date, the case law of the Ad Hoc Tribunals has always viewed armed conflict as a mere “jurisdictional element.” Finally, the drafters of the Rome Statute did not include an intent requirement in the chapeau of Art. 8 ICC Statute – as they did in Art. 6 ICC Statute and, in particular, Art. 7 ICC Statute.<sup>342</sup> The *subjective* approach, on the other hand,

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337. *Prosecutor v. Tadi?*, Decision on Jurisdiction, *supra* note 302, para. 70; *See also Prosecutor v. Tadi?*, T.Ch. Judgment, *supra* note 306, paras. 572, 573; *Prosecutor v. Tadi?*, A.Ch. Judgment, *supra* note 199, paras. 249, 252; *Prosecutor v. Delalic et al.*, *supra* note 263, paras. 193, 195; *Prosecutor v. Furundžija*, *supra* note 262, para. 60; *Prosecutor v. Blaškić*, *supra* note 167, para. 68.

338. *Prosecutor v. Tadi?*, T.Ch. Judgment, *supra* note 306, para. 573.

339. *Prosecutor v. Tadi?*, Decision on Jurisdiction *supra* note 302, para. 69, referring to the crime of deprivation of liberty.

340. The following considerations are based on earlier reflections in *Ambos*, *supra* note 70, at 778 *et seq.* and Cassese Festschrift, 2003 (forthcoming).

341. *Cf. e.g.* Human Rights Watch, *Commentary on the 4th Preparatory Commission meeting for the ICC* (March 2000), at 3. Also in favor of a “jurisdictional element.” Fenrick, *supra* note 306, Art. 8 mn. 4; *see generally* Zimmermann, in Triffterer, *supra* note 300, Art. 5, mn. 9; *see also* Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, 33 (1999); Boot, in 1 ANNOTATED LEADING CASES 452 (Andre Klip & Goran Sluiter eds., 1999), at 456, leaves the question open.

342. ICRC, Non Paper, 27 January 2000, 3; *also* HRW, *supra* note 341, 3-4.

invoked the divergent nature of ordinary crimes and war crimes. The higher degree of blameworthiness associated with a war crime can only be justified if the perpetrator was also aware that he acted in the context of an armed conflict and, therefore, committed a war crime. In fact, the context element is part of the *actus reus* and therefore covered by the normal mens rea requirements. As is known, the issue could not be resolved in Siracusa.<sup>343</sup>

From a criminal lawyers perspective the subjective approach is clearly preferable. The objective approach makes the “contextual element” an objective condition of punishability or criminal liability (*objektive Strafbarkeitsbedingung*) and thus conflicts with the principle of guilt.<sup>344</sup> The question whether a particular element of the *actus reus* requires the perpetrator’s intent and, therefore, cannot be considered an objective condition of punishability depends on the relevance of this condition for the wrongfulness of the conduct (*Unrechtsrelevanz*) in question.<sup>345</sup> Thus, the crucial question is whether the “contextual element” of armed conflict influences the content of wrongfulness (*Unrechtsgehalt*) of war crimes pursuant to Art. 8 ICC Statute. If this is the case, i.e., if this element increases the content of wrongfulness of the actions in question, the intent of the perpetrator must also be related to it if a violation of the principle of guilt is to be avoided.

The answer to our question results from a comparison of conducts punishable according to both general (national) criminal law and Art. 8 ICC Statute. Take, for example, killing (Art. 8 (2)(a)(i) ICC Statute), destruction and appropriation of property (Art. 8 (2)(a)(iv) ICC Statute) and rape (Art. 8 (2)(b)(xxii)-1 ICC Statute). The punishability of these acts according to general criminal law or international criminal law depends, in objective terms, on the existence of an armed conflict and the characterization of the object of the offences as protected persons or objects. Thus, these elements have the effect of increasing the wrongfulness of the acts in question, at least if one assumes that a war crime possesses a higher degree of wrongfulness than a comparable ordinary crime. This “wrongfulness-increasing effect”

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343. The final report reads: “For Genocide and Crimes against humanity, a particular mental element will be listed. For War crimes, no *mental element as to the context* will be listed. The issue is left open [...]” (PrepCommis, Working Group on Elements of Crimes. Outcome of an intersessional meeting of the Preparatory Commission for the International Criminal Court held in Siracusa from 31 January to 6 February 2000, PCNICC/2000/WGEC/INF/1, 9 February 2000, 6, emphasis added).

344. As well as the traditional tendency of U.S. criminal law to construe individual responsibility objectively as “strict-liability” (*cf. crit. Kadish, Fifty years of criminal law: an opinionated review*, 87 CAL. L. REV. 943, 954 *et seq.* (1999)).

345. *Cf. GEISLER, ZUR VEREINBARKEIT OBJEKTIVER BEDINGUNGEN DER STRAFBARKEIT MIT DEM SCHULDPRINZIP* (1998), 130 *et seq.*

alone would prohibit the characterization of the aforementioned elements as objective conditions of punishability. As to criminal responsibility *in concreto* we can distinguish between three situations:

- The offences occur in peacetime.
- The offences occur during an armed conflict but are not related to this conflict, viz. occur only on the occasion of this conflict.
- The offences occur during an armed conflict and are related to this conflict.

It is obvious that in the first situation only criminal responsibility according to general criminal law is triggered. In the second and third situations, during an armed conflict, both general national criminal law and international criminal law could be applied. Clearly, ordinary crimes can also be committed during an armed conflict. The peacetime criminal justice system is not replaced by the wartime system, but the two systems exist simultaneously and thus the question of their delimitation arises. In this respect, the Elements concentrate on whether the conduct “took place in the context of and was associated with an [international] armed conflict [not of an international character].”<sup>346</sup> Thus, there seems to be agreement that the mere commission of an offence *on the occasion* of an armed conflict does not make it a war crime.<sup>347</sup> If the perpetrator uses the general chaos brought about by the outbreak of war to “settle old debts” and kills his neighbour, this offence is – to be sure – not a war crime for the rather formal reason that the neighbour is not a protected person according to the IV Geneva Convention;<sup>348</sup> however, it is also not a war crime because the act is not related to the armed conflict since the perpetrator wanted to kill the neighbour regardless of the existence of the armed conflict and did so.<sup>349</sup> This is even more obvious in the following case: If a group of rioting young football hooligans destroys several automobiles, this damage to property does not become the war crime of destruction of property according to Art. 8 (2)(a)(iv) ICC Statute simply because it occurs objectively during an armed conflict. Similarly, a rape punishable under general criminal law in peacetime does not become a war crime of rape according to Art. 8 (2)(b)(xxii)-1 ICC Statute simply because war has broken out overnight. The perpetrator in all these cases only turns into a “war criminal” if his

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346. See, e.g., Element no. 4 to Art. 8(2)(a)(i) ICC-Statute or Art. 8(2)(c)(i)-1 ICC-Statute.

347. Cf. Kress, *supra* note 302, at 122-3.

348. According to article 4 of the IV. Geneva Convention of 1949, civilians “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals” are protected.

349. See Bothe, *supra* note 306, at 388: “strictly private interpersonal conflict.”

conduct, as correctly required by the Elements, took place in the context of an armed conflict. However, this context cannot be merely determined objectively but results from the attitude of the offender towards the offence. If the perpetrator acts independently of the armed conflict, if he does not even know that an armed conflict is taking place, then his conduct does not take place within the context of this conflict, it is merely a coincidence that they occur simultaneously. However, if the perpetrator acts in the awareness of the ongoing armed conflict, if he even benefits from it, this awareness is the link between his conduct and the armed conflict. Thus, the link with the armed conflict is formed or created by the imagination of the perpetrator and not only based on mere objective circumstances. It is sufficient, however, that the perpetrator was aware of the factual circumstances of an armed conflict; he does not know or understand the underlying legal qualifications (i.e., possible normative elements of the *actus reus*). The introduction to the Elements of War Crimes reads:

“There is only a requirement for the awareness of the *factual circumstances* that established the existence of an *armed conflict* that is implicit in the terms ‘took place in the context of and was associated with.’”<sup>350</sup>

Similarly, the intent requirement must be formulated with respect to the *nature of the conflict* as international or non-international, since there are courses of conduct which render a person criminally liable in international conflicts but not in non-international conflicts.<sup>351</sup> Thus, the punishment according to one or the other category of “war crimes” can only be explained by the fact that the perpetrator was aware that he acted in one or the other type of conflict. The Elements, however, omit the requirement of intent in this context completely:

“In that context there is no requirement for *awareness* by the perpetrator of the *facts* that established the *character* of the *conflict* as international or non-international.”<sup>352</sup>

This would only make sense if Art. 8 ICC Statute did not retain the distinction of crimes committed in international and non-international

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350. Elements of Crimes, *supra* note 23, at 18.

351. *E.g.*, the use of poison or poisonous weapons is punishable in an international, but not in a non-international conflict (Art. 8(2)(b)(xvii) ICC Statute). Another important example is Art. 8(2)(b) (iv) ICC Statute as to the damage to the natural environment since this is a crime which not only according to the ICC-Statute but also according to existing customary international law is not applicable in a non-international armed conflict. *Cf. also* the far longer list in Art. 8(2)(a) and (b) ICC Statute as compared to Art. 8(2)(c) and (e) ICC-Statute.

352. Elements of Crimes, *supra* note 23, at 18.

conflicts. As long as this distinction exists, it must have an impact on the intent requirement if factual knowledge with respect to the *existence* of an armed conflict, as correctly stated in the Elements, is required. On the other hand, it must be admitted that the main difference in terms of the content of wrongfulness lies between crimes committed in peacetime or on the occasion of an armed conflict and those committed in the context of an armed conflict whereas the difference between crimes committed in an international and those committed in a non-international conflict is a minor one. As to the *lex lata*, it is limited to the (few) crimes that are punishable in an international, but not in a non-international armed conflict.

A parallel reflection with respect to the element of the offence regarding *protected persons or objects* also indicates the need for a requirement of intent. It is generally agreed that intent must relate to protected persons and objects. In the language of Art. 30 ICC Statute, these elements constitute a “circumstance” of which the perpetrator must be aware. The corresponding Elements require that the perpetrator be aware of the “factual circumstances that establish this status [as a protected person or protected object].”<sup>353</sup> If, however, the perpetrator is required to have knowledge of the factual circumstances, this implies similar knowledge with regard to the existence of an armed conflict, since protected persons or objects – as typical concepts of the laws of war – can only exist during such a conflict.

Finally, the subjective approach is more convincing with regard to the interpretation of *Art. 7 ICC Statute*. In both, Art. 7 ICC Statute and Art. 8 ICC Statute, a particular context is necessary for the conduct at issue to be treated as an international crime. Where Art. 7 ICC Statute refers to action “as part of a widespread or systematic attack against the civilian population,” Art. 8 ICC Statute places the action in the context of an (international or non-international) armed conflict. It would therefore be inconsistent if intent were necessary in one case, while in the other not even factual knowledge of the attendant circumstances were required.

The *case law* of the Ad Hoc Tribunals does not contradict this interpretation. It is certainly correct that the ICTY has, to date, viewed the requirement of armed conflict only as a “jurisdictional element.” The judicial precedents, however, only discuss the issue within the framework of the jurisdiction of the Court<sup>354</sup> and state only the undisputed, namely, that the incriminating conduct must take place in the context of an armed conflict. The truly controversial question is whether the elements in question can also

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353. Cf. e.g. Element 3 of Art. 8(2)(a)(i) ICC Statute, *supra* I.; similarly e.g. also Element 5 of Art. 8 (2)(a)(iv) ICC Statute regarding protected property.

354. See, e.g., *Prosecutor v. Tadić*?, T.Ch. Judgment, *supra* note 306, para. 572: “For a crime to fall within the jurisdiction of the International Tribunal [...]”

be viewed as attendant circumstances according to Art. 30(3) ICC Statute beyond their characterization as “jurisdictional elements,” and thus whether knowledge of them is required. This question would need to be discussed within the framework of individual responsibility for war crimes; in this part of the judgments, however, only – if at all – discussions of the objective and subjective requirements of the individual offences against the laws of war can be found.<sup>355</sup> In other words, the case law, like the Preparatory Commission, has left the question open.

Be that as it may, in *prosecution practice*, the subjective approach – knowledge of the factual circumstances of the existence of an (international or non-international) armed conflict – will hardly be distinguishable from the objective approach – assumption of an objective condition of punishability. The reason is that the international case law derives intent, particularly its cognitive element (knowledge), from objectively determined facts and circumstances anyway. It uses classical circumstantial evidence.<sup>356</sup> This judicial practice has also influenced the Elements, where the general introduction reads: “Existence of intent and knowledge can be inferred from relevant facts and circumstances.”<sup>357</sup> However, if, in a particular case, the conduct of an accused party took place in the context of an armed conflict, e.g., because she was the commander of a prison camp<sup>358</sup> or was involved in offences in military headquarters, the objection that she had no knowledge of this armed conflict can be rejected as a mere self-serving declaration. Even if the subjective approach would lead to insurmountable prosecution and proof problems, as was suggested, *inter alia*, by some NGOs,<sup>359</sup> this must be accepted in the interest of an international criminal law based on the rule of law and, in particular, on the principle of guilt. In the light of the IMT’s dictum that “mass punishments should be avoided”<sup>360</sup> and the always difficult task to separate the guilty from the innocent,<sup>361</sup> modern

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355. Cf. *Prosecutor v. Delalic et al.*, *supra* note 263, para. 419 *et seq.*; *Prosecutor v. Furundzija*, *supra* note 262, para. 134 *et seq.* In contrast, this is not discussed in *Prosecutor v. Tadić*, T.Ch. Judgment, *supra* note 306.

356. See already *supra* note 113 and text.

357. Cf. Elements of Crimes, *supra* note 23, at 5.

358. *Prosecutor v. Tadić*, T.Ch. Judgment, *supra* note 306, para. 575; *Prosecutor v. Delalic et al.*, *supra* note 263, paras. 196-197.

359. Cf. e.g., HRW, *supra* note 341, at 4.

360. The Trial of the Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Vol. 22, at 469 (London, HMSO 1950). *Id.* was also stated: “[...] the Tribunal should make such declaration of criminality [of an organization or group] so far as possible in a manner to ensure that innocent persons will not be punished.”

361. See *U.S. v. Krauch et al.* (case 6), VIII Trial of War Criminals (US Government Printing Office), 1081-1210, at 1126: “[...] we are unable to find once we have passed below those who have led a country into a war of Aggression, a rational mark dividing the guilty from the

international criminal law cannot pursue the objective of punishment of all possible suspects at all costs.<sup>362</sup> As a result, an intent requirement could only be questioned if more than mere factual knowledge were required. However, this is not the case as can clearly be seen from the Elements and the whole analysis just made.

## *II. Individual crimes*

### 1. General

The different crimes of Art. 8 ICC Statute have been taken from the prohibitions of the Hague and Geneva law, i.e., they must be interpreted in the light of these primary rules.<sup>363</sup> This dependence on the primary rules entails that there can be no war crimes regarding conducts which are not prohibited by the primary rules. On the other hand, not all primary prohibitions may be converted or transformed into secondary criminalisations, i.e., not all prohibitions are actual crimes.<sup>364</sup> This is a consequence of the – already mentioned – closed system of Art. 8 ICC Statute: While Art. 3 ICTYS refers to the “laws or customs of war” and thereby criminalizes all primary rules object of this reference, Art. 8 ICC Statute explicitly lists the crimes and naturally is more restricted than Art. 3 ICTYS. Art. 8 ICC Statute does not, for example, criminalize the use of nuclear or biological weapons explicitly but makes their criminalization dependent on a “comprehensive prohibition” which must be included in an annex to the Statute (Art. 8 (2)(b)(xx) ICC Statute). Apart from that, the use of these weapons could be covered by subparas. 2 (b)(i), (ii) or (iv).<sup>365</sup>

### 2. International versus non-international crimes

A mere reading of Art. 8 ICC Statute apparently shows that there exists more acts punishable in international than in non-international armed conflicts.<sup>366</sup> Yet, one must be careful in comparing subparas. (a) and (b) with

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innocent. [...] The mark has already been set by the Honorable Tribunal in the trial of the international criminals. It was set below the planners and leaders [...] who were found guilty of waging aggressive war, and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions. To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan [...] an aggressive war should be held guilty [...], but not those who merely follow the leaders [...].”

362. In particular human rights organizations, otherwise in favor of the fair-trial principle, should not be guilty of using double standards.

363. On primary and secondary rules (prohibitions and crimes) in this context see Bothe, *supra* note 306, at 381.

364. Cf. Bothe, *supra* note 306, at 387.

365. See Bothe, *supra* note 306, at 396-7, 406 *et seq.*

366. See for more details Condorelli, *supra* note 303, at 112-113; La Haye, *The Elements of War Crimes*, in Lee, *supra* note 228, 109 *et seq.*, especially at 217.

subparas. (c) and (e) on a purely literal basis. While there may be many divergences in the wording of the crimes, in substance there is considerable similarity, if not identity. Thus, for example, Art. 8 (2)(b)(ii) ICC Statute punishes intentional attacks against “civilian objects” and these very objects are enumerated in subparas. (e)(ii) and (iv), i.e., the same acts are punishable in a non-international armed conflict. Taking this into account, one can enumerate, at first sight, the following crimes that are only punishable in international armed conflict according to Art. 8 ICC Statute:<sup>367</sup>

- Launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (Art. 8 (2)(b)(iv));
- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion (Art. 8 (2)(b)(vi));
- Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury (Art. 8 (2)(b)(vii));
- The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (Art. 8 (2)(b)(viii));
- Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party (Art. 8 (2)(b)(xiv));
- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war (Art. 8 (2)(b)(xv));
- Employing poison or poisoned weapons (Art. 8 (2)(b)(xvii));
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (Art. 8 (2)(b)(xviii));

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367. For a comparative chart from the perspective of the non-international conflict crimes of subpara. (2)(e), see La Haye, *supra* note 366, at 217.

- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions (Art. 8 (2)(b)(xix));
- Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute ... (Art. 8 (2)(b)(xx));
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment (Art. 8 (2)(b)(xxi));
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (Art. 8 (2)(b)(xxiii));
- Using starvation of civilians as a method of warfare by depriving them of objects dispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions (Art. 8 (2)(b)(xxv)).

Taking a closer look at the shortcomings of Art. 8 (2)(e) ICC Statute, it is remarkable that the number of *figurae crimines* for non-international armed conflicts is limited compared to the ones applicable in international armed conflicts. The “use of inhumane weapons,” for example, is not taken into consideration in the context of non-international armed conflicts.<sup>368</sup> Neither is “starvation of civilians as a method of combat,”<sup>369</sup> which is

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368. See Condorelli, *supra* note 303, at 112. Bothe, *supra* note 306, at 420 points out that “[t]he use of anti-personnel mines and of chemical and biological weapons is not covered by the list of criminal acts in subparagraph (e), although their use is clearly prohibited in case of non-international armed conflicts under the relevant treaties as well as, it is submitted, under customary international law. Art. 1(2) of Protocol II to the U.N. Weapons Convention expressly provides that its prohibition apply also in situations referred to in Article 3 common to the Geneva Conventions.”

369. See BOOT, *supra* note 21, at para. 593, recalls that “[i]n 1992, the U.N. Security Council strongly condemned the practices of starvation during the Somali conflict. Not only was starvation considered contrary to international Humanitarian law, but the Council also affirmed that persons who committed or ordered such practice would be held individually responsible for such acts.” Nevertheless, “starvation of civilians as a method of combat” has not been included as a war crime committed under non-international armed conflict. See also Bothe, *supra* note 306, at 420.

prohibited under Article 14 of AP II,<sup>370</sup> included in Article 8 (2)(e) ICCS.<sup>371</sup> Other examples that have not been incorporated as war crimes committed in non-international armed conflicts in Article 8 (2)(e) ICCS are “collective punishments,” “acts of terrorism,” and “slavery and slave trade,”<sup>372</sup> all prohibited under Article 4 (2) of AP II.<sup>373</sup> Finally, Article 8 (2)(e) ICCS does not incorporate attacks which cause disproportionate incidental civilian damage as war crime committed in a non-international armed conflict.<sup>374</sup>

The non-inclusion of these crimes in Article 8 (2)(e) ICCS is partly due to the fact that some States have argued that these crimes have not yet reached the status of customary international law.<sup>375</sup> In particular, “Acts of terrorism” is not included for a lack of consensus among states on defining the acts constituting “terrorism.”<sup>376</sup> Further, some States tend to see any limitation of their exclusive competence in this field as a threat to their sovereignty.<sup>377</sup> This also explains why Art. 8 ICCS, as already mentioned,<sup>378</sup> lacks an opening formula.

### 3. Definition of War Crimes

Art. 8 ICC Statute contains 51 different provisions with various elements conflicting with the principle of legality, in particular its requirement of certainty (*nullum crimen sine lege certa*). As has been said before, Art. 8 ICC Statute basically copies the primary rules contained in the Geneva Conventions and AP’s but these provisions have not been drafted for criminal law purposes.<sup>379</sup> This is the main reason that they do not comply

370. Article 14 of AP II states that “[s]tarvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.”

371. See Kress, *supra* note 302, at 134.

372. See Kress, *supra* note 302, notes, however, at 134, that “[t]o a certain extent these forms of conduct are [...] covered [by] [...] Article 8(2)(c)(ii) to (iv) of the ICC Statute.

373. Article 4(2) of AP II states that “the following acts [...] are and shall remain prohibited at any time and in any place whatsoever: [...] (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; [...] (f) slavery and the slave trade in all their forms;”

374. Kress, *supra* note 302, at 135.

375. See Zimmermann, *supra* note 300, Art. 8, mn. 237; Kress, *supra* note 302, at 134 (customary criminalization under Article 4(2) of AP II not entirely free from doubt).

376. See BOOT, *supra* note 21, at para. 592; see also Kress, *supra* note 302, at 134 (civil war crime of “acts of terrorism” gives rise to concerns with a view to the demands of legal certainty); Momtaz, *supra* note 312, at 183, states that “[r]egarding acts of terrorism, [...] one could justify the refusal of the Statute to criminalize them by the absence of generally accepted definitions of such acts under general public international law.”

377. *Id.* See also BOOT, *supra* note 21, at para. 594.

378. *Supra* I, note 303.

379. Cf. Bothe, *supra* note 306, at 392-3.

without more with the requirements of the principle of legality. For reasons of space, only a few examples which are not only highly disputed but also of major importance will be given.

Art. 8 (2)(b)(iv) ICC Statute criminalizes the intentional launching of an “attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” The norm combines the grave breaches contained in Art. 85 (3) (b) and (c) of AP I and adds the damage to the environment as a specific element, which is based on a combination of Art. 35 (3) AP I and Art. 55 (1) AP I.<sup>380</sup> While the criminal sanction of environmental damage may be considered a progress,<sup>381</sup> the codification as a whole clearly constitutes a limitation compared to the primary rules. As regards the *actus reus*, criminal responsibility within the meaning of subpara. (2)(b) (iv) ICC Statute presupposes that the military advantage be “clearly excessive,” taking into account its “overall” impact, i.e., not only referring to the “concrete and direct military advantage anticipated” (Art. 57 (2)(a)(iii) AP I<sup>382</sup>) but “to the advantage anticipated from the attack considered as a whole.”<sup>383</sup> Thus, the delicate balance of interests implicit in the drafting of the primary rules was changed in favour of the military interests protected. The military perspective becomes even more important if one takes the view – in accordance with the Committee established by the Prosecutor of the ICTY to review the NATO bombing campaign against the FR Yugoslavia – that the balancing process itself must be carried out from the perspective of a

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380. See Herman von Hebel & Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT – THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 79 (Roy S. Lee ed.). Art. 35(3) of the AP I reads: “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” Art. 55(1) AP I reads: “Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”

381. Cf. Bothe, *supra* note 306, at 400.

382. Art. 57(2)(a)(iii) AP I states that “[w]ith respect to attacks, the following precautions shall be taken: [...] those who plan or decide upon an attack shall: [...] refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;” See also Fischer, *supra* note 305, at 90.

383. Interpretative Declaration of the UK to AP I, quoted according to Bothe, *supra* note 306, at 399.

“reasonable military commander.”<sup>384</sup> As to the *mental element*, the question arises what consequences an erroneous evaluation of the commander as to the proportionality of the military advantage would entail. In this case, the commander would not act with the knowledge required and could invoke the defence of mistake (Art. 32 ICC Statute). Thus, first, one must establish whether the rule on mistake of fact or mistake of law applies. The commander would not err on factual circumstances or the so called descriptive elements of the *actus reus* but with regard to the evaluation or assessment of its normative elements. The decision that the military advantage is excessive and therefore not proportional with regard to the damages caused is a value judgment. Thus, applying Art. 32 ICC Statute, the question arises if this mistake or error “negates the mental element.” While this is normally not the case for mistakes of law, *in casu* the Elements provide for an exception to the general rule that a value judgment must not be completed by the perpetrator and require “that the perpetrator make the value judgement” described in subpara. (2)(b)(iv) ICC Statute.<sup>385</sup> In other words, if the perpetrator makes an erroneous value judgement this would negate the mental element of subpara. (2)(b)(iv) ICC Statute since knowledge in this provision requires that the perpetrator makes a correct value judgment. An interpretation independent of the Elements would qualify the error about the proportionality of the attack as error about the normative elements of the *actus reus* (*normativer Tatbestandsirrtum*) and qualify it as an irrelevant error about the (legal) subsumption (*Subsumtionsirrtum*).<sup>386</sup> While this error, being irrelevant, does not exclude the *actus reus*, it may affect the perpetrator’s culpability in that the conduct or result may not be blamed on him since he made the wrong evaluation of the proportionality involved. The problem with this approach is that the underlying distinction between mental element or intent and culpability or blameworthiness is not recognized in the ICC Statute. The Statute is based on the classical canonical distinction between the external and internal side of the commission of a crime – “actus non facit reum nisi mens sit rea”<sup>387</sup> – and does not take up more modern developments in criminal law, in particular the finalist concept of a human act, which led to the distinction

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384. See Final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia <<http://www.un.org/icty/pressreal/nato061300.htm>>, para. 50, quoted in Bothe, *supra* note 306, at 399. See on the Report also *Quenivet*, 41 IND. J. INT’L L. 478 (2001).

385. Elements of Crimes, *supra* note 23, at 5.

386. See Bothe, *supra* note 306, at 400. See generally Ambos, *supra* note 70, at 788 with fn. 167 and at 811 *et seq.*

387. See Gao, in 4 *Rechtfertigung und Entschuldigung* 379 (Albin Eser & Nishihara Hrsg., 1995), at 383 with further references.

between the intent (*dolus*) as part of the actus reus and the blameworthiness as part of the guilt or culpability.<sup>388</sup>

Another example is the meaning of “regularly constituted court” in Art. 8 (2)(c)(iv) ICC Statute. Neither Article 8 (2)(c)(iv) ICC Statute nor common Article 3 GC give much guidance of what is meant by the notions “regularly constituted court” and “judicial guarantees which are generally recognized as indispensable.” However, the wording of the chapeau of Article 6 (2) AP II is in its essence identical to common Article 3 of the Geneva Conventions, and thus also to Article 8 (2)(c)(iv) ICCS. The relevance of Article 6 (2) AP II for the interpretation of common Article 3 of the Geneva Conventions is underlined in the ICRC Commentary on Article 6 AP II:

“Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. It supplements and develops common Article 3, paragraph 1, sub-paragraph (1)(d), which prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation.”<sup>389</sup>

Given the fact that the Statute has *verbatim* retained the language of common Article 3 of the Geneva Conventions, also dissident armed groups are bound to set up “a regularly constituted court” before a sentencing might take place. Thus, special courts set up on an *ad hoc* basis by rebel groups are prohibited. Independence and impartiality are the main features of “a regularly constituted court.” (cf. Art. 14 (1) ICCPR, 6 (1) ECHR, 8 (1) ACHR).<sup>390</sup> In determining whether a body can be considered to be *independent*, the court has regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressure and the question whether the body presents an

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388. See also the criticism in *supra* note 276.

389. Preparatory Commission for the ICC, PCNICC/99/WGE/INF.2, at p. 91.

390. *Id.* at 92.

appearance of independence. The court is *impartial* when the judges stand above the parties, decide without personal influence and objectively, only according to their best knowledge and conscience. Impartiality also means lack of prejudice or bias.<sup>391</sup>

Finally, one can mention Article 8 (2)(c)(iv) ICC Statute which refers to “*judicial guarantees which are generally recognized as indispensable.*” The judicial guarantees to be afforded according to common Article 3 of the Geneva Conventions are only described by the formulation “which are recognized as indispensable by civilized peoples”; this formula has been replaced in the Statute by “which are generally recognized as indispensable.”<sup>392</sup> In order to determine the generally recognized necessary judicial guarantees, the particular judicial guarantees under Article 6 of AP II may serve as a basis for interpretation. As indicated by the expression “in particular” at the head of the list, it is illustrative, “only enumerating universally recognized standards.”<sup>393</sup>

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391. *Id.* at 94. *See also* Judgments of the European Court of Human Rights concerning Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *e.g.*, Case of Kamasinski v. Austria, Judgment of 19 December 1989 (9/1988/153/207), at paras. 61 and 96; Case of Kremzow v. Austria, Judgment of 21 September 1993 (29/1992/374/445), at paras. 43 *st seq.*; Case of Remli v. France, Judgment of 23 April 1996 (4/1995/510/593), at paras. 24, 28 *st seq.*, 43 and 48; Case of Ferrantelli and Santangelo v. Italy, Judgment of 7 August 1996 (48/1995/554/640), at paras. 37 and 54; Case of Gregory v. The United Kingdom, Judgment of 25 February 1997 (111/1995/617/707), at paras. 35, 38 and 49.

392. *Id.*, *supra* note 389, at 97.

393. *Id.*

# Cybercrime-Cyberterrorism

Ellen S. Podgor\*

## Introduction

Globalization increasingly blurs the line between national and international jurisdiction. Countries are faced with determining whether they have extraterritorial jurisdiction to prosecute criminal activity such as international fraud, narcotics trafficking, and money laundering. These jurisdiction issues can be problematic.<sup>1</sup> Equally problematic is determining whether conduct should be classified as an international crime. Characterizing a crime as national, transnational, or international provides the basis for determining “who” will enforce the law and oftentimes it will also determine “who” will set the contours of how that crime is defined.<sup>2</sup>

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1. The focus here is often on international bases that provide extraterritorial jurisdiction. Most notably in this regard are the five traditional bases of jurisdiction, namely: territorial, nationality, passive personality, protective principle, and universality. *See* Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 437 (Supp. 1935); *see also* THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: BASES OF JURISDICTION TO PRESCRIBE ' 402 (1986). It is not accepted here that these five principles are set in stone. Rather, modification to these categories and the scope of jurisdiction may be warranted. *See* Edward M. Wise, *Jurisdiction, Theories of Punishment, and the Idea of Community* (Paper presented at a Special Session organized by the Committee on Philosophy and Law, at the Annual Meeting of the American Philosophical Association, Eastern Division, Boston, December 30, 1999) (*cited in* EDWARD M. WISE & ELLEN S. PODGOR, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 44 (2000)). The breadth of this area is highlighted by the many dimensions of territorial jurisdiction and the varied means by which some countries approach territoriality. For instance, Germany includes the “doctrine of ubiquity,” while the United States often uses “objective territoriality.” Council of Europe Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, CRIMINAL LAW FORUM 3, 441 (1992). Most recently I have been advocated for replacing “objective territoriality” with a less intrusive methodology that I call “defensive territoriality.” *See* Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing “Objective Territoriality” With “Defensive Territoriality,”* STUD. IN L., POL. & SOC=Y (forthcoming); Ellen S. Podgor, “*Defensive Territoriality*”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 GA. J. INT'L L. & COMP. L. 1 (2002).

2. Arguably it can be said that a definition of a crime should proceed any grant of jurisdiction. But it is equally persuasive to say that absent a consensus of a definition for a crime, the practicalities are that the jurisdiction with the authority to prosecute will be the one to determine the definition of that crime. When the issue is whether a crime belongs in an international arena, the questions of definition and jurisdiction merge. If the crime is found to be an international crime, then there is international jurisdiction. This does not preclude a determination of whether this jurisdiction will be complementary to national jurisdiction. The lack of a clear definition for what constitutes cybercrime makes the determination of whether it is an international crime particularly difficult.

Cybercrime presents a new dimension to jurisdiction issues and international crimes.<sup>3</sup> Because cybercrime crosses international lines, without necessarily requiring individuals or goods to cross these same lines, the question of “who” should respond to these unlawful computer acts requires careful consideration. At the forefront of resolving who should prosecute computer crimes is the necessity to resolve whether these crimes should receive a different jurisdictional analysis than other criminal acts.

Some advocate for approaching computer criminality in a “technologically neutral” way.<sup>4</sup> Others see computer criminality as *sui generis*.<sup>5</sup> It is advocated here that computer crimes require special analysis. One cannot treat computer crime jurisdiction with the same methodology used for crimes against persons or property. This essay explains the uniqueness of computer activity and the need to develop a new construct for criminal jurisdiction involving computer crimes.

In addition to treating the jurisdiction for computer crimes in a unique manner, it is also necessary to subdivide computer crimes to delineate specific types of computer activity. Thus, computer fraud jurisdiction differs from cyberterrorism; this is despite the fact that both are within the general category called cybercrimes.

This paper specifically examines one form of cybercrime, namely cyberterrorism, and argues that jurisdiction for cyberterrorism cannot be treated like jurisdiction for terrorist acts that do not involve a computer. Further, it shows that although cyberterrorism involves computer activity, it should not be handled the same as all other forms of computer crime. For example, jurisdiction issues related to cyberterrorism cannot be treated in

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3. See generally Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267 (2002); see also Pierre Trudel, *Jurisdiction Over the Internet: A Canadian Perspective*, 32 INT'L LAW. 1027 (1998).

4. See, e.g., Bruce P. Keller, *The Game=s the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1575 (1999) (contending that criminality analysis should be restricted to the underlying act rather than “the medium through which the act is conducted”). The Department of Justice also approaches computer crimes from a technologically neutral approach. See Laura J. Nicholson et al., *Computer Crimes*, 37 AM. CRIM. L. REV. 207, 208-09 (2000) (citing NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *COMPUTER CRIME: CRIMINAL JUSTICE RESOURCE MANUAL 2* (1989) (defining computer crimes as “any violations of criminal law that involve a knowledge or computer technology for their perpetration, investigation, or prosecution.”)).

5. See, e.g., David R. Johnson & David Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that “cyberspace requires a system of rules quite distinct from the laws that regulate physical, geographically-defined territories”); Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1004 (2001) (contending that cybercrime should be recognized as a new form of criminality).

the same way that one would approach jurisdiction issues for internet fraud, pornography via the internet, or other criminal acts related to computers.

After presenting the case for treating cybercrime *sui generis* and subdividing cybercrime to distinguish cyberterrorism from other types of cybercrime, this essay will examine the forum for prosecuting cyberterrorism. Unlike other criminal activities involving computers, cyberterrorism should be designated as an international crime.<sup>6</sup> It should be within the coverage of international tribunals, international law, and international enforcement.

### Cybercrime Jurisdiction

Unlike crimes such as robbery, burglary, or rape, the locus of the offense of a cybercrime<sup>7</sup> is not definitively based where the harm occurs. Likewise, the location of the perpetrator's acts may not be conclusive in determining the appropriate jurisdiction. As stated by former Attorney General Janet Reno, "[a] hacker needs no passport and passes no checkpoints."<sup>8</sup>

One can focus on the place where the perpetrator acts, the location that the activity travels through, or the ultimate destination of the activity. In many instances the harm can occur in more than one location. For example, a computer worm placed into an internet system can affect individuals in many different countries.<sup>9</sup> Conflicts can arise when more than one country claims jurisdiction. Although cooperation is a key ingredient to combating

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6. There has been significant discussion in legal scholarship as to what exactly is included within the rubric of the term "international crime." See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001); Edward M. Wise, *International Crimes and Domestic Criminal Law*, 38 DEPAUL L. REV. 923 (1989).

7. What constitutes a cybercrime has also been the subject of extensive discussion. See Council of Europe, Draft Convention on Cybercrime, *approved by Eur. Comm. On Crime Problems*, 50th Sess., June 18-22, 2001, *available at* <http://conventions.coe.int/Treaty/EN/cadreprojects.htm>.

8. Keynote Address by U.S. Attorney General Janet Reno on High-Tech and Computer Crime, Delivered at the Meeting of the P-8 Senior Experts' Group on Transnational Organized Crime (Jan. 21, 1997) *available at* <http://www.usdoj.gov/criminal/cybercrime/agfranc.htm>. This same metaphor was also used in a report of one of the President's working groups. See *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*, A REPORT OF THE PRESIDENT'S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET 22 (Mar. 2000) *available at* <http://www.usdoj.gov/criminal/cybercrime/unlawful.pdf>.

9. For example, both the "Melissa Virus" and "I Love You" bug resulted in damages to businesses in more than one country. See Podgor, *supra* note 3 at 269 n.7.

computer criminality, it is still important to have rules to resolve and guide the choice of jurisdiction.

Two dimensions to the jurisdiction issue are examined here. First is the issue of whether the “cyber” aspect of cybercrime requires a different jurisdiction analysis than other crimes. If a unique approach is taken for this activity, a second dimension requires looking at whether all cybercrimes should employ the same methodology to resolve jurisdiction disputes. It is contended here that cybercrime differs from other crimes and that in resolving issues of jurisdiction there needs to be specific consideration given to the “cyber” aspect of the criminality. Additionally, cybercrime needs to be subdivided to account for the specific activity. Cybercrime jurisdiction cannot be treated generically to place all computer offenses into a single analysis.

### *What is Cyber Crime?*

An inherent issue to any discussion of cybercrime jurisdiction revolves around the definition of “cybercrime.” Unfortunately, however, because of the array of conduct that can have some relation to a computer, there is no clear definition of this term. The breadth of activities that can be encompassed within the rubric of computer crimes can “include crimes involving pornography, auction fraud, telecommunication fraud, copyright and piracy offenses, online extortion plots, identity fraud, hacking, cyberterrorism, and cyberstalking.”<sup>10</sup> The computer can be the “object” used to commit a crime, the “target” of the criminal activity, or tangential to the crime.<sup>11</sup> These different forms of underlying activity make it difficult to have one definition that fits all forms of conduct. Whether cybercrime is approached from a domestic or international perspective, it is clear that a significant range of conduct may be designated computer crime.

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10. Podgor, *supra* note 3, at 273-74.

11. See Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L. J. 931, 934 (1996) (discussing how a computer can be “target of the offense,” “tool of the offense,” or “incidental to the offense.”); Joe D. Whitley & William H. Jordan, *Computer Crime*, ABA WHITE COLLAR CRIME INSTITUTE E-1 (2000) (describing how a computer crime can be the “object, subject, or instrument of a crime”). See also Podgor, *supra* note 3 at 273; Ellen S. Podgor, *Computer Crime*, ENCYCLOPEDIA OF CRIME & JUSTICE (2001). Computers used as “computerization tools” often use the computer to commit a traditional crime such as fraud or pornography. See *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*, A REPORT OF THE PRESIDENT’S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET 12 (Mar. 2000) (<http://www.usdoj.gov/criminal/cybercrime/unlawful.htm>).

## 1. Domestic - United States

In the United States, the main statute that criminalizes improper computer activity is found in 18 U.S.C. ‘ 1030. This statute fails to offer a definition of the term “computer crime” other than through a listing of different forms of conduct covered by the statute. Within this one statute exists seven different types of computer criminality.<sup>12</sup> For example, the statute penalizes computer espionage,<sup>13</sup> browsing in a government computer,<sup>14</sup> and trafficking of passwords.<sup>15</sup> Congress placed within 18 U.S.C. ‘ 1030 a wide range of different types of conduct and varying penalties, with the only commonality being criminality involving a computer. Nonetheless, due to the breadth of previously existing generic statutes such as wire fraud, prosecutors in the United States have not limited their computer related prosecutions to this one statute.<sup>16</sup>

## 2. International

In the international sphere, there is likewise no single definition for the term “computer crime.” There are, however, commonalities in the way different international initiatives consider the subject.

The United Nations Manual on the Prevention and Control of Computer-Related Crime acknowledges that a “global definition of computer crime has not been achieved; rather, functional definitions have been the norm.”<sup>17</sup> The document distinguishes between “computer misuse” and “computer abuse,” designating “annoying behavior” as not within the scope of criminal activity.<sup>18</sup>

The Convention on Cybercrime of the Council of Europe also fails to provide a general definition for cybercrime, and instead launches into a

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12. See 18 U.S.C. ‘ 1030(a)(1-7) (2002).

13. See 18 U.S.C. ‘ 1030(a)(1) (2002).

14. See 18 U.S.C. ‘ 1030(a)(2)(B) (2002).

15. See 18 U.S.C. ‘ 1030(a)(6) (2002); see also Ellen Podgor, *Computer Crimes and the USA Patriot Act*, 17 CRIM. JUSTICE 61, 62 (SUMMER 2002) (outlining changes to 18 U.S.C. ‘ 1030 enacted by the USA Patriot Act).

16. See 18 U.S.C. ‘ 1343 (2002).

17. There has been significant debate as to what constitutes a “computer crime.” INTERNATIONAL REVIEW OF CRIMINAL POLICY - UNITED NATIONS MANUAL ON THE PREVENTION AND CONTROL OF COMPUTER-RELATED CRIME, UNCJIN, 8th U.N. Congress, Nos. 43 & 44, at 4 (1999), available at <http://www.uncjin.org/Documents/irpc4344.pdf>.

18. *Id.* at 24. The document also distinguishes “between what is unethical and what is illegal.” *Id.* at 26.

discussion of cybercrime activities.<sup>19</sup> The definition section of the Convention provides meaning to words such as “computer system,” “computer data,” “service provider,” and “traffic data.” It then progresses into the substantive criminal law, covering the following areas: Title 1- “Offenses against the confidentiality, integrity and availability of computer data and systems,” Title 2- “Computer related offenses,” Title 3- “Content related offenses,” Title 4 - “Offenses related to infringements of copyright and related rights,” and Title 5- “Ancillary Liability and sanctions.”

Title one of the Convention on Cybercrime looks at those offenses that for the most part focus on the “target.” It provides the following subdivisions: Article 2 – “illegal access,” Article 3- “Illegal interception,” Article 4 – “Data interference,” Article 5 – “System interface,” and Article 6 – “Misuse of devices.” Title 2 of the Council of Europe Convention on Cybercrime pertains predominantly to instances where the computer criminality is the “object of the offense.” One finds here Article 7 – “Computer-related forgery,” and Article 8- “Computer related fraud.” This is separated into the next section that pertains to Content-related offenses. In title 3 of the Convention of Cybercrime one finds Article 9 – “Offenses related to child pornography,” and in title 4, “Offenses related to infringements of copyright and related rights.” But throughout all of these offenses, one does not find a explicit definition for the term “cybercrime.”

Other entities have also looked at how to approach the global nature of cybercrime. For example, in December of 1997, a high-tech subgroup of the G-8 convened a meeting to examine “high tech and computer-related crime.”<sup>20</sup> This group continues to offer cooperation among countries in combating this form of criminality.<sup>21</sup>

One also finds studies that have examined how best to approach the international nature of computer related activity.<sup>22</sup> Most notably here are the

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19. See *Convention on Cybercrime*, Eur. Consult. Ass., 109th Sess., Doc. No. 185 (2001), available at

<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

20. Computer Crime and Intellectual Property Section (CCIPS), International Aspects of Computer Crime, *Meeting of the Justice and Interior Members of The Eight*, (Dec. 9-10, 1997) at <http://www.usdoj.gov/criminal/cybercrime/intl.htm#Vc5> (Last modified Aug. 8, 2002) (the meeting included representatives from the United States, Italy, Russia, France, Britain, Germany, Japan, and Canada).

21. *Id.*

22. Erez Kalir & Elliot E. Maxwell, *Rethinking Boundaries in Cyberspace: A Report of the Aspen Institute Internet Policy Project*, THE ASPEN INST. (2002), available at [www.aspeninst.org/c&s?pdfs?rethinkingcyberspace.pdf](http://www.aspeninst.org/c&s?pdfs?rethinkingcyberspace.pdf); Abraham D. Sofaer, et. al., *A Proposal for an International Convention on Cybercrime and Terrorism* (Aug. 2000), at <http://www.ciaonet.org/wps/soa02/GoodmanCyberCrime2000.pdf>.

studies of a Stanford Conference and a Report of the Aspen Institute. Issued in August 2000 is a report referred to as the Stanford Draft that is titled, “*A Proposal for an International Convention on Cybercrime and Terrorism.*”<sup>23</sup> The Stanford Draft calls for a multilateral convention. It expresses similar objectives to the Council of Europe Report but offers a different approach to accomplish some of the objectives.<sup>24</sup> “*Rethinking Boundaries in Cyberspace*” is the title of a Report of the Aspen Institute Internet Policy Project. This report promotes a “shared map” to “encourage broader dialogue among these diverse stakeholders, and between them and the public that will inhabit the Internet to come.”<sup>25</sup> There has been strong international support and cooperation in combating cybercrime.<sup>26</sup> For the most part this effort has been generic to all cybercrime, as opposed to a specific form of cybercrime, such as cyberterrorism.<sup>27</sup> Cooperative efforts between nations occurred in cases such as “Mafiaboy” and the “I Love You” virus that caused significant damage globally.<sup>29</sup>

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23. Abraham D. Sofaer, et. al., *A Proposal for an International Convention on Cybercrime and Terrorism* (Aug. 2000), at

<http://www.ciaonet.org/wps/soa02/GoodmanCyberCrime2000.pdf> (proposing a “multilateral treaty focused on abuse of cyber systems” to further international cooperative efforts to combat cybercrime).

24. Compare *id.* with Convention on Cybercrime, *supra* note 19.

25. Erez Kalir & Elliot E. Maxwell, *Rethinking Boundaries in Cyberspace: A Report of the Aspen Institute Internet Policy Project*, THE ASPEN INST., 41 (2002), available at [www.aspeninst.org/c&s/pdfs/rethinkingcyberspace.pdf](http://www.aspeninst.org/c&s/pdfs/rethinkingcyberspace.pdf).

26. See e.g. Abraham D. Sofaer, et. al., *A Proposal for an International Convention on Cybercrime and Terrorism* (Aug. 2000), at <http://www.ciaonet.org/wps/soa02/GoodmanCybercrime2000.pdf> (noting that at a meeting of international “governments, industry, NGO’s and academia . . . clear consensus emerged that greater international cooperation is required” to combat cybercrime).

27. INTERNATIONAL REVIEW OF CRIMINAL POLICY - UNITED NATIONS MANUAL ON THE PREVENTION AND CONTROL OF COMPUTER-RELATED CRIME, UNCJIN, 8th U.N. Congress, Nos. 43 & 44, at 4 (1999), available at <http://www.uncjin.org/Documents/irpc4344.pdf> (noting that no specific definition of computer crime exists).

28. The President’s Critical Infrastructure Protection Board, *The National Strategy to Secure Cyberspace Draft*, (Sept. 2002), at <http://www.whitehouse.gov/pcipb/> (last visited Jan. 23, 2003) (espousing to “promote the development of an international network to identify and defend against cyber incidents as they begin”).

29. The estimated cost of damages to businesses worldwide resulting from the “I Love You” was \$6.7 billion dollars. *Frequently Asked Questions and Answers About the Council of Europe Convention on Cybercrime*, Computer Crime and Intellectual Property Section (CCIPS) of the Criminal Division of the Department of Justice, at <http://www.usdoj.gov/criminal/cybercrime/COEFAQs.htm#note1> (Dec. 1, 2000); see also Lev Grossman, *Attack of the Love Bug*, TIME MAG., May 15, 2000, at 49. The “I Love You” worm is just one email virus that has been internationally followed See, *CHIPS to Fight Cybercrime*, TIMES UNION, July 31, 2001, at B3, available at 2001 WL 24802478 (stating that the “I Love You” virus caused an estimated \$10 billion in damages); Nancy Parello, >Melissa= Created By N.J. Man, Officers Say, ATL. J. CONST., April 3, 1999, at F1.

Some of these initiatives, such as the *Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems*,<sup>30</sup> have proved controversial.<sup>31</sup> The recognition, however, that cybercrime costs billions to the world economy remains unrefuted.<sup>32</sup> In addition to the economic repercussions of improper computer activity, there is the additional acknowledgment that each year there are numerous attacks against government computers.<sup>33</sup>

### 3. Need for a Uniform Definition

It is apparent that a uniform definition of cybercrime has not been accepted domestically in the United States, or internationally. Despite this lack of definition, there is a clear understanding that certain activities fall within the contours of what constitutes computer crime. Although no definition is provided in this paper, it is acknowledged that a universal definition is needed to avoid problems that can arise when there are jurisdiction issues that are at the fringes of what might be considered a computer crime. The lack of a clear definition may raise concerns when the activity at issue involves conduct that may be placed in the category of either a traditional or computer crime.<sup>34</sup>

#### *B. Cyber Jurisdiction As Distinct*

Should cybercrime be treated premised upon the criminal activity that underlies the offense and without regard to its relationship to a computer, or

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30. *Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems*, Eur. Consult. Ass., 111th Sess., PC-RX (2002) 24 (Nov. 7, 2002), available at [http://conventions.coe.int/Treaty/EN/Treaties/Html/Corrup-EN.htm\(2002\)\\_24E.pdf](http://conventions.coe.int/Treaty/EN/Treaties/Html/Corrup-EN.htm(2002)_24E.pdf) (last visited Jan. 23, 2003).

31. Declan McCullagh, *U.S. Won't Support Net "Hate Speech" Ban*, available at [http://news.com.com/2100=1023-965983.html?tag=fed\\_top](http://news.com.com/2100=1023-965983.html?tag=fed_top) (last visited Jan. 30, 2003).

32. See *Bush Advisor: Cybercrime Costs us Billions*, REUTERS, Oct. 14, 2002, at <http://zdnet.com.com/2100-1106-961933.html> (cautioning that the "proliferation in cyberspace of weapons of mass disruption" will continue to threaten economic stability).

33. *Nunn Warns of Attacks from Techo-Terrorists*, ATL. J. CONST., Apr. 20, 1997, at G7 (citing former Georgia Senator Sam Nunn's concerns over cyberterrorism).

34. An instance where a computer is used as a storage device maybe an example of when problems might arise. In these cases, the computer may be tangential to the crime in that it is the place where the records of criminal activity might be stored, as opposed to the activity involving improperly accessing a computer or using a computer to send out a destructive virus that will harm other computers.

should the fact that a computer is involved in the activity cause it to be approached differently from other crimes? Both views have been expressed in legal scholarship.

Some people advocate that one should disregard the computer aspect of the criminality, and determine jurisdiction premised upon the actual conduct.<sup>35</sup> If approaching computer criminality in a “technologically neutral” fashion, one looks at the conduct involved as opposed to the medium used for allowing its occurrence.<sup>36</sup> Thus if the conduct is pornography, the fact that a computer is used to effectuate this crime is irrelevant.<sup>37</sup> Jurisdiction would be dependant on the conduct involved and whether extraterritorial jurisdiction was permitted for that conduct. Consequently, the range of conduct that computer criminality can be premised upon, makes this approach particularly appealing.<sup>38</sup>

Another approach to jurisdiction issues regarding computer crimes is to recognize the unique medium being used and provide a separate analysis premised upon the medium being a computer.<sup>39</sup> Using this methodology, as opposed to focusing on the underlying activity such as theft, fraud, or pornography, the computer is the starting point for determining who can prosecute.

Clearly approaching cybercrime from a “technologically neutral” fashion will ease questions of jurisdiction. The analysis simplistically looks only at the underlying conduct and the appropriate forum for that conduct. If the underlying conduct requires international jurisdiction, such as a crime against humanity, then it would be placed in an international forum. Likewise, if the computer conduct involves a single homicide, then territorial jurisdiction would be the predominant base for determining the forum.

This analysis, however, fails to consider some of the unique characteristics of cybercrime. Because cybercrime can occur in space, and

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35. See Keller, *supra* note 4 at 1572 (contending that internet crimes should not be treated differently than traditional crimes).

36. See Nicholson, et. al., *supra* note 4 (noting that the U.S. Department of Justice uses a “technologically neutral” approach).

37. See *id.* at 230.

38. In the United States, the Department of Justice defines computer crimes as “any violations of criminal law that involve a knowledge of computer technology for their perpetration, investigation, or prosecution.” Laura J. Nicholson, et. al, *supra* note 4 at 207-09 (citing NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, COMPUTER CRIME CRIMINAL JUSTICE RESOURCE MANUAL 2 (1989)).

39. See, Johnson & Post, *supra* note 5, at 1367 (arguing for a new genre of crime specifically related to cyber acts).

can occur without formal jurisdiction within a country, using the underlying offense as the basis for cybercrime jurisdiction may result in limitless jurisdiction.

This problem does not arise when using nationality as the basis of jurisdiction, since the perpetrator's nationality could easily control. But many countries may find the exclusive use of nationality unacceptable because it will preclude them from prosecuting individuals who commit crimes within their territory solely because the perpetrator is of a different nationality.<sup>40</sup>

When one moves beyond jurisdiction premised upon nationality, to different forms of territorial jurisdiction, one sees that computer crimes can have no lines. Conduct occurring outside of a country, and not having a specific country as its target, can in fact have an effect on an unintended country, and therefore become subject to its criminal jurisdiction. Thus, the perpetrator may not have intended to harm residents of a particular country but may be subject to its jurisdiction because the conduct had a harmful effect there. If the country was using a recklessness or negligence standard, it would seem appropriate for it to address such criminality. If, however, the computer offense requires specific intent, but does not require specific intent of the jurisdiction aspect, conduct that might not normally be covered by the criminal laws of a country suddenly becomes subject to its jurisdiction. The individual who did not intend to commit criminal conduct within a country becomes subject to its prosecution because the conduct had some effect in that country. Using this analysis, every country whose residents receive a harmful computer virus could prosecute the individual who placed that virus in the internet.

The breadth of computer jurisdiction makes it difficult to only apply a "technologically neutral" approach to cybercrime. National jurisdiction can be extended beyond the level of the non-technological crime. While an act of mail fraud is limited to the place that the perpetrator acts, or the location that receives the letter, computer criminality does not have the same jurisdiction limitations. As such by just focusing on the underlying conduct, and not considering the means used to commit the conduct, the activity may

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40. Some have suggested that "space jurisdiction" should control cybercrime activity. See Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH. L. REV. 69, 70 (1998); see also Podgor, *supra* note 3, at 303-04. Space law's use of nationality as the basis for jurisdiction, may not work as well with cybercrime jurisdiction as it does with space law because cybercrimes can have specific connections to a locale, while space law may not be connected to the jurisdiction base where the offense is initially perpetrated or the harm results. *Id.* at 304.

be brought into a forum and subjected to jurisdiction that could not have occurred with the underlying offense. Because countries may approach the criminality differently, the fact that the means used to effectuate the crime brings it into a new jurisdiction may make the conduct subject to prosecution that would not normally be considered criminal in the country where the perpetrator hit the computer key.

One response to this breadth in cyber-related jurisdiction is the call for an international regime to prosecute all computer crimes. This, however, is also not practical. Countries may not find it wise to submit to jurisdiction that might violate the rights of individuals in their country. For example, an infringement of first amendment rights in the United States might be a deterrent to obtaining United States cooperation.<sup>41</sup> Likewise, countries may not always agree on what should be within the realm of criminal fraudulent conduct and what should be left for civil actions.<sup>42</sup> To encompass all computer crimes into international law will prove difficult in that the crimes involved are not by their nature all international crimes<sup>43</sup> and not all considered wrongs worthy of criminality.

The deficiencies in using a technologically-neutral approach to cybercrime jurisdiction makes it important to consider the cyber activity distinctly. This, however, does not mean that all cyber activity should be subject to international jurisdiction or to one specific approach. The next section considers why it is important to classify cybercrimes into categories.

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41. See *id.* at 309-10 (noting that the level of privacy afforded U.S. citizens is not “a consistent norm among other countries of the world”).

42. See *id.* at 307. See also John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It*, 101 YALE L.J. 1875-77 (1992) (discussing the line between criminal and civil law).

43. See Wise, *supra* note 6.

### *C. Subdividing Cyber Jurisdiction*

A multitude of different activities are encompassed within cybercrime. As previously noted, these activities can range from fraudulent activities that might occur over the internet, to possible destruction of government property by someone who cracks into a government computer, to finally someone who commits crimes of mass destruction through the use of a computer. Merely separating cyber activity from other forms of criminality does not provide a sufficient basis for determining jurisdiction.

A second level of consideration is necessary to determine the appropriate jurisdiction for a cybercrime prosecution. This requires delineating the cyber activity. In distinguishing cyber activity, it should be noted, that there is still a recognition that the activity is based upon its relation to a computer. Thus, although the underlying conduct may be the controlling force for separating this criminal conduct, the separation is still occurring under the rubric of computer criminality. Thus, a techno-neutral approach is not being used, but the underlying activity is being factored into the second level jurisdiction determination, namely, what type of activity is in fact occurring through either using or targeting a computer. These activities need to be placed upon a spectrum, with national jurisdiction at one side, transnational jurisdiction in the center, and international crimes at the opposite end. Obviously, there will be overlap. Activity considered subject to national jurisdiction, may involve some aspect of extraterritoriality, and also may fit the definition of an international crime.

Many factors can be considered in deciding the appropriate jurisdiction for the cyber activity. Some of these factors are non cyber specific, while others do entail focusing on the nature of the computer involvement.

Generic factors for consideration would be the gravity of the offense, the extent that the offense is nationally focused, the level of acceptance of the offense in other countries, and the level that the offense violates an international norm. Thus, the more serious the offense and the more serious a violation of an international norm, the more appropriate it would be for international jurisdiction. Likewise, a more nationally focused act would be more apt for national jurisdiction. The appropriateness of extraterritorial national jurisdiction also entails consideration of comity concerns. Obviously this approach moves beyond distinguishing “international crimes” from “international concerns,” to present a

progressive approach to international crime that is not confined to a *stricto sensu* analysis.<sup>44</sup>

## Cyberterrorism

The particular category considered here is cyberterrorism. In keeping with the prior analysis, it is contended here that cyberterrorism jurisdiction needs to be considered separate from terrorism crimes. Further, cyberterrorism needs to be considered distinctly from other forms of cybercrime, such as cyberfraud. This essay advocates for cyberterrorism jurisdiction being in the international forum.

### A. What is Cyberterrorism?

Like cybercrime, cyberterrorism is not well defined. Initially, one can focus on the underlying crime of terrorism and then place this definition in the computer context. In the United States, terrorism is defined broadly to include a wide array of activity.<sup>45</sup> An established definition does not exist in

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44. As stated by Cherif Bassiouni, the “common denominator” is “the preservation of certain interests which represent commonly shared values in the world.” M. Cherif Bassiouni, *Introduction to Symposium on the Teaching of International Criminal Law*, 1 *TOURO J. TRANSNAT’L L.* 129 (1988).

45. In 18 U.S.C. § 2332b (2002), a statute titled, Acts of Terrorism Transcending National Boundaries, it states:

(a) Prohibited acts.—

(1) Offenses.—Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or (B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States; in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c). (2) Treatment of threats, attempts and conspiracies.—Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

(b) Jurisdictional bases.—(1) Circumstances.—The circumstances referred to in subsection (a) are—(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense; (B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated; (C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States; (D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States; (E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and

international circles,<sup>46</sup> although there are many anti-terrorism agreements between countries.<sup>47</sup> Agreements range from activities such as the seizure of aircraft<sup>48</sup> to the protection of nuclear materials.<sup>49</sup> Although a specific definition is not provided here, it is recognized that as a starting point for settling issues of jurisdiction, a clear definition of cyberterrorism needs to be determined.<sup>50</sup>

Post September 11, there has been enormous concern in the United States of the possibility of future terrorist attacks. The very passage by the

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artificial islands and fixed structures erected thereon) of the United States; or(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.(2) Co-conspirators and accessories after the fact.—Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

*Id.*

46. See generally CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* (1992).

47. See, e.g., The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177; New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 18 I.L.M. 1456 (1979); Protocol [to the 1971 Montreal Convention] for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627 (1988); IMO Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 (1988), together with a Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685 (1988); Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, U.N. Doc. A/49/742 (1994), 34 I.L.M. 482 (1995); International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249 (1998).

48. See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105.

49. See, e.g., Convention on the Physical Protection of Nuclear Materials, Mar. 3, 1980, I.A.E.A. Legal Series No. 12 (1982), 18 I.L.M. 1419 (1979).

50. The Report of the Policy Working Group on the United Nations and Terrorism states: Without attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality. To overcome the problem of terrorism it is necessary to understand its political nature as well as its basic criminality and psychology. The United Nations needs to address both sides of this equation.

*Report of the Policy Working Group on the United Nations and Terrorism*, at Annex, A/57/273; S/2002/875 (Aug. 6, 2002), available at, <http://www.un.org/terrorism/a57273.htm>.

U.S. Congress of the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” (USA Patriot Act)<sup>51</sup> and creation of a Homeland Security Office<sup>52</sup> is evidence of the internal re-evaluation of security occurring within this country. Securing the infrastructure is a top priority of the current United States administration,<sup>53</sup> with the Bush administration recently releasing a draft document called, “The National Strategy to Secure Cyberspace.”<sup>54</sup>

The Patriot Act provides increased tools to investigate cybercrimes including the addition of felony acts under the Computer Fraud and Abuse Statute (18 U.S.C. §1030) as predicate acts for receiving authority to intercept wire, oral, and electronic communications.<sup>55</sup> It adds new tools for investigating cybercrime through the development and support of cybersecurity forensic capabilities.<sup>56</sup> The Patriot Act also provides substantive provisions to the Computer Fraud and Abuse Act, such as the addition of an extraterritorial provision.<sup>57</sup>

Specifically with regard to cyberterrorism, the USA Patriot Act added certain computer criminality listed in the Computer Fraud and Abuse Act found in 18 U.S.C. §1030 to the existing terrorism statute.<sup>58</sup> Noteworthy here, is the fact that only certain types of criminality are included, namely, espionage and cyberterrorism. Acts within the Computer Fraud and Abuse Act that recklessly cause damage, or just cause damage, cannot be the basis of a terrorism charge.<sup>59</sup>

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51. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.) (2001).

52. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

53. See Dennis Fisher, *Preparing for a Different Kind of Cyberattack*, eWEEK, at <http://www.eweek.com/article2/0,,717180,00.asp> (Nov. 20, 2002) (discussing a Department of Defense and National Security Agency agreement of “joint research and development initiative with Lancope Inc., to build an advanced intrusion-detection appliance for use both inside the government and in the private sector”).

54. The President’s Critical Infrastructure Protection Board, *The National Strategy to Secure Cyberspace Draft*, (Sept. 2002), at <http://www.whitehouse.gov/pcipb/> (last visited Jan. 23, 2003) (setting forth a five-level strategy ranging from security of personal computers to global networks).

55. See USA Patriot Act, Pub. L. No. 107-56, ‘ 202, 115 Stat. 272, 278 (codified as amended in 18 U.S.C. 2516(1)(c)) (2001); see also Podgor, *supra* note 15. (analyzing the changes to the Computer Fraud and Abuse Act made as a result of the USA Patriot Act).

56. USA Patriot Act, Pub. L. No. 107-56, ‘ 816, 115 Stat. 272, 385 (codified as amended in 28 U.S.C. ‘ 509) (2001).

57. USA Patriot Act, Pub. L. No. 107-56, ‘ 814, 115 Stat. 272, 384 (codified as amended in 18 U.S.C. ‘ 1030(e)(2)(B)) (2001); see also Podgor, *supra* note 55 at 62.

58. See USA Patriot Act, Pub. L. No. 107-56, ‘ 808, 115 Stat. 272, 379 (codified as amended in 18 U.S.C. ‘ 2332b) (2001).

59. *Id.* “The fact that all types of computer criminality listed in the Computer Fraud and Abuse Act are not included in the Patriot Act demonstrates that there was an effort to limit the

Although new legal approaches to cyberterrorism have been recognized, not everyone sees cyberterrorism as an immediate problem. Some see the possibility of a major cyberattack as more “myth” than reality. As noted by Joshua Green in an article in the *Washington Monthly* titled, “*The Myth of Cyberterrorism*,” he stated that “[d]espite all the media alarm about terrorists poised on the verge of cyberattack, intelligence suggests that they’re doing no more than emailing and surfing for potential targets.”<sup>60</sup>

There have been cyber attacks, but whether these attacks rise to a level that constitutes terrorism, may depend on the definition of terrorism and more specifically, cyberterrorism.<sup>61</sup> A broad definition might allow for cyberterrorism to include the infiltration of a business computer. A more restrictive definition could have cyberterrorism limited to government computers. Finally, a very limited approach could require a result or intended result of mass destruction.

Irrespective of the definition accorded to cyberterrorism, it is uncertain as to whether a critical cyber attack is a future reality. But should this matter, other than in determining what priority cyberterrorism should receive in the list of priorities that need to be addressed? Fortifying the infrastructure, and setting the legal rules to accompany possible criminality can only assist in avoiding the problem and handling it efficiently should it become a reality.<sup>62</sup> Thus, claims of the non-existence of this type of criminality should not serve as a basis for disregarding consideration of a legal framework for cyberterrorism. Acting now, and defining the scope of the activity through definition, and setting forth an appropriate legal structure to monitor and enforce improprieties, will permit this conduct to be considered in a proactive manner as opposed to a reactive manner.

### *B. Cyberterrorism in the International Arena*

It is important to distinguish cyberterrorism from other forms of cybercrime. The disagreements that arise in discussion of topics such as

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definition of computer terrorism to acts [where] . . . the action is knowingly committed and the damage intentional.” Podgor, *supra* note 15 at 62.

60. Joshua Green, *The Myth of Cyberterrorism*, *The Washington Monthly Online*, at <http://www.washingtonmonthly.com/features/2001/0211.green.html> (Nov. 2002).

61. For example, should the early November 2002 “attack on servers that maintain the directory of domain addresses on which the Internet depends” be considered an attack of cyberterrorism? See Steven E. Roberts & Aaron D. Rosenblum, *The Government Wants You B to be a Cyber-Security Soldier*, *Mercury News*, at <http://www.siliconvalley.com/mld/siliconvalley/business/columnists/45225/4522596.htm> (Nov. 14, 2002).

62. From a United State perspective, a report recently issued provides strong evidence of persistent information issues. See *Progress Made, But Critical Federal Operations and Assets Remain at Risk*, GAO-03-303T (Statement of Robert F. Dacey) (Nov. 19, 2002)

pornography over the internet or cyberfraud, are less likely to be problems in discussions regarding cyberterrorism. The unique attributes of cyberterrorism make it an appropriate crime to initiate international jurisdiction for prosecution and penalty.

Extraterritorial prosecution of cyberfraud or pornography over the internet can raise issues as to whether the conduct is truly a crime and what rights of privacy cover the conduct. This controversy emerged prior to the passage of the *Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems*.<sup>63</sup>

Conduct considered criminal in one country may be perfectly legal in another. For example, using the internet to pass inside information in a securities transaction may be criminal conduct in the United States, but considered an accepted business activity in another country. Likewise, protected speech in the United States may be unprotected and considered a hate crime in another country.<sup>64</sup> When the conduct occurs via the internet, the conflict in the different laws raises concerns.

Because the internet spans the world, questions arise as to which country should have the right to prosecute the alleged criminal conduct. Should the conduct only be subject to prosecution in the place where the perpetrator presses the initial keystroke? Should all jurisdictions that are harmed by the criminal conduct be fighting over who should take the lead in pursuing the perpetrator? Will the location of the perpetrator be determinative? Will extradition treaties make a difference in deciding the forum for the place of prosecution? Should the nationality of the perpetrator be the controlling criteria? Will the location that has a statute making the conduct criminal be the deciding factor?

These questions, and many others, will predominate the discussion when conflicts arise regarding computer criminality. If the conduct is questionably criminal, or involves constitutional rights, the resolution may be particularly constrained. In contrast, if the conduct involves cyberterrorist activity, under an internationally accepted definition of that term, there is a universal desire to consider the conduct criminal and to punish the conduct.

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63. See *supra* notes 30, 31.

64. For example, consider the “controversy between the United States and Germany in that Germany wishes to ‘crack down extraterritorially on Neo-Nazi hate crimes: and the United States wishes to maintain individuals First Amendment rights within the United States.’” Podgor, *supra* note 3, at 310n.179.

It is this universal acceptance of terrorism as illegal that places cyberterrorism as distinct from many other forms of cybercrime. The gravity of the offense, and the universal concern surrounding this crime, make it an appropriate crime for an international forum. Further, cyberterrorism is not an issue that is consumed with questions of legality and privilege.

Although scholars have advocated the use of an international approach to cybercrime,<sup>65</sup> it is important to note the different forms of cybercrime. Without specifically subdividing cybercrime to reflect its components, one fails to consider the differences that exist in the various forms of activity that comprise cybercrime. Unlike cyberfraud, cyberstalking, and pornography over the internet, cyberterrorism's universal condemnation makes it particularly attractive as an international crime. Some of the stated issues surrounding the United States' failure to endorse the International Criminal Court are not likely to be problems when the context is cyberterrorism.<sup>66</sup>

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65. See, e.g., David Goldstone & Betty-Ellen Shave, Essay, *International Dimensions of Crimes in Cyberspace*, 22 *FORDHAM INT'L L.J.* 1924 (1999); Ricald W. Aldrich, *Cyberterrorism and Computer Crimes: Issues Surrounding the Establishment of an International Regime*, INSS Occasional Paper 32 (April 2000) (USAF Institute for National Security Studies USAF Academy, Colorado); see also Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 *VILL. L. REV.* 1 (1996).

66. One finds a listing of United States concerns with the International Criminal Court in the "American Servicemembers' Protection Act of 2002," which states:

(7) Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury. (8) Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court. (9) In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.

22 U.S.C. ' 7421 (2002).

## Conclusion

The international forum offers a significant advantage for the prosecution of cyberterrorism. The universal qualities inherent in this crime<sup>67</sup> make it particularly appropriate for using the international process. Further, international law and cooperation could be furthered by using cyberterrorism as a stepping stone to achieve better acceptance for the international forum.

Unlike many other crimes, the investigation of cyberterrorism requires significant international cooperation.<sup>68</sup> Because this crime uses the global network as a means for the commission of the crime, it is prime for using the international process. Further, it is not hindered by issues that have plagued some countries from accepting an international criminal tribunal.

In moving cyberterrorism into the international arena and developing an international structure for its investigation and prosecution, it is important to define the specific contours of this term.<sup>69</sup> It is also important to distinguish cyberterrorism from other forms of cybercrime. This does not mean that cybercrime as an entity should not eventually be a part of the international legal system. It merely suggests that in proceeding to increase acceptance of the international forum, one needs to start with areas of mutual acceptability. Success in these areas can serve as the basis for future successes.

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67. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (noting that the concept of universal jurisdiction was developed "centuries ago to address the piracy that menaced international trade").

68. Computer crimes have issues of identity not common to other forms of criminality. Perpetrators can act anonymously making detection a significant problem. There is also the possibility that the criminal activity passed through many different countries before reaching its ultimate destination. See Podgor, *supra* note 3 at 310-311.

69. It has been expressed that there is a need to establish rules of war with respect to cyber crimes between countries. Christopher Joyner and Catherine Lotrionte, in their article *Information Warfare as International Coercion: Elements of a Legal Framework*, questioned as to when cybercrime should be considered a cyber-attack and what should be the legal responses to this conduct. Christopher Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 EUROPEAN J. OF INT'L LAW 825 (2001).



# The International Community's Recognition of Certain Acts as "Crimes under International Law"

Dr. Lyal S. Sunga\*

## 1. Introductory Remarks

The Institute, under the guidance of its President, Professor M. Cherif Bassiouni – who has shown not only great intellectual leadership but also a brilliant organizational sense – contributes immensely to the development of international criminal law. Among its broad range of activities, the Institute provides a valuable forum for diplomats, Government officials, academics and practitioners working in the field of international criminal law to exchange views, and through vigorous discussion and debate, to help sharpen the international community's focus on critical aspects of international criminal law norms and implementation. Exemplary in this regard was the Thirtieth Anniversary Conference which brought together numerous experts in the field to share their views on cutting edge themes. As Rapporteur for Panel 3 entitled "International Crimes: Criteria for Their Identification and Classification and Future Developments," it is my honour to encapsulate the main points advanced in the presentations and ensuing discussion as well as to offer my own reflections.

The Panel gave rise to much stimulating discussion and featured: H.E. Sharon Williams, Judge *ad litem* of the International Criminal Tribunal for the Former Yugoslavia and Professor of International Criminal Law at Osgoode Hall Law School in Toronto; Professor Bert Swart, Judge in the Court of Appeals of Amsterdam and Professor of Criminal Law at the University of Amsterdam Faculty of Law and Member of the Conseil de Direction of AIDP; Professor Kai Ambos, Professor of Criminal Law at the Max Planck Institute for International and Comparative Criminal Law; and finally, Professor Ellen S. Podgor, Professor of Law at the Georgia State University College of Law in Atlanta. Panel 3 was ably chaired by H.E. Pierre Joxe, currently Member of the Constitutional Council, and formerly Minister of Defense, Minister of Justice and Member of Parliament of the Republic of France.

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## 2. Synopsis of Main Points Raised in the Presentations

### A. *H.E. Sharon Williams*

Judge Williams pointed out that in the absence of a composite international criminal code, international criminal law had developed in a very piecemeal way. She distinguished straightaway international from transnational crimes, underlining the point that the presence of an international element did not necessarily suffice to qualify a given crime as a crime under international law. 'Transnational crimes,' she said, were crimes that concerned "essentially domestic criminal conduct," but were perpetrated across international boundaries. She gave the example of fraud which can involve perpetrators, victims or acts, in more than one State. The immediate question then becomes "what determines the essentially domestic character of crimes as opposed to their being essentially international in character?"

Judge Williams concluded that the international community identifies a crime under international law as an act that:

- 1) constitutes a "core crime as such;"
- 2) affects a serious interest of the State;
- 3) runs counter to commonly shared values of States; or
- 4) involves more than one State, rather than only one, as well as nationals of more than one State.

In the ensuing discussion, a number of interlocutors referred to 'transnational crimes' as those which concerned "*essentially domestic criminal conduct*" perpetrated across international boundaries. Fraud involving perpetrators, victims or acts, in more than one State was given as an example, raising the question as to what exactly determines the 'essentially domestic character of crimes' as opposed to their being 'essentially international in character' or for that matter 'purely domestic.'

### B. *Professor Bert Swart*

Professor Bert Swart adopted the basic distinction between international and transnational crimes and categorized crimes under international law as:

- 1) crimes against the peace and security of mankind;

- 2) other crimes of concern to the international community as a whole;
- 3) crimes of concern to States.

He queried whether the category of 'crimes against the peace and security of mankind' could further expand in future. Since torture had become incorporated under the rubric of crimes under international law, he asked, why should not also enforced disappearances, or for that matter, all serious human rights violations, become considered 'crimes under international law'?

In his paper (included in the present collection) Professor Swart considered that:

“Crimes against the peace and security of mankind threaten basic values and interests of the community of nations. Their unique feature is that the characterization of certain types of conduct as criminal does not depend on national law but has its direct and immediate basis in international law. ...Secondly, there are international crimes which harm the interests of individual States or groups of States and with regard to which an agreement has been reached that the conduct to be prevented and repressed will be made a criminal offence under the domestic laws of the States that are parties to the agreement. That agreement primarily serves the purpose of facilitating prevention and repression at the national level through mutual cooperation in criminal matters. Here, the characterization of a type of conduct as criminal depends on national law. Often these crimes are referred to as “transnational crimes,” “conventional crimes,” or “crimes under treaty.”

Professor Swart noted that both the 1991 and 1996 versions of the ILC Draft Code of Crimes against the Peace and Security of Mankind covered only crimes that ‘threaten basic values and interests of the community of nations whereas ‘international crimes’ concerned only individual States or a section of the international community at large. In contrast, Professor Bassiouni has argued for a more ‘unitary approach’ on the grounds that all crimes under international law share in common the basic fact that each one has been qualified by the international community as a whole as a ‘crime under international law.’

Professor Swart pointed out that both the ILC's 1994 Draft Statute for a Permanent International Criminal Court<sup>1</sup> and the Rome Statute of the International Criminal Court<sup>2</sup> distinguished between "serious crimes of concern to the international community as a whole" and "international crimes." He further surmised that: "for the purpose of a discussion on the criminalization and codification of international crimes, it may be of some use to distinguish between three categories of crimes: crimes against the peace and security of mankind, other crimes of concern to the international community as a whole, and crimes of concern to (individual) States." Later on he remarked that "the concept of crimes against the peace and security of mankind is not static but flexible and open-ended."

### C. *Professor Kai Ambos*

In his presentation, Professor Ambos highlighted numerous issues concerning the development of crimes under international law and in particular the expansion of the legal definitions of 'war crimes,' 'genocide,' and 'crimes against humanity' since World War II. Because of the large number of specific issues Professor Ambos raised, it is more convenient to provide my own reflections on his valuable presentation as we proceed through it, rather than to lump them together with my reflections on issues arising from the other presentations.

As regards the crime of genocide, Professor Ambos underlined ongoing debate as to how a group should be defined in relation to the crime - whether by mainly objective criteria or by the more subjective approach taken in the ICTY's *Jelencic* case. Another perennial issue has been whether the crime of genocide hinged upon or implied a minimum number of persons to be killed or threatened (a matter of *actus reus*) or whether it related only to the intent to destroy in whole or in part a substantial part of the group (a matter of *mens rea*).

Ambiguity persisted also over the elements of specific intent to commit genocide and the threshold that should be applied at trial. Did a perpetrator have to exhibit only knowledge or awareness of the likely result of genocidal acts or is the *mens rea* requirement satisfied only at a much higher level of proximate cause and effect? Related to the problem of specific

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1. See the Report of the International Law Commission on the work of its forty-sixth session: 2 May-22 July 1994, U.N. Doc. A/49/10 Supp. 10, UN General Assembly, 1994.

2. Statute of the International Criminal Court, adopted in Rome in a non-recorded vote, 120 in favour, 7 against and 21 abstaining, on 17 July 1998, entered into force on 1 July 2002; (A/CONF. 183/9).

intent was the question as to whether direct perpetrators of genocide remain subject to a different *mens rea* standard than either accomplices or superiors who, in principle, could perhaps be swept within the ambit of genocide prosecutions for a less active role both physically and mentally. In effect, a clear order from a superior to subordinate officers to commit genocide disclosed specific intent and was probably relatively unproblematic. Less clear were cases where a superior made no order to commit genocide, but failed to prevent, halt or punish such acts being carried out by subordinates where he or she ought to have known they were being perpetrated.

As regards crimes against humanity, Professor Ambos queried whether the requirement of 'widespread or systematic' was entirely disjunctive or whether there might be a conceptual relationship *between* 'widespread' and 'systematic' that had to be understood, particularly given the implied connection to a policy of attack. Another point was whether the reference to 'civilian population' in the chapeau to Article 7(1) of the Rome Statute might possibly have become redundant now that the legal category of 'crimes against humanity' applied in all situations - both in armed conflict and beyond. Professor Ambos also remarked that if we considered 'knowledge of the attack' in connection with 'crimes against humanity' as an awareness of the risk that the conduct constituted a crime under international law, this would imply that perpetrators had to be knowledgeable about the intricacies of international criminal law - perhaps an unrealistic requirement.

As for war crimes, undeniably the Rome Statute had advanced humanitarian law considerably by its clearly stipulating individual criminal responsibility for crimes committed both in international and non-international armed conflict situations. In this connection, Professor Ambos wondered whether international and non-international conflict situations could perhaps be assimilated. Of course, in a fundamental sense, the distinction between international and non-international armed conflict could not be considered to have been rendered moot, because Article 8 of the Rome Statute prescribes criminal responsibility for different sets of crimes for international and non-international armed conflicts and the ICC Prosecutor therefore must distinguish between the two. Professor Ambos raised the interesting point as to whether we can say that there is a non-international armed conflict only in a part of a country rather than the whole country in cases where armed hostilities are intense but localized. For my own part, I would argue that ultimately, because the State of a whole sovereign territory is the legal entity that is a party to the Geneva Conventions and which incurred responsibility under international law for

non-compliance, from a purely juridical point of view, although we could speak colloquially of an armed conflict in Chiapas or in Chechnya, as long as the Geneva Convention requirements were met to take the situation beyond 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence' (to use the language of Article 1(2) of Protocol I), we would have to say that, if there were non-international armed conflicts in Chiapas and Chechnya, there were non-international armed conflicts in Mexico and Russia.<sup>3</sup>

Another ambiguity relating to the scope and application of the Rome Statute's provisions on war crimes related to the degree of connection necessary between the criminal act in question and an ongoing armed conflict. Did a perpetrator have to know that there was an armed conflict in course? What other criteria if any would have to link criminal acts to the armed conflict? These questions were important because they determined how one could distinguish between ordinary criminal acts and war crimes.

Although the issues raised above were by no means novel, they remained important and they will certainly confront the ICC from its earliest phase of operations.

#### D. *Professor Ellen S. Podgor*

Professor Podgor emphasized 'cybercrime' as a transnational crime but one that almost escaped definition. She suggested that cybercrime had to be addressed as a crime committed in cyberspace and that implied that it should figure as a crime under international law. Although she did not make the analogy, she could have added that, like slave-trading and piracy committed in *res communis*, a danger could be that unless every State were recognized to have authority to prosecute offenders, then no State might feel sufficient jurisdictional connection to undertake this responsibility, and consequently, perpetrators could enjoy *de facto* impunity.

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3. One may recall that the ICRC Commentary to Geneva Convention I alludes to a range of 'convenient criteria' in distinguishing non-international armed conflict situations from isolated acts of riot, rebellion or banditry. Such factors relate to the degree of organization of a military force opposing the Government, the recourse of the Government to regular military forces against insurgents, Government recognition of the insurgents, the belligerents self-identification as belligerents, official U.N. attention to the matter, insurgent *de facto* authority over persons in a determined territory and the agreement of insurgents to be bound by the Geneva Conventions. See COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES OF THE FIELD (Jean Pictet ed., 1952), at 49-50.

### 3. My Reflections

#### A. Looking for 'Essential Elements' in Crimes under International Law

At first glance, I would agree broadly with Judge Williams' distinction between transnational and international crimes. Certain kinds of acts seem to have only local repercussions, while others seem to threaten values basic to the international community as a whole. Nonetheless, while it is probably true that transnational crimes do concern acts that constitute at the same time criminal conduct under domestic law, I wonder whether any approach that seeks to pinpoint something 'essential,' 'inherent' or 'intrinsic' in the kind of act or conduct itself can take us very far in explaining why a particular community, whether local, regional or international, identifies such act or conduct as criminal. Rather than to search for the *essential* element in the kind of act, might it not be more fruitful to concentrate more on the process of international criminalization as a form of the State's political response to address particular concerns in light of prevailing changing social and international dynamics. Indeed, Judge Williams highlighted a similar point very well in her presentation when she referred to the fact that international criminal law norms specifically prohibiting maritime hijacking did not develop until the International Maritime Organization spurred multilateral action on the problem following the Achille Lauro Affair of 1984.

Yet, it is still worth asking whether there is really anything essential in terrorism or drug-trafficking, or for that matter, cross-border fraud, that makes these acts *intrinsically* international rather than transnational in character or the other way round. Could it not be that were States eventually to consider certain kinds of fraud to be of sufficient gravity which should be addressed by multilateral i.e. international mechanisms, rather than on a transnational basis that relied more on State cooperation, nothing *intrinsic* in the crime of fraud itself prevents the international community from taking this step. In other words, States remain free to distinguish among domestic, transnational and international matters at any given moment in history according to the changing, sometimes unpredictable economic, political and social exigencies of the moment.

#### B. The Concept of 'Core Crime'

Taking this argument further, one could also say that when we refer to the international community having recognized a particular crime under international law as a 'core crime as such,' we are bordering on a tautology,

because whatever the international community considers to constitute both a core crime and a crime under international law depends on the collective political will and nothing more. Perhaps any argument that purports to uncover the essential ingredients that qualify an act to be a crime, or further, to qualify it as a *core crime* is probably circular in that it presumes at least part of that which it is seeking to explain. In other words, to speak of 'core crimes' might add little to the debate analytically because the very fact that the international community designates certain acts and not others as 'crimes under international law' implies that such acts are considered to touch the core of social interest and concern. My concern over 'intrinsic,' 'inherent,' 'essential' and 'core crimes' as they are employed in this context is not a terminological or semantic one only, but rather, one basic to the kind of enquiry that should be adopted as a matter of logic in our efforts to understand the international community's recognition of certain acts as 'crimes under international law.'

### C. *The Ambiguity of 'Serious Interests of the State'*

Another criterion advanced for the identification of crimes under international law was that the kind of act in question had to affect a serious interest of the State. While it is undoubtedly true that crimes affect a serious interest of the State, this criterion does not necessarily assist us to identify the kinds of acts that should qualify as crimes under *international* law since presumably all crimes are considered to affect a serious interest of the State in one way or another which is why they were proscribed as crimes in the first place. For example, a failure to proscribe and enforce responsibility even for petty theft could be considered to affect a serious interest of the State in the sense that such failure could give rise to an increase in the commission of other kinds of crimes, such as grand theft, extortion, burglary and assault,

The obvious rejoinder would be that petty theft cannot be equated with genocide, war crimes or crimes against humanity: there is an obvious disparity in the gravity of crimes under international law as compared to petty theft. However, if it is the *gravity* of the crime that determines whether it should be dealt with internationally or domestically, then strictly speaking, its seriousness or gravity might not be related to an *interest of the State* as such, but more to the interests of the international community as a whole. Neither is this a question of semantics only, because the interests of an individual State can run counter to those of the international community as a whole. In this connection, one can think of the 'criminal State' that invades

another State for enrichment or other advantage. Accordingly, we see in Article 1 of the Rome Statute of the International Criminal Court<sup>4</sup> that the ICC shall be a permanent institution with “the power to exercise its jurisdiction over persons for the most serious crimes of *international concern*.” This implies not only the interests of single States taken collectively, but rather the interests of all States taken together: the two are not quite the same. The former relates only to the sum of individual State interests (which might include such illegal acts as aggression, while the latter refers to multilateral interests that States share in common in the service of common values (which rules out such offences).

*D. The Concepts of “International Peace and Security” and “Crimes against the Peace and Security of Mankind”*

In his paper, Professor Swart took account valuably not only of the Rome Statute, but also of the views of scholars and the ILC codification efforts, employing a wide-angle lens to the picture. Indeed, one can agree broadly with the substance of the three-fold distinction among: crimes against the peace and security of mankind (or better, ‘crimes against the peace and security of humanity’); ‘crimes of other concern to the international community’ (which might not affect peace and security directly, but which form the subject of international cooperation); and ‘crimes of concern to States.’ Furthermore, Professor Swart carefully noted the flexibility and open-endedness of the process of criminalization, in other words, the continuation of legal interpretation, adjudication and codification in this field.

While the substance of the three-fold distinction seemed quite useful, two sets of weaknesses in this approach could still be noted. Could one really distinguish between crimes affecting international peace and security or ‘the peace and security of mankind’ to use the language of the ILC draft Code on the one hand and ‘other crimes of concern to the international community as a whole’ on the other? Is it not true, that in some way, all crimes of concern to the international community affected international peace and security? The problem here is that ‘peace’ and ‘security’ were broad concepts and their meaning depended on whether we chose to adopt ‘peace and security’ in the sense of the Charter of the United Nations which referred to aggression rather than international criminal law violations

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4. See Statute of the International Criminal Court, *supra* note 2.

(although the relevance of crimes under international law to international peace and security has been developing through the Security Council's action to establish *ad hoc* international criminal tribunals). If we considered 'peace and security' to relate more to the peace and security of people and individuals, in other words, if we viewed it more from the angle of human security from violence and breach of the peace, rather than from the angle of the disruption of a State's legal sovereignty, then in principle, *any* crime of concern to the international community as a whole could be considered to degrade international peace and security simply because it involved an act of concern to the international community. This approach has the virtue of linking 'international crimes' to 'peace and security' as a matter of conceptual and semantic definition, rather than to make the distinction between the two essentially one requiring a factual determination. The question then becomes "At what point could we really say that a crime of international concern affected 'the peace and security of mankind'?"

Were the concept of 'crimes against the peace and security of mankind' to be understood to denote the same thing as 'international peace and security,' then we would still have to distinguish among 'crimes against the peace and security of mankind' and 'other crimes of concern to the international community as a whole' simply because not all 'crimes of concern to the international community as a whole' could be said to constitute at the same time 'crimes against the peace and security of mankind.' If the concept of 'crimes against the peace and security of mankind' were to mean anything at all, then small-scale drug-trafficking or counterfeiting which counted as 'other crimes of concern to the international community as a whole' could not be considered also 'crimes against the peace and security of mankind' simply because these crimes might cause little if any disturbance to the international community as a whole. In other words, if we considered that 'crimes against the peace and security of mankind' meant 'crimes against international peace and security,' then we evoke war and other major threats to international peace as our standard. On the other hand, if we considered 'crimes against the peace and security of mankind' as a concept unique to international criminal law with little or no relation to the constitutional framework of the Charter of the United Nations, then we ignore the fact that historically, the international community has identified certain acts as crimes under international law precisely because they disturb international peace and security and threaten the legal and political sovereignty of the State at the same time. These conundrums lead me to reflect a little on the importance of considering the historical context of the development of international criminal law.

### E. *The Importance of Historical Contextualization*

In my view, to understand fully how and why the international community over time has identified and recognized certain acts as crimes, one has to place the whole question into broad historical perspective because only then does the phenomenon of criminalization become apparent as a process. I would even say that to consider the various categories of crimes under international law in the abstract ignores the whole purpose and relevance of codification as a phase in the development of a larger system of norms and implementation. In other words, what appears at first to be chaos and disorder in the identification and classification of international crimes in fact can be understood as a series of manifestations, over a long historical process, on the part of the international community to develop a comprehensive *system* of international criminal law, an approach I laid out in a book published on the eve of the Rome Conference.<sup>5</sup>

Here is where I would have preferred a much more historically integrated approach to international criminal law than I feel Professor Swart has employed. Rather than to contrast the approaches of the Rome Statute and ILC Draft Statute on the one hand, to the 1991 and 1996 ILC Draft Codes on the other, would it not be more pertinent to view the Rome Statute as having largely *overtaken* the ILC's work on both the Draft Code and the Draft Statute? After all, all these and other products of the ILC in the area of international criminal law represent steps or phases that culminated eventually in the Rome Statute. In other words, excessive focus on conceptual categorization can throw out of focus the interrelations among all these developments in the overall evolution of international criminal law.

In this connection, I found it interesting that a number of interveners wondered whether the International Law Commission's draft Code of Crimes against the Peace and Security of Mankind might be helpful in terms of the further codification and progressive development of international criminal law. For my own part, I feel it would be unlikely for the candlelight of the International Law Commission's category of 'crimes against the peace and security of mankind' to retain much relevance against the noonday sun of the Rome Statute. The Rome Statute represents a far more extensive codification and progressive development of international criminal law than the ILC draft Code. In effect, we could consider that the

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5. See further LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION* (1997).

establishment of the ICC has overtaken the ILC codification project in terms of the historical development of international criminal law.

F. *'Crimes under International Law' versus 'International Crimes'*

To make one final terminological/conceptual observation, it is becoming more common to hear international criminal law scholars refer to 'international crimes' rather than the less elegant 'crimes under international law.' One should recall that the term 'international crimes' was employed very much as a concept separate and distinct from 'crimes under international law.'

The term 'international crimes' was enshrined in the International Law Commission's Article 19 of Part 1 of the 1976 version of the Draft Articles on State Responsibility<sup>6</sup> in contradistinction to 'international delicts.' Both international crimes and international delicts were supposed to refer to an internationally wrongful act breaching an international obligation "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."<sup>7</sup> At the time, and for decades afterwards, the ILC consistently dissociated the concept of crimes committed by States from crimes committed by individuals (termed 'crimes under international law').

As we know, the fundamental illogicality of referring to the State as the perpetrator of a crime, and therefore as a 'criminal State,' as well as the impossibility of putting a State in jail (collective sanctions notwithstanding!) forced the ILC finally to drop the concept of 'international crime' completely from the draft Articles on State Responsibility for Internationally Wrongful Acts. Accordingly, the draft Articles adopted by the International Law Commission at its fifty-third session in 2001 make no reference to the concept.

Now that the ILC has finally abandoned the confusing concept of international State crime, and the robust regime of the Rome Statute has brought the doctrine of individual criminal responsibility under international law to the fore, the term 'international crime' is rapidly losing its old association with State crime. The term now seems to be used increasingly as synonymous with 'crime under international law.' There is now little risk of harm or confusion since the *only* criminal responsibility regime under

6. 2 YEARBOOK OF THE ILC (1976) Part 2, at 75, U.N. Doc. A/CN.4/ Ser.A/1976/ Add.1 (Pt. 2).

7. Article 19(3) of Part 1 the ILC's 1976 Draft Articles on State Responsibility, *Ibid.*

international law now relates directly to individuals and not States. This is not to rule out or ignore the fact that individuals acting on *behalf of* the State or exercising State power may be held criminally responsible. The point is that such individuals can be held criminally responsible in an individual and personal capacity: the State cannot be held *criminally* responsible as a State. Neither can organizations, such as corporations, shield the individual from criminal responsibility under international law. The beauty of the Rome Statute is that it establishes definitively and comprehensively that individuals cannot escape responsibility for crimes under international law by trying to hide under the blanket of collective anonymity.



**International Criminal Law: Quo Vadis?  
30 November 2002**

**Panel 4: The harmonization of general principles of criminal law: The statutes and jurisprudence of the ICTY, ICTR and the ICC**

*Chair:* H.E. Carmel A. Agius (Malta)  
Judge, Trial Chamber II, International Criminal Tribunal for the former-Yugoslavia; Former Justice, Supreme Court of Malta

*Presenter:* Professor Thomas Weigend (Germany)  
Professor of Criminal Law, University of Köln

*Panel of Experts:*

Professor Alfredo Etcheberry (Chile), Professor of Criminal Law, National University of Chile; President, Chilean Bar Association; Member, Conseil de Direction, AIDP

Professor José Luis de la Cuesta (Spain), Professor of Criminal Law Universidad del País Vasco; Former Vice-Rector of the University; Director, Basque Institute of Criminology; Member of the Board, ISISC; Deputy Secretary General, AIDP

Professor Raimo Lahti (Finland), Professor of Law, University of Helsinki Faculty of Law; Vice-President, AIDP

*Rapporteur:* Professor Michele Papa (Italy)  
Professor of Criminal Law, University of Florence Faculty of Law

**Panel Questions:**

1. How will the six modalities be applied in the future (i.e. extradition, judicial legal assistance, transfer of criminal proceedings, transfer of sentenced persons, freezing and seizing of assets, and recognition of foreign penal judgments)?
2. What new techniques of inter-state cooperation are likely to be developed?
3. Will law enforcement and intelligence information-sharing and other forms of cooperation be regulated by treaty and national law?
4. How will these modalities affect human and civil rights, including privacy rights, and how to protect them?

# **The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview**

**Thomas Weigend\***

I have been given a truly Herculean task: to present, within the limits of a half-hour, the outlines of present international criminal law on the myriad of issues connected with the General Part of the criminal law. I take comfort in the fact, however, that the distinguished experts sitting on the panel will expand and explain where I can only give brief hints, so that in the end the picture may become clear enough for us to enter into a fruitful debate.

In accordance with the advice Professor Bassiouni was kind enough to give, I will concentrate my remarks on a number of major issues reflected in the jurisprudence of the ad hoc tribunals as well as the ICC statute, leaving aside theoretically interesting but practically marginal questions. I will start with a few remarks on possible sources of law in the area of the General Part and will ask what role the principle of legality has to play in today's international criminal law. I will then take a look at general requirements concerning *actus reus* and *mens rea* and move on to accomplice and command responsibility. The final part of my presentation will be devoted to grounds for excluding criminal responsibility.

## **1. Sources of General Principles**

When we look for sources of international law we are accustomed to start with the short catalogue of potential candidates listed in art. 38 of the statute of the International Court of Justice. Applying art. 38 to our subject, we have to ask whether general principles of substantive criminal law can be found in conventions, in customary international law or in general principles of law recognized by all civilized nations. Before I turn to the conventional law embodied in the statute of the ICC, let me briefly raise the question whether general principles of criminal law can be found in *customary law*. Only very few general rules concerning criminal liability arguably qualify as being part of customary law based on their recognition

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at least since the jurisprudence of the Nuremberg International Military Tribunal. One such rule could be the recognition of *superior orders* as a potential mitigating circumstance – which at the same time means that the fact of having been ordered to commit an international crime does not relieve the actor of criminal responsibility. Superior orders have been regarded as (merely) mitigating the sentence in the IMT statute as well as the statutes of the ad hoc tribunals for Yugoslavia and Rwanda.<sup>1</sup> But the limited relevance of superior orders has been cast into doubt by their elevation to the status of a full-fledged defense, albeit under narrow conditions, in the ICC statute: under art. 33, reliance on (unlawful) superior orders relieves the perpetrator of criminal responsibility for a war crime if he did not realize the unlawfulness of the order, and the unlawfulness was not manifest.<sup>2</sup> Similarly, the irrelevance of immunities under national and international law, which might have qualified as a rule of customary law,<sup>3</sup> has been put into question by the recent decision of the International Court of Justice in the case of Congo vs. Belgium, presenting different opinions on the issue at least with respect to *national* jurisdiction over foreign government officials.<sup>4</sup>

Given the absence of hard and fast customary law in this area, it is understandable that the ILC Draft Code of Crimes of 1996 referred to “general principles of law” common to all nations when it dealt with defenses under international criminal law.<sup>5</sup> It is in fact not difficult to demonstrate that the criminal laws of most states rely on similar general concepts and rules, regardless of their common law or civil law heritage. Consider, for example, the principle of causation as a requirement for liability for offenses involving harm or endangerment, the acceptance of self-defense and necessity as grounds for excluding responsibility, the recognition of mistake of fact as a defense in intentional crime, and the

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1. See art. 8 IMT statute, art. 7 sec. 4 ICTY statute, art. 6 sec. 4 ICTR statute.

2. For discussions, see AMBOS, ALLG. TEIL, at 372, 836; Paola Gaeta, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 172 (1999), at 186 et seq.; NILL-THEOBALD, “DEFENCES” BEI KRIEGSVERBRECHEN AM BEISPIEL DEUTSCHLANDS UND DER USA (1998), at 65 et seq., 167; Zimmermann, in HANDBOOK (Antonio Cassese, Paola Gaeta, & Jones eds.), at 965.

3. Immunities have been termed legally irrelevant, both for substantive responsibility and for jurisdiction, in art. 27 ICC statute; for similar earlier statements (limited to the issue of substantive responsibility), see art. 7 IMT statute, art. 7 sec. 2 ICTY statute, art 6 sec. 2 ICTR statute.

4. The judgment of Feb.14, 2002 can be found under [www.icj-cij.org](http://www.icj-cij.org). For a thorough discussion, see C. KREB, ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 114 (2002).

5. See art. 14 ILC Draft Code and the commentary associated with it, showing that – as of 1996 – international documents failed to explicitly mention defenses.

principle of accomplice liability of persons giving advice or assistance to the perpetrator of a crime. While it is fair to say that these are universally recognized general concepts one must see the limits of this insight: Most national laws have implemented *some* concept of self-defense, mistake of fact, and accomplice liability, but there is a fairly broad range of variation when one looks at the details of the law both on the books and in practical application. It is hence not surprising that the judges strongly disagreed in the ICTY case of *Erdemovic* as to whether the defense of necessity is available, as a matter of general principle, in cases of the crime against humanity of murder.<sup>6</sup> This example shows that what there exists in terms of internationally recognized general principles is not particularly helpful in deciding hard cases because these principles, perhaps having a hard core, are extremely fuzzy at the edges.

Has this state of affairs changed with the advent of the ICC statute? Although it is not clear that this was the intent of the statute's founding fathers, one can regard the ICC statute as a first attempt at formulating the existing body of generally recognized criminal law principles, and some of its definitions have already been adopted by the ICTY. Take, for example, the judgment of the trial chamber in the *Kordic and Cerkez* case. The defendants had relied on the defense of self-defense, claiming that their ethnic group had been the victim of a policy of aggression by another ethnic group, thus permitting them to act in self-defense. The court counters that claim by citing the definition of self-defense in art. 31 (1) (c) of the ICC statute, declaring that "the principle of self-defence enshrined in this provision reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law."<sup>7</sup> While one may have reason to doubt the latter part of this claim, it is pertinent that the court uses the ICC statute as a point of reference for determining the status of international criminal law.<sup>8</sup> One should note, on the other hand, that the ICC statute is not meant to be a mere restatement of customary law but in some instances reflects its authors' aspiration for progress. Consider, for example, the general exclusion of any temporal limitation of prosecution in art. 29 of the statute – a statement that is likely to go beyond the previous state of the law, given the fact that the 1968 U.N. Convention on the Non-

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6. Erdemovic no. 75 -79.

7. Prosecutor v. Kordic and Cerkez no. 451.

8. In a similar vein, the Appeals Chamber decision in *Pros. v. Delalic et al.* (at no. 196), refers to art. 28 ICC statute as authority for the fact that effective control is the appropriate standard for command responsibility.

Applicability of Statutory Limitations to War Crimes and Crims against Humanity<sup>9</sup> has not been ratified by a great number of states. Similarly, the recognition of superior orders as a full defense, albeit under very narrow conditions, and its limitation by the principle of manifest illegality in art. 33 of the ICC statute, may well go beyond settled customary law and universally recognized general principles,<sup>10</sup> setting standards that await validation by future practice. It remains to be seen to what extent the ICC will develop the authority to thus shape international criminal law.

Let me now turn to particular concepts of the General Part, attempting to determine their current status on an international level. One of the most basic and at the same time most contested concepts is the

## 2. Principle of Legality

Whereas this principle as such is universally recognized, there exist significantly different views as to what are relevant sources of law qualifying as a basis for criminal responsibility. A broad concept of law includes statutes as well as customary law and judge-made law, whereas a strict concept, prevalent on the European continent, recognizes only previously written law as a relevant source of incrimination, *nullum crimen sine lege scripta*. In the area of international criminal law, this narrow view conflicts with the general recognition of customary law as a legitimate source of law, as explicitly stated in art. 38 (b) of the ICJ statute. This conflict has become prominent in the debates surrounding the legitimacy of the application of the IMT charter, art. 6 of which defined as crimes coming within the jurisdiction of the Nuremberg tribunal acts that had not previously been termed criminal offenses in any statute or international convention. Nuremberg itself, however, has made international criminal law: since the application of its charter by the tribunal, and since the explicit affirmation of “the principles of international law recognized by the Charter... and the judgment of the tribunal” by the General Assembly of the United Nations,<sup>11</sup> it cannot be denied that the acts contained in art. 6 of the

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9. 754 U.N.T.S. 73.

10. In earlier law, obedience to superior orders had been regarded as a mere grounds of mitigation; see art. 8 IMT statute; art. 6 Charter of the International Military Tribunal for the Far East. For a discussion, see Paola Gaeta, 10 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 172 (1999).

11. U.N. G.A. Res. 95 (I) of Dec. 11, 1946.

IMT charter, namely aggression, war crimes, and crimes against humanity, are international crimes. Another part of universally recognized international criminal law has its foundation in international conventions which have been almost universally ratified and thus become part of international *ius cogens*. This is true for the Genocide convention of 1948 as well as the four Geneva conventions of 1949 concerning the protection of non-combatants in armed conflicts.

Given this *acquis* of international criminal law embodied in conventional law, the principle of legality did no longer pose a major obstacle when international criminal responsibility was brought (back) to life in the 1990s. The Secretary-General of the United Nations had thus good reason to confidently declare, in his report introducing the statute of the ICTY, that the international criminal tribunal on former Yugoslavia was to apply “international customary law,”<sup>12</sup> citing the sources I have just referred to. It is worth noting that the Secretary-General explicitly recognized the applicability of the principle *nullum crimen sine lege*, inferring from this principle the requirement for the tribunal to apply only those rules of law which are “beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”<sup>13</sup> And the ICTY itself has consistently claimed to adhere to this principle, striving to show, even in controversial decisions such as *Tadic*, that its judgments are based on well-founded rules of customary international law, not on rules “invented” by the members of the tribunal.<sup>14</sup>

The ICC statute has, to some extent, further tightened the legality principle, at least with respect to its own jurisdiction. Whereas art. 22 sec. 3 of the ICC statute declares that the statute does not affect the characterization of any conduct as criminal under international law, thus leaving undisturbed the dynamic sources of international law with respect to defining criminal offenses, the ICC itself is precluded from going beyond the narrow confines of its statute in defining the scope of crimes under its jurisdiction. Art. 22 sec. 1 of the statute limits criminal responsibility to those crimes the statute itself defines as coming under the jurisdiction of the

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12. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), (U.N. Doc. S/25704 of May 3, 1993), at no. 35.

13. *Id.* at no. 34.

14. See the discussion on the applicability of certain war crimes to non-international armed conflict in *Tadic*.

court,<sup>15</sup> and sec. 2 even implements the principle of strict construction in favor of the accused. But this is not the whole truth. Art. 22 of the ICC statute, taken literally, refers only to the question whether “the conduct in question” leads to criminal responsibility. For all other legal issues the ICC has to determine, art. 21 of the statute lists as sources for finding the law, *inter alia*, the Elements of Crimes, applicable treaties as well as principles and rules of international law, and finally, as a fallback position, “general principles of law derived by the Court from national laws of legal systems of the world,” provided these principles are not inconsistent with the ICC statute and international law. It is an open question whether (or to what extent) the general rules contained in Part 3 of the statute are subject to the strict legality principle of art. 22 or to the broad array of potential sources of law in art. 21. One indication that the latter solution may be what the authors of the statute had in mind can be found in art. 31 sec. 3 of the statute, explicitly referring the court to the applicable law as set forth in art. 21 when looking for additional grounds for excluding criminal responsibility. Because additional grounds of justification and excuse work in favor of the accused, however, this provision can be reconciled with the position that the strict principle of legality applies to rules of the general part whenever going beyond the text of the statute would *disfavor* the accused. One example might be broad recognition of the possibility of commission by omission, beyond the situations covered by command responsibility described in art. 28 of the statute. Another example would be acceptance of *dolus eventualis* as a possible mental element for international crimes, which might be in accordance with customary law and certainly with the majority of national legal systems but is clearly not covered by the definition of the mental element in art. 30 of the ICC statute. I would submit that the strict regime of art. 22 of the statute applies to these issues, for the simple reason that the question whether certain conduct constitutes a crime – which is the issue ostensibly to be decided on the basis of art. 22 – cannot be determined by simply looking at the Special Part of the statute; the judge must, rather, in each case consider the interplay between general rules and special prohibitions before he or she can say whether the actor’s conduct constitutes a crime. Take, for example, the situation of a soldier negligently killing a combatant who had surrendered at discretion – it would be incorrect to say

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15. Interestingly, according to art. 22 (1) ICC statute substantive liability follows the scope of jurisdiction – one might have expected the two concepts to appear in reverse order, i.e., the Court’s jurisdiction being determined by substantive liability according to the statute.

that the soldier commits the war crime under art. 8 (2) (b) (vi) of the ICC statute, Killing or wounding a combatant after surrender, but that an independent rule of the general part (namely the requirement of intent according to art. 30 ICC statute) somehow saves him from punishment; rather, the soldier clearly does not commit a war crime – a result that can only be found by reading articles 8 and 30 together. A look at the rationale behind the principle of legality provides another argument in favor of a comprehensive view of the principle: the idea that the citizen should be able, from reading the text of the law, to determine what the limits are between punishable and tolerable conduct, leads to the conclusion that the general rules applying to each criminal proscription must be included in the guarantee of legality: without an exact and conclusive description of the rules governing, for example, the required mental element, attempts, omissions, and justification, no one can determine what the legal limits of prohibited conduct are in any given situation.<sup>16</sup> In conclusion, we can say that the ICC statute signifies a great step toward recognition of the principle *nullum crimen sine lege* in international criminal law by not only preventing the Court from finding or developing new crime definitions but also by providing clear-cut general rules which cannot be superseded by unwritten law to the detriment of the accused.

### 3. Rules on Criminal Responsibility

In what follows I will very briefly treat a few of the many substantive issues associated with the general part of international criminal law.

#### A. *Mental element*

The *actus reus* of international offenses does not, apart from the issue of commission by omission<sup>17</sup>, present problems of a general nature. While some of the offense descriptions require causing a certain result, and others

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16. The same conclusion must be reached under the alternative rationale that the lawgiver and not the executive or judiciary ought to determine the exact boundaries of socially tolerable conduct – these boundaries would be quite unsettled if limited to “bare” offense descriptions.

17. Both the ICTY and the ICTR have insinuated the possibility of committing or participating in an international crime by omitting to fulfil a legal duty, but a finding in that regard was not so far required for conviction; cf. *Pros. v. Tadic*, ICTY Judgment of July 15, 1999 (IT-94-1-A) at no. 188; *Pros. v. Rutaganda*, ICTR Judgment of Dec. 6, 1999 (ICTR-96-3-T) at no. 41.

are limited to conduct regarded as inherently harmful or dangerous – such as the act of imposing measures intended to prevent births within a group as a form of genocide (art. 6 (d) ICC statute) – all international crimes require some overt conduct.

The mental element, however, has always been a source of controversy and remains so. Some of the problems arise from different concepts – perhaps only different names for very similar concepts – of the mental element in the civil law and common law traditions. Other problems have been caused by the wording of art. 30 of the ICC statute, which attempts to define the mental element; and still other difficulties follow from a lack of harmonization between this definition and the offense definitions in arts. 6, 7 and 8 of the statute. But let me try to treat these questions one by one.

First, there exists a puzzling array of legal terms connoting various (psychologically dubious) states of knowledge and attitudes concerning fulfilment of the objective elements of an offense. While unconditional anticipation of perpetration of all objective elements on the part of the actor, often termed intention or knowledge, is undoubtedly sufficient for full criminal liability in international law as well as most national legal systems, the mere conscious taking of a risk raises doubts. An actor's awareness that the material elements of the offense *might* be fulfilled does not *per se* equal "full" intention in most legal systems. Sometimes this state of mind is given equal weight with knowledge if it is coupled with some positive attitude on the part of the actor with respect to the harm or consequences required by the offense definition, as in the concept of *dolus eventualis* in the law of Germany and other systems; sometimes the mere acceptance of a risk is termed differently – "recklessness" is the most frequently used term in common law jurisdictions – and treated in similar but not identical ways as "full" intention.

This unclear and precarious state of the law has spilled over into the debate on international crimes. In the *Celebici* case, for example, the ICTY trial chamber has in effect placed on equal footing intentional and reckless killing, thus likening risk-taking with intention as to the harm.<sup>18</sup> The ICC statute clearly takes a different approach: art. 30 explicitly requires, for criminal responsibility under the statute, "intent and knowledge." The ensuing attempt, in sections (2) and (3), at defining these concepts can only be regarded as a dismal failure; yet the only thing that these definitions make clear is that the mere taking of the risk that a consequence will occur does

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18. Pros. v. Delalic et al., at no. 431

not satisfy either the knowledge or the intent requirement.<sup>19</sup> This does not quite answer the question, however, whether the ICC statute completely rules out *dolus eventualis* as a basis for criminal liability, because the opening words of art. 30 contain the caveat “unless otherwise provided,” which might arguably be interpreted as referring to other sources of international criminal law. In line with my remarks about the reach of the principle of legality, I would, however, submit that expansions of the definition of the mental element in art. 30 of the ICC statute would have to be found in the statute itself, not in outside sources.

Which brings me to the next point, namely internal inconsistencies within the ICC statute with respect to the mental element. Read by itself, art. 30 of the statute seems to provide a comprehensive and conclusive – though inherently unclear – definition of the mental element required for liability under the statute: the actor needs to have intent and knowledge with respect to all material elements of the offense he commits. If one takes a look at the offense descriptions in articles 6, 7 and 8, however, one encounters a host of epithets describing various kinds of mental attitudes: “deliberately,”<sup>20</sup> “intentional(ly),”<sup>21</sup> “wilful(ly),”<sup>22</sup> or “wantonly.”<sup>23</sup> It is by no means clear whether and to what extent these words are meant to create additional or different requirements for the offender’s mental state, or whether they are just harmlessly redundant repetitions of what art. 30 has already declared. The matter is made even more complicated by the existence of Elements of Crimes, adopted by the Assembly of States Parties on the authority of art. 9 of the statute, which in some cases seem to lessen the requirements as to the offender’s mental state.<sup>24</sup> Are such deviations from the standard of art. 30 of the statute sanctioned by the “unless otherwise provided” clause, or are they illegitimate invasions of the authors of the Elements into territory that is off limits for them? Finally, there is the thorny issue of the mental element with regard to “contextual circumstances,” such as the existence of a systematic or widespread attack as a general prerequisite for crimes against humanity.

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19. See Eser, in: *Cassese/Gaeta/Jones*, Handbook, pp. 945-946. This is true unless one interprets the “ordinary course of events” clause in art. 30 (2) (b) as hinting at the *dolus eventualis* situation; but there is little reason to believe that this is what the authors intended. Cf. however, Piragoff, in: *Triffterer*, Commentary, Art. 30 n. 22.

20. Art. 6 (c).

21. Art. 7 (2) (b), (e), (g), Art. 8 (b) (i), and many others.

22. Art. 8 (2) (a) (i), (iii), (vi).

23. Art. 8 (2) (a) (iv).

24. See, e.g., Element 6 on Art. 6 (e) ICC statute, requiring only negligence with respect to the age of the victim of forcible transfer.

The controversial question whether the actor must have full knowledge with respect to these circumstances has found a compromise solution in the Elements of Crimes, which require (only) that the actor was aware of the relevant factual background; he need not have made the normative conclusion that the attack was indeed “widespread” or “systematic.”<sup>25</sup>

### *B. Complicity and Related Concepts*

#### *Complicity*

With respect to the participation of several individuals in one offense, national legal systems offer vastly different models. Some systems tend to treat alike every one who is even remotely involved in bringing about the offense, others distinguish clearly among various distinct kinds of perpetrators and accomplices and limit criminal liability to the particular forms of participation described by the law.

International criminal law has traditionally adhered to the “all-inclusive” model. The IMT charter, for example, declares in art. 6 that “leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit .. crimes are responsible for all acts performed by any persons in execution of such plan,” thus implementing the broadest concept of common law conspiracy and providing the same legal consequences for perpetrators and mere conspirators in the earliest stages of a criminal design. The ICTY statute, while excluding mere conspiracy except in cases of genocide,<sup>26</sup> otherwise follows the example of the IMT, declaring to be “individually responsible for the crime,” *inter alia*, anyone planning the crime, instigating its commission, or aiding and abetting in its perpetration or even preparation.<sup>27</sup> The ICTY Appeals Chamber has made clear, in the case of *Delalic et al.*, that these forms of complicity should be distinguished both from (personally and directly) “committing” the offense and from responsibility as a superior for its commission by subordinates.<sup>28</sup> Yet the ICTY statute does not foresee reduced sentences for mere accomplices, hence the distinction between

25. See Elements of Crimes, general introduction, no. 7.

26. See art. 4 (3) (e) ICTY statute.

27. Art. 7 (1) ICTY statute.

28. *Pros. v. Delalic*, Appeals Judgment, at nos. 338, 342-344.

various groups of persons held “responsible” for an offense appears to be a rather academic exercise.

Art. 25 of the ICC statute goes further in technically distinguishing several categories of “individual responsibility” by listing in separate subsections commission (including joint commission and commission “through another person”), solicitation and inducement, aiding and abetting, and contribution in the context of a joint criminal enterprise.<sup>29</sup> From the meticulous listing of these various forms of participation, one might conclude that the catalogue of art. 25 is meant to be conclusive, so that other forms of accomplice liability – if they exist – are not to be recognized by the ICC. The ICC statute is silent, however, as to the exact requirements of accomplice liability, in particular as to the question of whether there must be an identifiable main perpetrator, acting unlawfully, to provide a basis for accomplice liability. Art. 25 (3) (a) of the statute answers this question in the negative with regard to the case that one of several *joint perpetrators* is not criminally responsible: the others remain responsible in that situation. But that leaves open the general question – resolved differently in different legal systems – whether accomplice liability is necessarily accessorial or whether (and to what extent) an accomplice can be held responsible even when there is in fact no one committing the offense. The ICC statute also fails to distinguish levels of responsibility with respect to sanctioning: it is left to the discretion of the court to give lesser sentences to persons only marginally involved in the commission of a crime. The point is not even alluded to in art. 78 sec. 1 of the statute, which requires the court to take into account in sentencing only “the gravity of the crime and the individual circumstances of the convicted person.” It remains to be seen whether the jurisprudence of the ICC moves into the direction of a more differentiated system distinguishing among forms of perpetration and complicity according to their typical seriousness, or whether international criminal law retains the ancient maxim “caught together, hung together.”

### *Command responsibility*

As with accomplice liability, there seems to exist a widespread consensus with respect to the general concept of a military commander’s responsibility for crimes committed by subordinates under his control. The

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29. Art. 25 (3) (a)-(d) ICC statute.

rationale behind command responsibility is the consideration that those who have armed individuals available to carry out their commands bear a special responsibility for controlling these individuals, notoriously prone to commit unlawful acts in the context of armed conflicts or other attacks. Upon closer examination, however, the implications and limits of this concept are far from clear. Art. 7 (3) of the ICTY statute,<sup>30</sup> purporting to formulate international customary law, describes in some detail the prerequisites of command responsibility. Main elements of that definition are (a) being a superior, (b) knowing or having reason to know that a subordinate is about to commit an offense and (c) failing to take the necessary measures to prevent him from doing so, or in the alternative, (d) failing to take the necessary measures to have the subordinate punished for offenses committed. The ICTY, in the *Celibici* case, was confronted with situations raising difficult questions concerning the interpretation of this provision. For example, the tribunal had to determine the exact meaning of the term “superior” – does that expression relate to a *legal* concept of command function, or to an individual’s *effective* ability to control the conduct of subordinates? Is it sufficient that the individual has substantial influence on other individuals’ conduct, or is something closer to total control necessary to trigger command responsibility? Given the defendant was a superior in accordance with the statute, was it necessary to show (hypothetical) causation, i.e., his ability to prevent the perpetration of the offense in question or to bring about punishment of the offender? And what exactly does the “had reason to know” alternative mean? Does conviction under this clause require proof that concrete information was available to the defendant if he had only cared to take an interest, or does the clause imply a standard closer to strict liability? On all these issues, the ICTY Appeals Chamber steered a reasonable middle course, requiring a superior’s effective control over his subordinates, a concrete possibility to obtain the relevant information as a prerequisite for a finding of negligence, and a possibility to actually prevent commission of the offense as an (unwritten) additional element of the offense.<sup>31</sup>

The ICC statute more or less follows the same path. Its art. 28 defines, in considerable detail, the prerequisites of command responsibility. “Effective authority and control” are the hallmarks of a superior under this statute. Knowledge of an impending offense to be committed by “the

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30. Art. 6 (3) ICTR statute is identical with art. 7 (3) ICTY statute.

31. *Pros. v. Delalic et al.*, Appeals Judgment, at nos. 197, 228-239, 266, 398-399.

forces” under the superior’s command is put on an equal footing with a concrete “should have known” standard, and the issue of (hypothetical) causation is addressed explicitly in that the commission of the offense must have been “a result of his ... failure to exercise control properly” over his subordinates; the superior must thus have had the actual (or, in the negligence alternative, the hypothetical) power to “prevent or repress” the commission of the offense and must intentionally have failed to make use of that power.<sup>32</sup>

From a Continental perspective, one of the problems with the broad concept of command responsibility inherent in both the ad hoc tribunals’ and the ICC statutes is the parallel treatment of the cases of knowledge and negligent ignorance of impending offenses; another problem is the superior’s responsibility for offenses committed by his subordinates on the sole basis of his subsequent failure to properly report an offense of which he had not previously been aware. In the case of negligent ignorance as well as in the case of non-reporting, there certainly exists a neglect of the superior’s duties. But it is doubtful whether this neglect, which need not have had any direct impact on the commission of the offense in question, really merits responsibility for the offense committed by the subordinates. National legislatures have reacted differently to this problem. Whereas England has faithfully transformed the ICC statute’s concept of command responsibility into national law, realizing that it implies an expansion of criminal responsibility, Germany has created special offenses of (intentionally or negligently) neglecting a superior’s duty to supervise and of non-reporting of subordinates’ offenses, both with lesser penalties than those available for commission of or complicity in the international crimes in question.<sup>33</sup>

#### **4. Grounds for Excluding Responsibility**

In the concluding part of my presentation, I will very briefly treat what Europeans tend to name “justification and excuse” and for which the ICC statute has coined the neutral term “grounds for excluding criminal responsibility.” Some of the traditional grounds of justification and excuse can be expected to have very little practical application in the area of international crime, but this does not mean that the controversies

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32. See art. 28 (a) (ii) ICC statute.

33. See §§ 13, 14 German *Völkerstrafgesetzbuch* of June 30, 2002.

surrounding some of the concepts relevant here have not reached the field of international crime.

### A. *Mistake*

Mistake is one of the areas of the General Part characterized by great theoretical debates. There seems to be a general consensus, however, as to the relevance of good-faith factual errors, even when an international crime is committed: The soldier who shoots a civilian honestly believing him to be a hostile soldier in combat simply lacks “intent and knowledge” with respect to the fact, crucial to the commission of a war crime, that he is dealing with a person protected under the Geneva Conventions.<sup>34</sup> Art. 32 section 1 of the ICC statute explicitly makes this point, which is really dictated by logic so that this provision is, strictly speaking, redundant.

The ICC statute is, on the other hand, quite clear in denying a general defense of “mistake of law”: an individual who commits one of the acts described in articles 6, 7 or 8 of the statute and knows what he is doing but simply thinks that his conduct is not a crime will not be relieved of criminal responsibility. As a general proposition, the maxim *error iuris nocet* can no longer be regarded as being universally consented; on the contrary, it seems that a majority of legal systems grants an excuse when the actor honestly and unavoidably believed that his conduct was not against the law. But it is unlikely that this situation, namely an “isolated” mistake of law, ever arises in connection with the crimes covered by the ICC statute. It would take great powers of persuasion on the part of the defense to make a court believe that someone did not and could not realize that, for example, maltreating civilians or prisoners of war, or committing atrocities in the course of a widespread or systematic attack against a civilian population, was prohibited by law. The only practically conceivable exception might arise when the actor is being ordered to commit an act of this kind by his military or civilian superior; and the ICC statute explicitly provides for this case in art. 33.<sup>35</sup> The authors of the statute may thus be forgiven for refraining from

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34. Cf. art. 8 (2) (a) ICC statute. It is a different question as to which material (objective) elements the offender must have knowledge and intent; see *supra*.

35. There has been some debate as to whether art. 33 ICC statute is too generous with respect to persons committing war crimes on superior orders; see *Gaeta* (n. xx, *supra*). As has been pointed out above, the fact that an individual carried out superior orders has traditionally been regarded as a mere grounds for mitigating the punishment. Yet the more lenient solution to be found in art. 33 ICC statute can well be defended on the grounds that the actor is not punished only if he was following superior orders believed to be binding *and* was acting in an honest and

entering into the theoretical debate about the treatment of mistakes of law, even though one may well regret that the statute fails to give a positive example of a progressive resolution of this issue.

But there exist more difficult cases of mistakes in the grey area between “pure” mistakes of fact and “pure” mistakes of law. Take, for example, the case of a military commander seizing vehicles for transporting his troops, believing that the vehicles in question belong to citizens of his own country, whereas in fact the enemy has property of the vehicles. Can the commander use his error as a defense against the charge of “seizing the enemy’s property” under art. 8 sec. (2) (b) (xiii) of the statute even though his mistake pertains to legal issues, namely the existence of property rights? Art. 32 sec. 2 of the ICC statute suggests an affirmative answer to this question since this provision allows for exclusion of criminal responsibility on the basis of a mistake of law if that mistake “negates the mental element” required by the crime in question. If that result is accepted, does that also mean that an actor has a valid defense in the following hypothetical: in the context of a widespread attack against a civilian population, the actor locks up a group of members of the victim population in an unused school house for several weeks, denying the victims proper food and access to bathrooms; when charged with the crime against humanity of “severe deprivation of physical liberty in violation of fundamental rules of international law,”<sup>36</sup> the defendant claims that he was not aware of the legal dimension of the term “severe,” nor did he know what the applicable “fundamental rules of international law” were, and therefore thought he acted properly. In accordance with what most people would feel is right, the applicable Elements of Crimes would deny the defendant an excuse under art. 32 sec. 2 of the statute, making clear that an actor only needs to know the relevant *factual* circumstances constituting “severity” of a deprivation or the violation of a fundamental rule of law.<sup>37</sup> But plausible as the difference in outcome between the two hypothetical cases may appear, there remains an open question as to how far arguably normative mistakes can negate the “mental element required.”<sup>38</sup>

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fairly reasonable belief that his action was not unlawful; cf. *Zimmermann*, in: Handbook pp. 965-966; *Scaliotti*, 1 Intl. Criminal Law Rev. 142 (2001).

36. Art. 7 (1) (e) ICC statute.

37. See Elements of Crimes, General Introduction sec. 4 and Art. 7 (1) (e), 3rd element.

38. One difficult issue is the treatment of mistakes as to what constitutes collateral civilian or environmental damage “clearly excessive” in relation to the military advantage anticipated, under art. 8 (b) (iv) ICC statute. The Elements of Crimes deal with this issue in a purposely obscure footnote; cf. *Frank*, in: Lee, pp. 150-151.

Another open question concerns factual mistakes as to the prerequisites of grounds for excluding criminal responsibility, the classic example being the actor's honest but mistaken assumption that another person is about to commit an unlawful attack against him. If the actor carries out an preemptive strike in order to ward off the attack, can he then rely on the defense of self-defense, assuming its legal requirements<sup>39</sup> are otherwise fulfilled? The formulation of art. 32 sec. 1 of the ICC statute seems to suggest a negative answer because it limits the exclusion of responsibility by a factual mistake "only" to the case that this mistake "negates the mental element required by the crime." It seems patently unfair, however, to deny the actor a defense in the situation I described, assuming his mistake could not have been avoided even by exercising proper care. If one thinks that art. 32 sec. 1 of the statute precludes a defense of mistake, this may well be a case in which the ICC might wish to rely on an unwritten ground for excluding responsibility in accordance with the opening clause of art. 31 sec. 3 of the statute.

### *B. Self-Defense*

As I just mentioned, art. 31 sec. 3 of the ICC statute recognizes self-defense as a valid defense even against charges of the most serious international crimes. This provision limits the availability of the defense, however, in two ways: in cases of genocide and crimes against humanity, self-defense can be relied upon only if the actor or a third person was faced with an imminent unlawful use of force against the *person*, not against property; and self-defense is generally limited by the principle of proportionality. The latter requirement is in accordance with many but by no means with all national provisions on self-defense; and the restriction of self-defense to defending against assaults on life and limb makes sense at least in practical terms, because it is hardly conceivable how one should be justifiably able to commit one of the acts constituting genocide or a crime against humanity in defense of property rights. Art. 31 sec. 3 of the ICC statute has therefore not been criticized as being too restrictive but as going too far in allowing self-defense in the context of international crimes. There is indeed little by way of documented acceptance of self-defense, in the situations relevant here, in customary international law; and despite the explicit disclaimer, in the second sentence of the statute provision, of

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39. Cf. art. 31 (1) (c) ICC statute.

likening “defensive” military operations and self-defense, one might fear that the concept could be interpreted too broadly, reviving a loose notion of military necessity as a general justification for committing atrocities. It will be for the jurisprudence of the ICC to lay to rest such fears by properly limiting the concept of self-defense to conceivable cases of individual emergency situations in which the actor cannot be blamed for going beyond formal rules of warfare to ward off imminent death or mayhem.

Let me stop here, although there are a great number of normatively difficult and intellectually challenging issues still to be discussed. I am sure that many of these issues will be taken up by the distinguished panelists. Even from my brief remarks, it should however have become evident that international criminal law has made great strides toward finding common ground on perennially controversial problems – and that we will still have to grapple with them as hard cases come before the international tribunals.



# The Principles of Legality and *Non Bis in Idem*

Alfredo Etcheberry\*

## Principle of Legality

It can be properly said that the principle of legality is the cornerstone of modern criminal law, based on a liberal philosophy. As long as criminal law remained the exclusive province of each sovereign state, that principle simply meant that the law was the only source that could declare that certain human acts were to be considered criminal and consequently punished with penalties whose nature, duration or magnitude were also fixed by law.

That principle is usually stated in the formula: *nullum crimen, nulla poena sine lege*.

The complete development of the principle of legality allows us to say that it encompasses three aspects:

- a) The law as the only legitimate source to create criminal offences and their penalties;
- b) That a penal law cannot be applied retroactively;
- c) Lately, under the influence of Beling's doctrine, it has been recognized that a penal law must define or describe the behaviour to be punished and not merely make ambiguous statements or give vague criteria.

The second and third aspects of the legality principle should not in principle pose very difficult problems when it comes to apply them to international criminal law. It is the first one which has given birth to a long debate, particularly with regard to the international trials following World War II.

As it has been said in Professor Weigend's introduction, the concept of law in the European continental legal systems meant only a written law, that is, a statute or an act, enacted by the legislative branch of a Government. In countries of common law tradition, customary and judge-made law are also considered as a legitimate source of criminal law, though Parliament, Congress or state legislatures are now in practice the main source of creation and modification of criminal law. But in any case, those sources of criminal

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law are local or domestic sources. We do not imagine that a British court would pretend to decide according to customary English law or English judicial precedent, a criminal case outside the United Kingdom jurisdiction.

That used to be the main hurdle when it came to be admitted the very existence of an international criminal law. In the international field there was no single sovereign authority that could enact world valid penal laws and no permanent international criminal courts to try people according to those laws. It is well known, and I do not want to be repetitious that until the recent creation of the ICC, the existing International Courts lacked penal jurisdiction and that the sources of international law mentioned in Art. 38(b) of the International Court of Justice statute do not include law.

When the IMT in Nuremberg came to try the main Nazi war criminals, many jurists, not suspect of being sympathetic to the fallen regime, pointed out that the basic tenet of legality had been violated, for the alleged crimes had not been qualified as such by an internationally accepted legal instrument. Out of the three groups of crimes under trial (not including conspiracy) it was alleged that war of aggression and the acts in violation of the uses and customs of war were perhaps breaches of existing treaties entailing international responsibility for States, but not criminal liability for individual people. And as to crimes against humanity, most, if not all the facts considered as such were indeed criminal, but not under that denomination and not as part of a national plan or policy from a given country's Government, and therefore should be tried as national crimes by national courts according to national laws.

However, the Nuremberg Tribunal did not mean to create a new penal law, namely, criminal offences unknown as such up to that date, and the corresponding penalties. The idea that International Law could be a valid source of Criminal law was not new. At the beginning of World War I the French Government created a Commission to investigate acts committed by the enemy troops in violation of international law. Near the end of that war France issued a solemn warning to the effect that the systematic violations of the rules of law and humanity and the acts contrary to international law and the very principles of all human civilization entailed the moral, pecuniary and criminal responsibility of those that commanded them and carried them out.

The Lansing Commission on Responsibilities and Sanctions recommended after that war the creation of an international tribunal that should try those facts according to the principles of the *jus gentium* as they result from the established customs among civilized nations, the laws of humanity and the requirements of public conscience, and as to penalties, it

should apply the ones corresponding to the nationality of the indicted or those in force in the countries represented in the Court.

Art. 227 of the Treaty of Versailles provided for the trial of the Kaiser, the former German emperor, by a special international tribunal for a supreme offence against international morals and the sacred authority of the treaties.

The Committee of Jurists in charge of drafting the Statute of the International Court of Justice recommended giving the Court penal jurisdiction to try crimes against international public order and universal *jus gentium*.

In 1915, the systematic extermination of the Armenian people by the Turkish authorities elicited a joint declaration from France, Britain and Russia to the effect that those crimes against humanity and civilization would entail the personal responsibility of the members of the Ottoman Government as well as that of the agents carrying out the massacres. The Treaty of Sevres – finally not ratified – provided for the delivery of those responsible of the Armenian genocide (as we would call it today) to be tried by a special court appointed by the League of Nations.

The League of Nations in 1924, at the motion of Herriot and Ramsay Macdonald, voted a Protocol to enact compulsory arbitration, which has the paramount importance of being the first international accord to qualify in so many words a war of aggression as an international crime. The Pan American Conference at Havana in 1928 also held that a war of aggression was a crime against the human race. We must also remind the Locarno treaties (1925) and the Pact of Paris or Briand-Kellogg (1928), formally waiving the right to any war of aggression, though not going so far as to declare such a war an international crime. However, that treaty, which many authors consider as still in force because it has never been formally repealed by any of its 63 signatories, was one of the strongest grounds on which the Nuremberg Tribunal held a war of aggression to be an international crime.

Such a long preamble only intends to show that before the Nuremberg trial the idea was already there. That is, (1) that there were real crimes in international law, independently from national sovereign legislations; (2) that those crimes resulted from the most serious violations of *jus gentium*, the customs and laws of war, the principles of civilized nations and the public conscience of the human race; (3) that it was desirable that those crimes were tried before an international court. The idea and the term international crime had been coined for good.

Now we come to the Nuremberg trial. The creation of the court was preceded by the report of the United Nations War Crime Commission in September 1944 to establish a United Nations Court to try war criminals

who would thus be withdrawn from their national jurisdictions in this respect. As sources of substantive law that Court would resort to “the international conventions declaring the laws of war and their international customs; the principles of *jus gentium*; the laws of humanity and the claims of public conscience; the principles of criminal law generally recognized by civilized nations and even judicial decisions considered as auxiliary means to determine the rules of the law of war.”

The report of the Commission was superseded by the Charter of the Nuremberg Military Tribunal whose well known Art. 6 sets forth the now classic trilogy of international crimes categories: crimes against peace, war crimes and crimes against humanity. An effort is evident to comply with the principle of legality through the enumeration and sometimes a detailed description of the crimes to be punished. Nevertheless, it must be pointed out that in the field of war crimes, letter (b) points out that they “shall include, but not be limited to...” the acts listed thereafter, and that letter (c), referring to crimes against humanity speaks of “other inhumane acts committed against any civilian population...,” which are obviously not *numerus clausus* lists.

From then on, there has been a noticeable trend towards the affirmation of the principle of legality as one of the basis of international criminal law, with the addition of two important legal sources: international conventions or treaties declaring that certain acts are to be considered international crimes and judicial precedents from international courts. The Nuremberg Principles, approved by the U.N., clearly distinguish international crimes as originating directly in international law from national or domestic crimes, set forth in national law: the circumstance that a fact is not considered a crime under domestic legislation does not prevent its punishment under international law (Principles I and II). Principle VI enumerates verbatim the crimes listed in the Nuremberg Charter, with the open clauses we have already mentioned.

The Universal Declaration of Human Rights in its Article 11.2 asserts the principle of legality:

“11.2. 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...”

The International Covenant on Civil and Political Rights (1966) (Art. 15) provides:

“15.1. No one shall be held guilty on any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...”

Similar provisions are to be found in the European Convention on Human Rights (1950, Art. 7); the Charter of Fundamental Rights of the European Union (2000, Art. 49.1) and other international documents on Human Rights.

Several international Conventions have expressly or impliedly declared certain acts to be international crimes: genocide, *apartheid* (declared specifically a crime against humanity).

The International Criminal Tribunals created by the Security Council to deal with crimes committed in the Former Yugoslavia and in Rwanda contain very similar provisions in their respective Statutes concerning the principle of legality: Art. 1 confers upon them a general power to prosecute persons "responsible for serious violations of international humanitarian law..." and Arts. 2, 3, 4, and 5 divide those offences into four groups, namely, Grave breaches of the Geneva Conventions of 1949; Violations of the laws or customs of war; Genocide and Crimes against Humanity. Long lists of offences are drawn in each of those articles: however, in the provisions concerning crimes of war and crimes against humanity, the old Nuremberg clauses have been retained; so, with respect to the former it is provided that such violations "shall include, but not be limited to": and with regard to the latter the list ends by (i) "other inhumane acts."

Finally, the Statute of the International Criminal Court places under its jurisdiction only "the most serious crimes of concern to the international community as a whole." It further specifies that those are exclusively the following crimes: genocide; crimes against humanity; war crimes and the crime of aggression. It is interesting to note that with regard to the latter the postponement of the jurisdiction of the Court is due precisely to the absence of a proper definition agreed upon by the State parties. It is clearly a token of concern for the principle of legality, for the State parties did not wish in this respect simply to submit to the decisions of a political entity such as the Security Council and act upon the latter's decision to declare that a given State is waging a war of aggression.

The definition of "genocide" in Art. 6 follows verbatim that which is found in the international convention on this crime.

As to crimes against humanity we find in the Statute certain new elements (Art. 7). First, the jurisdiction of the court is exercised with regard to such crimes only "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Second, the list of such crimes is longer than the ones in preceding international instruments and more precise and detailed. (For instance, *apartheid* is now included here). The usual "analogy clause" is retained

here, but in a somehow restricted form: letter (k) refers to “other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.” It is difficult to conceive any such act that does not qualify as torture, expressly mentioned in letter (f).

The ICC also has jurisdiction with regard to war crimes, according to Art. 8 “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” This sentence has no special legal effect: it rather wants to emphasize the fact that the Court will not act except in the most serious and large-scale crimes.

War crimes are basically conceived as violations of the Geneva conventions of 1949. A long and detailed enumeration thereof is made, comprising crimes committed in the frame of conflicts of an international nature and those committed in internal or non-international conflicts. 34 crimes are included in the first group and 16 in the second one. No analogy provision is found such as the ones in previous international documents: “other serious violations... etc.” (not specified).

What should our final appraisal be concerning the principle of legality and international criminal law? I believe we can summarize our conclusions in this way:

1) The principle of legality is firmly entrenched in the minds of jurists in the field of criminal law, whether national or international;

2) The meaning of that principle is that no one can be convicted of a criminal offence for an act that was not considered such under national or international law before that act was committed;

3) The only valid source of criminal law in the domestic field is law, meaning written statutes in countries of continental European tradition, and customary laws and judicial precedent as well in common law countries;

4) In international law, the relevant sources are *jus cogens*, conventions that have reached world-wide acceptance, the other sources mentioned in Art. 38 of the Statute of ICJ, the general principles of the law of nations, and to a certain extent, the jurisprudence of the international criminal courts that have been established up to the present time.

5) The important thing in order to preserve the principle of legality is that international offences are well defined in advance so that potential offenders cannot claim ignorance of the criminal character of their behaviour.

6) With regard to penalties it is not possible to achieve such an absolute precision (as neither is it possible in domestic law), due to the many circumstances that influence the specific penalty that will be applied in each particular case. The principle is in our opinion respected when a potential offender knows clearly that his intended act is a criminal one; that therefore

it is subject to a penalty, and that if it is an international crime, all of them being very serious ones, the penalty will be severe. But the Universal Declaration of Human Rights and other international instruments protect him from being subject to cruel, inhuman or degrading punishments.

### **Principle of *Non Bis in Idem***

This principle can be understood in two different aspects: procedural and substantive.

From a procedural point of view, it corresponds to what is called double jeopardy in American law, that is, the prosecution of a person for an offence for which he or she has already been prosecuted, no matter what the outcome of such previous prosecution might have been.

From a substantive point of view, it means that the same facts cannot be taken into account twice (or further times) to fix the penalty imposed for a given criminal offence, either to multiply the number of offences, or to substantiate aggravating circumstances that will enhance the penalty imposed for a single offence.

It must be said that this is a field that has been neglected in international penal law. No much attention has been paid to its fundamental principles, though they certainly are on the basis of liberal criminal law.

From a procedural point of view, this state of things is probably due to the fact that the jurisdiction of the Nuremberg and the Tokyo Tribunals, as well as those of the former Yugoslavia and the Rwanda tribunals were exclusive, that is to say, the charters or statutes that created and regulated such tribunals claimed the only right to try the offences mentioned therein: should other courts try to exercise jurisdiction with regard to the same offences, that claim would not be accepted and if carried out in practice, they would be ignored and not taken into account.

It is a different thing in the Statute of the ICC, because it provides that the jurisdiction of the Court is complementary of national jurisdictions, that is to say, that any crime included in the ICC jurisdiction is also included in that of a party State, which has a preferential right to try the case. In fact, any such offence could in principle be tried before the ICC or before a national court, with the obvious risk of competing claims over the case and an eventual case of double jeopardy.

The problem is dealt with in Art. 20 of the ICC Statute which rules that double jeopardy is proscribed. The rule works this way:

(1) No person can be tried more than once by the Court for the same conduct, no matter the outcome of the first trial;

(2) No person can be tried by another court (that is, a national one) for a crime under the jurisdiction of the ICC, if he has already been convicted or acquitted of said crime by the ICC;

(3) No person can be tried by the ICC for crimes included in Arts. 6, 7 or 8 (that is, all, excepting aggression) if he has already been tried by another court.

But the latter rule has exceptions. The local trial does not bar a new trial by the ICC in two cases:

a) When the trial at the other court was conducted with the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; and

b) When the proceedings at the other court were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Therefore, in these two cases, double jeopardy is in fact possible.

The moral justification for this breach of a basic principle is that the original trial was in fact a mock trial, not a real one, where the formalities only tried to conceal a miscarriage of justice. Nevertheless, the fact remains that the final authority to decide on the validity of the local trial is the ICC itself, which is claiming a right to try the case again. Perhaps this is an aspect in which future developments of the ICC Statute could provide for a better system to ascertain the validity of the first trial.

As to the substantive aspect of this principle, we must admit that so far it has not been dealt with in international criminal law. This must be to us a matter of concern, because the long enumerations in Arts. 6, 7 and 8 of the ICC Statute lead easily to overlapping definitions of particular offences, a state of things that could easily lead to multiple convictions for what are basically the same conducts. No particular rules have been laid down in the Statutes of the several international criminal courts to deal with this problem: the so-called “accumulation” of offences, either apparent or real, and its effect on the applicable penalties.

Thus, in our opinion, if the principle of legality has sufficiently and satisfactorily been debated in international penal law, much remains to be done with regard to the *non bis in idem* principle, in its procedural as well as in its substantive aspects.

# Towards Harmonization of the General Principles of International Criminal Law

Raimo Lahti\*

## I. On the Sources and Nature of General Principles

Before the consideration of the general principles of Rome Statute of the International Criminal Court (ICC), as defined in Part 3 of the Statute, Article 21 on the applicable law should be studied. The Court shall apply, in the first place, the Statute itself (including “Elements of crime”); in the second place, applicable treaties and the principles and rules of international law; and, if these primary sources are insufficient, general principles of law derived from national laws of legal systems of the world (under prescribed restrictions).

When discussing the significance of the principles and rules of international law, Professor Thomas Weigend refers in his general report to Article 38 of the Statute of the International Court of Justice. He puts the question whether general principles of substantive criminal law can be found in conventions, in customary international law or in general principles of law recognized by all civilized nations. According to Weigend’s answer, the criminal laws of most states rely on similar concepts and rules; in this sense it can be spoken about universally recognized general concepts but the exact contents of these concepts vary widely from one country to another.

This justified observation increases the role of the *general principles of criminal law derived from national laws* of legal systems of the world. These general principles of criminal law been developed since the 19th century primarily by the doctrines and practices of national criminal laws and criminal justice systems. Such concepts, principles and theories have mainly been developed within two different legal cultures, either in civil law or common law countries, and have therefore been differentiated to large extent. Research on comparative criminal law has not been carried out enough, so as to create the basis for a coherent and principled system of international criminal law.<sup>1</sup> The trend towards more harmonized criminal

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1. See, e.g., Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1 (1999), at 32.

laws within European Union (EU) has increased the need and interest for such a comparative research and system building.<sup>2</sup> The ICC Statute with its general part hopefully encourages the scientific community to new research projects, comparable to those of Max Planck Institute for Foreign and International Criminal Law.<sup>3</sup>

The ICC Statute is the first instrument to codify generally international criminal law and specially the general principles of international criminal law. Part 3 concerns these principles. Neither the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor the Statute of the International Criminal Tribunal for Rwanda (ICTR) have such a part of general principles but they do recognise some of these principles, in particular the principle of individual criminal responsibility (including the sub-questions of command responsibility and of superior orders). The jurisprudence of the *ad hoc* International Criminal Tribunals, ICTY and ICTR, has taken up views of many of these issues, and the case-law of these Tribunals has influenced on the elaboration of the relevant provisions of the ICC Statute.

*The ICC Statute is still far from a comprehensive and coherent general part*, because the doctrines on it are not yet in the same developmental stage as are most of the national criminal law systems following the continental European tradition.<sup>4</sup> Part 3 of the ICC Statute is rather an attempt to merge the world's criminal law systems into one legal instrument that was more or less acceptable to the delegations present in Rome after the three years' intensive preparatory work.<sup>5</sup>

The ICC Statute issues important challenges to (international) criminal law theorists. For instance, it could be traced the elements of crime in the Statute which are reflecting a common law tradition only and which of them rather express some kind of convergence of the continental and common law thinking. Another task would be to (re)construct the general concept of

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2. Cf. generally Raimo Lahti, *Towards an International and European Criminal Policy?* in LIBER AMICORUM BENGT BRÖMS 222-240 (Matti Tupamäki ed., Finnish Branch of the International Law Association, Helsinki 1999).

3. See especially 1, 2 RECHTFERTIGUNG UND ENTSCHULDIGUNG / JUSTIFICATION AND EXCUSE (Albin Eser & George P. Fletcher eds., Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg 1987-1988).

4. See Albin Eser, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767 (*hereinafter* COMMENTARY) (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) at 774.

5. See Ambos *supra* note 1, at 1. See also Immi Tallgren, *We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 683 (1999), at 683: "International law is a projection of the imagination and professional identity of the practitioners in the field."

crime for systematizing the doctrines of individual responsibility in international criminal law.<sup>6</sup>

In my presentation I will firstly (Part 2) deal with the following general questions: To what extent do the general principles reflect a differentiation of international criminal law on national, trans-national and supra-national levels and what are the prospects for harmonizing of these principles on those levels? In this connection I will also touch upon the role of the legality principle in relation to the general principles of individual criminal responsibility? Secondly (Part 3), I shall illustrate my general observations by giving examples of these principles (doctrines) and, finally (Part 4), draw some conclusions.

## **II. Differentiation of international criminal law and harmonizing the general principles of this specific area of law**

When considering the structure and contents of international criminal law a distinction between various levels, i.e., national, trans-national and supra-national ones, has proved to be useful.<sup>7</sup> On the one hand, certain *differentiated* areas of criminal law have traditionally been developed, such as military criminal law; some of them are in the phase of development, such as economic criminal law and international criminal law. These tendencies are discernible both nationally and internationally. On the other hand, the elaboration and application of general principles both in domestic settings and on trans- and supra-national levels probably lead towards more *harmonized* doctrines of international criminal law.

The diversification of various areas of criminal law (especially the emergence of economic and international criminal law) is reflected in the pluralism of general legal doctrines and in the need to develop a more dynamic conceptual and system thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena.<sup>8</sup> As for

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6. As to these issues, see the detailed analysis of Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, Duncker & Humblot (2002); as to the dominant role of common law, see especially at 46-47, and to the concept of crime, see especially at 541-542.

7. See, e.g., the structure of the book *Principles and Procedures for a New Transnational Criminal Law* (Albin Eser & Otto Lagodny eds., Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg 1992).

8. Cf. generally Kimmo Nuotio, *Transforming International Law and Obligations into Finnish Criminal Legislation* 10 *Finnish Yearbook of International Law* 325 (1999), at 346; Mireille Delmas-Marty, *Towards a Truly Common Law, in Europe as a Laboratory for Legal Pluralism* (2002); Mireille Delmas-Marty, *The ICC and the Interaction of International and National Legal Systems*, in 2 *Commentary*, *supra* note 4, at 1915-1929.

international criminal law, certain general principles have their doctrinal roots in this area: in particular, irrelevance of official capacity, responsibility of commanders and other superiors and superior orders. It is interesting to look at the developments of these doctrines; already the comparison between the Statutes of *ad hoc* Tribunals ICTY and ICTR, on one hand, and the ICC Statute, on the other, indicates substantial changes in the provisions concerning superior responsibility and superior orders. Even more attention should be paid those general principles which are for the first time regulated in the ICC Statute, such as the provisions on Individual criminal responsibility (Article 25) as well as on Mental element (Article 30) and on Mistake of fact and mistake of law (Article 32). Following Mireille Delmas-Marty's theoretical concepts, it may be questioned to what extent the elaboration of these principles of international criminal law has been conducted through *hybridization*, i.e., by combining and fusing elements from both common law and continental law systems to qualitative different outputs; another question is to what extent the implementation of those principles furthers *harmonization* of national criminal laws.<sup>9</sup>

The significance of the *legality principle* in international criminal law has been essentially strengthened in the ICC Statute. The different rules of this fundamental principle have been defined in Articles 22-24: *Nullum crimen sine lege*, *Nulla poena sine lege* and Non-retroactivity *ratione personae*. The rule of strict construction and the "more favourable" clause in Article 22, paragraph 2, should be especially mentioned, because such provisions are seldom in national criminal laws. Thomas Weigend suggests in his general report that the legality principle and the just-mentioned paragraph would also be applied towards the general principles of criminal law (Part 3 of the ICC Statute). Cogent reasons are in favour of this interpretation.<sup>10</sup> On the other hand, it can also be argued for a smoother application of the legality principle when taking into account the role of the general part (which in certain respects differs from that of the special part).<sup>11</sup>

### **III. The ICC Statute as reflecting the latest developments of the general principles (doctrines): examples for a critical assessment**

*Individual criminal responsibility* as such is a generally recognised principle of international criminal law since the judgments of the

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9. See Delmas-Marty, in 2 COMMENTARY, *supra* note 8, at 1923-1929.

10. See also, e.g., MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES. INTERSENTIA 395 (2002).

11. Cf. generally PHILOSOPHY AND THE CRIMINAL LAW (Antony Duff ed., 1998).

International Military Tribunal. Articles 25 (3) and 28 of the ICC Statute define the scope of individual criminal responsibility, covering the basic rules and rules expanding attribution. An important question is how the characteristic of international criminal law to create liability for acts committed in a collective context and systematic manner can be adjusted to the principles of individual responsibility and culpability. So criminal attribution for such international crimes as defined in the Articles 5-8 of the ICC Statute (“macro-delinquency”) has distinguishing features in comparison with the individual criminal liability for “ordinary” offences according to domestic criminal laws: “the individual’s own contribution to the harmful result is not always readily apparent.”<sup>12</sup>

Subparagraph (d) of Article 25(3) extends the liability for *contributions to a collective crime* or its attempt in such a way which deviates from the civil law (Romano-Germanic) tradition when criminalizing participation in ordinary offences. It is noteworthy that this liability form is not fully in line with the common law concept of “conspiracy” but presents a compromise formulation, which was also included in a similar provision of the anti-terrorism convention.<sup>13</sup>

A general regulation on the criminal *responsibility for omission* (commission by omission) was not adopted in the ICC Statute, although it was proposed during the preparatory work. In this respect the ICC Statute is not following a legislative trend of the recent reforms of Continental criminal laws (for instance, that of the Finnish Penal Code).

Nevertheless, the criminal liability for omission is recognized in Article 28 concerning *superior responsibility*. The responsibility of commanders and other superiors is based on customary international law, but the broad concept as adopted in this provision can be criticized. For instance, it is questionable to draw a parallel between the cases of knowledge and negligent ignorance of impending offences – as also Thomas Weigend rightly points out in his general report.<sup>14</sup> The solution of the German Code of Crimes against International Law (2002) to regulate the superior

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12. Citation from Kai Ambos, *Article 25 in COMMENTARY ON THE ROME STATUTE* (Otto Triffterer ed., 1999), at margin number 3. *See in detail* Klaus Marxen, *Beteiligung an schwerem systematischen Unrecht*, in 3 *AUFGEKLÄRTE KRIMINALPOLITIK ODER KAMPF GEGEN DAS BÖSE? MARKODELINQUENZ 220-236* (Klaus Lüderssen Hrsg., 1998); KAI AMBOS, *DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS*, at 518-542.

13. *See* International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998), annex, Article 2(3)(c).

14. *See further* Kai Ambos, *Superior Responsibility*, in 2 *COMMENTARY*, *supra* note 4, at 823-872.

responsibility in three separate provisions might serve as a model how to clarify and differentiate the contents of this general principle.<sup>15</sup>

The subjective requirements of individual responsibility according to the ICC Statute (in particular, the definitions on mental element in Article 30 and on the mistakes of fact and law in Article 32) mean a remarkable progress towards having the *culpability principle* as an essential independent element of crime in addition to the objective wrongdoing.<sup>16</sup> The recognition of mistake of law and duress as grounds for excluding criminal responsibility indicates a somewhat larger conception of culpability than to regard it as a psychological concept of *mens rea* (guilty mind) only, when it would be synonymous with intent and knowledge.

Nevertheless, the provision on the mistakes of fact and law is unsatisfactory. Article 32 is based on the traditional common law doctrine that a mistake shall be a defence only if it negates the guilty mind. The doctrine implies that mistake as to the wrongfulness of the act cannot in any case exclude criminal liability (i.e., *error iuris nocet*). In this strict form the doctrine disregards the culpability principle as it has been adopted in recent Continental criminal laws. Mistake as to circumstances affording a ground excluding liability should also be recognized. I agree with Thomas Weigend, when he in this connection refers to Article 31(3), which allows the ICC to rely on an unwritten ground for excluding criminal responsibility.

#### IV. Some conclusions

My examination of certain general principles of criminal law has been fragmentary. It still indicates that there has been a remarkable evolution of these principles in the jurisprudence of ICTY and ICTR as well as in the doctrines codified in the ICC Statute. It is easy to agree with Thomas Weigend's comment in his general report that "international criminal law has made great strides toward finding common ground on perennially controversial problems." Nevertheless, much controversy in doctrinal issues remains.

When striving for a more coherent and rational system of international criminal law the general principles, concepts and the values and theories

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15. See Gerhard Werle & Florian Jessberger, *International Criminal Justice is Coming Home: The New German Code of Crimes against International Law* 13 CRIM. L.F. 191 (2002), at 204.

16. See especially Albin Eser, *Mental Elements – Mistake of Fact and Mistake of Law*, in 1 COMMENTARY, *supra* note 4, at 890-891.

behind them should be carefully analysed and clarified by the international scientific community in order to satisfy the demands for legitimacy and legal security in the application of the ICC Statute. The significance of comparative criminal law in this scrutiny cannot be overemphasized, when taking into account Article 21(1)(c) and its reference to national laws of legal systems of the world as a secondary source of the general principles of law. It would be recommendable to find out common grounds for approaches based on different legal traditions (especially those of civil law and common law cultures) in these doctrinal issues. We should be able to combine and fuse elements of these different legal traditions in a fruitful way. For securing the appropriate implementation of international criminal law both in domestic courts and in international courts it would be advisable to develop more harmonized general principles of law.



# Harmonization of General Principles of Criminal Law: A Critical Report on the Debate

Michele Papa\*

## 1. Introduction

Reporting on the panel that debated about the harmonization of general principles of International Criminal Law, I try both to give a very essential synthesis of the discussion and to develop some personal reflection on the treated matters. Contributions to the discussion covered many topics: excellent papers were delivered for circulation before the conference and updated versions of them have been submitted to be printed in this book. The papers and the oral presentations focused in particular on:

The general problem regarding the sources of International Criminal Law, with a significant attention to the possible conflict with the principle of legality;

The articulation of the rules concerning ascription of responsibility, with a particular attention to issues like *mens rea* and complicity;

The rules concerning justification and excuse; essential was the analysis of the rationales for excluding responsibility. The discussion placed a particular attention on issues like mistake and self defence.

Finally, a fourth major topic was that raised by the paper presented by Professor Etcheberry: it was the topic of “*ne bis in idem*.” The principle was discussed in its double face: as prohibition against multiple prosecutions for the same offence; as prohibition against multiple punishments.

## 2. The problem of legality

2.1. In the general International Criminal Law debate about the principle of legality, it is today possible to perceive an increasing feeling of confidence and optimism about the state of the issue. This is particularly true, of course, after the International Criminal Court (ICC) statute. Even if the analysis of the panel had sometime critical overtones and even if it was always well aware of the traditional problems of the matter, the mentioned optimism was shared by the speakers of this conference.

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Optimism derives, in the first place, from the fact that definitions of international crimes are getting more and more settled. Legal scholarship has been refining the contour of many prohibited conducts, while a major contribution lately came from the case law of the two *ad hoc* Criminal Tribunals for former Yugoslavia (ICTY) and for Rwanda (ICTR). The International Criminal Court statute provided, more recently, a comprehensive definition of major international crimes.

With these considerations on the background, the panel discussion concentrated on a second relevant reason to be optimistic with legality today: the fact that ICC statute goes much further than previous international documents, by providing a set of articulated rules concerning the “general part” of International Criminal Law. Hence, today we have not only clearer definitions of crimes, but, for the first time, also a systematic body of written rules concerning ascription of international criminal responsibility.

The issue of legality is surely one of the major topics of International Criminal Law. This report is not the place to go into details – a sophisticated analysis is contained in the various paper of the panel. However, it is probably useful to point out here a number of critical reflections.

The feeling of confidence and optimism for the role of strict written legality, expressed by International Criminal Law authors, finds today no correspondence in the debate going on among scholars that deal with national criminal justice systems. On the contrary, the general attitude towards strict legality is that of disappointment and skepticism. Keeping in mind the old but fundamental lesson that comes from “legal realism,” but also the complexity of post-modern western societies criminal law theoreticians have today very clear the limits of blindly trusting the guarantee of a positive statutory law. They have a precise awareness of the risk of depending on written law as the final and universal solution to the problems concerning protection of the individual against arbitrary deprivation of liberty by the State.

As a matter of fact, theoreticians are today skeptical about many traditional features of the principle of strict legality. Of course, what is under discussion it is not the set of values which are behind the principle (the protection of the individual from arbitrary acts of the State), but rather the possibility to really achieve those objective simply by stating written rules in positive norms.

In the first instance, it is doubtful whether statutes increase very significantly people’s knowledge of the law. It is doubtful, more in general, whether spelled out rules are really so important in driving people’s behaviour. Many individuals do not know the positive law and still act

lawfully, while others disregard very well known rules of conduct to which draconian sanctions apply. The issue cannot be taken much longer, but what is important to realise is that ascription of criminal liability is a very articulated mechanism. It goes from police discretion to sentencing discretion, passing throughout the entire criminal process. The idea that this complex sequence can be reduce to a legal syllogisms, where positive law plays the role of the major premise, is too simplistic to be trusted anymore.

Another aspect of legality today under criticism is the assumption that parliamentary legislatures are the best possible lawmakers, so good lawmakers that we give them a complete monopoly over the criminalisation process. This idea is not shared in every western system, but it is pretty common in civil law legal cultures.

Critics of the parliamentary monopoly in Criminal Law stress two major points: in the first place, they say that when economy or technology comes into question, the task of legislating is today very complicated -much more than in the past. It is not a job for lay people: a technical competence is often necessary both in order to understand the nature of the interests to be balanced and in order to plan the possible policies to find a proper regulation of the conflict. National Parliaments often do not have the conceptual instruments to face the complexity of these issues.

In the second place, critics highlight that the same democratic principle is under discussion nowadays. Nobody challenges its moral legitimacy, of course. That legitimacy is a solid acquisition of the last two century history. What is under debate is rather the risk to ignore the conditions in which, in contemporary societies, the general community develops its "consensus" to legal policies. The awareness of these problems is in fact behind the development of concepts like those of "fundamental rights," "human rights," and similar. These are in fact expectation of individual protection that cannot be modified by the "general will" of any particular community. Needless to say, the risk of a "democratic tyranny" is especially true today, in the age where social consensus is heavily depending upon of mass media.

2.2. Considering what has been rapidly summarised above, my question is the following: the enthusiasm for the idea of positive, statutory, international criminal law is it really above any possible discussion? When we applaud to the recent developments of International Criminal Law, in particular to the enactment of positive rules concerning the general part of Criminal Law, aren't we forgetting what has become today *acquis commune* among national criminal law theoreticians, i.e. that positive law legality is not the final and universal solution to the problem of individual protection against arbitrary deprivation of liberty or life from the State?

These are not rhetorical questions. In fact, while, on one hand, a positive answer may be the logical consequence of a skeptical and realistic approach, on the other hand, there are many good reasons why the idea of “strict statutory legality” deserves today new credits in the realm of International Criminal Law.

First of all, I would like to stress the importance of a background feature that affects the role of legality in the two different environments. The roles of legality are very diverse. In the framework of national systems strict legality is a tool to actually protect the individual against the arbitrary action of the State -an arbitrary action that otherwise is very likely to take place systematically, as part of the general crime control policy. In other words, I want to stress the fact that at the national level we have the terrific power to inflict criminal sanctions, a power that is always “in action” and that we must continuously regulate and constraint in order to protect the individual. If we did not state rules (better: written rules) to limit the State power, the State would act anyway, and would deprive individuals of their personal liberty. No criminal justice system would leave murderers go free; systems that disregard legality would punish them arbitrarily i.e. without *ex ante-facto* rules of law describing the requirements of criminal responsibility, the definition of the proscribed conduct, the proper punishment to be inflicted.

Differently, in the context of International law, the traditional risk is not that of an arbitrary reaction by an Institution that holds the power and that carries on the everyday crime control policy. The risk is rather that of indifference to “crime” (atrocities of international significance) the risk is that of failing to react to such crimes. Hence, in this framework legality doesn’t work as a limit to an expansive force in action, but rather as a one of the basic features of a legal system that is under construction – a feature that attributes a particular legitimacy to the new legal system. Of course, also in International Criminal Law legality will work (and does work) as a protection for the individual, however it doesn’t play the same important political role that connotes the relation between the individual and the public authority in domestic criminal justice.

Furthermore, it is important to note that, at the national level, the necessity to limit and regulate the power to infringe personal freedom of the individuals depends very much on the integrated combination between legality, as a technical solution to law making, and other political and constitutional factors such as the separation of powers in the State organization. The separation among the Legislature, the Executive and an independent Judiciary is one of the most important complements to legality.

If we try to develop this analysis we realise that the complex interaction between technical and political features, interaction which is at the very core of the idea of legality and whose crisis is today the main reason why legality is under discussion and criticism at the national level, it is at the margins of what we mean with the term legality in the arena of International Criminal Law.

Take for example the critical relationship between the principle of legality and the democratic principle: somehow the issue is too complex to come into real question in the field of International Criminal Law. The feeling is that the connection between International Criminal Law and the opinion of the general community, or even the opinion of “a majority,” is both very indirect and to a certain extent needless to be verified. International crimes have fundamental customary and “natural law” components – a set of meta-historical components which is the main driving factor of such peculiar criminalisation process.

2.3. In light of what we have been discussing in the last paragraph, it is perhaps reasonable to say that in International Criminal Law the most significant component of the idea of legality it is not the democratic principle rationale, i.e., the political link between Criminal Law rules and the will of the community, but rather the “certainty of the law” technical rationale.

If this is true, we may in fact look with optimism to the possibility of increasing certainty of law by stating statutory rules both to define crimes and to spell out “general part” principles of responsibility. In order to develop this feeling of optimism we should reflect on a particular feature of International Criminal Law, a feature that appears very clearly in the system outlined by the Rome Statute for an International Criminal Court. This is that International Criminal Law is a recent criminal justice system with very limited jurisdiction and with a criminalisation process and an enforcement that are very selective.

International Criminal Justice, and in particular the International Criminal Court system, have been built in a previous “law-free space,” in a legal vacuum. This is why still today International Criminal Justice is much more independent than national systems from the infinite number of factors, formal and informal, legal and not legal, that influence the everyday interpretation of the law and more in general the functioning of justice. International Criminal Justice administered by international courts, is a sort of “digital system of justice,” a system carefully planned, a system projected to work on few limited target cases. It is like a reality *in vitro*: a system where every brick of the construction is projected and dislocated at its

proper place, a system self-aware of each piece of its legal mechanism and of its loopholes.

I think that, in this framework, interpreters relate to written rules in a different way than in domestic criminal justice. They are much more available to read and follow the rules as real “instructions” concerning the adjudication of the case. Of course, whenever they find a gap in the statutory law or whenever they enter into an area not regulated by written law they will recur to other sources. But in all other instances, interpreters will take the reading of the written rules very seriously, even when these rules regard the general part.

This different attitude could be very important in enlarging the scope of legality, expanding it to the general part. In fact, the relation between rules of the general part and the principle of strict legality is not a very easy one. Even where strict legality has a long time tradition, such as in civil law countries, it is not clear at all what legality means in the general part of the Criminal Law. While in the special part legality finds its implementation by providing statutory description of precise paradigm of conduct, in the general part the task is very different. There are not conducts to describe but rather principles to define. While conduct can be defined by reference to a socially shared scheme of behaviour, principles rely more heavily on concepts and words.

Hence, no wonder that the definition of the principles concerning the basic fundamentals of responsibility requires the continuous and necessary contribution of sources different from the legislature – case law and legal scholarship. We all know, for example, that it is not realistic to pretend to define issues like “causation” in three statutory lines. Common lawyers are even more aware of this difficulty, by distinguishing very sharply between rules of conduct (those that the citizen is entitled to know in advance) and principles of adjudication (directed to adjudicators and not to citizen).

In this framework, codification of the general part in the International Criminal Court Statute is a great leap ahead. It means in fact a commitment to extend legality beyond the traditional borders of the offence definition in order to cover all requirements of criminal responsibility.

### **3. The problem of *ne bis in idem***

Another very interesting topic was brought in the panel discussion by the paper of professor Etcheberry. What are the consequences of recognizing the principle of *ne bis in idem* in International Criminal Law? Is the International Criminal Court system compatible with this fundamental

principle? Interesting to note, the main focus was directed on the substantive law side of the principle in question – the ban of multiple punishment for the same offence.

The problem originates from the fact that also in International Criminal Law, the same conduct can be, sometime, legally relevant more than once –with the possibility to add up more than one penalty. This happens when the same conduct appears to violate twice or more times the same statute (as in the case of murdering several persons) or when one transaction appears to infringe many different statutes (as in the cases of kidnapping and rape of the same victim in the same context).

We all know how difficult these problems are in everyday domestic criminal justice. We all recall the many complicated tests that have been elaborated, by domestic courts and by scholars, in order to distinguish the case of a true duplication (or multiplication) of the same offence (hence: *bis in idem*) from the case of a mere interference between two (or more) conducts (hence: accumulation of charges).

The problems highlighted by Professor Etcheberry are very real. However, I think that in order to face these problems we should first of all decide whether it is proper to transfer to the International Criminal Law arena the complex debate that has been going on for decades at national justice level, especially in civil law countries. My suggestion in that, while it would surely be necessary to keep in mind the theoretical framework of the topic, it would be a mistake to depend too much on the various tests of logical nature that have been proposed in domestic justice.

In the first place because, apart from the case of offences perfectly included into others, all proposed tests are very controversial. For example, we still have problems in deciding what happens in many instances of “reciprocal speciality,” i.e., when two offences have some overlapping elements and some other elements that are randomly generic and specific.

In the second and more important place, because the tests that are used at the national justice level presuppose a set of general conditions that are unknown to International Criminal Law. For example, when we recur to a systematic interpretation of different overlapping provisions, when we argue that the *voluntas legis* is clearly in favour of multiple punishment or in favour of charging just one crime, when we sustain that in cases of “reciprocal speciality” one particular statute prevails on the other, in all these cases we use criteria that make sense only if we assume that the Criminal Law which is on the background is systematic, complete and coherent.

When we do not have such systematic and coherent legal background, and this is the case of International crimes, it is far better to take another

approach. We could even start with a test of logical nature (such a *Blockburger*-like tests that says that two offences are different when each requires an element not required by the other – each requires proof of a fact not required by the other), but in any case this approach should be completed with the some consideration of “substantive justice nature.”

One solution is to consider the nature and quality of the protected values. As the ICTY Trial Chamber stated in the *Krupre?ki? and others case* (ICTY Trial Chamber III, 14 January 2000, IT-95-16-T) if a transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that transaction infringes both criminal provisions. This test looks very sound, being grounded on the idea that each distinct value deserves to be protected and that such protection should remain visible by keeping an autonomous charge and sentence. However, it is not easy to focus the specific values that each international criminal rule intends to safeguard, and this gives broad discretion to the adjudicators that have to decide on multiplicity of charges. The risk is to state a principle, that of merging of offences in case of crimes affecting homogeneous values, that is likely to be disregarded in practice, given the natural tendency of the interpreter to highlight differences more than similarities in case of interests offended by crimes.

Another, perhaps better, solution is that of recurring to a very strict criterion in the phase of charging, for example the sole “speciality” or “lesser included offence” test, and then re-consider the matter at the sentencing level, “grouping” charges of similar nature for mere sentencing purposes. This solution combines both the advantage of keeping visibility of the multiple breaches of law and of assuring proportionality of the sentence to be served. Unfortunately, the approach of art. 78 of the ICC statute does not seem to go in this direction. In fact it provides that when a person has been convicted for more than one offence the Court will pronounce a sentence for each crime and a join sentence specifying the total period of imprisonment. The consequence seems to be that the Court cannot impose a single term of imprisonment for a variety of offences.

**International Criminal Law: Quo Vadis?  
2 December 2002**

**Panel 5: The emergence of uniform standards of “due process” in international and national criminal proceedings**

*Chair:* H.E. Judge Alphons Orié (The Netherlands)  
Judge, International Criminal Tribunal for the former-Yugoslavia; Former Judge, Supreme Court of The Netherlands

*Presenter:* Mr. Donald Piragoff (Canada)  
Senior General Counsel, Criminal Law Policy Section,  
Department of Justice of Canada

*Panel of Experts:*

Professor Michail Wladimiroff (The Netherlands), Attorney at Law and  
Professor of Law, The Hague, The Netherlands

Professor Kenneth Gallant (United States), Professor of Law, University of  
Arkansas at Little Rock, William H. Bowen School of Law

Dr. Geert-Jan G.J. Knoops (The Netherlands), Attorney at Law, The Hague,  
The Netherlands

*Rapporteur:* Judge Jean-Paul Laborde (France)  
Inter-regional Adviser, Crime Prevention Centre, United  
Nations; Magistrate, Ministry of Justice, France

**Panel Questions:**

1. Is there a “general part” of ICL and how is it identified? What techniques can be resorted to for the identification of “general principles of law”?
2. How satisfactorily does international criminal law deal with the principles of legality?
3. To what extent is Part 3 of the ICC Statute a satisfactory codification of the general part of international criminal law?
4. To what extent does the jurisprudence of the ICTY and ICTR satisfactorily address questions of the “general part” such as: general and specific intent, reckless conduct, command responsibility, and others?
5. To what extent is the jurisprudence of the IMT and IMTFE still relevant?

# The Emergence of Common Standards of “Due Process” in International and National Criminal Proceedings

Donald K. Piragoff and Paula Clarke\*

## 1. Introduction

The establishment of the International Criminal Court (“ICC”) will provide an extraordinary venue for developing a consistent body of shared norms in international criminal law. Building on the foundation created by the International Criminal Tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”), the ICC has the potential to serve as a model for systems of criminal justice that are developing at the national level and to provide an international standard for fair proceedings in the context of grave international crimes. The viability and institutional integrity of the ICC will in large part depend on its ability to balance judicial efficiency with a commitment to the protection of substantive and procedural fairness for the accused, as well as to victims and witnesses. Speaking of the ad hoc Tribunals, Richard Goldstone, the first Chief Prosecutor for the ad hoc Tribunals stated, “Whether there are convictions or whether there are acquittals will not be the yardstick of the [ICTY]. The measure is going to be the fairness of the proceedings...”<sup>1</sup>

Another key measure of the ICC will be its ability to reach out to national jurisdictions, especially societies recovering from war, by providing a model criminal justice system. The Statute of the International Criminal Court<sup>2</sup> lies at the heart of an evolving international criminal justice system, setting out eleven general principles of criminal law and a set of procedural rules that guide the functioning of the Court. The principles set out in Part 3 of the ICC Statute represent a blend of civil, common law and other legal approaches and include legal maxims such as *ne bis in idem*, *nullum crimen sine lege*, and *nulla poena sine lege*. The Rules of Procedure

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1. Donald K. Piragoff is Senior General Counsel and Paula Clarke is Counsel with the Criminal Law Policy Section of the Department of Justice, Canada. The views expressed herein represent the views of the authors, and may not necessarily represent the views of the Department of Justice.

Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J. Int’l Law 111, quoting Richard Goldstone at 114.

2. 17 July 1998, U.N. Doc A/CONF.183/9 (entered into force 1 July 2002) [hereinafter the “ICC Statute”].

and Evidence<sup>3</sup> are built upon these basic principles, elaborating a set of rules that balance the need to create an efficient international justice system with the need to protect innocent individuals from unfair trials, while providing protection to victims and witnesses.

The early stages of negotiation for the establishment of a permanent international criminal court were fraught with tensions over the diverse legal systems that sought to have their judicial values represented in the ICC Statute. A number of States envisioned a statute that would specifically accommodate their own constitutions. Delegations vied to have their domestic criminal system replicated on an international level, creating an impossible situation in which agreement would be untenable without a willingness to compromise. Eventually, the commitment to the creation of a permanent international criminal court gave rise to the broadly accepted position of the *sui generis* nature of the international justice system under development, as a “system that carries the imprimatur of many legal systems and closely resembles none.”<sup>4</sup>

The establishment of the ICC was a feat of intricate multilateral negotiations, at the end of which was established a truly international criminal procedure that reflects primarily the civil and common law criminal justice systems, imports elements of other systems and also creates entirely new features. The negotiation of a set of procedural rules by States has created a strong set of due process protections for the accused in international criminal trials. The due process rights provided by the Rules of Procedure and Evidence meet the highest standards set by international human rights treaties, customary international law, and general principles of law.<sup>5</sup> In fact, one commentator has stated that the due process protections embodied in the ICC Statute are exhaustive and consistent with, if not in excess of, the United States of America’s constitutional criminal procedure.<sup>6</sup> It is a dramatic improvement over the protections afforded to the accused in the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis of August 8, 1945 (the “London Charter”) where rules of procedure and evidence were considered to be “technical” rules that

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3. Rules of Procedure and Evidence, adopted by the Preparatory Commission for the International Criminal Court on 30 June 2000, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000 [hereinafter the “Rules of Procedure and Evidence”].

4. Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, DUKE J. COMP. & INT’L L. 5 (2001), at 5.

5. Jacob Katz Cogan, *supra* note 1 at 117.

6. Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381. See also Monroe Leigh, *The United States and the Statute of ICC*, 95 AM. J. INT’L L. 124 (2001).

should not impede the efficiency of the hearing.<sup>7</sup> The very purpose of the ICC is the protection of human rights, and it should not be held less stringently to human rights norms than are national systems.

The process of negotiation of the ICC Statute and Rules of Procedure and Evidence determined that a true international criminal procedure requires four elements in order to secure its legitimacy: it must adequately protect the due process rights of the accused; it must reflect aspects of criminal procedure that are supportable by the major legal systems of the world; it must generally respect the sovereign rights of States while being independent of national laws; and it must fully balance the rights and interests of victims and witnesses.

The meaning of due process rights in an international criminal hearing is still evolving, taking as its starting point the guarantees laid out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (the "ICCPR").<sup>8</sup> The body of jurisprudence generated by the ICC will be essential to clarifying the meaning and substance of due process rights in international criminal adjudication. This paper will explore a number of different themes: the relationship among common law, civil law and international criminal law in regards to the creation of the ICC; an overview of due process rights to date in international criminal adjudication; an analysis of how the ICC Statute and the Rules of Procedure and Evidence contribute to the development of an international standard of due process rights in international criminal hearings; and finally, the effect that any such international standard of due process rights may have on domestic criminal procedural rules.

## **2. The Relationship Among Common Law, Civil Law and International Criminal Law and the Creation of the ICC**

It was clear before the establishment of the ICC that any international criminal court would have to be acceptable to both civil law countries that apply the inquisitorial method of criminal procedure, and the common law countries that follow the accusatorial procedure.<sup>9</sup> As the ICC is a treaty-

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7. The London Charter enunciated the principle that "the Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value." *The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis* of August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 at Article 19.

8. Dec. 19, 1966, art. 14, 999 U.N.T.S. 172, 176-177. [hereinafter the "ICCPR"].

9. John Dugard, *Obstacles in the Way of an International Criminal Court*, 56 CAMBRIDGE L. J. 329 (1997), at 331.

based court, it was essential that the Court be perceived as fair and legitimate in all quarters.<sup>10</sup>

Indeed, the negotiations of the ICC Statute were in fact marked by the tension between civil law and common law. The negotiations of the ICC Statute were founded originally upon a draft written by the International Law Commission<sup>11</sup> that put forward a primarily common law perspective and was very similar to the Statutes and original Rules of the ICTR and ICTY, although the Rules of the ICTY and ICTR have since evolved into a more mixed system. When drafting the Rules of Procedure and Evidence for the ICC, it was easy to agree in principle that an international court should not reflect one legal system, but the actual task of drafting rules that reflected a compromise between the main criminal justice systems was more difficult. Not only did concessions need to be made among proponents of the different legal systems, but drafters had to ensure that the resulting procedural mechanism were efficient, while safe-guarding the rights of the accused and respecting the interests of victims and witnesses.

The negotiation process for the ICC Statute and the Rules of Procedure and Evidence was very different from the experience of negotiating the ICTY Statute. The draft ICTY Statute was prepared significantly by common law experts and was adopted under severe time constraints.<sup>12</sup> It was adopted, with limited debate on its substance, by way of a resolution of the United Nations Security Council. In contrast, the ICC Draft Statute is a treaty that was negotiated by States over a period of several years with involvement by experts from various jurisdictions and benefited from the practical experience gained through the Tribunals.

Likewise, the development of the rules of procedure of the Tribunals and the ICC also differed. The Tribunal's Rules of Procedure and Evidence<sup>13</sup> were developed by the judges of the Tribunal and adopted by them. Although judges of different legal systems were members of the Tribunal, they adopted an essentially adversarial form of proceedings. Over time, civil

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10. Håkan Friman, *Procedural Law of the International Criminal Court – An Introduction*, in 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Flavia Lattanzi & William A. Schabas eds. 2001).

11. Report of the International Law Commission on its Forty-sixth Session, Draft Statute for an International Criminal Court, 2 May 1994-22 July 1994, GA, 49th Session, Supp. No. 10, UN Doc. A/49/10.

12. Vladimir Tochilovsky, *Legal Systems and Cultures in the International Criminal Court*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 627 (Horst Fischer/Claus Kreß/Sascha Rolf Lüder, eds, 2001), at 628.

13. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. IT/32, Rev. 24 (2002) [hereinafter "the ICTY Rules"].

law elements have been introduced into the ICTY proceedings, such as referring to witnesses as “witnesses of justice” rather than witness of the parties.<sup>14</sup> As well, the Prosecutor has an obligation to present both inculpatory and exculpatory evidence.<sup>15</sup> The judges were able, after careful consideration, to amend the ICTY Rules to meet the needs of the Tribunal as they became apparent. One commentator has suggested that expediency, rather than a principled preference for civil law approaches, was the primary motive that led to judges – as opposed to the Prosecutor – acquiring more control over the proceedings. A backlog of cases and the length of time that it took to complete cases prompted the judges of the ICTY to look for means to expedite the process.<sup>16</sup> As judges need to be adequately informed about cases in order to control the proceedings and examine evidence, the judges of the ICTY began to request that parties submit written witness statements and other documents to the Court, somewhat similar to the investigative dossier submitted to judges in a civil law criminal trial.<sup>17</sup>

The decision to reserve to States the right to draft the Rules of Procedure and Evidence for the ICC differed from the precedents of all existing international tribunals, such as the Statutes of the International Court of Justice and the International Tribunal for the Law of the Seas, as well as the Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda. Previous international judicial bodies allowed Judges to adopt their own rules for the conduct of their proceedings.<sup>18</sup> The direct involvement of States in the drafting of the Rules of Procedure and Evidence led to the novel blend of legal systems resulting in a hybrid system. The States negotiating the Statute and the Rules functioned essentially as a legislative organ, enacting both a statute and rules of procedure for the ICC to implement and adjudicate.

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14. “From the moment they make the solemn declaration at the latest, the witnesses must no longer be considered witnesses of either of the parties to the trial but only as witness of justice.” T.Ch. I, Decision on Communications Between Parties and Witnesses of 11 December 1998, *Jelisić*, IT-95-10-T.

15. “The Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting” T.Ch.II, Decision on Communication Between Parties and their Witnesses of 21 September 1998, *Kupreskić*, IT-95-16-T.

16. The *Blaskić* trial took more than two years to complete and the trial of *Delalić et al.* took almost one and a half years.

17. See Tochilovsky, *supra* note 12, at 634.

18. See Silvia Fernandez di Gurmendi & Håkan Friman, *The Rules of Procedure and Evidence of the International Criminal Court*, in 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 289 (2000), at 289.

There were a number of factors that shaped the final result of the ICC Statute and Rules. Some of these included: the attempt by some delegations to replicate on an international level elements of their own criminal justice systems; a reaction by many civil law countries to the perceived common law bias of the statutes that established the ICTY and ICTR, as well as the Rules of Procedure and Evidence adopted originally by the judges; the recognition that the jurisprudence of the Tribunals was incorporating many elements of a civil law procedural system, which resulted in a shift in the character of the Rules; the desire by an overwhelming number of States that the Prosecutor be independent with respect to the investigation of offences and the drafting of the charges; the fear, primarily but not exclusively of common law States, of the potential abuses of unbridled inquisitorial systems; the fear of perceived “gamesmanship” in the actions of counsel in adversarial systems, particularly as reflected by popular films and the media; the concern by civil law States for the need for some pre-trial judicial involvement to ensure that the significant powers of the Prosecutor were not abused and the rights of the accused respected; the desire, primarily of common law States, to ensure that judicial involvement, both pre-trial and trial, was focused on judicial oversight and not interference; the desire of civil law States to ensure that all witnesses and evidence would be available in order to find and determine the “truth”; the desire of common law countries that all evidence submitted be subject to rigorous examination by the parties; a determination by an overwhelming number of States that due process rights of an accused be respected; the efforts of non-governmental organizations and many States that the interests of victims and witnesses had to be respected and that some interests should be regarded as rights; and the willingness by most States to forego the form of their own legal traditions and procedures in favour of reaching an agreement on common principles, and incorporating elements from each system, or drafting entirely new procedures, to put these principles into effect. The Statute and the Rules of Procedure and Evidence are the product of the interplay of these and other factors that influenced the negotiation process.

### **3. What are Fair Trial Standards for International Criminal Proceedings?**

The concept of a “fair trial” is a first generation human right and is considered to be essential to a democratic society.<sup>19</sup> The right to a fair trial

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19. See CHRISTOPH J.M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* (2001) at 21-22.

was enshrined in Articles 14 and 15 of the ICCPR which came into force in 1976. Alongside the ICCPR, four regional instruments were developed. The European Human Rights Convention of the Council of Europe entered into force in 1950 and Articles 6 and 7 address the “fair trial” principle. In the Americas, Article 26 of the American Declaration of Rights and Duties of Man (1948) and Article 8 of the American Convention on Human Rights (1969) enshrine the fair trial principle. The African Charter on Human and Peoples’ Rights (ACHR) (1981) contains the right to a fair trial in Article 7. When the United Nations decided to establish the ad hoc Tribunals for the former Yugoslavia (1993) and Rwanda (1994), the Secretary General stated that it is “axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of the proceedings.”<sup>20</sup>

The minimum rights outlined in the Statutes for the ICTY and ICTR reflect those found in Article 14 of the ICCPR. This instrument is routinely cited as the internationally recognized standard for the rights of the accused. The judges of the Tribunals are allowed flexibility to draft their own rules of procedure and evidence, placing upon these judges the responsibility for developing a system of procedural protections for the accused. They are obligated to provide their accused with all of the due process rights to which individuals are entitled by way of international human rights law.<sup>21</sup> The very act of rule-making allows the Tribunals to play a unique role in resolving gaps and inconsistencies in the sources of human rights law informing the conduct of the trials.<sup>22</sup>

To date, the body of international norms on due process rights is still in its infancy and there exist a number of unanswered legal questions. It is hoped that the ICC will contribute to the development of international due process norms and help to resolve these issues. For example, there is debate concerning the extent to which certain due process norms may be derogable under international law. Even though the right to a fair trial occupies a central role in human rights law, it is not considered to be a *jus cogens*<sup>23</sup>

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20. Report of the U.N. Secretary General pursuant to para. 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704, of 3 May 1993, para 101, 106.

21. Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecutions of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), para 106.

22. See DeFrancia, *supra* note 6, at 1390.

23. *Jus cogens* is a non-derogable, peremptory norm that is universal in its application and cannot be bargained away through treaty negotiation. *Jus cogens* was defined in Article 53 of the Vienna Convention on the Law of Treaties as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention of the Law of Treaties, May 23, 1969, art. 53, U.N.T.S. 331, 334.

right, but a *jus dispositivum*<sup>24</sup> right.<sup>25</sup> If the right to confront a witness is a *jus dispositivum* right, what are the boundaries of permissible derogation? In such a case, the rights of the accused and the rights of the victims are not equal – one must take precedence over the other,<sup>26</sup> or the rights of one need to be accommodated in such a manner as to still preserve the rights of the other.

While the principle of a fair trial is recognized as a general principle of international law, this principle is subject to different interpretations in different legal systems. Due process rights are interpreted relative to the context in which they are being applied. For example, the situation in Rwanda and the former Yugoslavia created a situation where witnesses and victims who testify are placed in serious danger of reprisals. The reality of this situation led to the judicial view that the Tribunals either have to permit anonymous testimony or they would be unable to obtain crucial evidence. This appears, however, to conflict with the right of the accused to confront witnesses and brings into question what is meant by a “fair trial.” In the ICTY Statute, the basic provisions for the accused include the right to a fair and public trial, to be informed of the nature and cause of the charges, and the right not to be compelled to testify against oneself.<sup>27</sup> However, these rights are balanced against the provisions of Article 22 that require special provisions for the protection of witnesses and victims. A fair trial is still ensured for the accused, although the scheme laid out for the Tribunals recognizes that a “fair trial” encompasses more than just the rights of the

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24. *Jus dispositivum* rights are rights which do not bind all states, as do *jus cogens* rights, and which are derogable. The majority of rules in international law are *jus dispositivum*.

25. However, it is worth noting that in General Comment 29, the U.N. Human Rights Committee argued that in states of emergency, there should be a narrow interpretation of the ability to derogate on the ground that some rights and freedoms are impliedly non-derogable by virtue of their relationship to expressly non-derogable rights. In paragraph 15 the Committee wrote “[t]he provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15” U.N. Doc CCPR/C/21/Rev.1/Add.11, (2001) Human Rights Committee General Comment 29, 31 August 2001, paragraph 15. However, it should also be noted the Draft Third Optional Protocol to the ICCPR, which attempted to amend the ICCPR to make Article 14 and others non-derogable, was unsuccessful.

26. See DeFrancia, *supra* note 6, at 1396.

27. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), Art. 21. [hereinafter “ICTY Statute”].

accused, and that the right of victims and witnesses to their physical safety and mental well-being must be balanced against the accused's right to a fair trial.

In any case, the ICC or the Tribunals should not adopt a set of rules of procedure that would violate the right of the accused to a fair trial. The very purpose of international criminal law is to protect human rights, and that applies to both the victims and the accused. As stated by Christoph J. M. Safferling:

The aim of protecting human rights is itself limited. Human rights can only be protected through human rights. If human rights are to be protected via criminal prosecution, the applied system must itself be strictly compatible with human rights.<sup>28</sup>

A strong argument exists for the position that the ICC should be unable to derogate from its guarantee of a fair trial in any situation. Sara Stapleton sets out four reasons why derogation from the Rome Statute is unacceptable. First, the ICC has no derogation clause that would provide a textual basis for derogation. Second, the ICC cannot meet the standards for derogation set out in previous human rights instruments. Third, there is no mechanism for review of a decision by the ICC to derogate. Finally, derogation allows for deviation from minimum procedural rights of the accused. Derogation from the obligation to protect fair trial guarantees would serve to undermine the moral foundation and rationale for the ICC.

Allowing the ICC, an aggressive enforcer of human rights, to deviate from the minimum international standards for a fair trial would undermine the credibility of existing human rights norms. How can a national government be expected to follow minimum standards for a fair trial if an international tribunal does not? Because of the importance of strict adherence to international human rights standards, the ICC should ensure that its statute is interpreted in such a way that protections are not rendered meaningless.<sup>29</sup>

The establishment of the ICC is reflective of the increased importance that international organizations can have over the rights of individuals. Following World War II, international human rights law gained prominence with the ICCPR, a growth that dovetailed with the growth of modern

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28. See Safferling, *supra* note 19, at 46.

29. See Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31/2-3 N.Y.U. J. INT'L L. & POL. 535 (1999), at 546.

international organizations. As Kenneth Gallant noted,<sup>30</sup> international organizations such as international criminal tribunals and courts possess the power to affect the rights and liberties of individuals. As such, it is essential that these organizations have mechanisms in place designed to protect individual rights.

The standard by which a fair trial in an international criminal court should be judged is not equivalent to the standards by which we judge domestic criminal trials. The *sui generis* nature of the ICC and its Rules of Procedure and Evidence do not resemble the rights and rules of any one legal system. Thus, it is impractical to compare domestic fair trial standards with what a fair trial means in an international context. Nevertheless, an international tribunal should comply with the international standards that are applicable to it.

Notwithstanding any differences between national and international standards, international tribunals have felt the need to examine national approaches to fair trials in establishing their own interpretation of the right to a fair trial. The panels of the *ad hoc* Tribunals employed various approaches in their interpretation of due process rights, eventually examining and incorporating the practice of national courts and regional human rights tribunals as a starting point, as was endorsed in the decision of the *Delalic* Trial Chamber<sup>31</sup> and elaborated in the *Kupreskic*<sup>32</sup> trial chamber judgment.

Article 21 of the ICC Statute is an improvement in this regard in that it specifically sets out the applicable law to be used by the Court. Judges must first look to the Statute, the Elements of the Crimes and the Rules of Procedure and Evidence. The next source of law, and of secondary importance, is “applicable treaties and the principles and rules of international law.” Under this source of law, statements by other international tribunals in interpreting and applying the ICCPR and other similar due process rights will be persuasive. The third source of law for interpretation is “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the

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30. See Kenneth S. Gallant, *International Human Rights Standards in International Organizations: The Case of International Criminal Courts*, (2002) presented at the conference “International Criminal Law: Quo Vadis,” International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, December 2, 2002.

31. ICTY Decision, *Prosecutor v. Delalic and Others, Decision on the motions by the Prosecutor for protective measures of witnesses pseudonymed “B” through “M”*, No. IT-96-21-T (28 Apr. 1997).

32. *Kupreskic*, Trial Chamber Decision, IT-95-16 (14 January 2000).

national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

The principle of a fair trial in an international criminal context does not have a clear and firm meaning, as it is still evolving. While certain minimum guarantees of general application are embodied in Articles 14 and 15 of the ICCPR, it is difficult to draw general conclusions about the principle of fair trials in the general international context. However, international tribunals have found the experience of national criminal systems to be useful in interpreting fair trial standards for their own purposes.

The next issue we will examine is the applicability of the Rules of the Tribunals, and the experiences of the Tribunals, in interpreting “fair trial” standards within the framework of international criminal law.

#### **4. Are the Rules of the ICTY and ICTR a satisfactory embodiment of contemporary procedural criminal law?**

The experience of the Tribunals is helpful to understand the background to the negotiations of the ICC Statute. During the course of the Tribunals’ existence to date, a transformation occurred on two levels. First, the Rules started out from a strong adversarial perspective favouring common law procedures, but eventually moved towards a more mixed system, incorporating elements of the civil law and common law criminal procedures. The second evolution is that even though the Tribunals commenced with a very broad approach to witness testimony, wide admissibility of evidence and liberal rules on affidavit evidence, the Tribunals naturally tended to limit this approach with the growing recognition of the need to protect the due process rights of the accused and to monitor the integrity of the Tribunals.

The Yugoslav and Rwanda Tribunals were developed pursuant to a series of United Nations Security Council measures condemning the atrocities that were committed in the former Yugoslavia and Rwanda. The ICTY was created under the authority of Resolution 808, on February 22, 1998 which stated that under the authority granted to it by Chapter VII of the U.N. Charter, “an international tribunal shall be established for the prosecution of persons responsible for the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>33</sup>

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33. U.N. Resolution on the ICTY, *supra* note 20, para 1.

The governing legal document for the ICTY is the Statute of the Yugoslav Tribunal,<sup>34</sup> which delineates the geographic, temporal and subject-matter jurisdiction of the Tribunal. The Statute outlines basic protections for the rights of the accused and for the rights of victims.<sup>35</sup> Article 15 empowers the judges to develop the Rules of Procedure and Evidence. The Rules were adopted on February 11, 1993, and have been amended several times. They, together with the Statute, govern the trials at the ICTY.

The Rwanda Tribunal was created after a Special Rapporteur, appointed by the United Nations Commission on Human Rights, issued a report on May 25, 1994 that prompted the Security Council to recognize that genocide had occurred in Rwanda. Resolution 955 established the ICTR.<sup>36</sup> The Statute and the Rules of Procedure and Evidence of the Rwanda Tribunal are modeled on those of the ICTY and were adopted on June 29, 1995, and have been amended frequently.

The *ad hoc* Tribunals were created for the purpose of prosecuting violations of international humanitarian law, and their mandates were limited to the offences that occurred in their respective jurisdictions. As such, each Tribunal and its accompanying rules operate as a *sui generis* system with very little guidance from any real source of historical precedence. The Tribunals play a dual role by both creating their own rules of procedure and evidence, and then interpreting those rules. The Tribunals have served to identify gaps and inconsistencies in the sources of human rights law regarding fair trials.

The reliance of the Tribunals on international cooperation has resulted in cases in which the ability of the accused to defend him or herself was compromised. Early judgments and the early rules supported wide admissibility of evidence, a broad approach to witness protective measures, and liberal rules on affidavit evidence. However, there was an evolution in the ICTY and ICTR towards realigning efficiency and witness protection with fundamental concerns of trial fairness. For example, the question of whether to allow anonymous witnesses to testify before the ICTY was discussed in the *Tadic* case,<sup>37</sup> the *Blaskic* case<sup>38</sup>

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34. ICTY Statute, *supra* note 27.

35. Article 21 and Article 22 of the ICTY Statute.

36. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994).

37. ICTY Decision, *Prosecutor v. Tadic, Decision on the Prosecutor's Motion Requesting Measures for Victims and Witnesses*, Case No. IT-94-1-T, 10 Aug. 1995 and *Prosecutor v. Tadic, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Measures for Victims and Witnesses*, Case No. IT-94-1-T, 10 Aug. 1995.

38. ICTY Decision, *Prosecutor v. Blaskic, Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, Case No. IT-95-14-T, 5 Nov. 1996.

and the *Delalic* case,<sup>39</sup> with a resultant evolution away from such practices.

Article 21 of the ICTY Statute provides that an accused is entitled to certain “minimum guarantees,” including the right “to examine, or have examined, the witnesses against him.” This right is not absolute and is balanced against the need to protect witnesses and victims. Article 20(1) of the ICTY Statute expressly provides that the trials shall proceed both “with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” In the *Tadic* decision, the Trial Chamber of the ICTY granted complete anonymity for a witness during the trial, stating that “[t]he situation of armed conflict that existed and endures in the area in which the alleged atrocities were committed is an exceptional circumstance *par excellence*.”<sup>40</sup> The Court established two criteria for video-conferencing: the testimony of the witness must be sufficiently important to make it unfair to proceed without it; and the witness must be unable or unwilling to come to the Tribunal. In the *Blaskic* case, the Trial Chamber found that the “exceptional circumstances” no longer existed and that it would be unfair for the Prosecutor to benefit from them. The decision in *Delalic* applied the two criteria established in the *Tadic* decision and added a third criterion: the accused must not thereby be prejudiced in the exercise of the right to confront the witness.<sup>41</sup>

In the examination of how to strike a balance between the rights of the accused and the rights of victims and witnesses, one issue that arose is the weight that should be given to Article 14 of the ICCPR, the European Convention on Human Rights, the African Charter on Human and Peoples Rights and the American Convention on Human Rights in striking this balance. In *Tadic*, the Trial Chamber found that these instruments and their provisions concerning fair trials could not be used as the basis for setting out the appropriate balance between the accused’s right to a fair trial and the protection of victims and witnesses.

...neither Article 14 of the ICCPR nor Article 6 of the European Convention on Human Rights (“ECHR”), which concerns the rights to a fair trial, list the protection of victims and witnesses as one of its primary considerations...In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused’s right to a fair and public trial and the protection

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39. *Delalic*, *supra* note 31.

40. *Tadic*, *supra* note 37 at para 61.

41. *Delalic*, *supra* note 31 at para 17.

of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.<sup>42</sup>

However, in *Delalic*, the Trial Chamber affirmed that nonetheless the fair trial provisions in the ICCPR are foundational to the Tribunals, and thus must be respected:

[D]ecisions on the provisions of the International Covenant on Civil and Political Rights (“ICCPR”) and the European Convention on Human Rights (“ECHR”) have been found to be authoritative and applicable. This approach is consistent with the view of the Secretary General that many of the provisions in the Statute are formulations based upon provisions found in existing international Instruments.<sup>43</sup>

The Tribunals’ reliance on the cooperation of States to arrest and detain suspects leads to the issue of who is responsible when the due process rights of the accused have been violated prior to arriving under the custody of the Tribunal. Under Rule 40(c) of the ICTR Rules, the supervisory responsibilities of the Tribunal do not commence until the moment of actual transfer of custody to the Tribunal. Yet this creates a situation in which an accused’s due process rights may have been violated by the State requested to enforce the arrest warrant, and the Tribunal is put in the awkward position of either having to criticize the State on which it relies for cooperation, or permitting violations of due process rights that may take place as a result of its requests.<sup>44</sup> In the case of *Barayagwiza v. The Prosecutor*,<sup>45</sup> the Appeals Chamber ordered the dismissal of the case and immediate release of the accused as a result of due process abuses. The accused was arrested and detained in Cameroon for a nineteen-month period, during which time his *writ of habeas corpus* was not considered by the Tribunal nor was he indicted on any formal charges. The Appeal Chamber applied doctrines of constructive custody, abuse of process and the mandatory right to file a *writ of habeas corpus* as justification to release the accused, stating that to proceed would “cause irreparable damage to the integrity of the judicial process.”<sup>46</sup>

This decision caused political discontent in Rwanda, and the Appeals Chamber later reinstated the indictment on the grounds of newly discovered

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42. *Tadic*, *supra* note 37 at paras 26-27.

43. *Delalic*, *supra* note 31 at para 27.

44. See DeFrancia, *supra* note 6 at 1405.

45. ICTR Decision. *Barayagwiza v. Prosecutor*, No. ICTR-97-19 (3 November 1999).

46. *Ibid* at para 108.

facts that revealed that the Prosecutor had been more diligent than originally thought. The importance of the decision, however, is that it clarified that the Tribunal has a supervisory role over the detention of individuals held pursuant to the arrest warrants it issues. An interesting aspect about the case is that this supervisory standard could eventually result in a situation where uniform standards are required by all cooperating States in the implementation of international arrest warrants. It is crucial that international courts that rely on State cooperation maintain the status of being an independent body and not subject to political pressures, and that procedural rights of the accused not be sacrificed for the efficiency of the Tribunal or Court.

Another area in which the Tribunals recognized the fair trial rights of the accused was in the area of “equality of arms.” Despite the fact that no mention is made of the principle of equality of arms in the ICTY Statute, the ICTY has recognized the importance of the principle of a fair trial in its own decision. In *The Prosecutor v. Alekovski* case, the Appeals Chamber explained that “each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”<sup>47</sup> In *Tadic* not only did the Appeals Chamber hold that the principle of equality of arms fell within the fair trial guarantees under the ICTY Statute, it went further and found that, in international criminal proceedings, the principle of equality of arms must be given a wider interpretation than is normally upheld for proceedings in national courts.<sup>48</sup>

The creation of the Tribunals, as well as development of Rules by the International Criminal Court, and subsequent judicial interpretation, must be understood in the context of the particular situation being addressed in the former Yugoslavia and Rwanda, the grave nature of the crimes, the hardship in the collection of evidence, the protection of victims and witnesses, and the need to ensure fair trial rights for the accused. Due to this situation-specific backdrop, it is difficult to proffer the Tribunal experience as being the widely-applicable model standard of due process procedural safeguards at the international level. The procedural rules in the ICC Statute<sup>49</sup> and Rules

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47. ICTY Decision, *Decision of the Prosecutor’s Appeal on Admissibility of Evidence, The Prosecutor v. Alekovski*, Case No. I-95-14/1-A, Appeals Chamber International Tribunal for the Former Yugoslavia, 16 Feb. 1999, p 24.

48. *Prosecutor v. Tadic, Judgment of the Appeals Chamber*, Case Number IT-94-1, 15 July 1999 at para 52.

49. See COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 1999).

of Procedure and Evidence,<sup>50</sup> which were negotiated by States and for the context of a Court whose jurisdiction is not limited to two particular situations of humanitarian atrocity, reflect a different model standard.

## 5. The Rules of Procedure and Evidence for the ICC

While the true value of the ICC to the development of a consistent body of shared norms in international criminal law will become evident as its jurisprudence evolves, it is useful to look to the ICC Statute and the Rules of Procedure and Evidence to examine the framework that they provide. The ICC Statute and Rules of Procedure and Evidence reflect both incorporation and evolution of, as well as rejection of, the Tribunal experience.

Articles 55 and 67, which are based on Articles 14 and 15 of the ICCPR, correspond with similar provisions in other international human rights instruments. The minimum guarantees enjoyed by the accused and set out in Article 67 are the right to a fair hearing conducted impartially, the right to be informed promptly of the nature, cause and content of the charge in a language that the accused understands, to have adequate time and facilities to prepare a defence, to communicate freely with counsel of choice, to be tried without undue delay, and to examine or have examined the witnesses against him or her. Article 55 focuses solely on the rights of persons during an investigation, including rights against self-incrimination and coercion, duress or torture, and rights to counsel and interpretation. During the negotiation of Articles 55 and 67, a number of countries set the ICCPR as an absolute minimum and would not entertain any proposals to Articles 55 and 67 that might derogate from the ICCPR guarantees in Articles 14 and 15. In fact, the result is that Articles 55 and 67 exceed the ICCPR guarantees in several aspects.<sup>51</sup> Of course, however, Articles 55 and 67 of the ICC Statute, like Articles 14 and 15 of the ICCPR set out broad skeletal principles. Their interpretation and implementation at the national level differ greatly. The challenge during the negotiations was to forge a common consensus to put flesh on these guarantees in the Rules of Procedure and Evidence.

Another significant aspect of the ICC Statute is that during its preparatory stage, delegates made a marked departure from the

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50. See THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS (Roy Lee ed., 1999).

51. See Christopher Hall, *Article 55: Rights of Persons during an investigation*, and William Schabas, *Article 67: Rights of the accused*, in COMMENTARY ON THE ROME STATUTE, *supra* note 49, at 727 and 845.

predominantly common-law nature of the ICTY and ICTR Statutes, and made a conscious effort to negotiate a Statute, and a subsequent set of Rules of Procedure and Evidence, that were acceptable to all States. In the words of one participant to the negotiations “the fight between common law and civil law has been replaced by an agreement on common principles and civil behaviour.”<sup>52</sup> The ICC Statute and the Rules of Procedure and Evidence attempt to establish a truly international set of procedures, acceptable to the major legal systems of the world and drawing on the experiences of previous international tribunals.<sup>53</sup>

In the end, continuing to evaluate the ICC from the perspective of one’s national system is a fruitless task. Doing so fails to acknowledge the unique foundation on which the ICC was built – an international agreement on common goals and principles, and some novel mechanisms to achieve this end that reflect elements of various legal systems. The ICC can never truly reflect the totality of mechanisms in a given national system. The measure of success of the ICC will be the extent to which its mechanisms secure the objective of a fair and expeditious trial.

Speaking on the ICTY, Judge Patrick Robinson made a similar point:

Whether the Tribunal has an inquisitorial or accusatorial system is, in the end, an unproductive and unnecessary debate, since in interpreting a provision that reflects a feature of a particular system, it would be incorrect to import that feature wholesale into the Tribunal without first testing whether this would promote the object and purpose of a fair and expeditious trial in the international setting of the Tribunal.

While greatly influenced by national law and priorities, however, the ICC Statute and the Rules have the potential to engender a reciprocal influence on such laws and practices. To illustrate some of the novel procedures created, the rest of this paper will discuss four aspects of the ICC Statute and the Rules of Procedure and Evidence, and their effect on international criminal procedure and potential effect on national laws and procedures, these being: admissibility of evidence; pre-trial proceedings; the supervisory responsibility of the ICC over individuals arrested pursuant to

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52. Cited in Hans-Jörg Behrens, *Investigation, Trial and Appeal in the International Criminal Court Statute (Parts V, VI, VIII)*, 6/4 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 429 (1988), at 429.

53. See Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, in 11/3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 569 (2000), at 579.

an ICC arrest warrant; and the rights of victims and witnesses *vis-à-vis* the concept of a “fair trial.”

(i) *Admissibility of Evidence*

As mentioned earlier, Articles 19 and 20 of the Nuremberg Charter provided that the Tribunal shall admit any evidence which it deems to have probative value, shall not be bound by technical rules of evidence, and may require the parties to inform it of the nature of the evidence before ruling on its relevance. Article 44(3) of the original ILC Draft Statute replicated that provision by stating: “The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its evidence or admissibility.” As well, Rule 89(c) of the ICTY also provides that the “Chamber may admit any relevant evidence which it deems to have probative value.” However, Rule 89(d) also acknowledges that the “Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”

In the *Delalic* case, the Trial Chamber of the ICTY indicated that its standards of admissibility and exclusion of evidence were independent of national law and practice, stating that the standards of the ICTY *vis-à-vis* the interrogation of a suspect were higher than that of the domestic standard in the Austrian criminal justice system. In this case, defendants Esad Landzo and Zdravko Mucic were unable to exclude statements made to the ICTY Prosecutor after their transfer to The Hague. Mucic, however, was successful in excluding an interview by the Austrian police who apprehended him because the Trial Chamber found that “the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal’s Statute and rules as to render the statement...inadmissible.”<sup>54</sup>

During the negotiations of the Preparatory Committee there was a growing recognition that relevancy should not be the sole determinant of admissibility and that other factors needed to be considered, including the securing of a fair trial, the rights of the defence and a fair evaluation of the testimony of a witness.<sup>55</sup> At the Rome Conference a decision was reached to provide a general principle in the ICC Statute that relevance is not the sole determinant of admissibility and that other factors need to be considered as

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54. ICTY Decision, *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Lando*, (Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence 2 September 1997, Case No. IT-96-21) para 52.

55. Report of the Preparatory Commission on the Establishment of an International Criminal Court, Vol. II, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc A/51/22 (1996) pp 214-217.

well.<sup>56</sup> The final paragraph agreed upon for Article 69(4) stated: “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.” No specific standard was included (such as probative value being “substantially outweighed” by prejudicial effect) in order to leave the details to the Rules or to the jurisprudence of the ICC.

Article 69(4) is an amalgam of both common law and civil law concepts and does not strictly follow the procedures of either. While the article adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence, some common law concepts are incorporated, which results in a hybrid system. The basic principle in both common law and civil law systems is “that relevant evidence which has probative value is admissible if such evidence is not affected by an exclusionary virus.”<sup>57</sup> Article 69(4) permits the Court to “rule on the relevance or admissibility of any evidence” before considering the question of weight. The Court can either: 1) rule first whether evidence possesses sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in Article 69(4), and evaluate subsequently the weight of any admitted evidence as part of the evaluation process; or, instead 2) admit evidence and consider relevance, admissibility and weight together as part of the evaluation of the admitted evidence, taking into account the same factors. Whether the Court would choose to proceed by one analytical method or the other would be influenced, *inter alia*, by the need to ensure the protection of other values in the adjudication process, for example, such as the rights of the accused, a fair trial, a fair evaluation of the testimony of a witness and the rights of victims. In some situations, protection of these values would be best served by the exclusion or non-admissibility of the evidence, rather than by admitting it and subsequently according it little or no probative weight.<sup>58</sup>

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56. See Donald K. Piragoff, *Article 69: Evidence*, in COMMENTARY ON THE ROME STATUTE, *supra* note 49 at 889.

57. *Prosecutor v. Delalic, Mucic, Delic and Landzo* (Decision on the Prosecution’s oral requests for the admission of exhibit 155 into evidence and for an order to compel the accused, Zradavko Mucic, to provide a handwriting sample, 19 Jan. 1998, Case No. IT-96-21), para 30.

58. See Donald Piragoff, *Evidence*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF THE CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy Lee ed., 2001) at 905-909; Donald Piragoff, *Procedural Justice Related to Crimes of Sexual Violence*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 398 (H. Fisher, C. Kress & S. Luder eds., 2001) at 407-409.

The fairness of a trial to the accused is not only protected under Article 69(4), but also under paragraph 7. Article 69(7) states that “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) [t]he violation casts substantial doubt on the reliability of the evidence; or (b) [t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” There exists some question as to the extent to which violations of the Statute or internationally recognized human rights find their operation through Article 69(7) as opposed to Article 69(4). Clearly, violations of rights that are specifically enumerated in the Statute or recognized internationally find their remedy regarding their admissibility in Article 69(7). However, in situations where Articles 69(7) and 69(4) overlap, Article 69(4) is either a statement of principle to which Article 69(7) provides specific rules in the situations therein outlined, or is a residual means of non-admissibility or exclusion where Article 69(7) does not apply but the fairness of the trial may nonetheless be prejudiced by the admission of the evidence. The relationship between Articles 69(4) and (7) may be clarified through the jurisprudence of the Court.

While Article 69(8) precludes the Court from adjudicating and making a decision about the applicability of a State’s national law to a particular factual situation related to the relevance or admissibility of evidence, *Delalic* illustrates that there are occasions when international criminal tribunals are forced to evaluate not the applicability of a State’s law, but whether or not the substance of the law is sufficiently rigorous to permit admissibility of evidence, which was collected under that law, into the ICC trial.

(ii) *Pre-Trial Proceedings*

Drafters of the ICC Statute addressed the problems related to the need for expeditious trials by providing specific powers to the Pre-Trial Chamber.<sup>59</sup> The Pre-Trial Chamber was a result of compromise and general agreement on the desire for independence of the Prosecutor in investigation and drafting of charges; common law distrust of inquisitorial judicial investigation which was viewed as being antithetical to independent prosecution; civil law desire to incorporate some judicial checks and balances on the broad power of the Prosecutor; and, general consensus on the need for some judicial review and confirmation of the charges. The Pre-Trial Chamber was advocated primarily on the basis of the Continental

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59. Article 57 of the ICC Statute.

tradition of investigative judges or magistrates. Nevertheless, many of its functions parallel those of magistrates in common law systems, who issue warrants and other legal processes, and review the sufficiency of the evidence and confirm the charges. The result is a Pre-Trial Chamber that functions as a supervisory body, issuing warrants and other orders upon the application of the Prosecutor, and in some cases making orders on the application of the accused, and reviewing the charges to confirm their sufficiency. To protect the interests of victims, supervisory functions also include the power to review certain decisions of the Prosecutor not to proceed with an investigation.<sup>60</sup> The Pre-Trial Chamber, however, does not possess any independent investigative function, except in the context of Article 56(3)(a). This article permits the Pre-Trial Chamber, in very limited exceptional circumstances, to take measures on its own initiative to preserve evidence that it deems would be essential for the defence at trial.

On the part of the Prosecutor, some functions with inquisitorial origins were also introduced, such as the Prosecutor's obligation to investigate equally incriminating and exonerating circumstances.<sup>61</sup> In the ICTY proceedings, the Prosecution had no obligation to investigate equally both incriminating and exonerating circumstances in order to establish the truth, whereas in civil law jurisdictions the Prosecutor is obligated to do just that.

It was thought that while certain functions set out in Article 57 were significant enough to require adjudication and decision by the whole Chamber, it would be more efficient to have other more routine powers exercised by a single judge of the Pre-Trial Chamber.<sup>62</sup> The Pre-Trial Chamber's powers include the power to issue orders and warrants as required by an investigation<sup>63</sup> and to provide for the protection and privacy of victims and witnesses, preservation of evidence, protection of national security information, and the protection of those who have been arrested.<sup>64</sup> Therefore, while the pre-trial powers of the Prosecutor are extensive and independent, they are subject to some judicial oversight to protect the rights of the accused, victims and witnesses. Moreover, the powers of the Prosecutor are checked by the confirmation hearing as set out in Article 61.

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60. Article 53(3) of the ICC Statute.

61. Article 54 of the ICC Statute.

62. See Ken Roberts, *Aspects of the ICTY Contribution to the Criminal Procedure of the ICC*, in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk MacDonald 571* (Richard May et. al. eds., 2001).

63. Article 57(3)(a) of the ICC Statute.

64. Article 57(3)(b) of the ICC Statute.

This provides the judges with an opportunity to determine whether there is sufficient evidence to confirm the charges and provides accused with an opportunity to challenge the evidence. Moreover, the willingness of the drafters of the ICC Statute to create a Pre-Trial Chamber is indicative that they learned from the experience of the Tribunals in attempting to expedite trial proceedings.

*(iii) Supervisory Responsibilities*

The ICC Statute provides for stronger safeguards against unlawful detention, implying that perhaps there will be a stronger relationship between the ICC and cooperating States than existed between the Tribunals and States. Drafters of the ICC Statute acknowledged that the deprivation of an individual's liberty must be subject to strict safeguards.<sup>65</sup> Article 55(1)(d) states that no one shall be subjected to arbitrary arrest or detention or be deprived of his or her liberty, except on such grounds or in accordance with the procedures set out in the Statute.

The provisions on pre-trial detention and supervision in the ICC Statute were influenced by the experience and practices of the ICTY and ICTR.<sup>66</sup> As mentioned above, in the *Barayagwiza* case, the Tribunals initially permitted pre-trial detention to continue for much longer than considered acceptable by international human rights instruments. The ICC Statute has specific criteria for an arrest warrant, and the relationship between the Court's authority over its arrest warrants and the arrest proceedings of the arresting State have been clarified. Article 59(4) and Rule 117 state that an accused person, who may be detained by national authorities pursuant to an ICC arrest warrant, can challenge the issuance of the arrest warrant only before the ICC. The accused can, however, apply to the competent judicial authority in the custodial State for interim release and for a determination whether his or her rights relating to the arrest procedures under the national law have been respected. The national judicial authorities are precluded specifically from considering whether the arrest warrant was properly issued by the ICC.

With respect to the issue of pre-trial delay, Article 60 states that the Pre-Trial Chamber shall periodically review its ruling on the release or detention of a person, and may do so at the request of the Prosecutor or the accused. Rule 118 specifically states that the Pre-Trial Chamber may review its ruling

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65. See Fernandez di Gurmendi & Friman, *supra* note 18.

66. *Ibid.*

on release or detention of a person surrendered to the Court every 120 days and shall do so at any time on the request of any party. No specific provision, however, governs the issue of pre-trial delay while the accused is detained by the custodial State. Article 59 preserves the right of the custodial State to determine the conformity of the detention with national law. The question arises as to what determination the Pre-Trial Chamber may make concerning an inordinate delay occurring during detention in the custodial State, and the effect that such may have on the lawfulness of the ICC process, even if the period of delay is legally acceptable at the national level. The *Barayagwiza* case may serve as precedent for the ICC to possess also a supervisory role over actions by national authorities, at least with respect to their effect on the ICC process.

Article 55 also sets out a number of other rights applicable to persons being questioned, such as the right: not to be compelled to incriminate oneself; not to be subjected to any form of coercion, duress, threat, torture or any other form of inhuman or degrading treatment; to the assistance of interpretation and translation; to be informed that there are grounds to believe that the person has committed a crime within the jurisdiction of the Court; to have legal assistance; and to be questioned in the presence of counsel.<sup>67</sup> Rule 111 provides for the procedure for the formal recording of the questioning. A significant aspect of Rule 111 is that both the ICC Prosecutor and *national authorities* who question a person are obligated to give due regard to the person's rights contained in Article 55.

Thus, the ICC Statute and Rules set out a framework for supervision of much of the pre-trial trial process, even including a framework applicable at the national level.

#### *(iv) Rights of Victims and Witnesses*

The concept of a fair trial has traditionally referred to the rights of the accused, but there has been increased recognition that these rights must be balanced with the rights of victims and witnesses. Fair trial requirements for the accused have generally included a public hearing in which the accused has the opportunity 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 the witnesses against him."<sup>68</sup> However, exceptions to this right are also recognized in international law. Article 6(1)

67. Article 55 of the ICC Statute.

68. ICCPR, Article 14(3), European Convention of Human Rights, Article 6(3), American Convention of Human Rights, November 22, 1969, Article 8(2)(f).

of the European Convention on Human Rights permits limitations to the right to a public trial in several cases, and fair trial provisions are not explicitly included among the nonderogable articles of either the European Convention or the ICCPR, and may be qualified. In *Kostovski v. The Netherlands*, the European Court found that the disadvantages faced by an accused when addressing the evidence given by an anonymous witness can be counterbalanced by other safeguards provided by the trial court.<sup>69</sup> This is similar to the position held by some domestic courts that emphasize the importance of protecting the right to a fair trial, while accepting that compromises such as protecting the identity of a victim or witness, may be justified in order to ensure a balance of fairness.

The Rules of Procedure and Evidence ensure that sufficient weight is given to the perspectives of the victims. The ICC Statute effectively addressed the lacunae in the ICTY Statute and Rules regarding victims. The ICTY Statute and Rules dealt with victims mainly in their role as witnesses and focused on their protection.<sup>70</sup> The drafters of the ICC provided for victims in their role as witnesses, but also followed the tradition of some civil law jurisdictions by providing for the views of victims to be given at some points during the proceeding.<sup>71</sup>

Three provisions in the Statute lay out the framework of victims' participation. When a Prosecutor submits a request for the authorization of an investigation that the Prosecutor wishes to initiate *proprio motu*, Article 15(3) provides that "victims may make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence." Article 19(3) permits that victims may submit observations to the Court when a ruling of the Court is sought in regards to admissibility of the case or jurisdiction. Finally, Article 68(3) permits victims to present their views and concerns when their personal interests are affected, at stages in the proceeding that the Court determines to be appropriate and consistent with the rights of the accused to a fair and impartial trial. The framework set out by the ICC Statute was elaborated through Rules 45 and 89-93, which provide for a definition of victim and a regime for their participation.

In terms of witness protection, Article 68(1) of the ICC Statute envisions that the ICC will take "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and

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69. *Kostovski v. The Netherlands*, (1999) 166 Eur. Ct. H.R. (ser. A.) at 3

70. ICTY Statute, Articles. 15, 20(1) and 22.

71. Rules 87 and 89 of the Rules of Procedure and Evidence and Arts. 68(1) and (2) of the ICC Statute.

witnesses.” In comparison with the Rules of the Tribunals, Article 68(1) is novel in that it states a number of factors that the Court must take into consideration when granting “appropriate measures” such as age, gender, health, and the nature of the crime, especially when the crime involves gender or sexual violence or violence against children.<sup>72</sup> The right of confrontation, enshrined in Article 14(3) of the ICCPR, is also guaranteed in the ICTY Statute and the ICC Statute. Articles 67(1) and 69(2) of the ICC Statute provide that trials shall be held in public and that the testimony of a witness shall be given in person. However, Article 69(2) permits exceptions to this in the Rules of Procedure and Evidence, and provides that the Chambers of the Court may allow *viva voce* or recorded testimony of a witness, via video or audio technology. Rules 87 and 88 contain specific provisions to give effect to this balancing of interests between the rights of accused persons and rights of victims and witnesses. Rules 67-69 provide general provisions concerning the admissibility of testimony by witnesses who are not actually present before the Court.

The concept of “fair trial,” as set out in Article 69(4) is also affirmed in Article 64(2) which mandates that 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.” Article 67(1) entitles the accused to a “fair hearing conducted impartially,” and Article 68(1) and (5) refer to a “fair and impartial hearing.” The concept of a fair trial has traditionally referred to the fairness of the trial for the accused. However, Article 68 recognizes the importance of victims and witnesses and charges the Chambers and the Prosecutor with the protection of their rights and interests. While it may appear that there is a conflict between the protection of the accused’s right to a fair trial, and the obligation to protect the rights of witnesses and victims, it must be noted that Article 64(2) requires that 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.” Therefore, a “fair trial,” and prejudice thereto, may also incorporate or be counter-balanced by some aspects of the fair treatment of victims and witnesses, and not solely the fair treatment of the accused.<sup>73</sup>

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72. See Åsa Rydberg, *The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 455 (1999), at 469.

73. See Donald K. Piragoff, *Article 69: Evidence in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 907* (Otto Triffterer ed., 1999).

## 6. Relationship between ICC and national laws

Are the procedural standards of international courts applicable to national criminal procedures? The simplistic answer to this question is negative. The two levels of court and legal systems are distinct and independent. The statutes and rules of procedure and evidence, developed for the Tribunals and the ICC, and their related jurisprudence, are binding only upon those bodies. In the course of negotiating the ICC Rules of Procedure and Evidence, some states agreed to procedural or evidentiary provisions that would be applicable for the Court, but which were totally inconsistent with their own national laws and practices. Due to fears held by some delegations about the potential impact or influence of these new international rules on their own national systems as a result of having agreed to their adoption, they wanted a clear disclaimer of their scope. Accordingly, the Explanatory note preceding the ICC Rules of Procedure and Evidence contains the explicit disclaimer that “(t)he Rules of Procedure and Evidence on the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings.”<sup>74</sup>

Nevertheless, the more accurate answer to the question of application of international standards to national criminal procedures requires a more nuanced response, and in some respects the answer is positive.

For example, the recent trend of establishing “mixed tribunals” – national courts or panels of national courts with foreign or international components and financial support – such as in East Timor, Cambodia or Sierra Leone – can contribute to a “trickle down” effect whereby the ICC could assist in setting international standards on procedural fairness, which could be adopted by the mixed tribunals. In turn, the tribunals can play a role in helping national courts adopt fair trial guarantees and mechanisms to ensure any such guarantees. These tribunals can be an effective means of promoting a democratic culture in a society in which the institutions crucial to democracy – the courts, law enforcement and the separation of the government and the military – have been undermined or destroyed by civil conflict. Not only does the presence of a tribunal devoted to the prosecution of war crimes and crimes against humanity serve to end a culture of impunity for such crimes, it also facilitates the transition to a democratic culture by promoting viable due process standards and rules that post-transition national courts may adopt.

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74. Explanatory note, ICC Rules of Procedure and Evidence, *supra* note 3 at 1.

Additionally, the influential impact of the international standards cannot be discounted as a persuasive force by persons who may advocate for change at the national level, or by national courts that may look to the international jurisprudence and standards for guidance in interpreting national laws.

Moreover, while not having a direct affect on national proceedings “for the purpose of national proceedings,” the ICC Statute and Rules may indeed have an affect on national law and practices for the purposes of *international proceedings*.

In fact, in some circumstances, the ICC Statute or Rules explicitly acknowledges the existence of national rules of procedure and practice. Where international and national standards interact and a conflict arises, the resolution will generally require that both standards coexist in the context of their own spheres in order to preserve the independence of the Court and the sovereignty of the State. Nevertheless, the specific identification of conflict or difference cannot but have a political effect at the national level, with the potential for pressures to change the national law or practice, or for the Court to reconsider its original position. In some circumstances, the conflict may raise questions as to whether the State is in compliance with its obligations under the ICC Statute.

For example, the case of *Barayagwiza v. The Prosecutor*, discussed earlier,<sup>75</sup> involved the ICTR ruling that the due process rights of the accused were violated by the lengthy delay in executing the warrant to surrender the accused to the custody of the Tribunal, which resulted in the Tribunal ordering the dismissal of the case. Although, the international Prosecutor was held partially to blame for the delay, the ruling of the Tribunal can also be taken as a criticism of State action. The case caused significant political reaction both nationally and internationally. Although in this specific case, the Tribunal reviewed and altered its original finding after considering new facts that had not been originally considered, the significance of the case is that the supervisory role of the Tribunals and the ICC can involve some evaluation of whether the accused’s subjection to national standards or practices might violate international standards applicable to the Tribunal or Court such as to affect its own pre-trial and trial process. A similar case is that of *Delalic*, discussed earlier.<sup>76</sup> Despite the fact that statements from the accused were taken by national authorities in accordance with national law and practice, the ICTY excluded the statements in its proceedings because

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75. *Barayagwiza v. Prosecutor*, *supra* note 45.

76. *Prosecutor v. Delalic et al.*, *supra* note 54.

the Trial Chamber found that “the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal’s Statute and rules as to render the statement...inadmissible.”<sup>77</sup>

The inter-relationship and dichotomy between international standards and national standards is specifically acknowledged in some areas of the ICC Statute. As noted earlier, Article 59 (4) and Rule 117 state that the accused person, who may be detained by national authorities pursuant to an ICC arrest warrant, can challenge the issuance of the arrest warrant only before the ICC. The accused can, however, apply to the competent judicial authority in the custodial State for interim release and for a determination whether his or her rights relating to the arrest procedures under the national law have been respected, but such judicial authorities are precluded from considering whether the arrest warrant was properly issued by the ICC.

The dichotomy of function so between the ICC and national courts is not as distinct, however, with respect to the question of admissibility and exclusion of evidence. Article 69(8) precludes the ICC from ruling on the application of the State’s national law, when deciding on the relevance or admissibility of evidence collected by a State. The ICC will naturally apply its standards to determine relevance or admissibility of evidence. Nevertheless, while it cannot judge directly whether the actions of national authorities in collecting the evidence comply with national standards, it may be necessary in some cases to judge whether the actions of national authorities in collecting the evidence meet international standards, thereby determining the effect of such actions on the question of relevance or admissibility of the evidence collected. While the Court is precluded from ruling on the applicability of the State’s national law to the particular facts of the case, the Court in undertaking its own functions may have to consider the actions of national authorities in the collection of evidence, including taking into account the existence of the national law.

In the context of a determination whether a case is admissible under Article 17, the Court is entitled to consider national law and practices, and the extent of their compliance with “the principles of due process recognized by international law,”<sup>78</sup> as well as whether “the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>79</sup> The principle of complementarity, in particular as demonstrated by Article 17, may thus be influential in prompting a State to amend its laws or practices in order to accord with international due

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77. *Ibid* at para 52.

78. Article 17(2) of the ICC Statute.

79. Article 17(3) of the ICC Statute

process standards, as well as to ensure that it is able to obtain the accused or necessary evidence and carry out its own proceedings. A State may do so in order to ensure that the Court, in the context of determining whether a case is admissible, does not find that the State “is unwilling or unable genuinely to carry out the investigation or prosecution” at the national level, thereby justifying the Court in ruling that the case is admissible before it.<sup>80</sup>

In determining “unwillingness” in a particular case, the Court shall consider whether: the national proceedings or decision were undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person to justice; or, the proceedings were not being conducted independently or impartially, and were conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice. In making this determination, the Court is entitled to have regard to “the principles of due process recognized by international law.”<sup>81</sup> Thus, the Court is entitled to consider, according to international standards, the likelihood of due process and fairness being afforded in any national proceedings.

In determining “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.”<sup>82</sup> A State can do little about inability to obtain the accused, or the necessary evidence and testimony, in situations of total or substantial collapse of its national judicial system. However, the situation of “unavailability of its national judicial system” may be due to the failure or inability of the State to have the necessary laws or procedures to investigate and prosecute adequately the case. A State may have the ability to remedy the latter situation.

Therefore, if a State wishes to be in a strong position to challenge the admissibility of a case before the Court, it would be wise to ensure that its national legal system is in accord with “the principles of due process recognized by international law” and that measures to obtain the accused, as well as the necessary evidence and testimony, are available within its national judicial system so as to enable it to undertake the investigation and prosecution of the case.

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80. Article 17(1)(a) and (b) of the ICC Statute.

81. Article 17(2) of the ICC Statute.

82. Article 17(3) of the ICC Statute.

It is a domestic issue whether or not embarrassing pronouncements by an international tribunal or court, or the desire to have a strong position *vis-à-vis* the issue of complementarity, will cause sufficient political pressure at the national level to prompt a revision and amendment of national standards to be more in accord with the international standards. National governments are not obligated to do so, but political pressures may prompt them to do so. In addition of course, pronouncements by the ICC on the meaning to be given to ICCPR rights, which are essentially incorporated in Article 67, could be persuasive in giving meaning to ICCPR rights at the national level.

Nevertheless at the practical level, both international and national authorities will likely be more cautious and prudent in ensuring that the rights of the accused in regard to pre-trial detention and investigation, as determined by international standards, are respected. If a State is obligated to assist an international tribunal or court in the collection of evidence or the arrest of an accused, the fulfillment of such obligation is only meaningful if the national actions are undertaken in such a manner as to facilitate and not hinder the success of the international proceedings.

In some cases, national authorities may be obligated specifically to undertake their actions in a particular manner. As noted earlier, Rule 111(2) of the ICC Rules of Procedure and Evidence obligates both the international Prosecutor and national authorities when questioning a person to give due regard to the rights set out in Article 55 of the Statute. In such case, national practice must conform with the international standards set out in the Statute for the purposes of the international proceedings.

Part 9 of the ICC Statute governs the relationship between the ICC and national authorities in the context of formal requests for cooperation in relation to investigations and prosecutions. Article 86 obligates States Parties to cooperate fully with the Court in its investigation and prosecution of crimes, in accordance with the provisions of the Statute. Article 88 requires States Parties to ensure that there are procedures available under their national law for all of the forms of cooperation specified under Part 9, and Article 87(4) and Article 93(1) specifically set out a number of forms of assistance that States Parties may be required to provide under the procedures of their national law, in compliance with requests by the Court. Thus, in ratifying and implementing their treaty obligations, States Parties are required to change or conform their national law and practices, as necessary, in order to be able to comply with requests for assistance of the forms specified. This obligation is subject, however, to Article 93(3), which provides for a consultation mechanism, and even modification of the request by the Court, in situations where the execution of a particular measure of

assistance “is prohibited in the requested State on the basis of an existing fundamental legal principle of general application.”

Articles 87(7) and (5) provide that where a State, including a State not party to the Statute but which has entered into a cooperation agreement with the Court, fails to comply with a request to cooperate by the Court and which is contrary to the provisions of the Statute, the Court may refer the matter to the Assembly of States Parties or, where the Security Council referred the investigation to the Court, to the Security Council. Thus, a failure to enact national law or conform national practices to ensure that there are procedures available at the national level for all of the forms of cooperation specified, as required by Article 88, can lead to referral for comment or action by the Assembly of States Parties or the Security Council.

With respect to remedial action by the Court, the Statute does not provide for any general remedy where there is a failure to comply with a request by the Court for cooperation, other than a finding to that effect and referral under Article 87. Article 72, however, concerning disclosure and protection of national security information, provides some specific remedies concerning the situation where a State objects to the disclosure of information or documents on the ground that disclosure would prejudice its national security interests. Where the disclosure was sought pursuant to a request for cooperation under Part 9 and the State refuses, or a third person requested to provide such disclosure refuses, on the ground that disclosure would prejudice the State’s national security interests, the Court may, after undertaking a consultation process with the State, refer the matter to the Assembly of States Parties or the Security Council in accordance with Article 87(7). In all other circumstances, the Court may order the disclosure.<sup>83</sup> A failure to comply with the order would likely result in the same referral process under Article 87.

However, the Statute also recognizes that the disclosure of the information or documents may be highly relevant to issues in the trial of the accused. In some cases, their relevance to issues in the trial may be significant. Article 72(7) also affords the Court another remedy where disclosure has been refused. It provides that “(t)he Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.”<sup>84</sup> This remedy would be

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83. For an analysis of Article 72 see Donald K. Piragoff, *Protection of National Security Information*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 270 (Roy Lee ed., 1999).

84. Article 72(7)(a)(iii) and (b)(ii) of the ICC Statute.

particularly beneficial in situations where the information or documents would exonerate the accused or cause serious doubt as to the veracity of a piece of the prosecution's evidence. In such case, the absence of the evidence might even adversely affect the accused's right to a fair trial. The remedy of drawing an inference as to the existence or non-existence of a fact is, thus, a means to secure the accused a fair trial, and avoids the possibility of the Court having to take more drastic action, such as dismissing a charge because the accused is not able to have a fair trial.

The question arises as to whether in situations where Article 72 is not applicable (i.e., situations where refusal to disclose information or documents is not based on the ground of prejudice to national security) the Court has an inherent power to fashion a similar remedy of inference as exists in Article 72, or to fashion other remedies. In the case of *Barayagwiza v. The Prosecutor*,<sup>85</sup> the ICTY used its inherent power as a court to dismiss the case on the basis of abuse of process. In that case, denial of the accused's rights was considered to amount to an abuse of process of the Court, such that the remedy fashioned was to dismiss the case rather than proceed. It may be open to the ICC to also exercise its inherent power as a court to protect its own process and fashion remedies, such as dismissal of charges or drawing an adverse inference, where to proceed with the trial without remedy would deny the accused due process and a right to a fair trial. Although the Statute is silent with respect to the existence of such powers, Article 21 entitles the Court where the Statute is silent to apply principles and rules of international law and, failing that, general principles of law derived by the Court from national law of legal systems of the world. The concept of abuse of process has been recognized by the ICTY, as well as by courts in some national legal systems. Therefore, legal precedents exist.

Lastly, where evidence has been collected by either the Prosecutor's staff or national authorities, and submitted to the Court, the failure to comply with international standards of human rights in its collection can result in the exclusion by the Court of the evidence under Article 69(7), as noted earlier.

## 7. Conclusion

The meaning of due process rights in the context of international law is still evolving, and likely always will. In the past ten years, with the advent of the ad hoc Tribunals and the International Criminal Court, the concept has seen exponential development from its starting point in the International

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85. *Barayagwiza v. Prosecutor*, *supra* note 45.

Covenant on Civil and Political Rights. Lofty principles in the ICCPR have been given concrete meaning in the statutes and rules of these international judicial bodies and their jurisprudence to date. The development of these more comprehensive standards at the international level has been significantly influenced by a dialectic process between different national legal systems of the world. The result is a more comprehensive articulation and framework of international due process rights, which may carry the imprimatur of many legal systems and may closely resemble none.

Dialectic is a two way process. While the dialectic between national legal systems has influenced the development of international standards, the new international framework has the strong potential to create a new dialectic with national systems and to influence the future development of national law. Indeed, the core purpose of the ICC is to provide for the protection of humanitarian rights to war-affected nations that lack the ability, will or legal structure to prosecute for genocide, war crimes and crimes against humanity. Perhaps the ICC can serve a dual process and also provide a model of minimum standards of due process rights to these countries recovering from war and rebuilding their legal systems, as well as to all nations that work closely with the ICC.



# **International Human Rights Standards in International Organizations: The Case of International Criminal Courts**

**Kenneth S. Gallant\***

Professor Bert Swart introduced the issue of the law-making authority of international organizations in international criminal law at this Conference. He argued that the United Nations Security Council created terrorism as an international crime in its resolutions following the events of September 11, 2001.<sup>1</sup> In part I of this paper, I will discuss the international law-making function for and of international organizations as it relates to the human rights of individuals.

The development of international criminal law and procedure demonstrates that human rights law, originally designed to protect individuals against abuses by States, is now being reshaped to prevent abuses by international organizations, specifically international criminal tribunals. The law in question is particularly but not exclusively the law of the International Covenant on Civil and Political Rights. It is my hope—though this is beyond the scope of today’s discussion—that other types of international organizations whose activities can affect the rights of individuals will also come to recognize relevant international human rights standards as binding on them as well.

In part II of this paper, I will discuss one shortcoming of the ICC Statute<sup>2</sup> relating to implementing international human rights standards: its failure to include a defense organ or other institutional voice for the defense in the Court’s structure. I will conclude with a brief discussion of devices being used to remedy this omission, particularly the creation of the International Criminal Bar. The ICB is an organization currently in the process of

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1. Bert Swart, Commentator for Panel 3, International Crimes: Criteria for their identification and classification, and future developments; International Criminal Law: Quo Vadis, International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy, 30 November 2002.

2. Rome Statute of the International Criminal Court, 53rd Sess., U.N. Doc. A/CONF. 183/9, *adopted* by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, *as corrected by the *procès-verbaux** of 10 November 1998 and 12 July 1999, art. 1 [hereinafter ICC Statute].

formation that will provide a voice for lawyers representing both the accused and victims before the ICC.

### **I. Individual human rights and the ICC as an International Organization**

Modern international organizations originated in the period around the turn of the twentieth century. The theory of state sovereignty had reached its high water mark. States were seen as the actors in the international legal system, and individuals were at best the objects of their actions. When these organizations were created, States were seen as their constituents and objects of their actions. Individuals were seen as irrelevant to their creation, and individual rights could not be threatened by their existence.

After World War II came the blossoming of international human rights law. The document we are most concerned with here, the International Covenant on Civil and Political Rights, is a treaty among most states of the world, drafted in the context of the United Nations system. Through the ICCPR, states have bound themselves to observe a broad range of individual human rights, including many rights related to criminal law and procedure.<sup>3</sup>

As we discussed on Saturday, some rights in the ICCPR have become customary international law—that is, they have become recognized as binding on states which have not ratified the convention. It was suggested in discussion that the core criminal procedure rights, in article 14, were not intended to become customary, because they are among the rights that can be derogated from in the case of emergency threatening the existence of the relevant nation under article 4.

Some of the article 14 rights, such as the to a fair trial before an independent tribunal and the right to counsel, have so formed the world's developed and developing systems of criminal justice—both national and international—that they are required under customary international law.<sup>4</sup> At

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3. International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (entered into force 23 March 1976), arts. 6 (limitations on death penalty), 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), 8 (prohibition of arbitrary arrest and detention, and other provisions related to personal liberty and arrest), 10 (treatment of arrested persons, including juveniles), 11 (prohibition of debtors' prisons), 14 (criminal procedure rights in general, including rights to counsel, to fair criminal process, to appeal, to a single proceeding and punishment in any state for a single offense [*ne bis in idem*], and to compensation for unlawful deprivation of freedom), 15 (*nulla crimen sine lege*; non-retroactivity; recognition of international crimes), 17 (right to privacy).

4. Michael Wladimiroff, Commentator for Panel 5, The emergence of uniform standards of "due process" in international and national criminal proceedings; International Criminal Law: Quo Vadis, International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy, 2 December 2002.

most, the authority of states to derogate from these rights may be considered as a customarily permissible limitation of these rights in very limited circumstances.

Along with the growth of international human rights law, we have seen an explosion in the number and roles of international organizations. Some of these, most notably the international criminal tribunals and courts, have the power, and indeed the mandate, to affect individual rights and liberties. The international community has recognized the need for protection of individual rights by international organizations, though it did not do so all at once, and the recognition is not yet complete.<sup>5</sup>

The Nuremberg and Tokyo Tribunals were not international organizations in the modern sense, although the former was the direct creation of the London Agreement between states, and drew its law and authority from the Charter annexed to the Agreement. In the Statutes of both Tribunals, there were few protections for the rights of defendants, except for the very important right to counsel.

By the time of the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in 1993, the international community recognized the need for more guarantees of fair process for the accused. In drafting the ICTY Statute, the Secretary General of the United Nations took these procedural rights from article 14 of the ICCPR.<sup>6</sup> He also recognized the criminal law principles of *nulla crimen sine lege* and *non bis in idem*, from articles 15 and 14 of the ICCPR respectively. The procedural rights especially have a clear pedigree from the ICCPR, as they are taken into the Statute nearly word for word. Within a year, another example of mass atrocity forced the creation of the International Criminal Tribunal for Rwanda (ICTR). It adopted the same set of criminal law and procedure rights for individuals in its Statute.

As discussed by Mr. Piragoff, both the ICTY and ICTR are subsidiary organs of the United Nations as an international organization,<sup>7</sup> created by the U.N. Security Council. They share in the legal personality of the United Nations.

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5. For individual rights in international criminal law, especially the ICC, see generally Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (2003); Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW (ENFORCEMENT) 693 (M. Cherif Bassiouni ed., 2d ed., 1999).

6. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Add.1/Corr.1 (1993).

7. Donald Piragoff, Presenter for Panel 5, The emergence of uniform standards of “due process” in international and national criminal proceedings; *International Criminal Law: Quo Vadis*, International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy, 2 December 2002.

What was recognized in the creation of the ICTY and ICTR was that an international criminal tribunal would have the bare power to act justly or unjustly towards individuals accused of crime. In procedural matters, the possibilities for human rights abuse are very similar in national and international courts. Thus as a matter of functional protection, it makes sense that the United Nations, an international organization, would borrow the definitions of fair elements of criminal procedure from the ICCPR, designed to ensure fairness in national proceedings.

Where functional differences exist between courts of a state and an international criminal tribunal, some differences in the definition of rights exist. Most notably, this occurs in the definition of *non bis in idem*, in some common law countries called the right against double jeopardy. In the ICCPR, this right applies within national systems only, but within those systems there is no exception for retrial after a corrupt determination of innocence.

*Non bis in idem* is an important element of a fair criminal justice system; thus it exists in the Statutes of the ICTY and ICTR (and now the ICC). The international community does not have a particular interest in seeing persons tried or punished twice for the same offense (though different states might each feel an interest in prosecuting a given crime), and wishes to encourage states to prosecute human rights abusers at the national level. Thus, its version of the *non bis in idem* contains the prohibition against double international and national trial and punishment, whichever system acts first. However, because the purpose of the Statutes of the International Tribunals is to prevent impunity, which might be achieved by manipulation of national criminal justice systems to produce acquittals after sham prosecutions or sham punishments after convictions, the right does not come into play in the international criminal tribunal unless there has been a fair proceeding in the national system. Thus this particular right is extended beyond its definition in the ICCPR because an international organization as prosecutor does not have the same interests as states do; and the right is limited in a way that is absent in the ICCPR, again because of the international community's specific interests in justice in cases of the most serious international crimes.

The alignment of interests here is not perfect. As pointed out, a State might still feel an interest in punishing an international criminal in its own system, even after international punishment. This is clear in the case of Rwanda, which has executed the death penalty against some of those involved in the 1994 genocide, even though death is not an available penalty in the ICTR. A person tried by the ICTR cannot be executed by Rwanda for the crimes tried by the ICTR, even if the crimes carry the death penalty in Rwanda. Nonetheless, the version of *non bis in idem* in the Statutes of the

ICTR and ICTY, as well as in the ICC Statute,<sup>8</sup> demonstrates how a right set out against states in the ICCPR has been adapted to the situation of international organizations.

The ICTY and ICTR Statutes did not adopt all individual rights contained in the ICCPR. For example, they do not contain the remedy provisions of the ICCPR for violation of individual rights, or some of the specific provisions concerning the treatment of detainees.<sup>9</sup> As an example of the latter, they omit protections for juveniles under arrest. This may be because no prosecutions were contemplated against juveniles by those writing the Statutes, and thus their rights were not of functional concern.

In any criminal justice system, the possibility of arbitrary, illegal or unjust detention exists. The lack of remedies provisions in the ICTY and ICTR Statutes demonstrates the real limits of the application of human rights law to international organizations as of 1993-94.

The Rome Statute of the International Criminal Court continues the expansion of individual rights against an international organization. We only have time to discuss a few of them here. First, the ICC Statute adopts protections for persons under investigation who have not yet been accused of international crime<sup>10</sup> that are not part of the ICCPR or customary international law. Again, this is part of a functional recognition that abuses can occur during a criminal investigation, and can be reduced or prevented by specific protections in the Court's Statute. How this will contribute to the growth of criminal procedure both internationally and nationally remains to be seen.

Second, the Court and those acting for it in holding prisoners are required to comply with internationally recognized standards for humane treatment of those in custody.<sup>11</sup> What is interesting here is that these standards are defined in terms of "widely recognized international treaty standards governing the treatment of prisoners." This is stronger than saying that terms of imprisonment must comply with requirements of customary international human rights law. Not all rights in such treaties will have passed into customary international law, yet the ICC, and States with which it contracts for imprisonment of convicts, will nonetheless be bound to follow these treaties.

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8. Where the first word is *ne*.

9. *E.g.*, ICCPR, arts. 10 (pretrial detainees); 14 (compensation).

10. ICC Statute, arts. 56, 57.

11. ICC Statute, art. 59(2) (rights of persons arrested in a State Party), 103 (Court to consider widely accepted international treaty standards in determining appropriate state for imprisonment of convict), 106 (state of imprisonment shall abide by widely accepted international treaty standards).

Third, the founding documents of an international organization, as with the constitutions of nations, will not generally provide all the protections for human rights that are needed in the organization's life. Thus, the ICC Statute has two open-ended provisions to protect individual rights, in Articles 21(3) and 31(3) (especially, for the purposes of this discussion, the former).<sup>12</sup>

Article 21(3) requires that the Court interpret the law in accordance with internationally recognized human rights standards. The text makes no distinction between substantive international human rights and the rights to fair criminal procedure that are the focus of today's panel. Nor indeed should it. What is necessary for the protection of human rights is that the Court should consider those ways in which its operations can affect individuals, and to ensure that it treats them as required by minimum human rights standards, even if they concern rights not specifically set forth in the ICC Statute.

It is too early to state in full what international human rights will exist against international organizations generally as a matter of customary international law. Because of functional differences among international organizations, there may never be a single list, but merely a set of principles which can be used to determine what rights apply to an international organization which exercises authority over individuals or over private rights generally. This is one reason why it is important to have provisions such as Article 21(3) in the organic documents of international organizations whose powers may affect the rights of individuals.

Finally, the compensation provisions of the ICC Statute<sup>13</sup> grew out of an awareness that injustices can occur in any system of criminal sanctions, including those watched over by the international community. To have an enforceable right to compensation for an arbitrary arrest, for example, is a very progressive development in the law of international organizations. It continues the establishment of a direct relation of rights and duties between an international organization, the ICC, and those individuals whose lives it directly affects.

## **II. Lack of a Defense Organ in the ICC Statute**

Institutional structures, as well as enumeration of specific rights, are important to the protection of individual interests. One failing of the ICC

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12. ICC Statute, art. 31(3), provides that the Court may consider possible new substantive defenses to criminal charges. Substantive criminal law developments are being considered by others at this conference. However, the author elsewhere has indicated that ICC Statute, art. 21(3), can be used to ensure that the definitions of crimes under the ICC Statute do not infringe on substantive international human rights, such as freedom of expression. See Gallant, *supra* note 5, at 703-06.

13. ICC Statute, art. 85.

Statute, which should be reviewed in seven years, when the Statute is open for amendment, is the lack of a defense organ in the Court. There is an institutional voice for the Prosecutor in all major decisions concerning the Court,<sup>14</sup> but no institutional voice for individuals, especially the accused.

There are non-governmental organizations and associations of counsel working on these issues, considering the interests of the accused (for example, the International Criminal Defense Attorney's Association) and victims (for example, the Victims Rights Working Group of the Coalition for an International Criminal Court). These, however, work outside the formal structure of the International Criminal Court. Efforts are therefore under way to ensure that the interests of the accused in individual rights are protected by institutions associated with the Court.

First, the Rules of Procedure and Evidence will require that the Registrar establish the Registry so as to protect the legitimate rights of the accused to vigorous, independent counsel.<sup>15</sup> The First Year Budget contains funding for a Defense Unit within the Registry to administer legal aid programs and provide defense facilities. In some ways this office will be parallel to the Victim and Witness Unit in the ICC Statute, but it will not have the physical protection and counseling functions of the Victim and Witness Unit. While each office may serve the needs of individuals before the Court, they are necessarily institutionally neutral offices, because they are part of the neutral Registry.<sup>16</sup>

Thus, a second initiative has been undertaken. A number of individuals, Bars, and NGOs from around the world are establishing the International Criminal Bar for the International Criminal Court. The purpose of the ICB is to be a voice for counsel for both the accused and victims in the ICC, to protect their independence and professional integrity and their clients' rights.<sup>17</sup> It will seek recognition from the Registrar under Rule of Procedure and Evidence 21 as a representative body of counsel and legal organizations to give input to the Registrar on all appropriate matters. If successful, it will be the beginning of the missing "Third Pillar"<sup>18</sup> of the International Criminal

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14. See, e.g., ICC Statute, art. 48 (Prosecutor may suggest changes to Rules of Procedure and Evidence; no parallel voice for other interests before the Court).

15. Rules of Procedure and Evidence 20, 21, in Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 Sept. 2002, Official Records, ICC-ASP/1/3, para. 22, at 5, 10, 27-28 [hereinafter ICC-ASP/1/3], adopted Sept. 9, 2002.

16. For this reason, the Victims and Witnesses Unit cannot be considered a truly independent voice advocating for interests of these groups. This in no way devalues the vital work assigned to the Unit in protecting and supporting individual victims and witnesses.

17. In accordance with the Civil Law tradition, prosecutors are not seen as part of the Bar in the current stage of the development of the International Criminal Bar.

18. Phrase used by Elise Groulx of Canada, Executive President of the International Criminal Bar and President of the International Criminal Defense Attorneys Association.

Court—the pillar protecting individual rights, in distinction to the pillars of the independent, neutral Judiciary and the Office of the Prosecutor.

Perhaps surprisingly, other international judicial bodies designed to be permanent, such as the International Court of Justice, have not developed Bars or Bar Associations, even though the concept is common to almost all lawyers practicing before them. The ICTY, an *ad hoc* Tribunal, which will probably complete its work within the decade, has successfully developed a Bar, but its Bar is relatively new.

The International Criminal Bar is structuring itself to ensure that lawyers from developing countries become trained to participate in practice before the ICC—to democratize the practice of international criminal law. The lawyers practicing before this Court should not be limited to those from developed countries who traditionally have had the training and other resources to develop an international practice.

This may have another benefit for the development of international human rights, this time at the national level. Lawyers from emerging democracies who practice before the Court may help bring back international standards of criminal justice to their developing court systems. The circle of human rights development, from standards for national justice to standards for international organizations will be closed as the international standards are re-integrated into the lives of nations emerging from dictatorship or anarchy.<sup>19</sup>

*NOTE on later developments: On 21-22 March 2003, the International Criminal Bar met in Berlin, adopted its Constitution, along with a Code of Conduct and Disciplinary Procedure for Counsel, which it has proposed to the International Criminal Court. It also held elections for its first governing Council. At a meeting in the Hague 23-24 October 2003, it presented a Proposed Legal Assistance System for Indigent Defense Cases to the International Criminal Court, as a work in progress.<sup>20</sup>*

*The need for an international court to have a Bar is not yet universally accepted. Thus, the Assembly of States Parties of the International Criminal Court took no action on recognition of the International Criminal Bar at the ASP's Second Meeting, 9-12 September 2003, in New York.*

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19. The creation of joint national/international tribunals, incorporating international human rights protections, such as the Special Court for Sierra Leone, is another device for assisting such nations in developing fair court systems.

20. Documents of the International Criminal Bar can be found at its website, [www.icb-bpi.org](http://www.icb-bpi.org).

## **L'émergence de règles uniformes de procès équitable dans les procédures internationales et nationales**

**Jean-Paul Laborde\***

Si, dans quelques siècles un éminent professeur de droit faisait l'histoire de la procédure pénale, il ne manquerait pas de mentionner que, dans des temps très reculés, juste après l'âge des cavernes, aux alentours du vingt-et-unième siècle, le monde ancien était plongé dans des longues discussions sur les mérites comparés des procédures pénales accusatoire et inquisitoire, qui avaient fini par se résoudre, au petit bonheur la chance, à la suite de la création tout d'abord des tribunaux internationaux mis sur pied à cause de conflits terribles dont on ne connaissait pas très bien les causes. En effet, la confrontation des systèmes avait inévitablement amené à prendre le meilleur de chacun d'entre eux.

D'ailleurs, ajoutait ce professeur, les différences entre les deux systèmes de droit étaient si minimes qu'on se demandait bien pourquoi autant de juristes avaient ferrailé pendant autant d'années pour en arriver un résultat vraiment prévisible. En effet, dirait cette sommité internationale, ces juristes de temps anciens auraient dû, dès le départ, considérer que seuls devaient compter les principes généraux sur la base desquelles les éléments du « due process » et du « fair trial » s'étaient lentement édifiés. Et, bien sûr, cet éminent juriste du quarantième siècle ne manquerait pas de citer la fameuse réunion du lundi, 1<sup>er</sup> décembre 2002 au matin, qui s'était tenu à l'Institut supérieur international des sciences criminelles de Syracuse. Cette séance avait pour thème « L'émergence de règles uniformes de procès équitable dans les procédures pénales internationales et nationales ». La séance était présidée par le Juge Ori du Tribunal criminel international pour l'Ex-Yougoslavie, le rapport introductif ayant été présenté par Donald Piragoff, Conseiller principal à la section de politique pénale du ministère de la justice du Canada, suivi par de brillantes présentations de Michael Vladimiroff, Ken Gallant et Geert Knoops. Donald Piragoff résumait parfaitement l'état de la question pour l'époque! De quelles sources les principes internationaux du « due process » et du procès équitable avaient-elles pu émerger ? Comment un équilibre avait-il pu être établi entre les droit de l'accusé et ceux de la victime ? Comment les règles de procédure de la Cour

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\* Chef du Service pour la prévention du terrorisme, Office des Nations unies contre la drogue et le crime; Secrétaire général de la Revue internationale de droit pénal, membre du corps judiciaire français.

Pénale internationale avaient-elles pu être adoptées en tenant compte à la fois des différents systèmes juridiques énoncés plus haut et à travers une négociation très difficile qui avait finalement abouti à un système de procédure « sui generis ». La solution retenue n'avait d'ailleurs rien à voir, il faut le noter, avec les règles de procédure des tribunaux internationaux pour l'Ex-Yougoslavie et le Rwanda largement influencées, du moins au début de leur existence, par les principes de « common law » et qui avaient été rédigées par les juges eux-mêmes. Bien sûr, les principes sur lesquels ces règles de procédure de la Cour Pénale internationale n'étaient pas nées comme d'une génération spontanée! Ils avaient tout d'abord lentement diffusé dans les constitutions nationales en élevant les droits de l'homme au niveau de principes constitutionnels. Puis, ils avaient subi une « transmutation » pour venir se fondre dans des conventions internationales et commencer à constituer un corpus juris de normes internationales d'applicabilité indirecte. Puis, les principes incorporés dans ces instruments internationaux redescendaient en parapluie dans les législations nationales au fur et à mesure de la ratification des instruments internationaux. Tel était le cas, par exemple, pour les règles inscrites dans le Pacte international relatif aux droits civils et politiques, la Convention européenne des droits de l'homme du Conseil de l'Europe, la Convention américaine sur les droits de l'homme ou la Charte africaine des droits de l'homme et des peuples.

Le processus d'émergence de ces principes ou du moins la reconnaissance de ceux-ci, allait son petit train, lorsque les événements terribles de l'Ex-Yougoslavie et du Rwanda poussèrent à la création par le Conseil de sécurité de l'Organisation des Nations unies de deux tribunaux ad hoc. Alors s'ouvrait une ère nouvelle, celle de l'applicabilité directe des principes du « due process », concept difficile à traduire en français mais qui reflète les idéaux démocratiques contenus dans les conventions ou protocoles internationaux traitant du sujet mais aussi issus de la coutume internationale. Ces principes étaient diffusés dans les règles de procédure des tribunaux ad hoc à tous les stades de leur procédure. Il va de soi que le principe du procès équitable y était inclus.

Puis vint la création de cette vieille Cour pénale internationale qui avait tout d'abord uniquement jugé les crimes internationaux et qui depuis lors avait établi des chambres de jugement et des bureaux de procureurs dans tous les pays du monde. Les mêmes principes étaient reflétés dans le Statut de Rome avec, toutefois, une plus grande considération pour la place des victimes et des témoins, du fait de l'influence du droit continental. Il fallait aussi noter la création d'une section préliminaire de la Cour chargée de toute les questions « avant le procès lui-même ». Les règles de preuve, quant à

elles, comprenaient aussi un mélange savant permettant au juge d'exclure, à sa discrétion, certaines de celles-ci, mais l'autorisant aussi à les conserver, si nécessaire.

Des esprits cartésiens auraient pu penser que le processus d'émergence allait s'arrêter là. Pas du tout ! La fameuse conférence de Syracuse relevait déjà des effets retour dans les droits nationaux de la nouvelle prévalence de principes relativement bien harmonisés du « due process ». Ceci pouvait lentement se mettre en place grâce au principe de la compétence complémentaire de la Cour Pénale internationale. De plus, l'imbrication des questions relatives à la détention préventive qui pouvait être décidée d'une manière tout à fait indépendante par les cours nationales lorsqu'elles étaient saisies de l'exécution de mandats d'arrêt par la Cour mais dont la régularité par rapport aux principes du « due process », pouvait avoir une influence en aval sur le déroulement de sa propre procédure. Il fallait aussi mentionner les questions de coopération internationale telles que les procédures d'extradition et d'entraide judiciaire entre la Cour et les autorités nationales pour les besoins d'affaires lancées par la juridiction internationale. Lentement, le venin du processus d'émergence des règles uniformes du procès équitable s'instillait dans les veines des procédures nationales.

D'autres occasions se présentaient aussi au fur et à mesure de la création de tribunaux mixtes à composition à la fois internationale et nationale tels que ceux du Kosovo, de la Sierra Leone ou encore du Cambodge. Ces tribunaux étaient chargés, dans les cadres du retour à la paix de ces pays, de juger les auteurs de crimes commis lors des périodes de troubles. La fusion là aussi portait en germe l'insertion des principes internationaux dans le droit national. La création de l'«International Criminal Bar» qui est pour notre quarantième siècle une si vieille institution, en était à ses balbutiements mais elle annonçait la mise en place de standards essentiels aux droits de la défense et que nous connaissons bien aujourd'hui ! Certes, la véritable responsabilité du procureur par rapport à ses actes de poursuites n'était encore considérée que sous l'angle de l'échec ou du succès de celles-ci et non en considération de la responsabilité institutionnelle du Procureur. Il restait aussi à régler l'importante question de l'exclusion de la responsabilité pénale pour cause de démence. Mais tout ne pouvait pas être fait en un jour !

Que de chemin parcouru depuis Syracuse ! Ces ancêtres auraient tout de fois dû se pencher sur leur propre histoire pour y voir combien les règles du procès équitable avaient marqué leur époque bien avant la création de la Cour Pénale internationale. Ainsi, s'ils avaient vraiment regardé de près les critères sur quels l'un des tous premiers tribunaux pénaux internationaux, à

savoir le Tribunal de Nuremberg, avait été hautement apprécié, ils y auraient déjà décelé les motifs du succès des principes du «due process». C'est en effet par une application stricte de ces principes que ce tribunal a été reconnu comme un modèle d'équilibre et de sagesse dans ses jugements de personnes ayant commis, devant l'histoire, des crimes particulièrement odieux.

Le respect de ces principes revient finalement à rappeler ce que La Fontaine, un célèbre auteur français du XVIIIème siècle relevait à l'époque dans sa fable « Les animaux malades de la peste » :

« Selon que vous serez puissants ou misérables, les jugements de Cour vous rendront blanc ou noir ».

L'émergence des règles du procès équitable, appliquées depuis ces temps si reculés du vingt et unième siècle a fini par faire mentir La Fontaine.....au quarantième siècle.....mais sortons de notre rêve et espérons que cela se produira un peu plus tôt !

## **International Criminal Law: Quo Vadis ?**

**2 December 2002**

### **Panel 6 - The modalities of international cooperation in penal matters and their expansion**

*Chair:* Professor Hans-Jürgen Bartsch (Germany)  
Director, Department of Crime Problems, Council of Europe; Professor of International Law, Free University of Berlin

*Presenter:* Dr. Julian Schutte (The Netherlands)  
Director, Legal Division, Council of the European Union; Member, Conseil de Direction, AIDP

*Panel of Experts:*

H.E. Judge Wolfgang Schomburg (Germany), Presiding Judge, International Criminal Tribunal for the former -Yugoslavia; Former Judge, Federal Court of Justice of Germany

Professor Mario Pisani (Italy), Professor of Criminal Procedure, University of Milan; Member of the Board, ISISC; Member, Conseil de Direction, AIDP

Professor Christopher L. Blakesley (United States), Professor of Law Emeritus, Louisiana State University; Professor of Law, William S. Boyd School of Law, University of Nevada at Las Vegas; Member, Conseil de Direction, AIDP

*Rapporteur:* Professor Otto Lagodny (Austria)  
Professor of Criminal Law and Procedure, University of Salzburg Faculty of Law

**Panel Questions:**

1. Are there standards of international due process of law that are binding upon international judicial and quasi-judicial bodies? How are they identified? What mechanisms are employed to identify general principles of procedural law applicable to international and/or national criminal proceedings?
2. To what extent are decisions of the ECHR and HCHR binding or influential on international judicial and quasi-judicial organs, and on the development of international procedural standards of “due process of law”?
3. To what extent is the ICC Statute a satisfactory embodiment of contemporary standards of procedural international criminal law?
4. To what extent are the rules of the ICTY and ICTR and their respective jurisprudences a satisfactory embodiment of contemporary procedural criminal law?
5. Are the procedural standards of the ICC, ICTY and ICTR applicable to national criminal procedure?
6. To what extent do “soft” rules developed by human rights bodies have an impact on international criminal processes and on national criminal proceedings?
7. What should victims’ rights be in international and national criminal proceedings?

# **The “Indirect Enforcement System”: Modalities of International Cooperation in Penal Matters**

**M. Cherif Bassiouni\***

## **Section 1. Introduction**

The “indirect enforcement system” is the term applicable to the enforcement of ICL through national legal systems. It is founded on two aspects. The first aspect is the assumption that states will incorporate in their national laws the obligations arising under ICL. This process of domestication of ICL is intended in part to adopt treaty-obligations to the requirements of national law. Thus, ICL, as domesticated, becomes applicable through national legal systems in accordance with their legal requirements. The second aspect derives from the first, and that is for states to use their internal legal processes not only to enforce their treaty obligations domestically, but also enforce their treaty obligations to cooperate internationally. The term “inter-state cooperation in penal matters” applies to the modalities relied upon by states in their bilateral relations to enforce their respective criminal norms.

These two legal regimes, respectively applicable to the enforcement of international and domestic crimes, differ as to the sources of their legal obligations, but not as to their modalities. In fact, these two legal regimes share the same eight modalities, which are: extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement information-sharing, and regional and sub-regional “judicial spaces.” Since the “indirect enforcement system” operates through the intermediation of national legal systems, the effectiveness of the modalities of international cooperation necessarily reflects the strength and weaknesses of the respective national legal systems.

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## Section 2. The Maxim *Aut Dedere Aut Judicare*

### 2.1. *Origin and Rationale*

The maxim *aut dedere aut judicare* is the cornerstone of ICL's "indirect enforcement system."<sup>1</sup>

The maxim originated in a longer formula developed by Hugo Grotius in 1624 as "*aut dedere . . . aut punire*."<sup>2</sup> In 1973, this writer changed *aut punire* to *aut judicare*,<sup>3</sup> since the purpose of contemporary criminal law is to *judicare* those who are believed to have committed a crime, and not to *punire*, until after guilt has been established.<sup>4</sup>

The position attributed to Grotius, that all states have a common interest in suppressing international crimes, is the foundation of why states should engage in international cooperation in penal matters. At the time of Grotius and until the twentieth century, international cooperation was essentially limited to extradition. Thus, the legal literature of almost five hundred years remained focused on extradition, whose rationale, however, extends to all other forms of international cooperation in penal matters.

1. See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW* (1995).

2. See HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk II, ch. XXI secs. III and IV, in *CLASSICS OF INTERNATIONAL LAW* 526-29 (James B. Scott ed., F. Kelsey trans., 1925). See *infra* note 12 and corresponding text, which reveals that Grotius' concept was based on Baldus, who posited a similar proposition in the fourteenth century.

3. The verb *judicare* primarily means "to judge" or "to try." It suggests a full trial. The noun form *judicatio* refers to "an inquiry into an accusation." Thus, the Latin may be sufficiently ambiguous to cover an inquiry for the purpose of determining whether or not to initiate a trial (as well as different national procedures for reaching such a determination). The expression *aut dedere aut judicare* does not seem to have been widely used much before 1974. It figures in the *Final Document: Conclusions and Recommendations of the Conference on Terrorism and Political Crimes*, held in Siracusa, Italy in June 1973, which is printed in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* xi, at xix (M. Cherif Bassiouni ed. 1975). M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 7 (1974). This was a recurrent question at the International Seminar on Extradition, held in Siracusa in December 1989, the proceedings of which are contained in 62 *REV. INT'L DE DROIT PÉNAL* 13-699 (1991). See Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 *NORDIC J. INT'L L.* 49 (1988); E. M. Wise, *The Obligation to Extradite or Prosecute*, 27 *ISRAEL L. REV.* 268 (1993).

4. For contemporary perspectives, see BASSIOUNI & WISE, *supra* note 1; M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (4th rev. ed. 2002), chapter I at 35; Declan Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 *J. INT'L L. & ECON.* 483 (1975); Edward M. Wise, *Prolegomenon to the Principles of International Criminal Law*, 16 *N.Y.L.F.* 562, 575 (1970); Edward M. Wise, *Some Problems of Extradition*, 15 *WAYNE L. REV.* 709, 720-23 (1969); CHRISTINE VAN DEN WYNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL WORLD PUBLIC ORDER* 8, 158-62 (1980).

The cornerstone of the “indirect enforcement system” and of the “inter-state cooperation in penal matters” regimes remains the concept *aut dedere aut judicare*. All other modalities of international cooperation are secondary to the goals of prosecution or extradition. Consequently, it is necessary to start with the question of why either prosecution or extradition is mandatory.

The first answer is self-evident whenever states have jurisdiction to prosecute – it is their duty to do so whenever the crime is national – but not so evident for example, when the crime has been committed elsewhere, or when neither the perpetrator or the victim are nationals of the state. The second, extradition, appears less compelling in the absence of a duty to do so. The threshold question, therefore, is: What are the controlling goals that compel the practice of surrendering fugitives? Extradition, after all, is not an end in itself. No one supposes that it is somehow an intrinsic good to maintain a certain balance of trade in fugitives from justice. Thus, if the practice is not to be regarded as an aimless exercise, it ought to be found to serve some ulterior purpose related to legitimate state policy interests, or the interests of the international community, assuming that such a concept exists.<sup>5</sup>

From the point of view of a state requesting extradition, the ends to be served by the return of fugitives are precisely the same as those that are supposed to be served by its criminal law, namely: retribution, deterrence, and re-socialization. Extradition is a means by which states enable their criminal justice systems to make sure that the purposes to be served are not frustrated by the ability of putative wrongdoers to flee the jurisdiction and obtain asylum in another state. Thus, extradition is a system designed to ensure that criminals do not escape the punishment that they deserve so that the preventive, educative or expressive uses of the criminal law are not diluted by the recurrent experiences of offenders managing to avoid trial or punishment by fleeing to a foreign sanctuary. In short, it serves to close a loophole in the effectiveness of national criminal justice systems. In that respect, the rationale for extradition from the requesting state’s perspective is compelling.

But what about the state from which extradition is requested? From its point of view, why should it be thought desirable or justifiable to engage in extradition? It is so only if sovereignty and national boundaries are irrelevant to an interest which all states share in ensuring that common crimes committed anywhere, or at least international crimes, do not go

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5. See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003), Chapter I, section 3.4, The Underlying Concept of ICL Enforcement: A *Civitas Maxima*.

unpunished.<sup>6</sup> This leads to a bifurcated distinction as to domestic crimes and international crimes. The latter justify the recognition of common interests by the states comprising the international community, in part because these common interests reflect commonly shared values which are reflected in some or all international crimes.<sup>7</sup> But with respect to domestic crimes, can it be said that all states in the international community have a common interest in upholding each other's criminal laws? One answer is that crime is presumptively a social and moral wrong, and wherever crime is committed, so the argument runs, all those who share the values protected by criminal laws should be concerned with its application. This means that all states have a mutual (and not common) interest in upholding each other's criminal laws whenever these laws' protected social interests are the same – namely, the proposition that the underlying facts constitute a crime in the respective states' criminal law.<sup>8</sup> The debate on the merits of this rationale goes back to Beccaria in the 1500s, and is expressed in his words as follows (although he did not endorse this position):

There are also those who think, that an act of cruelty committed, for example, at Constantinople may be punished at Paris, for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men.<sup>9</sup>

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6. See, e.g., J. B. Moore, *The Difficulties of Extradition* [1911], in 3 COLLECTED PAPERS 314 (1944). Cf. 1 J.B. MOORE, A TREATISE ON EXTRADITION & INTERSTATE RENDITION 57 (1891).

7. See BASSIOUNI, *supra* note 5, Chapter III, *Ratione Materiae*: The Sources of Substantive International Criminal Law.

8. A basic principle in extradition law and practice is the principle of double criminality, or dual criminality. See BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at chapter VII.

9. CESARE BECCARIA-BONESANA, AN ESSAY ON CRIMES AND PUNISHMENTS 135 (2d Amer. ed. 1819; Academic Reprints ed. 1953). The phrase “knights errant of human nature” is an inspired invention of the translator. The Italian original says literally “avengers of the sensibilities of mankind.” In Italian, the full passage reads: “*Alcuni credano parimente che un'azione crudele fatta, per esempio, a Costantinopoli, possa esser punita a Parigi, per l'astratta ragione che chi offende l'umanità merita di avere tutta l'umanità inimica e l'esecuzione universale; quasiché i giudici vindici fossero della sensibilità degli uomini e non piuttosto dei patti che gli legano tra di loro.*” CESARE BECCARIA, DEI DELITTI E DELLE PENE 71-72 (Franco Venturi ed., 1965). The first Italian edition dates from 1764. The translation quoted is based on an early Italian edition in which this passage appeared in chapter 35, on “sanctuaries” or asylum (*asili*); in the definitive Italian text of 1766, the passage appears in chapter 29, on “imprisonment” or arrest (*cattura*).

Though theoretically laudable, the hypothesis of such universal jurisdiction is neither desirable nor practical for a variety of reasons.<sup>10</sup> At the other end of the spectrum from this universal jurisdiction ideal is the view that states are not obligated to extradite unless they feel so inclined. An intermediate position is that states, at the least, should refrain from impeding extradition by making it more difficult than it need be, or place obstacles in the way of bringing criminals to justice. This position had the support of Baldus in the fourteenth century (as reported in the fifteenth century by Jean Bodin), who noted that:<sup>11</sup>

All lawyers with almost one consent say: sovereign princes not be bound to restore strangers flying unto them, unto their own princes demanding them. . . . Only Baldus addeth this condition thereunto, not to restore him to be right, so that the prince unto whom the condemned or guilty person is so fled, do upon him justice.<sup>12</sup>

The logical conclusion is that since states cannot and do not exercise universal jurisdiction over all crimes,<sup>13</sup> they should at least be willing to extradite perpetrators to a place where they can be prosecuted or punished as the case may be. The level of obligation to do so is enhanced when it comes to international crimes because of the hypothesis of a *civitas maxima*,<sup>14</sup> whereby at first a moral and then a legal obligation arose because a common, or at least mutual, interest of the international community or community of states existed to combat such crimes.<sup>15</sup> This common or mutual interest both justifies and requires the extradition of offenders, or else their trial by the state that refuses extradition, and constitutes the foundation of the contemporary maxim *aut dedere aut judicare*.

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10. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001); *Princeton Principles on Universal Jurisdiction* (Princeton University Program in Law and Public Affairs, 2001).

11. A concurring statement by four judges in the *Lockerbie* (Provisional Measures) case, cited in full *infra* at note 44, says that the idea has been around "since the days of Covarrovias and Grotius." See [1992] I.C.J. Reports, at 24 (Evensen, Tarassov, Guillaume & Aquilar Mawdsley JJ, joint declaration). Covarrovias (1512-1577), in fact, lived somewhat earlier than Grotius (1583-1645), but considerably later than Baldus (1327-1400).

12. JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALTH* 359 (K. McRae ed., 1962). Bodin's *LES SIX LIVRES DE LA REPUBLIQUE* was first published in French in 1576; in a Latin version in 1586. The French and Latin texts differ substantially. The only complete English translation, published by Richard Knolles in 1606, is a composite drawn from both the French and Latin versions. McRae's edition is a corrected facsimile reprint of Knolles' translation.

13. See Bassiouni, *Universal Jurisdiction*, *supra* note 10.

14. See BASSIOUNI, *supra* note 5 at Chapter I, section 3.4.

15. See P. E. CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 173 (1951), who argued for a moral order binding the international community.

This proposition, however, depends on an unarticulated premise, which needs to be explored. If we start from the hypothesis that the international system is actually a “society of states” rather than a genuine global “community” (as discussed in chapter I), what legal obligations follow when we come to consider the purposes of extradition? One line of argument is that since there is no worldwide “community,” but only a set of particular national communities, crime can only be of concern to the nation in which it takes place. Criminal law makes sense as a practice for blaming members of a community who violate that community’s norms, and not members of another community for what they do elsewhere. There is, by hypothesis, no international “common good.” Thus, as Beccaria maintained: “The place of punishment can certainly be no other than that where the crime was committed; for the necessity of punishing an individual for the general good subsists there, and there only.”<sup>16</sup> Since crime ordinarily concerns only the country in which it occurs, there is no general obligation to extradite or to punish fugitives from justice in other countries.<sup>17</sup> That is why states have historically engaged in extradition through treaties. Modern state practice, likewise, generally reflects the view that, in the absence of some treaty obligations, there is no right under international law to insist that fugitives be surrendered. The rationale for extradition thus turns on reciprocal self-interest, each state having an interest in getting back fugitives from its own law who flee to a foreign country. But to secure their return on a regular basis, a state is likely to have to agree to extradite in its own turn. Thus, the mutuality of interests is not the reciprocal enforcement of other states’ criminal laws, but the reciprocal exchange of fugitives for purely selfish interests. It is, therefore, one reason for concluding extradition treaties and other treaties on the various modalities of international cooperation in penal matters. Such treaties are predicated on considerations of mutual advantage on the part of the essentially self-regarding members of a “society of states.”<sup>18</sup> But over time, as more states engaged in the practice and accepted the hypothesis that they share a mutual interest, if not a common, interest in the practice, that which was the occasional became the rule. Practice then reinforced the rule, which in turn, became an inchoate

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16. See BECCARIA-BONESANA, *supra* note 9, at 135-36.

17. This, also, was Christian Wolff’s position, despite his hypothesis of a *civitas maxima*. See CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 82 (J. Drake trans., 1934).

18. This was treated as the only possible alternative to the hypothesis of a *civitas maxima* in E. M. Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 710-11 (1968); and M. C. Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, in AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS 10, 15 (D. Oehler & P.G. Potz eds., 1970).

obligation after the adoption of a large number of treaties containing provisions on extradition. This rationale also applies to international crimes. But in this respect, the common interests of the international community are definitely more pronounced than in respect to domestic crimes, though the distinction has been lessened in the era of globalization.<sup>19</sup> The obligation to prosecute or extradite is nevertheless more justified in the era of globalization with respect to international crimes because of worldwide consensus flowing from commonly-shared values and interests of the global society which impel worldwide interests in preventing and suppressing such crimes.

Another line of argument, also starting from the premise that the international system comprises a “society of states,” reaches a different conclusion. This is the line of argument adopted, in essence, by Grotius, and also by Bodin and Vattel.

Bodin’s argument is stated as follows:

[E]very prince by the laws both of God and nature. . . [is] bound to do justice. . . Magistrates in the same Commonweale are by mutual obligation bound to help one another. . . why then should princes be exempted from the like bond, so well agreeing with the laws both of God and nature? . . . Wherefore I hold it to be an injury unto the estate of another man, to detain a guilty fugitive after he is demanded to be again unto his own prince restored.<sup>20</sup>

This argument does not base the obligation to surrender the fugitive on a common interest in preventing and repressing crime. It is rather a matter of avoiding injury to another sovereign by impeding the exercise of a prerogative conferred, according to these and other scholars, by the laws of God, nature, and the laws of the state.

Grotius suggests, in response to Bodin’s argument on the question of returning an alien fugitive to “his own prince,” that it makes no difference whether the fugitive is an alien or a subject: the same rules apply.<sup>21</sup> Those rules give the state where a crime has occurred the right to prosecute or punish the offender. The state where the accused or guilty person resides ought not to interfere with this right.<sup>22</sup> But since it is not usual or expedient for a state to permit the forces of another to enter its territory for the purpose

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19. See BASSIOUNI, *supra* note 5 at Chapter X.

20. See BODIN, *supra* note 12, at 359-60.

21. See GROTIUS, *supra* note 2, § IV(8), at 529.

22. *Id.* § III, at 526.

of inflicting punishment, the state where one who has been found guilty lives should do one of two things: either punish him itself or deliver him to the requesting party.<sup>23</sup> It is not rigidly bound to surrender the culprit; it has an alternative: either surrender or prosecute/punish him.<sup>24</sup> Such surrender neither confers nor takes away any right; it only removes an impediment to the exercise of a right.<sup>25</sup>

Grotius, therefore, does not base the obligation to extradite or punish on a common interest in the prevention and repression of crime. Like Bodin, he treats it a matter of bilateral obligation, of respect for the prerogatives of another sovereign and only where that sovereign has been in some special sense injured by a particular offense. Grotius discusses extradition in the course of talking about what we would now call state responsibility for the acts of private individuals. He distinguishes two ways in which a state may become liable for such acts: *patientia* and *receptus*.<sup>26</sup> The one involves a failure to take steps to prevent acts injurious to other states; the second involves harboring those who have committed such acts. A state will be liable for harboring those who, by committing crimes, have especially injured another state or its rule. Such liability can be avoided by seeing to it that the guilty individuals are properly punished, either by surrendering them to the state they have injured or by punishing them as they deserve. Grotius's entire discussion of extradition presupposes some kind of special injury to another state.

There is another feature of Grotius's argument that is often overlooked. The obligation to extradite or punish arises only with respect to "one who has been found guilty" [*qui culpae est compertus*]. Grotius emphasizes this language by adding in a note: "for surrender should be preceded by judicial investigation [*deditionem enim praecedere debet causae cognitio*]; it is not fitting 'to give up those who have not been tried.'"<sup>27</sup> The quotation regarding not giving up those who have not been tried is taken from Plutarch's life of Romulus, where Remus says to Numitor: "you seem to be more like a king than Amulius; you hear and weigh evidence before punishing, while he surrenders men without a trial."<sup>28</sup> Thus, presumably the Grotian maxim *aut dedere aut punire* applies only in a case in which the offender already has been determined to be guilty. Nowadays it is said that Grotius's principle

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23. *Id.* § IV (1), at 527.

24. *Id.* § IV (3), at 528.

25. *Id.* § IV (7), at 529.

26. *Id.* § II (2), at 523.

27. *Id.* § IV (1), at 527, n.1.

28. PLUTARCH, ROMULUS vii. 5, at 106 (Loeb Classical Library 1914).

really should have read *aut dedere aut judicare* (either extradite or prosecute), since it is not right to require a state to punish everyone whose extradition is refused; it is sufficient to require prosecution. Punishment should only be imposed on those found guilty. Yet Grotius knew that. He was talking about alternative ways of dealing with fugitives who have been found guilty after a full inquiry (*cognitio*). He cannot be taken to imply that there is an obligation to punish those who may not be guilty. He does not propose an obligation to punish without a finding of guilt. He rather insists, contrary to modern practice, that there is no obligation to extradite without such a finding.<sup>29</sup>

Vattel follows Grotius in treating extradition as a way of avoiding state responsibility for the acts of private individuals. Where Bodin contemplated only the extradition of aliens, Vattel contemplates only the extradition of nationals. Vattel's argument is as follows:

[S]ince the sovereign should not permit his subjects to trouble or injure the subjects of another State, much less be so bold as to offend a foreign Power, he should force the offender to repair the evil, if that can be done, or punish him as an example to others, or finally, according to the nature and circumstances of the case, deliver him up to the injured State, so that it may inflict due punishment upon him. . . . A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it.<sup>30</sup>

As with Bodin, and as with Grotius, the Vattelian obligation to extradite derives from a particular view of the duties which a state owes to other sovereigns, not on the "criminal justice policy" of an "international community." Bodin rejected the whole idea of an "international community."<sup>31</sup> While Grotius has been represented as predicating the obligation to extradite or punish on the existence of a *civitas maxima*, in fact this is an expression he never seems to use.<sup>32</sup> And Vattel is quite explicit about disassociating himself from Wolff's concept of a *civitas maxima*:

29. Cf. Gilbert Guillaume, *Terrorism et Droit International*, 215 HAGUE REC. 287 (1989), at 371 ("In fact, Grotius only contemplated surrender or punishment of a guilty person once 'tried and convicted.' But one cannot subordinate extradition to prior proof of guilt without rendering this procedure difficult and aleatory.").

30. E. DE VATTEL, 2 THE LAW OF NATIONS 136-137 (Charles G. Fenwick trans., 1916).

31. See F. H. HINSLEY, SOVEREIGNTY 179-82 (1966).

32. Martin Wight, *Western Values in International Relations*, in MARTIN WIGHT, DIPLOMATIC INVESTIGATIONS 89, 102 (1968), lists a wide range of expressions used by Grotius to describe

From the outset it will be seen that I differ entirely from Mr. Wolff in the foundation I lay for that division of the Law of Nations which we term voluntary. Mr. Wolff deduces it from the idea of a sort of great republic (Civitas Maxima) set up by nature herself, of which all the Nations of the world are members. . . . This does not satisfy me, and I find the fiction of such a republic neither reasonable nor well enough founded to deduce therefrom the rules of a Law of Nations at once universal in character, and necessarily accepted by sovereign States...<sup>33</sup>

Following the lead of Grotius and Vattel, the customary international law of state responsibility hesitatingly developed along lines that required states to cooperate in order to ensure that those who commit such crimes were brought to justice. In practice, however, many exceptions, some substantive and others procedural, frustrated the attainment of this goal. States also hesitated to accept any obligation that would require what they might consider to be “political offenders” to be returned to their oppressors.<sup>34</sup> Thus, a state will not incur international responsibility for giving asylum to fugitives from another country. As it developed, the customary law of state responsibility generally requires repression of injuries to foreigners by private individuals only if those injuries occur within a state’s own territory.<sup>35</sup> Treaties may impose further duties, but state practice is limited as to the general obligation to extradite or alternatively to punish offenders who have committed crimes abroad. Current international law, however, increasingly requires states to deny a safe haven to those who have

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international society: *communis societas generis humani, communis ilia ex humano genere constans societas, humana societas magna ilia communitas, magna ilia universitas, magna ilia gentium societas mutua gentium inter se societas, ilia mundi civitas, societas orbis*. The list does not include *civitas maxima*.

33. E. DE VATTEL, *supra* note 30, preface, at 9a.

34. A view supported by the late Professor Wise. See Edward M. Wise, *Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare*, 62 REVUE INTERNATIONALE DE DROIT PÉNAL 109, 127-134 (1991). Concerning the “political offense exception,” see BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at chapter VIII, section 2, and with respect to terrorism, see e.g. INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1973-2001 (M. Cherif Bassiouni ed., 2001), at 1. See also CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS (2001).

35. See *Principles on State Responsibility, Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001*, chapter 4, U.N. Doc. GAOR A/56/10. See also Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Alien Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 276-307 (1977); John R. Crook, *The U.N. Compensation Commission – A New Structure to Enforce State Responsibility*, 87 AM. J. INT’L L. 205 (1993).

committed certain international crimes such as genocide, crimes against humanity, war crimes, and torture. Since 9/11, “terrorism” has been deemed part of that category. For extradition purposes, these crimes are the “exception to the political offense exception.”<sup>36</sup> Arguments in favor of an obligation to extradite (or prosecute) have had to turn instead to the postulate of a communal interest in the repression at least of international offenses. For those who are skeptical about existence of an “international community” possessing real authority, this line of argument seems to beg the question. For those who believe in the reality of the “international community,” it is practically self-evident.

The historical discussion of the duty to extradite, which would have applied to other modalities of inter-state cooperation in penal matters, had these existed before the twentieth century, reveals however, that if an international mutual interest exists, let alone a common interest, and if these interests were in some way based on commonly shared values which protect certain social interests, then the obligation to surrender, cooperate, and prosecute and punish would be self-evident.

## 2.2. Nature and Content of the Obligation

However, and notwithstanding the writing of some scholars supporting the proposition of a *civitas maxima*, the practice of states has not yet clearly evidenced the recognition of the duty *aut dedere aut judicare* as being part of general international law, except for certain international crimes.<sup>37</sup>

Assuming the current existence of such a duty, there remain two sets of questions about the obligations arising out of this duty and its unarticulated premises.

(1) The duty to prosecute or extradite can be viewed as alternative or cumulative.<sup>38</sup> So far, only the writings of some scholars have held that a cumulative duty exists for *jus cogens* international crimes.<sup>39</sup> It should be

36. See BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4.

37. BASSIOUNI & WISE, *supra* note 1, at 28-30.

38. The issue was discussed at the Eleventh International Congress on Comparative Law. See generally M. Cherif Bassiouni, *General Report on the Judicial Status of the Requested State Denying Extradition*, in PROCEEDINGS OF THE ELEVENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, reprinted in 30 AM. J. COMP. L. (1982). See, however, Mario Pisani, *Aut Dedere Aut Punire*, 30 L'INDICE PENALE 241 (No. 2, 1966). Professor Pisani translates Grotius' treatment of the subject in full and quotes him as saying “*Est enim disjunctive obligato.*”

39. See BASSIOUNI, *supra* note 5, at Chapter III, section 3, *Jus Cogens*, and authorities cited. These international crimes are: aggression, genocide, crimes against humanity, *apartheid*, war crimes, piracy, slavery and slave-related practices, and torture. Beyond these international crimes, the obligations raised by the maxim *aut dedere aut judicare* presumably do not apply to other international crimes. Some authors even question whether the obligation to prosecute

noted, however, that no treaty applicable to any of the twenty-eight categories of crimes discussed in chapter III provides for a cumulative obligation, while less than 100 treaties out of the existing 281 ICL treaties provide for an alternative duty (*i.e.* prosecute or extradite).<sup>40</sup>

States have the duty to enforce, under their respective national laws, an obligation arising out of conventional and customary ICL. Thus, if the obligation arises out of a treaty, whether multilateral or bilateral, it is legally binding, but only on its signatories. If it arises out of general international law it is binding on all states. But, at this stage of ICL's development only *jus cogens* international crimes rise to the level of an *obligatio erga omnes*, and are, therefore, obligations under general international law, which are binding upon all states.<sup>41</sup>

(2) Neither the maxim of *aut dedere aut judicare* nor any treaty establishing the duty to prosecute or extradite specifically include qualitative criteria. Presumably, the two-pronged duty is predicated on certain unarticulated premises which include such qualitative criteria, namely: that the prosecution (in the prosecuting state) is to be effective and fair, that the extradition process is to be effective and fair, and that prosecution (in the requesting state) is also to be effective and fair. ICL does not address these underlying premises, their scope, contents and how they are to be determined. Moreover there are no guidelines in ICL for the resolution of conflicts between states in cases of dispute as to the execution of these obligations and those legal consequences that attach to a failure to comply.<sup>42</sup> The general treaty obligation of "good faith," however, applies to states that are bound by treaty provisions with respect to the duties to prosecute or extradite.<sup>43</sup> But, on the whole, the implementation of these obligations remains imperfect for lack of specific normative clarity as to the unarticulated premises in question.

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or extradite, irrespective of the *jus cogens* nature of the crime, is sufficiently carried out in the practice of states to be deemed part of customary international law. Such a view undermines the foundation of international criminal law enforcement, except insofar as it arises from specific treaty obligations.

40. See BASSIOUNI, TERRORISM CONVENTIONS, *supra* note 34, at 45-78.

41. See Bassiouni, *Universal Jurisdiction supra* note 10.

42. The principles of state responsibility for wrongful conduct apply. See PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (2001) (prescribing principles to govern the application of universal jurisdiction in light of its potential for abuse).

43. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), U.N.T.S. 331, U.N. Doc. A/CONF.39/27 1155. Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." TASLIM OLAWALE ELIAS, THE MODERN LAW OF TREATIES, 71-84 (1974).

The seminal case in point is the Lockerbie case.<sup>44</sup> It arises out of specific treaty obligations and not out of the general international law obligation to prosecute or extradite which derives from the maxim *aut dedere aut judicare*. Nevertheless, the legal issues raised in that case apply equally to treaty obligations and to general international law obligations. Shortly after the tragic incident of Pan Am 103's explosion over Lockerbie, Scotland on December 21<sup>st</sup>, 1988,<sup>45</sup> the United States and Scotland issued indictments against two Libyan intelligence operatives, Abdelbasset Ali Al-Megrahi and Lamine Khalifa Fhimah. They were charged with planting explosives on the plane which resulted in the death of 259 passengers and 11 persons in and around the town of Lockerbie, Scotland. Thus, the United Kingdom and the United States sought the extradition from Libya of these two Libyan nationals charged with crimes arising out of that explosion. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation provides for the duty to prosecute in its article 7, and for the duty to extradite in its article 8.<sup>46</sup> Libya argued that it had the priority right to prosecute. The United States and the United Kingdom argued that no prosecution in Libya would be effective because Libyan authorities were involved in the plot; instead, they claimed a priority right for their extradition request over Libya's claim of the right to prosecute. Libya responded by arguing that these two governments would not provide its nationals with a fair trial. Consequently, the unarticulated premises of effectiveness and fairness in the execution of the alternative duties to prosecute or extradite became the legal basis for a stalemate.

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44. For application, pleadings, orders, oral arguments and judgments arising out of this incident, see generally, *Case Concerning Questions of Interpretation and Application of 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, General List No. 88 (Libyan Arab Jamahiriya v. United Kingdom) (Instituted in Registry of the Court of International Justice on 3 March 1992), available at <http://www.icj-cij.org/icjwww/idocket/iluk/iluk2frame.html> (last visited November 15, 2002). See also *Case Concerning Questions of Interpretation and Application of 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, General List No. 89 (Libyan Arab Jamahiriya v. United Kingdom), (Instituted in Registry of the Court of International Justice on 3 March 1992), available at <http://www.icj-cij.org/icjwww/idocket/ilus/ilusframe.html> (last visited November 15, 2002).

45. Scotland has autonomy within the United Kingdom, and has its own distinct legal system in which the death penalty has been abolished. Nevertheless, it is the government of the United Kingdom which acts on behalf of Scotland in matters of foreign affairs, as does the United States government with respect to the States within its federal system.

46. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [Montreal Hijacking Convention], 23 September 1971, 24 U.S.T. 564, 974 U.N.T.S. 177, 10 I.L.M. 1151; reprinted in BASSIOUNI, *TERRORISM CONVENTIONS*, *supra* note 34, at 135.

In 1992, Libya filed suit against the United States and the United Kingdom in the ICJ.<sup>47</sup> To forestall the ICJ's decision on the merits of the case filed by Libya, the United States and United Kingdom obtained from the Security Council Resolution 731 (1992) requiring Libya to surrender the two accused to the United States and to the United Kingdom.<sup>48</sup> Because the United Nations Charter does not give the ICJ the express power of judicial review over Security Council decisions, the ICJ felt estopped from passing judgment on whether such a resolution was a valid exercise of the Council's prerogatives under Chapter VII, which deals with issues involving peace and security. Thus, how the Council found that the non-extradition of two accused bombers constituted a threat to world peace and security was not judicially reviewable by the ICJ.<sup>49</sup> But the ICJ was nonetheless faced with the merits of the case filed by Libya pursuant to the 1971 Montreal Convention,<sup>50</sup> namely, whether the duty to prosecute had precedence over the duty to extradite, and by implication, if there were any unarticulated conditions relating to effectiveness and fairness.

The stalemate lasted for ten years but was never resolved by the ICJ. Instead, the interested states did so. Libya and the United States and the United Kingdom agreed to have what is equivalent to a change of venue, by having Scottish judges applying Scottish criminal law and procedure sit in an unused Dutch military facility outside The Hague. There, after a two-year trial, one defendant, Abdelbasset Ali Al-Megrahi, was found guilty and sentenced to life imprisonment, and the other, Lamine Khalifa Fhimah, was found "not guilty by reason of insufficient evidence" (which is a form of verdict available under Scottish law when the evidence does not rise to the standard of "beyond reasonable doubt").<sup>51</sup>

While the legal stalemate over prosecuting the two Lockerbie accused has been brought to an end by means of a practical arrangement that satisfied the concerns of the interested governments, it did not provide an answer to the basic question of whether prosecution has priority over extradition, nor to the corollary questions pertaining to effectiveness and fairness. The ICJ had the opportunity to clarify these issues, but failed to do so. Thus, the questions raised about the duties to prosecute or extradite, and

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47. See *supra* note 44.

48. S.C. Res. 731, U.N. Doc. S/Res/731 (1992); reprinted in 1 BASSIOUNI, *TERRORISM DOCUMENTS*, at 20.

49. See, e.g., *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* (Mohammed Bedjaoui ed., 1992).

50. *Supra* note 46.

51. *Megrahi v. Her Majesty's Advocate*, [2002] S.C.C.R. 509.

the premises of effectiveness and fairness remain substantially unanswered, except for what is expressed in the writings of scholars.

### **Section 3. The Modalities of “International Cooperation in Penal Matters”**

#### *Section 3.1. Introduction*

The modalities discussed below are essentially the same which are resorted to in the “indirect enforcement system” of ICL, and in the regime of inter-state cooperation in penal matters with respect to domestic crimes. The difference, however, is at the sources of legal obligations triggering the resort by a state or by an international judicial organ to use any of these modalities. With respect to the regime of “inter-state cooperation in penal matters,” the sources of legal obligations are treaties and national laws, but, the subject-matter is domestic crimes. Whereas, with respect to the “indirect enforcement system” of ICL, the source of obligation arises from treaties specific to international crimes and from general international law, namely customary international law and the higher law of *jus cogens*, but the subject-matter is international crimes. It should be noted, however, that within international law sources applicable to international crimes, there is a hierarchy. Since not all international crimes rise to the level of *jus cogens*, the source of legal obligation differs with respect to different categories of international crimes. It should also be noted that in the era of globalization, more international crimes which have not so far been deemed part of *jus cogens*, like “terrorism,” have risen to a higher level of international concern, which may lead to their inclusion in the category of *jus cogens* international crimes and will thus require the imposition of more specific legal obligations upon states to prevent and suppress such crimes. Furthermore, parallel to that development is the increased mutual interest of states, largely as a result of globalization, to cooperate *more effectively* in the prevention and suppression of domestic crimes. Thus, the demarcation lines between *jus cogens* crimes and other international crimes is becoming more fluid with respect to the duty to prosecute or extradite and to lend other forms of international cooperation, just as the demarcation lines between international crimes and domestic crimes are becoming more fungible. ICL, therefore, blends these obligations in a way that they are soon likely to apply across the board to all forms of international, transnational, and domestic crimes.

In the historically short span of fifty years, the millenary practice of extradition as the *par excellence* modality of international cooperation has

become only one of several other modalities, and the rationale for such cooperation has been recognized, on the basis of pragmatism, as being necessary and desirous. In current international law, the discourse about the philosophical and intellectual foundations of legal institutions has regrettably degenerated to the expedient, the pragmatic, and the temporary. With the knowledge that more traditional intellectual rigor is viewed by some as pedantic and unnecessary, I nonetheless conclude that the rationale for international cooperation in penal matters is founded on a *civitas maxima*, on which the maxim *aut dedere aut iudicare* is based. Consequently, the processes by which the modalities of international cooperation in penal matters function must be guided by the aims of their rationale.

These modalities, of which there are at present eight, are: extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement information-sharing, and regional and sub-regional “judicial spaces.”

### *Section 3.2. Extradition*

Extradition is the world’s oldest modality of international cooperation in penal matters. The first recorded treaty dealing with extradition dates back to 1268 B.C.E. It was a peace treaty between Ramses II, Pharaoh of Egypt, and Hatussilli, Prince of the Hittites, in which the parties solemnly promised to surrender to one another their nationals who were wanted fugitives.<sup>52</sup> Since then, extradition has been the subject of numerous bilateral treaties, specialized regional multilateral treaties, and has been included in multilateral treaties dealing with different aspects of ICL.<sup>53</sup>

The national legislation of many states contains provisions on extradition,<sup>54</sup> but it is estimated that half of the world’s countries do not have such legislation. National legislation varies as to its content and specificity. Most states require the existence of a treaty in addition to national legislation. Diversity in national judicial and administrative practices is also quite significant.

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52. See BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at 32-33.

53. See, e.g., INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (M. Cherif Bassiouni ed., 1997), at 607 (Art. II of Convention on the Physical Protection of Nuclear Material), 837 (Art. III of Regional Convention on Suppression of Terrorism (Inter-Asian); BASSIOUNI, TERRORISM CONVENTIONS, *supra* note 34, at 389 (Art. III of the South Asian Association for the Regional Cooperation: Convention on Suppression of Terrorism), 503 (Arts. 7 and 8 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

54. For the U.S., see Title 18 U.S.C. §§ 3181-3196 (2002).

Nevertheless, treaties and national legislation contain similar substantive requirements, as well as similar grounds for the denial of extradition. Some requirements have reached the level of customary international law, such as the requirement of double criminality (also referred to as dual criminality), whereby the crime charged in the requesting state must also be found in the criminal laws of the requested state.<sup>55</sup> Another such requirement is the principle of speciality (also referred to as specialty).<sup>56</sup> According to this principle, the requesting state can only prosecute the surrendered person for the crime for which extradition was granted. Even though both of these requirements are found in the extradition laws of almost all states and in almost every extradition treaty, their application in national judicial practice varies. With respect to double criminality, some states require that the crime be identical in the two legal systems, while others require only that the underlying facts give rise to a criminal charge in the requested state's legal system.<sup>57</sup> Concerning speciality, some states allow the surrendered person to raise the issue *sua sponte* if the requesting state deviates in its prosecution from the charges for which the person was surrendered.<sup>58</sup> Others require that the requested state file a protest with the requesting state.<sup>59</sup>

These divergences reflect the two views of extradition.<sup>60</sup> One view is that it is a contract between states and that individuals are merely the objects of the proceedings. The other view is that individuals are subjects of the proceedings and the contractual undertakings of the states include stipulations in favor of the individual who is therefore a third party beneficiary of certain rights which he may himself claim.<sup>61</sup>

The most significant, and most likely, hurdles to extradition are grounds on which denial of extradition may be based. These are sometimes referred to as exclusions, exceptions, and defenses.<sup>62</sup> They include: exclusion of nationals from extradition, non-extradition of persons charged with political offenses or sought for political purposes, non-extradition when certain penalties are likely to be inflicted on the individual in the requesting states such as the death penalty and physical punishment or treatment amounting to torture, and denial of extradition when double jeopardy exists or when statutes of limitations apply. Non-extradition of nationals is probably the

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55. See BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at 461-510.

56. *Id.* at 551-568.

57. See *supra* note 1.

58. See BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at 548 *et. seq.*

59. *Id.* at 557 *et. seq.*

60. *Id.* at 29-45, 51-66.

61. *Id.* at 548 *et. seq.*

62. *Id.* at 587-750.

most significant of these exclusions, and it is contained in many state constitutions.<sup>63</sup> While some states have provided for a jurisdictional basis to domestically prosecute their own nationals which they will not extradite, the actual exercise of such national jurisdiction is rare.

One historic justification for that exclusion is that nationals of one state are not likely to receive fair treatment in the courts of another state. But that rationale is no longer valid for most legal systems. Moreover, the requested state can always require assurances from the requesting state to insure a fair trial. Such assurances can also be requested and obtained with respect to the non-application of certain penalties that are contrary to the requested state's public policy, such as the death penalty, corporal punishment, and excessively long periods of detention. Even though it is possible to find ways around these exclusions, they nonetheless constitute obstacles to extradition. The same applies to certain exceptions such as the "political offense exception,"<sup>64</sup> though state practice in the last two decades has significantly reduced its application due to specific treaty obligations on the prevention and suppression of terrorism,<sup>65</sup> and to the jurisprudential narrowing of the exception in most legal systems.

The practice of extradition in most states has been slowed and weakened by lengthy formalities and procedures. The civilist legal systems tend to be more expeditious because they do not inquire into "probable cause," nor do they provide for bail as do common law systems.<sup>66</sup>

Regional intergovernmental organizations have promoted multilateral treaties to enhance extradition and harmonize state practices. They are: the CE,<sup>67</sup> the OAS,<sup>68</sup> and the League of Arab States.<sup>69</sup> The EU has developed a

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63. *Id.* at 682 *et. seq.*

64. *Id.* at 549 *et. seq.*

65. BASSIOUNI, TERRORISM CONVENTIONS, *supra* note 34, at 254.

66. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at 826 *et. seq.* See also Dominique Poncet & Paul Gully-Hart, *Extradition: The European Approach*, in 2 INTERNATIONAL CRIMINAL LAW 227 (M. Cherif Bassiouni ed., 2d rev. ed. 1999).

67. European Extradition Convention, 12 Dec. 1957, E.T.S. No. 24; First Additional Protocol, 15 Oct. 1975, E.T.S. No. 86; Second Additional Protocol, 17 Mar. 1978, E.T.S. No. 98; Council of Europe: European Convention on the Suppression of Terrorism, 27 Jan. 1977, E.T.S. No. 90; 15 I.L.M. 1272.

68. Montevideo Convention of 1899, *amended as* Organization of American States T.S. No. 36 (1957). Inter-American Convention on Extradition, 25 Feb. 1981, O.A.S.T.S. No. 60; International American Convention on Mutual Assistance in Criminal Matters, 23 May 1992, O.A.S.T.S. No. 75.

69. Arab League Extradition Agreement, Sept. 14, 1951, in LEAGUE OF ARAB STATES COLLECTION OF TREATIES AND AGREEMENTS 95 (1978). See also the Arab League Agreement on Extradition and Judicial Cooperation of 1983 (commonly referred to as the Riyadh Agreement), which has been ratified by 16 Arab states. It includes the 1951 Arab League Agreement on

“European judicial space,” an idea proposed in the CE three decades ago, and discussed below in section 3.8.<sup>70</sup> According to the EU’s approach, an arrest warrant issued by any duly authorized prosecutorial or judicial authority in any EU country is to be executed in any other EU country without the need for going through extradition procedures.<sup>71</sup> This approach eliminates extradition altogether and whatever judicial safeguards are available in that process.

There is no United Nations multilateral convention on extradition. However, there is a model bilateral treaty.<sup>72</sup>

States continue to engage in bilateral treaty practice<sup>73</sup> that is lengthy, cumbersome and costly, yet they resist the more efficient approach of multilateral treaties. This is essentially due to political reasons, as the

Extradition and 1951 Arab League Agreement on Judicial Cooperation; The League of Arab States, The Council of Arab Interior and Justice Ministers: The Arab Convention on the Suppression of Terrorism (22 April 1998) in BASSIUNI, *TERRORISM CONVENTIONS*, at 393.

70. This idea was floated within the Council of Europe by France in the late 1970s but was not followed through. See MARIA RICCARDA-MARCHETTI, *ISTITUZIONI EUROPEE E LOTTA AL TERRORISMO* (1986); Franco Mosconi, *L’Accordo Di Dublino Del 4/12/1979, Le Comunità Europee e la Repressione Del Terrorismo*, LA LEGISLAZIONE PENALE, 543 No. 3 (1986) (referring to the European Judicial Space); Council of Europe, *International Cooperation in the Prosecution and Punishment of Acts of Terrorism: Recommendation No. R(82)1*, adopted by the Committee of Ministers of the Council of Europe on January 15, 1982 and Explanatory Memorandum (Strasbourg 1983); Christine Van den Wyngaert, *L’Espace Judiciaire Européen: Vers une Fissure au Sein du Conseil de L’Europe?*, 61 REV. DROIT PÉNAL ET DE CRIMINOLOGIE 511 (1981); Christine Van den Wyngaert, *L’Espace Judiciaire Européen Face a L’Euro-Terrorisme et la Sauvegarde des Droits Fondamentaux*, 3 REVUE INTERNATIONALE DE CRIMINOLOGIE ET LA POLICE TECHNIQUE 289 (1980); CONSIGLIO SUPERIOR DELLA MAGISTRATURA, *ESTRADIZIONE E SPAZIO GIURIDICO EUROPEO* (1979). They resurfaced in 2000 in the EU after the Maastricht and Schengen treaties entered into effect. See Regis de Gouttes, *Vers un Espace Judiciaire Pénal Pan Européen?*, 22 RECEUIL DALLOZ SIREY 154 (1991); SCHENGEN: INTERNATIONALIZATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, SECURITY AND THE POLICE (H. Meijers *et al.* eds., 1991); Regis de Gouttes, *Variations sur L’Espace Judiciaire Pénal Européen*, 33 RECEUIL DALLOZ SIREY 245 (1990).

71. Council Framework Decision of 13 June 2002 on the European Arrest Warrant & the Surrender Procedures Between Member States; (2002/584/JHA), OFFICIAL JOURNAL OF EUROPEAN COMMUNITIES 1-20, L190 of 18, July 2002. See also Giuliano Vassalli, *Mandato d’arresto e principio d’egualianza*, IL GIUSTO PROCESSO 129, No. 3, Sept.-Oct. 2002.

72. See U.N. Model Treaty on Extradition, G.A. Res. 116, U.N. GAOR, 45th Sess., Annex at 211-214; U.N. Doc. A/Res/45/116 (1990); U.N. Model Treaty on Mutual Legal Assistance in Criminal Matters, G.A. Res 117, 45th Sess., Annex, at 215-19, U.N. Doc. A/Res/117 (1990). This earlier model treaty is in the process of being updated by the UNCPD.

73. The number of estimated bilateral extradition treaties is over 1,000. The U.S. alone has treaties with over 110 states. See BASSIUNI, *INTERNATIONAL EXTRADITION*, *supra* note 4, at 925 *et. seq.* See also IGOR I. KAVASS & ADOLF SPRUDZS, 1 & 2 EXTRADITION LAWS AND TREATIES (2001).

bilateral practice permits them to tailor each treaty to the political relations and interests of the contracting states.<sup>74</sup>

All the factors mentioned above contribute to the lengthy, cumbersome and costly practice of extradition without necessarily enhancing the fairness of the process. Thus, states tend to use immigration techniques, and even kidnapping, as a way of obtaining custody of the person when extradition fails or is likely to fail.<sup>75</sup> These practices detract from the legitimacy of the process.

### *Section 3.3. Legal Assistance (Also referred to as Mutual Legal Assistance)*

This is a relatively new practice among states, developed primarily since the 1960s,<sup>76</sup> but which has its origins in an almost century-old practice known as “Letters Rogatory.”<sup>77</sup> This earlier practice, which is still used, though mostly in civil matters, is based on the principle of comity. This is when the courts of one state address a request to those of another state for judicial assistance in the form of taking the testimony of a witness or securing tangible evidence. The courts then transmit the oral or tangible evidence to the requesting court, certifying that the evidence has been secured in accordance with the legal requirements of the requested state.

Historically, the “Letters Rogatory” procedure was based on comity, and not on treaties. Thus, the requested state was under no obligation to accept the request or act pursuant thereto. In addition to this discretionary aspect, the formal process of transmitting “Letters Rogatory” has historically been inordinately long.<sup>78</sup> Moreover, it is also uncertain as to how the request will

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74. See, e.g., Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdoms, S. TREATY DOC. 8, 99th Cong., 1st Sess. (1985). *Hearing Before the Committee on Foreign Relations, 99th Cong., 1st Sess.* at 135-137 (1986), (statement of M. Cherif Bassiouni); M. Cherif Bassiouni, *The “Political Offense Exception” Revisited: Extradition Between the U.S. and the U. K.-A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENV. J. INT’L L. & POL’Y 255 (1987). There is also the bureaucratic interest of officials in ministries of foreign affairs and justice to engage in treaty negotiations which afford them the opportunity of travel abroad and to undertake work that is more satisfying than that of everyday routine.

75. See BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at chapters V and IV respectively.

76. The European Convention on Mutual Legal Assistance, 20 Apr. 1959 E.T.S. No. 30; First Additional Protocol, 15 Oct. 1975, E.T.S. No. 86; Second Additional Protocol, 17 Mar. 1978, E.T.S. No. 98.

77. For the U.S., see 28 U.S.C. § 1696, 1782 (2002).

78. The requesting court issuing the “Letter” transmits it in accordance with the judicial protocol of that legal system to the higher judicial authority, from where it goes to the minister of justice (in the U.S. to the Attorney General), who then transmits it to the minister of foreign

be executed by the requested court and, therefore, whether the evidence obtained will be usable (factually or legally) in the courts of the requesting state.

As an extension to “Letters Rogatory,” a few states have relied on the practice of sending a “Commission Rogatory” to another country to conduct its own investigation. This practice has been based on agreements between the states in question. Customarily, the commissions consist of a judge or a prosecutor conducting an investigation, inquiry, or interrogation of a witness in the territory of another state. In most cases, the “Commission Rogatory” is conducted on the grounds of the embassy of the sending state insofar as an embassy is deemed part of the flag state’s territory, even though it is on the territory of the host state.<sup>79</sup> The host state may also invite the “Commission” to sit in on one of its courts.

As of the 1960s, the practice of many states (within Europe, Latin America, the United States, and Canada) shifted to bilateral MLATs.<sup>80</sup> Moreover, the CE,<sup>81</sup> the OAS,<sup>82</sup> and the League of Arab States<sup>83</sup> promoted regional multilateral treaties. Still, the number of bilateral MLATs is far less than bilateral extradition treaties,<sup>84</sup> as is the number of states having national legislation on the subject.<sup>85</sup>

MLATs, like extradition treaties, have requirements, exclusions, exceptions, and defenses and they are substantively similar to their counterpart in extradition treaties and national legislation.<sup>86</sup> For example, the requirements of double criminality, speciality, and the “political offense

affairs (in the U.S., the Secretary of State), who then sends it to the Ambassador accredited to the requested state, who submits it to the ministry of foreign affairs of the requested state, and then the same course of transmission is followed in that state until the request reaches the appropriate court. Some states have, however, shortened the chain of transmission, but it nonetheless requires severe passages. As a result, this practice is still too lengthy.

79. There is a debate as to whether embassies are extra-territorial or only jurisdictionally immune. *See* MARJORIE M. WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 428 *et. seq.* (Dept. of State 1968). *See also* Leonard B. Sutton, *Jurisdiction Over Diplomatic Personnel and International Organizations Personnel for Common Crimes and for Internationally Defined Crimes*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni & Ved Nanda eds., 1973), at 97.

80. *See supra* note 76.

81. European Convention on Mutual Assistance in Criminal Matters 6 Dec. 1962, E.T.S. No. 030; First Additional Protocol, 15 Oct. 1975, E.T.S. No. 86; Second Additional Protocol, 17 Mar. 1978, E.T.S. No. 98.

82. *See supra* note 68.

83. *See, e.g. supra* note 69.

84. The estimated number of bilateral MLATs, worldwide, is fewer than 200.

85. The estimated number of states having relevant national legislation is fewer than 50 out of 193 states.

86. *See supra* note 4.

exception” are the same in extradition and in legal assistance. Some states deny legal assistance requests if the crime investigated by the requesting state incurs the death penalty when that penalty is abolished in the requested state.

MLAT procedures also vary in civilist and common law states, though their differences are less significant than in extradition procedures. The reason for that is MLAT procedures are largely influenced by treaties, which tend to be similar.

A unique characteristic of MLATs is that they are for the benefit of governments. Individuals cannot make use of them, nor, for that matter, can they benefit from them. Governments can make exclusive use of the evidence they exchange between themselves and can, subject to their respective laws, deny access by the interested individuals to evidence that they have received from foreign governments, including exculpatory evidence when such individuals are accused of the commission of a crime.

The forms of legal assistance vary widely. They include: taking of witness testimony, securing tangible evidence such as business and bank records, and conducting investigations. These forms of legal assistance can be conducted by the judicial, prosecutorial or law enforcement personnel of the requested state. Sometimes, the requested state allows a judge or prosecutor from a requesting state to conduct the investigation on its territory, but under the supervision of the requested state’s judicial authorities.

Technological advances which could enhance the taking of testimony in foreign countries have not been used. Thus, video-conferencing techniques to take witness testimony and to conduct cross-examination have not been resorted to, except in a few rare cases. The use of such methods would greatly reduce travel costs and make the process faster.

### *Section 3.4. Execution of Foreign Sentences*

Like MLATs, execution of foreign sentences is a modality of international cooperation that originated in the 1960s.<sup>87</sup> The goal of this

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87. For the different modalities of international state cooperation in penal matters, see: M. Cherif Bassiouni, *Extradition, Law and Practice of the United States*, in 2 BASSIOUNI ICL, *supra* note 66, at 191; Dominique Poncet & Paul Gully-Hart, *Extradition: The European Approach*, in 2 BASSIOUNI ICL, *supra* note 66, at 227. See also *Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners*, Note by the Secretariat, U.N. Doc. A/CONF.121/10. For articles considering international cooperation in criminal matters, see Heinrich Grutzner, *International Judicial Assistance and cooperation in Criminal Matters*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW, *supra* note 79, at 189; M.S. Harari *et. al.*, *Reciprocal Enforcement of Criminal Judgments*, 45 REVUE INTERNATIONALE DE DROIT PENAL 585 (1974); Ivan Shearer, *Recognition and Enforcement of Foreign Criminal Judgments*, 47 AUST. L. J. 585 (1973).

modality is to enhance the re-socialization of foreign-sentenced persons by returning them to their countries of origin. The modality also has a humanitarian goal in that it brings sentenced persons physically closer to family in their countries of origin.

The practice began in Europe as a result of a CE initiative<sup>88</sup> which had a large population of foreign “guest-workers” as they were called between the 1950s and 1970s. If for no other reason than statistics, the large number of foreign workers who came from different cultures committed crimes for which they were convicted and sentenced. Thus, the foreign prison population in these European countries increased, and it was felt that the return of such sentenced persons to their countries of origin was beneficial to all concerned.

During that same period of time, a large number of Americans, mostly between the ages of 18-25, traveled to foreign countries. In particular, they traveled to countries where they had easy access to drugs. The result was a significant American prison population in such countries as Mexico, Canada, Turkey, and the Netherlands. The U.S. followed Europe’s example and entered bilateral treaties with Mexico, Canada, Turkey, and other states,<sup>89</sup> and it acceded to the European Convention on this subject.<sup>90</sup>

Transfer of the execution of foreign penal sentences presents a peculiar legal problem in that it presupposes that a state can execute the penal judgments of another state. As discussed below, the recognition of foreign penal judgments has not gained more than scant recognition in most legal systems of the world. This is due to the fact that penal judgments are deemed a manifestation of state sovereignty. Consequently, states are reluctant to recognize other states’ penal judgments. To avoid this legal hurdle, experts, including this writer, developed the theory that the execution of foreign penal sentences is not the enforcement of foreign penal judgments, but the administrative execution of their consequences.<sup>91</sup> Thus, executing a foreign sentence does not imply the recognition of the penal judgment that gives rise to it. This reasoning, which is based on a valid legal fiction, separates the execution of the sentence from the recognition of the penal judgment which gave rise to the sentence.

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88. European Convention on Transfer of Sentenced Persons, Strasbourg, 21 Mar. 1983, E.T.S. 112. See also Helmut Epp, *Transfer of Prisoners: The European Convention*, in 2 BASSIOUNI ICL, supra note 66, at 751.

89. See M. Cherif Bassiouni & Grace M. W. Gallagher, *Transfer of Prisoners: Policies and Practices of the United States*, in 2 BASSIOUNI ICL, supra note 66, at 505.

90. *Id.*

91. *Id.* at 537-8.

In Europe the proposition was deemed acceptable, but in the U.S. it had to be subordinated to the transferred person's explicit waving of constitutional rights before the transfer and execution of the foreign sentence could take place.<sup>92</sup> This, too, was somewhat of a legal fiction, since the transferred person was in most cases under hardship conditions and willing to waive any rights in the hope of being returned to the U.S.<sup>93</sup> Nonetheless, it was felt that the benefits of the transfer outweighed those preserving the logic of the unity of a penal judgment and its consequences.<sup>94</sup>

The laudable humanitarian and rehabilitative purposes of the transfer of the execution of foreign penal judgments have given way, particularly in the United States, to the practice by governments to bargain for the cooperation of the sentenced person in exchange for transfer from a foreign country.<sup>95</sup>

The practice is particularly useful with respect to states whose relations are politically sensitive. In these cases, the state where the crime occurred can prosecute and then transfer the execution of the sentence to the state of nationality. Thus, the concerns of both states are met.

Transfer of execution of sentences can also strengthen accountability when a state is reluctant to extradite because of the possible treatment of the offender. Extradition can therefore be granted on the condition that if the person is found guilty, that person will be returned to the originally requested state for the execution of the sentence.<sup>96</sup> This is part of the gear-shifting mechanism referred to above.<sup>97</sup>

The most significant problem with this practice is the concern that transferring states have regarding whether the enforcing state will execute the sentence as ordered in the state of conviction. This is due to the fact that the state of execution applies its correctional laws and regulations to the transferred person. Consequently, conditions of detention are determined by the executing state. Moreover, enforcing states may claim that their laws apply with respect to amnesties and commutation of sentences. As a result, the original sentence in the state of conviction may not be carried out as it

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92. See *Mitchell v. United States*, 483 F. Supp. 291 (E.D. Wis. 1980); *Pfeifer v. United States Bureau of Prisons* 615 F.2d 873 (9th Cir. 1980).

93. See 5 MICHAEL ABELL & BRUNO A. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL EXTRADITION* (1995); *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANS. L. 249-68 (1978); *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANS. L. 67 (1979).

94. See *Rosado v. Civiletti*, 621 F.2d. 1179 (2d Cir. 1980).

95. This was the case in *Scalise v. Meese*, 687 F. Supp. 1239 (N.D. Ind 1988) and *Scalise v. Thornburg*, 891 F.2d 640 (7th Cir. 1989), though the legal issues presented were different.

96. See *supra* section 1.

97. See *supra* section 1, notes 38-45 and accompanying text.

was ordered. States are therefore cautious in granting transfers of sentenced persons and may require additional assurances from the enforcing state before agreeing to the transfer.

What started in the 1960s as a laudable humanitarian and rehabilitative program did not work out as expected for the reasons stated above, and in the last decade the practice has become limited to a few cases.<sup>98</sup>

### *Section 3.5. Recognition of Foreign Penal Judgments*

States have historically regarded penal judgments as an exercise of national sovereignty and have therefore refused to recognize foreign penal judgments.<sup>99</sup> But this rigid position is not without contradiction. For example, states concede extradition on the basis of a foreign judgment<sup>100</sup> and execute foreign penal sentences.<sup>101</sup> Admittedly, this is based on the fictional distinction between recognizing the consequences of a penal judgment and recognizing the penal judgment itself. Nevertheless, it is a legal fiction which shows that the non-recognition of foreign penal judgments is fundamentally dogmatic.

A more discerning position should be for states to recognize the penal judgments of other states where due process of law exists and where the crime charged satisfies the requirement of double criminality (namely that the underlying facts constitute the same category of crime).<sup>102</sup> Other requirements could be added, as in the case of extradition,<sup>103</sup> while another exclusion could be added if the foreign penal judgment is contrary to the recognizing state's public policy.<sup>104</sup> At present, only a European Convention exists on the subject.<sup>105</sup>

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98. No statistics are published, but researchers can obtain figures from certain ministries of justice.

99. See Dietrich Oehler, *The European System*, in 2 BASSIUNI, ICL, *supra* note 66, at 607; M. Cherif Bassiouni, *Universal Jurisdiction*, *supra* note 10.

100. See *supra* section 2.1.

101. See *supra* section 2.3.

102. See BASSIUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at 461-510.

103. See *supra* section 3.2.

104. This is the basis for non-recognition of sister-states' penal judgments in the United States, notwithstanding the constitutional requirement that sister-states give each other's judgments "full faith and credit" for the position of the U.S. See ALBERT A. EHRENZWEIG & ERIC JAYME, 2 PRIVATE INTERNATIONAL LAW 81-83 (1973); HERBERT F. GOODRICH & EUGENE F. SCOLES, CONFLICT OF LAWS, 14-15 (4th ed. 1964); EDWARD S. STIMSON, CONFLICT OF CRIMINAL LAWS, 20-26 (1936); Monrad G. Paulsen & Michael I. Sovern "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956). Cf. *Huntington v. Attrill*, 146 U.S. 657 (1892) (enforcement between domestic states); *Intercontinental Hotel Corp. (Puerto Rico) v. Golden*, 203 N.E.2d 210 (N.Y. 1964) (enforcement of gambling debt incurred in Puerto Rico).

105. The European Convention on the International Validity of Criminal Judgments, 28 May 1970, E.T.S. 70, has been ratified by only fourteen states.

As stated above, while states do not specifically recognize foreign penal judgments, they give recognition to some of the consequences of foreign penal judgments through extradition,<sup>106</sup> execution of foreign penal sentences<sup>107</sup> and freezing and seizing of assets deriving from criminal conduct.<sup>108</sup> Therefore, it is valid to ask whether the dogmatic rejection of recognition of foreign penal judgments is being gradually emptied of meaning. Should that position change, and foreign penal judgments become more widely recognized, it would open the door to increasing international cooperation in penal matters by making the consequences of foreign penal judgments more widely applicable in other states' domestic legal proceedings.<sup>109</sup>

### *Section 3.6. Transfer of Criminal Proceedings*

This is a procedure whereby one state transfers criminal proceedings to another state on the basis that the transferee state has more significant contacts with the parties, and is therefore a *forum conveniens*. This is in contrast to the transferring state being a *forum non conveniens*, or where some public policy interest exists that justifies the transfer of the proceedings in order to achieve the best interests of justice.

This is one of the gear-shifting mechanisms mentioned above,<sup>110</sup> wherein similar to those circumstances when extradition fails, there should be a concomitant duty for the requested state to prosecute, and, therefore, a transfer of criminal proceedings mechanism is needed. It should be noted that the rationale for transfer of criminal proceedings is different from that of *aut dedere aut judicare*, which requires a state refusing to extradite to assume the obligation to prosecute.<sup>111</sup>

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106. See *supra* section 2.1.

107. See *supra* section 2.3.

108. See *supra* section 2.6.

109. See *Cooley v. Weinberger*, 518 F.2d 1151 (10th Cir. 1975). In that case, the Tenth Circuit took note of the effects of a criminal conviction in Turkey of a U.S. Citizen who killed her husband and then claimed her widow's award under Social Security. She was denied the benefit based on a statutory exclusion for killing one's spouse. However, it presupposed the recognition of the Turkish penal judgment's legal consequences.

110. See BASSIOUNI, *supra* note 5, at Chapter I, section 2.

111. See Article 8, Italian Criminal Code, which provides that, where an Italian citizen is sought for extradition, and where the individual cannot be extradited because of his nationality, Italy must prosecute. See also *Venezia v. Ministero Di Grazia E Giustizia, Corte cost.*, No. 223, 79 RIVISTA DI DIRITTO INTERNAZIONALE 815 (Italy 1996).

A distinction exists between transfer of criminal proceedings and the assumption of criminal jurisdiction by a state as a result of specific legislation based on the nationality, passive personality, or universality principles of jurisdiction. The first model derives from the historic proposition of one state relinquishing jurisdiction in favor of another on the basis that the first of the states is a *forum non conveniens*. Thus, the state relinquishing of jurisdiction is based on facts which render that forum not only less convenient, but less conducive to the best interests of justice in that particular case, whereas the state assuming jurisdiction does so on the basis of a nexus to the case and/or to the parties.

The transfer of criminal proceedings should be similar to a change of venue procedure in order to enhance prosecution and, thus, accountability. There are, however, no bilateral treaties on this subject known to this writer.

*Section 3.7. Freezing and Seizing of Assets (Deriving from Criminal Activities)*<sup>112</sup>

The request by one state of another to assist it in the tracing, freezing, and seizing of assets is no different than other forms of obtaining evidence of criminal activities.<sup>113</sup> Consequently, it is essentially part of legal assistance.<sup>114</sup> Nevertheless, it differs from being limited to purely legal assistance because the confiscation of assets is in the nature of a criminal sanction, even if it is not always legislatively identified as such. Confiscation of assets in the requested state is predicated on a foreign penal judgment entered in the requesting state for a criminal activity that occurred in the requesting state or over which it had jurisdiction. Thus, it partakes of another modality of international cooperation in penal matters, namely, the enforcement of foreign penal judgments.<sup>115</sup> Since this procedure partakes of legal assistance, as well as enforcement of sanctions it can be considered a separate modality of interstate cooperation in penal matters.

It was not until the 1980s that international efforts were developed to trace, freeze, and seize assets, deriving from or used in connection with

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112. See M. Cherif Bassiouni & David Gualtieri, *International and National Responses to the Globalization of Money Laundering*, in 2 BASSIOUNI ICL, *supra* note 66, at 675, and JORDAN J. PAUST & M. CHERIF BASSIOUNI *ET AL*, INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS, 1087-1199 F.2d (2001). See also, e.g., RESPONDING TO MONEY LAUNDERING: AN INTERNATIONAL PERSPECTIVE (ERNESTO U. SAVONA, ed., 1997); PAOLO BERNASCONI, NEW JUDICIAL INSTRUMENTS AGAINST INTERNATIONAL BUSINESS CRIMES (1995); WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER-MEASURES (1993).

113. See *supra* section 3.3. See also Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339 (1990).

114. See *supra* section 3.3.

115. See *supra* section 3.4.

criminal activity, as a way of combating, primarily, the laundering of funds derived from drug proceeds.<sup>116</sup> As a result, the United Nations adopted in 1988 the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>117</sup> which deals exclusively with this subject. Then, in 1991, the Council of Europe adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.<sup>118</sup>

Unlike the 1988 United Nations Convention which focuses on drug trafficking as the predicate offense, the Council of Europe's Convention considers any crime as the predicate offense. Both of these Conventions are characterized by the style of mutual legal assistance conventions<sup>119</sup> and their provisions are directed to the international cooperation aspects of national criminal justice systems.

The international community's focus on administrative control techniques in banking and financial institutions developed, however, along different lines, as discussed below. Rather than developing through specific binding legal obligations, the approach was through voluntary guidelines, an approach that can be described as "soft law." This was because of resistance by many governments and banking and financial institutions claiming negative implications of these controls on their economic interests.<sup>120</sup>

The reason why a comprehensive international legal regime for the freezing and seizing of assets has not developed so far is in part because of the bifurcated nature of the control mechanisms which are needed in respect to this type of activity, and in part because of the different interests which oppose more effective controls. As to the first of these considerations, the problems derive from the different nature of criminal and administrative (financial) control mechanisms. The latter applies to financial and banking institutions, requiring from these institutions self-regulation and also the

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116. Bruce Zagaris & Constantine Papavizass, *Using the Organization of American States to Control International Narcotics Trafficking and Money-Laundering*, 57 REV. INT'L DE DROIT PÉNAL 119 (1986); M. Cherif Bassiouni, *Critical Reflections on International and National Control of Drugs*, 18 DENV. J. INT'L L. & POL'Y 11 (1990).

117. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, U.N. Doc. E/Conf. 82/14, 28 I.L.M. 493 (1989).

118. The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, E.T.S. No. 141, 30 I.L.M. 148 (1991). *See also* Hans G. Nilsson, *The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law*, 2 CRIM. L.F. 419 (1991). Note, *The International Attack on Money Laundering: European Initiatives*, 1991 DUKE J. COMP. & INT'L L. 213.

119. *Supra* section 3.3.

120. *See* Berta Esperanza Hernandez, *Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy*, 18 N.C.J. INT'L L. & COMM. REG. 235, 289 (1993).

external control of the national central bank and/or other organ of national financial control. The former norms are applicable in the context of the criminal justice system, and they are based on the practices of states in international cooperation in penal matters. Because these two sets of control mechanisms differ as to their source of law and methodology, as well as to their contextual applications, they are not easily susceptible of merger into a single comprehensive regime either at the international or national levels. This, in part, explains why there are very few bilateral treaties dealing with tracing, freezing, and seizing of assets, and why there are also only three multilateral Conventions on the subject, two of these are mentioned above, and the third is the United Nations Convention For the Suppression of the Financing of Terrorism, which is discussed below.<sup>121</sup>

The 1988 United Nations Drug Convention<sup>122</sup> reflects the states' goal of controlling international drug trafficking by depriving of their profits those in that chain of illegal activities from drug manufacturing to distribution. The Convention defines both drug trafficking and money laundering, though not in comprehensive legal terms.<sup>123</sup> Instead, it emphasizes the obligation of states to criminalize all aspects of production, cultivation, distribution, sale, or possession of illicit drugs. It also requires states, *inter alia*, to pass necessary national legislation, forfeit assets, and include provisions in their bilateral treaties on freezing and seizing of assets deriving from drug-related criminal activities. More significantly, judicial and other legal authorities are to be empowered to uncover bank, financial, or commercial records irrespective of national bank secrecy laws. States are also required to assist each other in their investigatory, prosecutorial, and adjudicatory processes regarding the tracing, freezing, and seizing of assets deriving from illicit drug activities. The Convention's article 7<sup>124</sup> requires parties to provide each other the "widest measure of mutual legal assistance,"<sup>125</sup> which includes a non-exhaustive list of the type of mutual legal assistance to be provided, such as: taking evidence or statements of persons, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information and evidentiary items, providing records and documents irrespective of whether their

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121. U.N. Doc. A/54/109 (9 Dec. 1999), reprinted in BASSIOUNI, TERRORISM DOCUMENTS, at 231.

122. *Supra* note 117.

123. Bassiouni & Gualtieri, *supra* note 112, at 696-702.

124. *Supra* note 117.

125. The relevant provisions on inter-state cooperation in penal matters are in Articles 5-7. *Supra* note 117.

sources are bank, financial, corporate, or business records, identifying and/or tracing proceeds through financial institutions and records, and anything else that may be deemed relevant to a criminal investigation related to drug crimes. The nature, purpose, and function of these provisions demonstrate their connection with mutual legal assistance, and therefore reveal that the tracing, seizure, and confiscation of assets deriving from illegal drug proceeds is a form of legal assistance.

The Council of Europe Convention<sup>126</sup> is structurally similar to the United Nations' 1988 Convention, and has the same legal characteristics.<sup>127</sup> The latter, however, is open to states which are not members of the Council of Europe as a way of inducing broader participation in the worldwide net designed to combat crime by depriving it of its profits. As stated above, the Council of Europe Convention, however, deals with all proceeds of crime, and is not, as in the case of the United Nations' 1988 Convention, limited to the proceeds and instrumentality of drug-related crimes.

The scheme of both of these multilateral conventions is based on the existence of a predicate criminal offence, thereby making the confiscation an additional sanction to other criminal sanctions for the crime from which the proceeds are derived, whereby the seizure can be deemed only an investigatory or precautionary measure since it is of a temporary nature.<sup>128</sup>

In 1991, the European Community Council adopted a Council Directive<sup>129</sup> applicable to banking and financial institutions. This Directive follows the initiative of July 19, 1989 by the G-7 nations, consisting at the time of twenty-eight members, to establish the Financial Action Task Force (FATF). The FATF prepared a report on money laundering in 1990, which was then followed by a set of recommendations known as the FATF Forty Recommendations.<sup>130</sup> They are directed to all banking and similar financial

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126. *Supra* note 118.

127. *Supra* note 117.

128. See, for the United States, PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS AND MONEY LAUNDERING* 7 (1984); James D. Harmon, *United States Money Laundering Laws: International Implications*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 1, 25 (1988); James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405, 410 (1988); Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465, 498 (1989).

129. Council Directive #91/308, 1991 O.J. (L.166) 77 (June 10, 1991). See also Note, *Putting Starch in European Efforts to Combat Money Laundering*, 60 FORDHAM L. REV. 429, 441-57 (1992); Ernesto Savona, *Mafia Money Laundering Versus Italian Legislation*, EUR. J. CRIM. POL'Y & RES. (June 1993).

130. Financial Action Task Force on Money Laundering, *The Forty Recommendations* (1990). For more information on the FATF, see <http://www.fatf-gafi.org/>.

institutions, including private and public banks, and provide for measures concerning: customer identification, record keeping requirements, due diligence of financial institutions in knowing their customers and their transactions, measures to cope with states that have insufficient or no anti-money laundering measures, commercial bank supervision by central banks, administrative cooperation, mutual legal assistance, and freezing and confiscation of assets. The goals of the FATF Forty Recommendations include improving banking and financial institutions' control effectiveness, strengthening domestic legislation, facilitating mutual legal assistance and other forms of interstate cooperation, and the elimination of the barrier of bank secrecy in the tracing of assets.

As a result of the efforts of the FATF, the Caribbean Financial Action Task Force (CFATF) was established in 1991, and in 1992, the Caribbean countries agreed to follow the FATF original Forty Recommendations as well as their subsequent twenty-one additional recommendations.<sup>131</sup> Thereafter, the Organization of American States (OAS) took steps to suppress the flow of illicit proceeds of drugs through the Model Regulations Concerning Offenses in Connection with Illicit Drug Trafficking and Related Offenses.<sup>132</sup> These regulations contain nineteen articles defining money laundering offenses and the methods for the freezing and confiscation of their proceeds and the proceeds of drug trafficking. Most of these regulations pertain to requirements applicable only to financial institutions.

Another important source of controlling money laundering is the 1988 set of "principles" adopted by the Basle Committee on Banking Regulation and Supervisory Practices.<sup>133</sup> This "committee," comprised of representatives of the Group of Ten industrialized nations (G-10), adopted non-binding "principles" requiring banks to obtain, *inter alia*, identification of customers, to take steps to ascertain the true ownership of accounts and assets, to refuse to conduct business with customers that do not provide adequate identification information, to refuse to carry out suspicious transactions, to take appropriate legal action in response to suspicious transactions, and to adopt specific institutional policies to implement these

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131. See *The Kingston Declaration on Money Laundering*, Kingston, Jamaica, (5-6 November 1992). For more information on the CFATF, see <http://www.cfatf.org/eng/>. See also Berta Esperanza Hernandez, *Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy*, 18 N.C.J. INT'L & COM. REG. 235, 289 (1993).

132. OAS/Ser. L/14 enrollments, 2/CICAD/INF. 58/92 (9 July 1992).

133. *Reprinted in* INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING 273-77 (W.C. Gilmore ed., 1992).

recommendations. Like the FATF and CFATF, the Basle Principles are in the category of “soft law,” but they are an important part of the overall structure of international financial controls to prevent money laundering.<sup>134</sup>

In 1999, the United Nations adopted the Convention for the Suppression of the Financing of Terrorism.<sup>135</sup> This Convention follows in the footsteps of the 1988 United Nations Drug Convention<sup>136</sup> which targets assets related to a specific criminal activity. The control scheme in both Conventions is therefore similar in nature.

After September 11, 2001, the Security Council adopted Resolution 1373 on 28 September 2001,<sup>137</sup> requiring all states to adopt effective national legislation to trace illegal proceeds of crime with a particular view to track funding for terrorism activities. As a result, a “special committee” was established within the Security Council to follow up on the implementation of this resolution, which generated an effective stimulus on most states to adopt anti-money laundering legislation that they had failed to do in the years past.<sup>138</sup>

As a result of Resolution 1773,<sup>139</sup> the focus of the control regime has shifted in emphasis to the supervision of banks and financial institutions, even though most countries, notwithstanding the adoption of new legislation,<sup>140</sup> do not yet have the capability through their respective banking system, and in particular through their central bank, to exercise effective administrative control over the multitude of domestic and international financial transactions.<sup>141</sup>

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134. See Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money Laundering Policy*, 19 *BROOK. J. INT'L L.* 872 (1993).

135. U.N. Doc. A/54/109 (9 Dec. 1999) reprinted in 1 *INTERNATIONAL TERRORISM: A COMPILATION OF UNITED NATIONS DOCUMENTS* (M. Cherif Bassiouni ed., 2002), at 231.

136. *Supra* note 106.

137. S.C. Res. 1373, UN SCOR 4385th mtg., U.N. Doc S/Res/1373 (28 September 2001). By the end of 2002, 164 countries had reported to the Committee on Terrorism about their national legislation.

138. These legislative enactments, which are reported to the special committee, are found on the web site of the International Money Laundering Information Network, sponsored by the United Nations Office on Drugs and Crime, <http://www.imolin.org/index.html>.

139. *Supra* note 124.

140. *Supra* note 125. To support Res. 1773, the International Monetary Fund established a unit of legal and banking experts to advise governments and provide them with technical legal assistance.

141. See Bruce Zagaris & Elizabeth Virginia, *Asset Forfeiture, International and Foreign Law: An Emerging Regime*, 5 *EMORY INT'L L. REV.* 446 (1991). John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and Money Laundering Statutes*, 37 *CATH. U. L. REV.* 489, 492 (1988); James D. Harmon, *United States Money Laundering Laws: International Implications* 9 *N.Y.C. SCH. J. INT'L L. & COMP. L.* 1, 25 (1988); Note, *Recordkeeping and*

The effectiveness of this modality of international cooperation is essentially hampered by the duality of its nature which is in part administrative and in part penal. The administrative part has to do with the exercise of controls over banks and financial institutions, first by these very institutions, and second by the supervisory role of the national central bank. Such a system, however, being essentially administrative, and also necessarily unobtrusive into legitimate financial and commercial transactions, is not easily blended in the penal system. Penal provisions which are the second aspect of the control system are dependent upon the existence of a criminal violation and therefore on available evidence to prove it. Because this depends largely on the effectiveness of the administrative control system over banks and financial institutions, the penal aspects of the control regime is therefore only as good as the administrative aspect of the control regime. These and other institutional problems relating to the fusion into a single control regime, of the administrative and penal aspects mentioned above, create opportunities for evasion and for abuse.

The gaps in the international control regime on tracing, freezing, and seizing of assets are numerous. In part, they are due to the fact that governments are not really that desirous of having a transparent world financial system. In the era of globalization, the goal is to eliminate barriers to the free flow and ease of worldwide financial transactions and not to place controls that inhibit that goal. Thus, governments have difficulty reconciling this goal of an open free flowing worldwide financial system and the establishment of controls over financial transactions that may impede such a system. But governments are also concerned with excessive transparency which would uncover some of their own transactions that they would prefer to remain undiscovered.<sup>142</sup> Some governments also deem the economic

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*Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is Not the Answer*, 66 NOTRE DAME L. REV. 863 (1990); Christine Van den Wyngaert, *Rethinking the Law of International Cooperation: The Restrictive Function of International Human Rights Through Individual-Oriented Bars*, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 489 (Albin Eser & Otto Lagodny eds., 1992); Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW.U. L. REV. 1169 (1992).

142. For example, every government has intelligence operations aboard and is always desirous of concealing these operations and their financing. Some governments with national industries producing arms also find it convenient to provide financial incentives for arms purchasers in other governments which they find necessary to conceal. There are also a host of financial transactions that governments engage in, most legitimate, but some not so legitimate which they would prefer to keep undisclosed. See also Bruce Zagaris & Scott B. MacDonald, *Money Laundering, Financial Fraud, and Technology: The Perils of an Instantaneous Economy*, 26 GEO. WASH. J. INT'L L. & ECON. 62, 72 (1992).

benefits of attracting foreign capital, no questions asked, as advantageous to their economies irrespective of the dangers posed by becoming a safe-haven for money-laundering. In addition, there are influential professions such as the legal, banking, commercialist (as business consultants are called in civilised countries), and accounting professions which are self-regulated in almost every country in the world and who essentially oppose legal restrictions that would ultimately contribute to prevent money-laundering. In almost every country in the world, these professions enjoy the confidentiality of their client relations, and that is an important privilege to preserve. But some members of these professions abuse their rights and violate the ethics of their profession by assisting clients in concealing the criminal proceeds of their assets and in helping them recycle or launder these funds to give them the appearance of legitimacy.<sup>143</sup> In most countries, the professions' self-regulations have proven ineffective to combat this problem.

These and other factors create substantial gaps in the international control regime. More significantly, however, is the inherent difficulty in developing an international control regime with respect to worldwide interconnected financial systems in which the free movement and fluidity of funds are intended to remain beyond external judicial control once funds enter into that system. The only effective points of control remain those of entry and exit, however, there is nothing inherently obvious as to the nature of transactions going in or out of the world financial pipeline. Nevertheless, these two points offer a better opportunity to identify the nature of these transactions or to lead to their nature and purposes. Thus, controls placed at these two points are key to the control regime. Of these two points of control, the point of entry is likely to be more effective than the point of exit, since the latter is too difficult to monitor, if for no other reason than the volume of daily electronic transactions. Yet, detection of suspicious transactions at the point of exit can lead investigators to the recipients or to the source of the funding.

In both cases, however, other difficulties exist. Among them, are tax-haven countries which offer great ease of cash transactions and electronic transactions from which it is difficult to arrive at the sources of such transactions and to their ultimate purposes. This is due to the fact that the banking regulations of such countries do not provide for means to identify bank account holders and transactions.<sup>144</sup> Furthermore, there is no

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143. Bassiouni & Gualtieri, *supra* note 112, at 722-730.

144. Referring to tax-haven countries, see INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING (W.C. Gilmore ed. 1992).

internationally agreed upon system of coding electronic transactions to narrow the focus of inquiry by investigators to potentially suspect transactions.<sup>145</sup> The coding of electronic transactions would greatly facilitate the identification, if nothing else, of the geographic locations of these transactions and their worldwide flow. But many governments have resisted such an approach for a variety of self-serving interests.

While the international control regime suffers from many gaps, it also, paradoxically, offers an opportunity for abuse by law enforcement and prosecutorial officials. For example, the freezing of assets can be a pressure tactic on someone whose cooperation may be sought by law enforcement or prosecuting officials, irrespective of whether that person has or has not committed a criminal violation. This is achieved by freezing a person's assets which prevents that person from carrying on his business, or even having enough resources to meet his livelihood needs. Furthermore, if a person is accused of a crime, the freezing of his assets prevents that person from having access to funds to pay for his defense. While some countries provide some exceptions because such a technique results in the denial of the right to counsel and thereby of the right to a fair trial, others, such as the United States, make no such exception and, on the contrary, make it known that asset freezing is an avowed prosecutorial pressure tactic.

Another potential for abuse is the freezing, and at times seizing, of assets that belong to third parties, particularly spouses and business associates whose assets may be tainted by being commingled with those of the person against whom an order or judgment to freeze or seize assets has been issued. Many legal systems do not allow for distinguishing assets or tracing assets by non-involved parties and therefore apply a presumption that assets deriving from criminal activities taint those assets that are commingled with them. To a large extent, this reverses the fundamental presumption of innocence and places the burden on the innocent party to prove that the assets claimed are free from the taint of illegality.

In many countries, particularly in the United States, government agencies have been given incentives to pursue proceeds of illegal activities by having a percentage of the confiscated assets turned over to their agencies. While on its face this policy appears positive, it has nonetheless altered the policies and practices of law enforcement and prosecutorial agencies in connection with interstate cooperation concerning the tracing,

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145. It is estimated that there are millions of daily electronic transfers amounting to billions of dollars. The larger transactions are governmental. A coding system could help identify individual transactions making it relatively easier to monitor these transactions and their source of origin.

freezing, and seizing of assets. As a result of this incentive, greater priority is given to the pursuit of financial crimes than to violent crimes. It also provides opportunities to suspects or accused who cooperate early on with these agencies and facilitate the process of forfeiting their assets to obtain reductions of their sentences. These practices have turned the incentives into a profit-sharing formula with criminal elements. This perversion of the incentives weakens the criminal justice system and maybe more significantly detracts from its integrity.<sup>146</sup>

### *Section 3.8. Intelligence and Law Enforcement Information-Sharing*

In the last few decades, law enforcement and intelligence cooperation has significantly increased. They are an important form of international cooperation, which, however, has not yet been recognized as equivalent to the other forms of legal cooperation in penal matters. Thus, there are no treaties applicable to law enforcement and intelligence cooperation as there are for mutual legal assistance, nor are there such forms of information-gathering and information-sharing by and between different agencies within separate countries. Regrettably, this important form of international cooperation has not yet been included in mutual legal assistance treaties.<sup>147</sup> Consequently, there are no legal or judicial safeguards to insure effective and regulated modalities of information-gathering and information-sharing between intelligence, law enforcement, and prosecutorial agencies. Thus, effectiveness is reduced and potential abuses are increased. This affects the accuracy of the information, and can lead to undue invasion of privacy. Because these practices are internationally unregulated, and nationally

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146. It is estimated that the U.S. and Switzerland share annually some \$300 million of confiscated proceeds. In the U.S., enforcement and prosecuting agencies partake in the distribution of confiscated assets, including state agencies. It is also estimated that, in view of the significantly high number of requests for tracing of assets under mutual legal assistance treaties between Switzerland and other countries, and based on multilateral treaties that Switzerland has ratified, as well as on its law on international mutual legal assistance, that country receives thousands of foreign requests for tracing assets in its financial institutions. As a result, those working in the fields of interstate cooperation in penal matters find themselves more absorbed in cases involving tracing, freezing, and seizing of assets than in cases involving other types of crimes. Because of the incentives of confiscating assets by the Canton in the which the assets are found, or alternatively by working out a negotiated sharing formula with the requesting state, violent crimes and other crimes which do not have such financial characteristics necessarily go down to the bottom of investigatory and prosecutorial priorities. Concerning Swiss procedures and jurisprudence on seizure of assets, see Dominique Poncet & Alain Maculoso, *Confiscation, Restitution et Allocation de Valeurs Patrimoniales: Quelques Considerations de Procedure Penale*, 221 LA SEMAINE JUDICAIRE 123-9 (2001).

147. See *supra* section 3.3.

unmonitored by the judiciary when committed other than on the national territory, they pose a challenge to due process of law and to the right of privacy.

Intelligence and law enforcement agencies have historically shared information outside legal and judicial supervision. This *de facto* modality of international cooperation has historically been secretive, and the laws of almost all countries seldom deal with the regulation of this type of activity, except when national legislation limits or regulates the scope and context of these agencies' domestic work. With respect to law enforcement agencies, the assumption has been that the national criminal laws applicable to the conduct of law enforcement officials at the domestic level are sufficient to regulate that activity. However, with the expansion of national intelligence and law enforcement activities in different countries, and with the increased sharing of information by these agencies, it is apparent that existing national legislation almost everywhere in the world is sufficient to regulate this type of activity and to bring it within the scope of judicial supervision.<sup>148</sup> The nature of the activity and the reluctance of those working in the intelligence field has prevented the adoption of national legislation providing legal controls and judicial supervision, even when they are designed only to prevent certain questionable, if not illegal, practices committed abroad.

Since the 1960s, the rise of "terrorism" in Europe and Latin America,<sup>149</sup> combined with the worldwide increase in drug trafficking and money laundering,<sup>150</sup> has given new impetus to intelligence and law enforcement information-sharing. Nevertheless, it is practiced selectively between states having close political ties and also between agencies from these states that have confidence in their respective reliability for confidentiality. What all of that amounts to are countries, and agencies within them, with a high level of comfort as to the preservation of their respective secret information, working together to the exclusion of others.

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148. For example, in the United States, the President can issue classified findings and policy directives to the Central Intelligence Agency (CIA) for extra-judicial killing of persons believed to be terrorists. See Esther Schrader & Henry Weinstein, *U.S. Enters a Legal Gray Zone: Strike in Yemen Raises Thorny Questions of Assassination and the Definition of War*, L.A. TIMES, November 5, 2002; M. Cherif Bassiouni, *The Problems with the Team Around Bush*, CHI. TRIB., January 5, 2003, Sec. 2, at 1.

149. M. Cherif Bassiouni, *Perspectives on International Terrorism*, in BASSIOUNI, TERRORISM CONVENTIONS, *supra* note 34, at 1.

150. M. Cherif Bassiouni & Jean-François Thony, *The International Drug Control System*, in 1 BASSIOUNI ICL, *supra* note 66, at 949.

After 9/11, the United States has become the recipient of a substantial flow of information from those countries it demands it from.<sup>151</sup> It has also become the arbiter of these countries' level and degree of cooperation. As a result, this practice of information-sharing, though for the United States is essentially information-getting, has become significantly more diffuse among more countries of the world. The facts of 9/11 demanded, rightfully so, more information-sharing than was practiced before, but in a substantial legal vacuum, as there is no multilateral convention regulating the flow of such information. This reduces the rights of individuals to know and to correct erroneous information, and in general, to protect the right of privacy.

Irrespective of the events of 9/11, the era of globalization has brought with it the spatial expansion of domestic, transnational and international crimes, and has also increased the opportunities for such crimes. Consequently, it is necessary for states to enhance their information-gathering and information-sharing about all forms of criminal activities. Surely, this is obvious in regard to "terrorism,"<sup>152</sup> drug trafficking and organized crime,<sup>153</sup> trafficking in women and children,<sup>154</sup> illegal arms' sales, money laundering,<sup>155</sup> smuggling in cultural artifacts,<sup>156</sup> and even car-smuggling. All these and other manifestations of criminal activities require a much higher level of information-gathering and information-sharing. This requires an expansion of the charters of Interpol<sup>157</sup> and Europol<sup>158</sup> to include a much more pro-active role for these organizations.

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151. See *Agreement Between the United States of America and the European Police Office*, Europol file no. 3710-60r2 (6 December 2001), *Supplemental Agreement Between the United States of America and the European Police Office on the Exchange of Personal Data and Related Information*, Europol file no. 3710/60r3 (20 December 2002). Nothing in these agreements provides for the right of privacy of individuals, or the right of any person or entity affected to have access to non-confidential information or to correct erroneous data.

152. M. Cherif Bassiouni, *Legal Controls of International Terrorism: A Policy-Oriented Perspective*, 43 HARV. INT'L L. J. 83 (2002).

153. M. Cherif Bassiouni & Eduardo Vetere, *Organized Crime and Its Transnational Manifestation*, in 1 BASSIOUNI ICL, at 883; and Bassiouni & Thony, *supra* note 150.

154. See IN MODERN BONDAGE: SEX TRAFFICKING IN THE AMERICAS (IHRLI, DePaul University 2002).

155. See Bassiouni & Gualtieri, *supra* note 112.

156. M. Cherif Bassiouni & James A.R. Nafziger, *The Protection of Cultural Poverty*, in 1 BASSIOUNI ICL, *supra* note 66, at 949.

157. See, e.g., Mary Jo Grotenroth, *Interpol Role in International Law Enforcement*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS (M. Cherif Bassiouni ed., 1988).

158. Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), 38 OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES 1, C 316 (27 November 1995).

But all that which is evident is not necessarily practiced. As stated above, no international, regional, bilateral, or national norms exist that regulate this inter-state activity. As a result, it remains selective, sporadic, and unregulated, with a potential for inefficiency, error, and infringement of the general right of privacy as well as for the specific rights of individuals.

The potential for misuse at the institutional level was evident in the “Echelon” operation<sup>159</sup> where the U.S., the U.K., Canada, Australia, and

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159. See Gerhard Schmid, *Report on the Existence of a Global System for the Interception of Private and Commercial Communications* (ECHELON Interception System) (2001/2098(INI)), European Parliament, PE 305.391, A5-0264/2001 (11 July 2001). The European Parliament resolution on the existence of a global system for the interception of private and commercial communications (ECHELON Interception System) (20010/2098(INI)) states:

*The European Parliament,*

- having regard to the Charter of Fundamental Rights of the EU, Article 7 of which lays down the right to respect for private and family life and explicitly enshrines the right to respect for communications, and Article 8 of which protects personal data,

- having regard to having regard to the European Convention on Human Rights (ECHR), in particular Article 8 thereof, which governs the protection of private life and the confidentiality of correspondence, and the many other international conventions which provide for the protection of privacy,

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A. whereas the existence of a global system for intercepting communications, operating by means of cooperation proportionate to their capabilities among the US, the UK, Canada, Australia and New Zealand under the UKUSA Agreement, is no longer in doubt; whereas it seems likely, in view of the evidence and the consistent pattern of statements from a very wide range of individuals and organisations, including American sources, that its name is in fact ECHELON, although this is a relatively minor detail,

B. whereas there can now be no doubt that the purpose of the system is to intercept, at the very least, private and commercial communications, and not military communications, although the analysis carried out in the report has revealed that the technical capabilities of the system are probably not nearly as extensive as some sections of the media had assumed, ]

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*Compatibility with EU law*

G. having regard to the statements made by the Council at the plenary sitting of 30 March 2000 to the effect that “the Council cannot accept the creation or existence of a telecommunications interception system which does not respect the laws of the Member States and which violates the fundamental principles aimed at protecting human dignity,” *Compatibility with the fundamental right to respect for private life (Article 8 of the ECHR)*

H. whereas any interception of communications represents serious interference with an individual’s exercise of the right to privacy; whereas Article 8 of the ECHR, which guarantees respect for private life, permits interference with the exercise of that right only in the interests of national security, in so far as this is in accordance with domestic law and the provisions in question are generally accessible and lay down under what circumstances, and subject to what conditions, the state may undertake such interference; whereas interference must be proportionate, so that competing interests need to be

New Zealand jointly carried out surveillance, by their respective official agencies, the CIA and MI-6, of some major European industries in order to inform their own. It was in short a major scandal of governmental industrial espionage against friendly states.<sup>160</sup>

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weighed up and, under the terms of the case law of the European Court of Human Rights, it is not enough that the interference should merely be useful or desirable,

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J. whereas the Member States cannot circumvent the requirements imposed on them by the ECHR by allowing other countries' intelligence services, which are subject to less stringent legal provisions, to work on their territory, since otherwise the principle of legality, with its twin components of accessibility and foreseeability, would become a dead letter and the case law of the European Court of Human Rights would be deprived of its substance,

K. whereas, in addition, the lawful operations of intelligence services are consistent with fundamental rights only if adequate arrangements exist for monitoring them, in order to counterbalance the risks inherent in secret activities performed by a part of the administrative apparatus; whereas the European Court of Human Rights has expressly stressed the importance of an efficient system for monitoring intelligence operations, so that there are grounds for concern in the fact that some Member States do not have parliamentary monitoring bodies of their own responsible for scrutinising the secret services,

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*National legislative measures to protect citizens and firms*

11. Urges the Member States to review and if necessary to adapt their own legislation on the operations of the intelligence services to ensure that it is consistent with fundamental rights as laid down in the ECHR and with the case law of the European Court of Human Rights;

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13. Calls on the Member States to aspire to a common level of protection against intelligence operations and, to that end, to draw up a Code of Conduct (as referred to in paragraph 4) based on the highest level of protection which exists in any Member State, since as a rule it is citizens of other states, and hence also of other Member States, that are affected by the operations of foreign intelligence services;

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15. Calls on those Member States which have not yet done so to guarantee appropriate parliamentary and legal supervision of their secret services;

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17. Calls on the Member States to pool their communications interception resources with a view to enhancing the effectiveness of the ESDP in the areas of intelligence-gathering and the fight against terrorism, nuclear proliferation or international drug trafficking, in accordance with the provisions governing the protection of citizens' privacy and the confidentiality of business communications, and subject to monitoring by the European Parliament, the Council and the Commission.

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160. Another example is the close CIA-Mossad (Israel) cooperation, which also targets legitimate Palestinian political activity. See DENNIS EISENBERG, URI DAN & ELI LANDAU, *THE MOSSAD, ISRAEL'S SECRET INTELLIGENCE SERVICE – INSIDE STORY* (1978). For a fascinating insight into the U.S. intelligence community's work and how it works, but particularly the National Security Agency (NSA), see JAMES BAMFORD, *BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY FROM THE COLD WAR THROUGH THE DAWN OF A NEW CENTURY* (2001).

With the post-9/11 increase in such information-sharing, and considering that the structure of names of the 1.4 billion Muslims of the world is different from that of their Western brethren, computerized databases are susceptible to many mistakes, with no way for the persons who have been wrongly included in certain categories in these databases to correct these mistakes.<sup>161</sup>

Some countries like the U.S. have legislation such as FOIA<sup>162</sup> and Privacy Act<sup>163</sup> to protect against errors, and presumably against abuses, but only when committed by U.S. governmental agencies. Since this does not apply to foreign agencies, the information received by U.S. agencies from foreign ones cannot be corrected. The administrative and judicial applications of the FOIA and Privacy Act which were at one time liberal,<sup>164</sup> have become unresponsive since 9/11 to the extent of contravening the letter, and surely the spirit of that legislation.<sup>165</sup>

Another set of problems arises in connection with the extra-territorial activities of intelligence and law enforcement officials. These extra-territorial activities are necessary for the reasons stated above and it would be absurd to respond to transnational and international crimes with boundary limitations on those entrusted to prevent and suppress such criminality. The problem however, as stated above, is the absence of legal regulation. The courts in many countries take the position that, in the absence of specific legislation, such extra-territorial activities are beyond the reach of domestic law. This argument goes even beyond that proposition and allows conduct deemed unconstitutional or illegal domestically to ripen into lawful conduct only because it took place in another country. Thus, when national agents kidnap a person abroad, national courts allow such a person to be tried on the supposition that *mala captus* is nonetheless *bene detentus*.<sup>166</sup> Similarly, evidenced seized abroad, either in the nature of coerced confessions or illegally obtained tangible evidence, which would not have been allowed into evidence had it been seized domestically, is

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161. See Ellen A. Yearwood, *Data Bank Control*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS (M. Cherif Bassiouni ed., 1988).

162. Freedom of Information Act, 5 U.S.C. §552 (2002) (amended 1996).

163. Privacy Act of 1974, 5 U.S.C. 552a (2002) amended 1990).

164. Janet Reno, Attorney General, Freedom of Information Act Memorandum, October 4, 1993.

165. John Ashcroft, Attorney General, Freedom of Information Act Memorandum, October 12, 2001, available at <http://www.usdoj.gov/04foia/0111012.htm>.

166. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 4, at chapter 5, pp 249-312, and particularly at 250-261.

allowed into evidence.<sup>167</sup> The assumption being that national laws, including the Constitution, do not extend nor apply extra-territorially.<sup>168</sup> In some cases, courts have recognized the applicability of the national constitutional and national laws extra-territorially if both the agent and the persons in question (suspect or accused) are nationals of the same state before whose courts the evidence is sought to be introduced.<sup>169</sup>

These questionable and illegal practices would be significantly reduced if this type of extra-territorial activity, as well as inter-state information-gathering and information-sharing would be regulated like other intelligence and law enforcement activities are regulated by domestic regulation.<sup>170</sup>

The European Court of Human Rights has ruled in several cases against extra-territorial actions by national law enforcement agents as constituting violations<sup>171</sup> of the European Convention on Human Rights and Fundamental Freedoms.<sup>172</sup> But, since the European Court can only provide monetary awards and not restore the *status quo ante*, these decisions have had a more limited deterring effect. Nevertheless, within the European

167. Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980); Steven M. Caplan, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COL. J. TRANSNAT'L L. 495 (1977); Charles C. M. Kolb, *The Fourth Amendment Abroad: Civilian and Military Perspectives*, 17 VA. J. INT'L L. 515 (1977).

168. The United States Supreme Court upheld the position that the Fourth Amendment does not apply to United States agents who are searching and/or seizing properties owned by a non-U.S. Citizen which is located outside the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

169. The Supreme Court in *Reid v. Covert*, 354 U.S. 1 (1957) held that a warrant for an overseas wiretap is subject to Federal Court jurisdiction. In *United States v. Toscanino*, 5 F.2d 267 (2d Cir. 1974), the Second Circuit took the position that the Fourth Amendment applies to U.S. agents abroad and that Federal courts can exercise their powers of supervision to suppress evidence illegally obtained abroad. That case, however, set up a high standard of egregious conduct and has been distinguished by a number of cases, including *U.S. v. Nira*, 515 F.2d. 68 (2d Cir.), *cert. denied*, 493, U.S. 847 (1975), and *United States ex rel. Lujan Gangler*, 510 F.2d 63 (2d Cir.), *cert.denied*, 421 U.S. 1001 (1975). The doctrine of inherent power of the court to supervise governmental action overseas which is directed against U.S. citizens was affirmed in *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976); *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980); and *United States v. Egan* 501 F. Supp. 1252 (S.D.N.Y. 1980).

170. Concerning the rights of individuals in inter-state cooperation, see THE INDIVIDUAL AS A SUBJECT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS (Albin Eser, Otto Logodny & Christopher L. Blakesley eds., 2002).

171. See DOMINIQUE PONCET, *LA PROTECTION DE L'ACCUSÉ PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (1977); ARTHUR H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (1978). See also *Bozano v. France* Eur. Ct. H.R. 5/1985/91/138 (18 December 1986); *Amekrane v. United Kingdom* 16 *YB Eur. Ct. H.R.* 356 (1973).

172. E.T.S. 5 (1950), 213 U.N.T.S. 262.

context, there is a much higher level of voluntary compliance by states with judicial decisions than in other regions of the world.

In 2000, the U.N. adopted a Convention Against Transnational Organized crime<sup>173</sup> and it deals in part with, but does not regulate, the question of inter-state law enforcement cooperation. Certain provisions, namely Articles 26-28 encourage bilateral and multilateral agreements on the subject of joint investigations, invites states parties in accordance with their national legal systems to develop national legislation permitting special investigative techniques, including electronic and other forms of surveillance and undercover operations, which presumably could be extended to law enforcement and intelligence agencies of other countries. It also addresses, though it does not regulate matters concerning criminal records, the protection of witnesses, assistance to victims, and criminalization of obstruction of justice.<sup>174</sup>

*Article 27, Law Enforcement Cooperation*, states:

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

a. To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities.

b. To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

i. The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

ii. The movement of proceeds of crime or property derived from the commission of such offences;

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173. United Nations Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, arts. 19-29, U.N. Doc. Res. A/55/383 (2 Nov. 2000).

174. *Id.*

iii. The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

c. To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

d. To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

e. To exchange information with other States Parties on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

f. To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this convention as the basis of mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavor to cooperation within their means to respond to international organized crime committed through the use of modern technology.

The conclusion is inescapable that intelligence and law enforcement information-gathering and information-sharing is necessary, but that needs to be better regulated at the international and national levels.

*Section 3.9. Regional and Sub-Regional “Judicial Spaces”*

Some regions and sub-regions of the world have cultural, legal and political and economic affinities. On that basis, they have established regional organization and sub-regional cooperative arrangements. Among them are: The Council of Europe, The European Union, The Organization of American States, The League of Arab States, The Organization of African Unity, The Commonwealth Secretariat. Sub-regional organizations include: countries from Scandinavia, the Baltic States, The Benelux Countries, The Andean Countries and others. In addition, there are many regional, inter-regional and sub-regional organizations and agreements regulating different aspects of international cooperation for these countries. Most of these deal with economic and social matters, including those like NATO which started as a military alliance and has now expanded into some social areas. The OSCE is also another type of organization which originated for the purposes of pressuring communist states in becoming more liberal, reinforcing democracy and strengthening human rights, and has developed into an organization which engages in support of democracy, human rights, and peace-keeping operations in Europe.

The relatively recent post-conflict justice initiatives in various contexts brought some of these and other inter-governmental organizations in the field of criminal justice, including international criminal justice.<sup>175</sup>

The convergence of these and other factors brought about a greater interest by inter-governmental organizations and particularly by regional and sub-regional organizations in the field of criminal justice. Because there are so many organizations whose history has evolved almost entirely different ways from one another (primarily because their mandates are so different), it is impossible to even categorize this evolution. What is certain is that, in some way or another, many inter-governmental organizations at the regional and sub-regional levels, and many countries with a history of sub-regional cooperation have moved into the field of criminal justice with ramification in international criminal justice or, at least, in international cooperation in penal matters. For example, the Council of Europe has sponsored over twenty-four conventions in inter-state cooperation in penal matters.<sup>176</sup> The OAS, The League of Arab States and The Commonwealth Secretariat have done the same. At the sub-regional levels, the Benelux the Nordic countries have also developed a region for international cooperation in penal matters.<sup>177</sup>

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175. See POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002).

176. See LA COOPERATION INTER-ÉTATIQUE EUROPÉENNE EN MATIÈRE PÉNALE (Ekkehart Müller-Rappard & M. Cherif Bassiouni ed., 2d rev. ed., 1991).

177. See Cohen Mulder & Bert Swart, *Judicial Assistance and Mutual Cooperation in Penal Matters: The Benelux and Nordic Countries*, in 2 BASSIOUNI ICL, *supra* note 66, at 535.

The European Union has entered the field with the so-called “third pillar” referring to justice issues. The Schengen Agreement has also established an open-boundary between the member states of the EU.<sup>178</sup> Recently, the EU has adopted an idea which had originally been proposed in the Council of Europe in the ‘70s, namely that of “judicial spaces.”<sup>179</sup> This concept essentially means that within the area determined as part of the “judicial space” judicial orders shall be enforced automatically by the respective states without the need for the intermediation of a judicial order issued by the enforcing state. This would also mean that law enforcement officials from one member state can pursue their investigations or pursue fugitives outside their national boundaries (obviously, with some coordination with local law enforcement). The first step in implementing this concept was developed through an EU directive authorizing the execution in any member state of an arrest warrant issued by the proper prosecutorial or judicial authorities of another member state on the condition that such a warrant was duly issued in accordance with the legal requirements of the laws of the state in which it was issued.<sup>180</sup>

#### **Section 4. Assessing the “Indirect Enforcement System”**

Since the end of World War II, international, transnational, and national incidence of crime have consistently increased while national criminal justice systems have become less able to deal with that increased volume. Since the 1990s, the apprehension and prosecution of offenders has also become more difficult, making international cooperation that more important, even though the modalities of international cooperation discussed above have not proven to be as effective as needed. The growth of globalization will only increase these difficulties.

Some government officials argue that the problems of international cooperation stem from procedural requirements that increase the rights of the individual to the detriment of the process.<sup>181</sup> The argument is not without merit, but it ignores the more significant causes which are systemic. This is the cause of international cooperation’s ineffectiveness as a system. For sure it is a workable system and it produces many positive results. But it can be

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178. See Bert Swart, *The European Union and the Schengen Agreement*, in 2 BASSIOUNI ICL, *supra* note 66, at 247.

179. See *supra* note 70.

180. See *supra* note 71.

181. See M. Cherif Bassiouni, *Introduction to Proceedings of the International Conference on Extradition held at International Institute of Higher Studies in Criminal Sciences* (Siracusa), 62 REVUE INTERNATIONALE DE DROIT PÉNAL (1991).

much more effective without detrimentally affecting “due process” and the rights of individuals.

The systemic problems of international cooperation derive in part from the insistence by many governments on bilateralism over multilateralism. The reason such states favor this approach is because they view international cooperation in penal matters as an extension of their political relations. Thus, governments reduce procedural barriers to international cooperation with friendly nations and increase them with less friendly ones.<sup>182</sup> As a result, international cooperation in penal matters has become a part of states’ political accommodation processes, instead of being a legal system, based on an international *civitas maxima*.<sup>183</sup>

A new approach is needed in which all the modalities of international cooperation which are now applied piecemeal, to be integrated into a unified system. In other words, the eight modalities discussed above should be part of the same gear-box in order to allow the appropriate authorities to shift from one gear to another. For example, if extradition fails, the alternative is not to kidnap the person, but to obtain conditional extradition subject to the return of the accused if proven guilty to serve the sentence in the originally requested state,<sup>184</sup> or to transfer the criminal proceedings.<sup>185</sup> In an integrated comprehensive system of international cooperation, more options are available to enhance the success of the process. That can easily be accomplished by national legislation,<sup>186</sup> and through multilateral and bilateral treaties. Such an integrated system’s goals should include: political

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182. See M. Cherif Bassiouni, *The “Political Offense Exception” Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENV. J. INT’L L. & POL’Y 255 (1987). Another set of problems arises out of the bureaucratic divisions that burden the administration of criminal justice in almost every country, which weakens international cooperation, the limited number of experts among judges, prosecutors, and administrative officials working in this field, and the fact that such personnel must face a large volume of cases with limited resources and support.

183. See BASSIOUNI, *supra* note 4, at Chapter I and section 2.

184. *I.e.*, execution of foreign sentences, as discussed in section 3.4.

185. See *supra* section 3.5.

186. Only three countries have developed integrated national legislation on international cooperation. They are Austria, Switzerland, and Germany. Austrian Law on Mutual Assistance in Criminal Matters, *Bundesgesetz vom 4 December 1979 Über alle Auslieferung und die Rechtshilfe in Strafsachen* (Auslieferungs – und Rechtshilfegesetz –ARGH), BGBl, Nr. 529/1979. See also ROBERT LINKE, ET AL., INTERNATIONALES STRAFRECHT (1981); KLAUS SCHWAIGHOFER, AUSLIEFERUNG UND INTERNATIONALES STRAFRECHT (1988). Swiss Federal Law on International Mutual Assistance in Criminal Matters, *ENTRAIDE INTERNATIONALE EN MATIÈRE PÉNALE* of March 20, 1981, *amended* 1996. Germany has, in connection with its ratification of the ICC, adopted a new comprehensive legislation on international cooperation in penal matters. See German ICC Co-operation Act of 21 June 2002, 1BGBl 2144. (Federal Gazette)(2002).

neutrality, the preservation of international standards of legality, human rights protections, and the enhancement of effective cooperation.

Multilateralism should serve to buttress bilateralism and *vice versa*. Moreover, harmonization of national legislation should be sought to produce new synergies that enhance complementarity. Thus, extradition, legal assistance, transfer of execution of penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets derived from criminal proceeds, intelligence and law enforcement information-sharing, and regional and sub-regional “judicial spaces” can reinforce each other without sacrificing proper legal procedures and without violating individual human rights.<sup>187</sup>

The present weaknesses of the “indirect enforcement system” include: 1) failing to provide an overall framework that integrates all the applicable modalities; 2) depending almost entirely on the effectiveness of national legal systems; 3) lacking a policy that provides continuity and progressive development; 4) placing the sole duty on states to act in conformity with treaty obligations without international constraints; 5) over-reliance on bilateralism; 6) failing to provide a mechanism for the resolution of conflicts that arise between states; and 7) lacking adequate safeguards to insure “due process.” In short, the present system has all the weaknesses inherent in an incoherent system.

A priority solution is to clarify and reinforce the obligations of states under *aut dedere aut judicare*. The duties to prosecute or extradite must include the unarticulated conditions of being executed effectively and fairly<sup>188</sup> and to develop a multinational integrated approach for all the modalities of international cooperation.<sup>189</sup> The cumbersome, costly, and

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187. See, e.g., Stefan Trechsel, *The Protection of Human Rights in Criminal Procedure*, 49 *REVUE INTERNATIONALE DE DROIT PÉNAL* 541 (1968); *Resolution of Twelfth International Penal Law Congress, in INTERNATIONAL CONGRESS ON PENAL LAW, ACTES DU XIIIE CONGRÈS INTERNATIONAL DE DROIT PÉNAL* 553-64 (Hamburg, Sept. 22, 1979) (Hans-Heinrich Jescheck ed., 1980). See also ANNE F. BAYESKY, *THE U.N. HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* (2001); BASSIOUNI, *HUMAN RIGHTS COMPENDIUM*; THEODOR MERON, *HUMAN RIGHTS IN INTERNATIONAL LAW* (1991).

188. See BASSIOUNI, *supra* note 5, at Chapter I.

189. Resolution of the Council of Ministers of Justice in 1987. See Rec. No. R/87/1 of the Member States (adopted by Committee of Ministers of Justice, Council of Europe 19/1/87); MÜLLER-RAPPARD & BASSIOUNI, *EUROPEAN INTER-STATE COOPERATION*, *supra* note 176, at 1695-1791. A special Committee of Experts has since been established with the Council of Europe to work on this project. In addition, the Council of Arab Ministers of Justice developed such a modal code of inter-state penal cooperation in 1988. Regrettably, it has not received attention from the Arab governments, as those states have not yet made international penal cooperation a priority. See 2 *Council of Arab Ministers of Justice: A Collection of the Council's Documents*, 96-148 (Jan. 1988); Peter Wilkitzki, *International and Regional Developments in the Field of Inter-State Cooperation in Penal Matters: The Council of Europe*, in 2 BASSIOUNI *ICL*, *supra* note 66, at 999.

lengthy bilateral approach must give way to a more effective multilateral process or at least to an integrated bilateral approach which can strive for greater national similarities.<sup>190</sup>

The practices described in section 3 with all their weaknesses persist even though the resort to these modalities on a singular and unintegrated basis has proven to be ineffective and inadequate in coping with increased international, transnational, and national criminality, particularly with respect to organized crime,<sup>191</sup> drug traffic,<sup>192</sup> and terrorism.<sup>193</sup> Consequently, international, transnational, and national criminal phenomena are not as effectively controlled as they could be, and governments find themselves attracted to either reduce the procedural safeguards of due process or to engage in questionable and even in illegal practices under their domestic laws and under international law.

This state of affairs is in part due to the political short-sightedness of politicians and senior government officials. But it is also due in part to the fact that there are insufficiently knowledgeable experts of ICL in ministries of foreign affairs and justice in most countries, particularly in developing countries. Yet developed countries offer little technical legal assistance and support to developing countries. Inter-governmental organizations too, are not offering sufficient technical legal assistance and support to developing countries. Moreover, administrative and bureaucratic divisions among the national organs of law enforcement and prosecution impair the effectiveness of international cooperation in penal matters.<sup>194</sup>

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190. There are an estimated 2,000 treaties among over 150 countries in the world regulating one or another aspect of international cooperation. The U.S. has over one hundred bilateral extradition treaties. See BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 4, at 113-121. The U.S. also has forty-six bilateral treaties on mutual legal assistance and nine treaties on execution of foreign penal sentences. A large number of bilateral treaties deal with inter-state cooperation in tax matters.

The Council of Europe has twenty-eight multilateral treaties on inter-state cooperation in penal matters. Other regional organizations like the OAS and The League of Arab States have a number of such multilateral treaties.

191. See M. Cherif Bassiouni & Eduardo Vetere, *Organized Crime and its Transnational Manifestations*, in 1 BASSIOUNI *ICL*, *supra* note 66, at 883.

192. See M. Cherif Bassiouni & Jean François Thony, *The International Drug Control System*, in 1 BASSIOUNI *ICL*, *supra* note 66, at 905.

193. See M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 *HARV. INT'L L. J.* 83 (2002); M. Cherif Bassiouni, *Perspectives on International Terrorism*, in BASSIOUNI, *TERRORISM CONVENTIONS*, *supra* note 34, at 1.

194. The most common divisions in national systems are among law enforcement, prosecution, judiciary, and corrections. In addition, within each subsystem, there are still more separate bureaucratic and administrative units. All too frequently these subsystems are self-contained and have their own separate international activities. Moreover, each subsystem defends its respective turf and supports its own methods, goals, and purposes leading to the

The following are some recommendations designed to enhance the effectiveness of international cooperation in penal matters. They are not listed on the basis of any priority or ranking.

Recognition of the maxim *aut dedere aut judicare* as a *civitas maxima*<sup>195</sup> and the development of international standards for states' compliance, including standards for effective and good faith prosecution and extradition.

Establishing by a multilateral treaty the criteria for criminal jurisdiction based not only on: territoriality, nationality, passive personality, protected interest, and universality,<sup>196</sup> but also other policy-oriented criteria that take into account national and international interests in achieving effectiveness and fairness, including criteria for conflict resolution and compulsory adjudication before the International Court of Justice, or before regional judicial organs.

Granting individual victims the right to initiate, or have a role in, prosecution as *partie civile*, including states other than that of their nationality.<sup>197</sup>

Developing a model international criminal code to serve as a model for codifying national legislation.<sup>198</sup>

fragmentation of the system of international cooperation. A thorough discussion of the effects of bureaucratic subsystems on the administration of criminal justice is contained in a report, prepared by this writer and presented to the *Seventh United Nations Congress on Crime Prevention and the Treatment of Offenders* (Milan, Italy Aug. 26 – Sept. 6, 1983), at 40-43, U.N. Doc. A/Conf. 121/NGO 1 (1986).

195. See *supra* section 2.

196. See BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 4, chapter VI, at 313-442. See also Christopher Blakesley, *Extraterritorial Jurisdiction*, in 2 BASSIOUNI *ICL*, *supra* note 66, at 43; Bassiouni, *Universal Jurisdiction*, *supra* note 10.

197. This idea was accepted by the United Nations Committee on Crime Prevention and Control on the basis of a proposal made by a Committee of Experts meeting at International Institute of Higher Studies in Criminal Sciences (Siracusa) for the implementation of the *United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. GAOR, 40th Sess., Supp. No. 53, at 213, U.N. Doc. A/40/53. See also Bassiouni, *Universal Jurisdiction*. See Symposium, *International Protections of Victims*, 7 NOUVELLES ETUDES PENALES (M. Cherif Bassiouni ed., 1988). See also *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur, M. Cherif Bassiouni*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(d), U.N. Doc. E/CN.4/2000/62 (18 January 2000).

198. The only comprehensive draft international code was prepared by this author in 1987. See BASSIOUNI, *ICL CONVENTIONS*, *supra* note 53. The Association Internationale de Droit Pénal has been a leader in this effort since 1926. See 6 *REVUE INTERNATIONALE DE DROIT PÉNALE* 275 (1928). The Association's former president made contributions to this effort prior to 1926 in his work, VESPASIAN V. PELLA, *LA CODIFICATION DU DROIT PÉNAL INTERNATIONAL* (1922). Subsequently, the International Association of Penal Law sponsored a project directed by the author, then its Secretary-General, which was presented to the Sixth United Nations

Developing specialized parts in national legislation on international cooperation in penal matters which integrate all the modalities of international cooperation.

Adopting a multilateral convention on cooperation between law enforcement and intelligence agencies setting forth the means, methods, and limitations of such cooperation, including the protection of fundamental human rights and the right to privacy.

Consistently including the integrated modalities of international cooperation in all substantive international criminal law conventions.

Developing a worldwide program of technical legal assistance,<sup>199</sup> and continuing legal education programs for public officials, judges and prosecutors in international criminal law.<sup>200</sup>

Developing in each country a specialized cadre of legal experts on ICL as well as within Intergovernmental organizations.

Developing networks of information and criminal justice data-sharing within states and between states.<sup>201</sup>

All of the above recommendations must apply in conformity with international, regional, and national human rights norms and standards.<sup>202</sup> It should be understood that the observance of human rights norms and standards does not reduce the efficiency or effectiveness of criminal justice systems.

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congress on Crime Prevention and the Treatment of Offenders (Caracas, Venezuela, Aug.-Sept. 1980) and published as M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL COURT* (1980), translated into French by Christine Van den Wyngaert as *Projet de Code Penal International*, 51 *REVUE INTERNATIONALE DE DROIT PÉNAL* (vols. 1-2, 1980), which was followed by a symposium issue of commentaries, 51 *REVUE INTERNATIONALE DE DROIT PÉNAL* (vols. 3-4, 1980); the Draft Code was translated into Spanish by Professor José de la Cuesta and was published as *DERECHO PENAL INTERNACIONAL PROYECTO DE CODIGO PENAL INTERNACIONAL* (1983), and it was translated into Hungarian by the Hungarian Ministry of Justice in 1984. A revised edition was published as M. Cherif BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987). See also 60 *REVUE INTERNATIONALE DE DROIT PÉNAL* No. 1-2, 1989, and in particular, the General Reports of Professors Otto Triffterer at 29, and Lech Gardocki at 89. The Fifteenth International Penal Law Congress, held in Vienna, October 1989, adopted a resolution to that effect. See Proceedings of the Fifteenth International Penal Law Congress (1991).

199. See *United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milano, Italy, August 26-September 6, 1983), U.N. Doc. A/Conf.121/22/Rev.1. For a Commentary on the Guiding Principles, see 6 *NOUVELLES ETUDES PÉNALES* 121 (1985).

200. *Id.*

201. *Id.*

202. See BAYEFESKY; BASSIOUNI; MERON, *supra* note 187.

## Section 5. Conclusion

There is in progress a rapid and significant process of harmonization, and to some extent, uniformization of the substantive and procedural norms and rules of international cooperation in penal matters. This process has been driven by multilateral treaties such as those developed by the Council of Europe, the Organization of American States, and the League of Arab States. When, cumulatively, over 100 states adhere to such multilateral conventions whose substantive and procedural norms and rules are similar, the consequences on national substantive norms and procedures are self-evident. Furthermore, the United Nations has been spurring model bilateral treaties in extradition, mutual legal assistance, transfer of prisoners, and transfer of proceedings which has also contributed to the process of harmonization. The events of 9/11 also spurred a significant leap in all forms of international cooperation, particularly in the areas of tracing, freezing and seizing of assets and in information-gathering and information-sharing by law enforcement and intelligence agencies, and also by prosecutorial agencies. In a different vein, European integration has spurred the more advanced concept of a “judicial space.” Lastly, the ICC, whose states-parties are approaching 100,<sup>203</sup> requires national implementing legislation in the area of cooperation.<sup>204</sup>

The modalities of cooperation between states-parties and the ICC, which can be described as vertical, even though the ICC is not a supra-national institution,<sup>205</sup> in contrast to relations between states-parties, which can be described as horizontal, are sure to have an impact upon all forms of international cooperation in penal matters. For if some 100 states develop national legislation with respect to modalities of cooperation with the ICC, it is sure to have an impact upon their bilateral practices.

There is in course a process of harmonization, if not unification, within each component of ICL. But the “indirect enforcement system” of ICL and the “inter-state cooperation” regimes are moving at a faster pace than any other component of ICL. Both regimes are likely to become one, and their modalities are likely to evidence a greater degree of substantive and

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203. As of April, 2003, 90 states had ratified the treaty establishing the ICC. For an updated list of ICC States-Parties, see <http://www.un.org/law/icc/index.html>. See also *ICC Progress Report No. 10* (International Human Rights Law Institute, DePaul University College of Law 2003).

204. See Part 9 of the ICC Statute in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (compiled by M. Cherif Bassiouni, 1999). See also BASSIOUNI, *supra* note 5, at Chapter VII, section 10.

205. See BASSIOUNI, *supra* note 5, at Chapter VII, section 2.

procedural similarity than any other component of ICL. The eight modalities discussed in this chapter are also likely to expand to include others.

The merging of these two regimes will reflect the erosion, if not elimination, of the distinction between national, transnational, and international crimes, and the increased need to cooperate with respect to all forms of criminality. But that outcome will not be the result of a deliberate choice based on the acceptance of a *civitas maxima*,<sup>206</sup> nor on the more specific recognition of the obligations of the maxim *aut dedere aut judicare*.<sup>207</sup> Instead, it will be the product of a pragmatic evolution whose impetus is globalization and not doctrinal concepts.

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206. See BASSIOUNI, *supra* note 5, at Chapter I, section 3.

207. See *supra* section 2.



# **“Surrender” in the context of the International Criminal Court and the European Union**

**Michael Plachta\***

The last decade of the twentieth century has witnessed the emergence of a new form of international cooperation in criminal matters, called “surrender.” It was given birth in the Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY),<sup>1</sup> and the Statute of the International Criminal Tribunal for Rwanda (hereinafter: ICTR).<sup>2</sup> This procedure has found a clear and unequivocal definition and normative regulation in the Rome Statute of the International Criminal Court (hereinafter: the ICC).<sup>3</sup> From these instruments, it could have been inferred that this new mechanism is applicable in the relations between an international criminal tribunal (court) and a state. However, one could argue that this conclusion will have to be modified in light of the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States of the European Union (hereinafter: EU), adopted by the Council of the European Union on 13 June 2002.<sup>4</sup> This Decision uses the term “surrender” for delivering up offenders among this group of countries. This is a troubling development, particularly for states that interpret Article 102 of the Rome Statute in good faith and, therefore have already passed domestic legislation on “surrender” thereby distinguishing it from “extradition.”

This paper will discuss some problems raised by this new phenomenon. First and foremost, the question arises as to whether “surrender” is a

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1. *Statute of the International Tribunal for the former Yugoslavia*, in Report of the Secretary-General Pursuant to paragraph 2 of U.N. Security Council Resolution 808, U.N. GAOR, 48th Sess., 3175th mtg., U.N. Doc. S/2-5704 (1993), *reprinted in* 32 I.L.M. 1159, p. 1198-1200 [hereinafter ICTY Statute].

2. *Statute of the International Criminal Court for Rwanda*, Article 23, in UN Sec. Council Res. 955, UN SCOR, 49th Year, Res. and Dec., at 15, UN Doc. S/INF/50 (1994) [hereinafter ICTR Statute].

3. *Rome Statute of the International Criminal Court*, 17 July, 1998, U.N. Doc. A/Conf. 183/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

4. *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of the European Union*, 13 June 2002, O.J. L 190/1 (18.07.2002).

qualitatively and substantially distinct procedure from “extradition.” Moreover, one could wonder about the proper “environment” in which each of these forms should operate (“horizontal” as opposed to “vertical,” see below). Finally, an impact of both regulations on domestic legal system deserves a scrutiny which will take into account both ratification (of the ICC Statute) and implementation (of the Framework Decision). These problems will be analyzed separately in each of these two contexts

## 1. The International Criminal Court context

### A. *Extradition (surrender)–related constitutional problems*

Admittedly, the Rome Statute of the ICC, with many of its innovative solutions and “revolutionary” provisions (art. 27 is certainly one of them), poses a significant challenge to states on their way towards its ratification. Constitutional impediments are undeniably the most difficult to overcome in this process. Among them, problems relating to delivering up persons to the Court are of crucial importance to both the ICC and the states themselves.

Under the Rome Statute, the presence of the accused in The Hague (or other place where the Court may have its seat in a particular case)<sup>5</sup> is a *conditio sine qua non* to prosecution, there being no possibility for trial *in absentia*.<sup>6</sup> Without its own independent police force, the ICC must rely on the cooperation of States Parties to arrest suspected individuals and make them available to the Court and its organs. The ability of the ICC to obtain custody of accused persons is directly related to the scope of legitimate state objections to the procedure whereby such a person is being delivered to the Court.

In the traditional system of extradition whereby offenders are being handed over between states, the grounds for refusal have developed into a highly sophisticated and extremely broad and diversified scheme which affects the effectiveness of international cooperation in criminal matters.<sup>7</sup> Accordingly, three possible types of objections could be raised against a surrender request submitted by the ICC. First, states might argue that their

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5. Article 3 para. 3 of the Rome Statute provides that, in addition to its regular seat in The Hague, the Court may sit elsewhere, whenever it considers it desirable.

6. Daniel J. Brown, *The International Criminal Court and Trial In Absentia*, 24 *BROOKLYN J. INT'L L.* 763 (1999).

7. Michael Plachta, *Human Rights Aspects of Extradition: Grounds for Refusal and the Principle Aut Dedere Aut Judicare*, in *INTERNATIONAL COOPERATION IN CRIMINAL MATTERS BALANCING THE PROTECTION OF HUMAN RIGHTS WITH THE NEEDS OF LAW ENFORCEMENT* 41 (Commonwealth Secretariat 2001).

domestic procedural requirements for arrest and surrender have not been met in the particular case. Second, states might point to such important grounds for refusal which are contained in their constitutions. Third, states might object to the ICC's failure to provide the same human rights and fair trial standards as the custodial state.<sup>8</sup>

Consequently, states contemplating ratification of the Rome Statute have to deal with some or all of the following extradition (surrender)-related problems:

choice of procedure whereby an accused will be delivered up to the ICC;  
 extradition of nationals;  
 immunities;  
 life imprisonment;  
 right to trial by jury.

The following are some provisions under the Rome Statute that could involve constitutional questions for States Parties when they are requested to surrender a person to the ICC:

- the absence of immunity for Heads of State (article 27);
- crimes listed under the Statute are not subject to a statute of limitations (article 29);
- the obligation of a State to surrender its nationals at the ICC's request (articles 59 & 89);
- the ICC's power to impose a sentence of life imprisonment (article 77(1)(b)); and
- persons appearing before the ICC will be judged by a three-judge chamber rather than by a jury (article 39(2)(b)(ii)).

Since in many countries, these issues involve constitutional provisions two approaches have emerged in the practice of ensuring consistency of national constitutions with the Statute: amendment approach and interpretative approach.<sup>9</sup> Some countries have decided to amend their constitutions to ensure they are in line with the Rome Statute. Such amendments have various forms: some are general (e.g. France, Colombia, Portugal), others address specific issues (e.g. Germany). While in only a few countries, a flagrant incompatibility between the Statute and the national constitution was established, and other states wanted to avoid possible

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8. One of the commentators argues that "surrender should only be possible if the ICC provided the same degree of rights protection as in the custodial state." See Simon N.M. Young, *Surrendering the Accused to the International Criminal Court*, 71 BRIT. YBK. INT'L L. 339 (2000).

9. Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 8 (2001).

future constitutional challenges, in most cases, the rationale behind the decision of these states to amend their constitutions is unclear. An explanation should probably take into account various legal and policy considerations, many of which are peculiar to the circumstances or constitutional traditions of a particular country.

Other states, after having conducted a rigorous domestic analysis and debate of the Statute and relevant constitutional provisions, have concluded that the latter are compatible with the former. In these countries, initial concerns regarding potential inconsistencies have been cleared which has led the way to the view that the Statute and the constitution can in fact be read harmoniously. The interpretative approach is based on several considerations of a more general application. They refer to the following analytical tools: (a) functional interpretation of the constitution that takes into account the evolution of that legal act, on the one hand, and the contemporary needs (social, political, etc.), on the other; (b) teleological interpretation pointing to the purpose and spirit of the constitution; (c) value-based interpretation; (d) interpretation taking into account a broader context, specifically international law obligations of a state.

The basic constitutional analysis in a number of countries is based, for instance, on the assumption that constitutions are living documents that reflect the aspirations of people. It follows from this premise that constitutional provisions should not be construed statically, but interpreted to embrace scenarios not contemplated by their drafters. As one commentator has noted: "The Constitution is a living document which reflects the aims, aspirations, genus and genesis, temper and thinking of the people. Constitution is not merely an imprisonment of the past, but is also alive to the unfolding of the future."<sup>10</sup> This kind of (liberal) interpretation of the constitution and its principles which would bring it to the conformity with the needs of the time would make amendments and drastic changes to it unnecessary. Another interpretative tool is to look at the text of the constitution from the perspective of underlying values embedded in the constitution and determine coincidence and commonality between the values of the ICC treaty and that constitution.

#### *B. "Extradition"/"surrender"/"transfer": terminology versus substance*

Even the highest level of perfection displayed in the Statute will not prevent the Court from being a "paper tiger" if the provisions adopted in

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10. S. MAHMOOD & N. SHAUKAT, CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 13 (3d ed. 1996).

Part 9 do not ensure an effective, efficient, prompt and real assistance, and cooperation of states.<sup>11</sup> Given that the Court does not have at its disposal its own police, military or law enforcement forces, it has to rely entirely on the assistance rendered by the authorities of the states. Moreover, since the Court is not allowed to hold trials in the absence of the accused, the only way to avoid the Court being completely paralyzed is to provide it with a tool that can be used to effectively secure the presence of defendants before it. Finally, an experience of the ICTY in this regard had to be taken into consideration.

From the outset, it was obvious that broadly speaking there are two options to solve this problem: either to maintain extradition (straight ["regular"] or somewhat modified) or to create a new form of delivery of a "body of a criminal," different and separate from extradition. The label that would be used for that procedure was not that important. It may be recalled that the Statute of the International Tribunal for the Former Yugoslavia<sup>12</sup> its implementing Rules of Procedure and Evidence,<sup>13</sup> and the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)<sup>14</sup> make reference to the process by which defendants are being brought before the Tribunal as "transfer" or "surrender." On the other hand, the Draft Statute prepared by the International Law Commission adopted the name "transfer."<sup>15</sup> The crucial point was to decide whether or not such a "delivery" will be carried out within the framework of extradition or rather a new method has to be worked out.

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11. See Rome Statute, *supra* note 3, at Arts. 86-102 ("Part 9: International Cooperation and Judicial Assistance"). However, some authors are less optimistic with regard to the question whether this goal can be achieved. They conclude that a careful analysis of Part 9 of the Statute suggests that while States agree to the establishment of the Court in principle, and even to its jurisdiction in theory, they are not willing to make the concessions to international cooperation that are needed to make the Court a success in practice. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEORGETOWN L. J. 444 (2000).

12. See ICTY Statute, *supra* note 1; Art. 19(2) ("surrender or transfer"), Art. 20(2) ("transfer"), & Art. 29(2)(e) ("the surrender or the transfer").

13. See ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), *as amended* by U.N. Doc. IT/32/Rev. 11 (1997), Rule 57 ("transfer"), Rule 58 ("surrender or transfer").

14. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 & Add. 1 (1993), *reprinted in* 32 I.L.M. 1163, ¶ 126 ("surrender or transfer") [hereinafter *Secretary-General's Report*].

15. *Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court*, 2 May-22 July, 1994, G.A., 49th Sess., Supp. No. 10, A/49/10, 1994, art. 53.

Although this problem has been discussed for quite a few years both in the context of the ICTY<sup>16</sup> and the ICC,<sup>17</sup> no decision was made until the last week of the Rome Conference. There the Polish delegation suggested that a more structured and a better methodological approach be adopted towards this problem that would reflect what the Roman jurists had taught a couple of thousand years earlier: *bene docet qui bene distinguit*. It was recommended that the solution should include the following steps:

- to distinguish clearly between extradition and surrender by pointing to fundamental differences between them;<sup>18</sup>
- to define surrender as a genuine and unique form of cooperation between states and the International Criminal Court; and;
- to frame this form accordingly by specifying its constituent elements with due consideration to the specific nature, organization, and jurisdiction as well as the needs of the ICC.

Along these lines, a set of definitions was proposed which has been adopted in Article 102.<sup>19</sup> This provision states that for the purposes of the Statute, “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute, whereas “extradition” means the delivering up of a person by one State to another as provided by treaty, convention, or

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16. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* (G.A., 50th Sess., Supp. No. 22, A/50/22, 1995, 39-42); see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II, (Compilation of Proposals) (G.A., 51st Sess., Supp. No. 22, A/51/22, 1996, 263-273); see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I, (Proceedings of the Preparatory Committee During March-April and August 1996) (G.A., 51st Sess., Supp. No. 22, A/51/22, 1996, 64-68); see *Decisions Taken by the Preparatory Committee at its Session Held 1 to 12 December 1997* (A/Ac.249/1997/L.9/Rev.1, 1997, 55-62); *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands* (A/Ac.249/1998/L.13, 1998, 144-161).

17. See Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557 (1994) (noting that ICTY Statute contains mandatory requirement of transfer of suspect to Tribunal); Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT'L L. 510 (1996) (arguing that although Security Council resolutions do not have exceptions to duty to surrender suspects, scheme devised in implementing legislation of United States could result in denial of surrender).

18. See Franco Mosconi & Nicolitta Parisi, *Co-Operation Between International Criminal Court and States Parties*, in *THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 313* (Flavia Lattanzi ed., 1998) (attempting to distinguish between “extradition” and “surrender” in the context of the ICC).

19. See Rome Statute, *supra* note 3, at art 102 (defining “surrender” and “extradition” in context of ICC). The proposal was made at the suggestion of the Polish delegate; see Michael Plachta, *Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law*, 5 U.C. DAVIS J. INT'L L. & POL. 181 (1999).

national legislation. To further clarify the meaning of these terms and to make the distinction between “extradition” and “surrender” more clear, a slightly modified and extended version of this article was proposed by the Polish delegation. However, due to the turmoil during the last plenary session, that proposal was withdrawn. The proposed language of Article 102 would read as follows:

*“For the purpose of this Statute:*

*‘surrender’ means the delivering up of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under Article 58, paragraph 3, or who has been convicted by the Court, by a State to the Court, pursuant to this Statute;*

*(b) ‘extradition’ means the delivering up of a person for the purpose of trial or service of a sentence, by one State to another as provided by treaty, convention or national legislation”<sup>20</sup>*

The main intent of this exercise was to free the “surrender” from a host of conditions, restrictions, and requirements which, developed in other epoch and designed for different purposes, are inappropriate in the context of the ICC. Among them, exceptions, exclusions, defenses, and exemptions traditionally have been the main obstacle to make extradition a fully effective tool in the fight against crime<sup>21</sup> To strengthen “surrender” and render it more efficient, the number and scope of grounds for refusal by the requested state had to be significantly restricted. This could and should have been expected from the government plenipotentiaries in Rome. However, the result of the Conference was surprising. The delegates have gone further in this direction than anticipated by removing from the Statute ALL grounds for refusal of “surrender.”<sup>22</sup>

Whether this revolutionary step will be successful and will not produce counterproductive results will depend first and foremost on the reaction of states, governments, and their national legislatures to the concept of “surrender.” Where states demonstrate a more conservative approach to the whole problem of international cooperation in criminal matters combined with suspicion with respect to the nature of “surrender,” they may tend to

20. See A/CONF. 183/C. 1/L. 93, July 17, 1998.

21. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 495 (3d ed. 1996).

22. See Rome Statute, *supra* note 3, at art. 89 (“States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”).

see and treat this procedure as a “hidden” or *de facto* extradition. In such a scenario, it will be significantly more difficult for these countries to amend their domestic legislation enabling their cooperation with the Court. Conversely, states that regard “surrender” as a genuine, *per se* form of delivering up the requested persons to the ICC should be able to convince their own parliaments to adopt the relevant national law and to amend the existing statutes. In sum, Article 102 of the Statute will become either a big failure or a great success. Its future lies in the hands of the states.

This author would, therefore, disagree with an assertion that states can call the procedure of surrender as they wish. Unless a distinction is made between *extradition* and *surrender*, cooperation - as envisioned under Article 102 - could be undermined. It was precisely the negotiators’ intention when drafting Article 102 to make a clear distinction between the concepts of *surrender* and *extradition*. Labeling the form of cooperation with the Court as *extradition* was precisely what they wished to avoid. Thus, it is important to keep the notion of *surrender* as far away from *extradition* as possible.

The notion of *surrender*, and its being distinct from *extradition*, is already known in a number of countries (e.g. Austria and Spain) due to changes in legislation that enable cooperation with the ICTY. Strong arguments could be presented to support the view that prohibition of extraditing a country’s own nationals should not be considered as barring *surrender* to the Court and that no constitutional changes are needed for enabling cooperation with the Court. There are several reasons for this.

First, there is the formal (or normative) argument, notably the distinction made by the Statute itself in Article 102, which clearly separates the two regimes of bringing individuals to the ICC. By ratifying the Statute, and in line with the law of the treaties, the State Party undertakes a fundamental obligation to interpret, respect and implement its provisions in good faith. That alone presupposes that the state will give a literal reading to Article 102. the purpose of this provision is to lend an operation of delivering up persons to the ICC a different connotation when compared with extradition. A request made by the Court cannot be likened to a request made by a state and the relationship between the Court and States Parties cannot, as a matter of principle, be made to fall within patterns and procedures that have roots in interstate practice.<sup>23</sup>

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23. See Dino Rinaldi & Nicoletta Parisi, *International Co-operation and Judicial Assistance between the International Criminal Court and States Parties*, in 1 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 346 (Flavia Lattanzi & William Schabas eds., 1999).

Second, a historical argument could be advanced according to which one should keep in mind that the ICC was not contemplated in the legislative history of any given constitution. The fact is that specific constitutional provisions prohibiting extradition of nationals were debated and adopted before the ICC came into existence. The ICC cannot be interpreted as equivalent to a state in cases where the state constitutions expressly prohibit extradition to another state. Therefore, arguments against extradition of nationals (even *mutatis mutandis*) do not apply to the surrender of persons to the ICC. Speaking of history, it is interesting to note in this context that the term “surrender” is not entirely new, and has not been invented for the purpose of the ICTY, ICTR and ICC. It was used in the Treaty of Versailles whose Article 227 reads as follows: “*The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the Emperor in order that he may be put on trial.*”

Third, a “structural” argument may be advanced: whereas traditional international cooperation can be characterized as “horizontal” or “parallel” between states, the ICC implies a vertical relationship with states. In the “horizontal” model, cooperation is not mandatory. In the absence of a treaty, there is no duty under general international law to comply with a request and grant assistance to another state. Even treaties usually leave considerable discretion to the parties to refuse requests and to decide on the manner in which requests will be executed. In sharp contrast to the “horizontal” (or “interstate”) model of cooperation is the “vertical” (or “supranational”) model of cooperation which applies to the relationships between states and international criminal tribunals (courts), such as the ICTY, ICTR and ICC. Although some commentators argue that the system of cooperation as adopted in Part 9 of the Statute has a “mixed character,”<sup>24</sup> the elements of the “horizontal” model apply to the more “technical” matter, that is, form and procedure,<sup>25</sup> and not to the substance of the “surrender.”

Fourth, the teleological argument points out that the purpose of the ICC is to stop impunity and bring to justice the most egregious violations of human rights. In the context of extradition the principle of *aut dedere, aut judicare* – either hand over or prosecute and bring to trial – is applicable. In the context of the relationship between a state and the Court, however,

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24. See Bert Swart & Goran Sluiter, *The International Criminal Court and International Criminal Co-operation*, in REFLECTIONS OF THE INTERNATIONAL CRIMINAL COURT 100 (H.A.M. von Hebel, J.G. Lammers & J. Schucking eds., 1999).

25. See Claus Kreß, Kimberly Prost, Angelika Schlunck & Peter Wilkitzki, *Part 9: Preliminary Remarks*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1048 (Otto Triffterer ed., 1999).

*surrender* comes into play when the requested state is unable or unwilling to prosecute. In the latter scenario, if the requested state was allowed to refuse surrender at its discretion this would lead to the impunity of an offender (no alternative for prosecution) thereby practically destroying the purpose of the ICC as formulated in the Statute and its Preamble.

Fifth, the substantive argument emphasizes that “surrender” and “extradition” are two substantially different concepts. Based on this interpretative argument, the relevant constitutional provision (*no extradition of nationals*) does not apply to surrender to the Court because such a provision’s objective is not to prevent the delivering up of persons to an international organ of the nature of the Court. Rather, this provision seeks to protect citizens from exposing them to the risk of discrimination, arbitrariness or abuse of a foreign state’s sovereign power. Such a fear is misplaced in respect of the ICC as both its Statute and the Rules of Procedure and Evidence demonstrate that the Court is bound to high standards of justice, to comprehensive procedural safeguards, and to comprehensive guarantees of independence and due process. The Statute provides many assurances that these crimes will be tried according to the highest standards of international law,<sup>26</sup> and procedural safeguards that ensure the utmost protection, submitted to an extremely rigorous regime of eligibility which gives States the initial responsibility to prosecute and punish these crimes. While prosecution of crimes within the jurisdiction of the ICC (“the most serious crimes of concern to the international community as a whole”) lies in the interest of all states, a request for extradition is generally submitted in the own interests of a single state.

Finally, there are some country-specific arguments. There might be procedures in national legislation that allow exceptions to the rule that an accused should be tried by their “*juge naturel*” (national court), as is the case in Poland where, under the guise of “transfer of criminal proceedings,” the Code of Criminal Procedure authorizes the prosecutor not only to transmit the files to a foreign state, but also to hand over the suspected person or an accused.<sup>27</sup> Where such, or similar, procedures exist, they may be invoked in support of *surrender* without amending the Constitution.

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26. See Lynne M. Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 *Wis. INT’L L.J.* 197 (2001).

27. See Michael Plachta, *Transfer of Proceedings and Transfer of Prisoners: New Instruments of Cooperation in Criminal Matters Among the Socialist Countries of Eastern Europe*, 3 *CONN. J. INT’L L.* 311 (1988).

*C. Distinct nature of the “surrender” as a corollary of the unique nature of the ICC*

Article 91(2)(c) requests States Parties to take into account “the distinct nature of the Court,” when determining their requirements for the surrender process in their State. It further provides that “those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome.” This wording was chosen to encourage States, if possible, to introduce a more streamlined process for surrendering persons to the ICC than their current process for State-to-State extradition. The idea behind this is that there are many lengthy delays involved in current procedures for extradition of nationals from one State to another. This is understandable where there are differences in the jurisprudence and standards of trial fairness between different jurisdictions, and States may need to protect their nationals from potential in-justices.

However, the ICC regime has been established by States Parties themselves. During the surrender of persons to the ICC, considerations relative to the impact of national values on the exercise of criminal law in different States need not be taken into account. These concerns do not arise in the same way with the ICC, to the extent that it is not a foreign jurisdiction, as is the court of another State. All States Parties actively participated in drafting the Rome Statute and will in future actively participate in developing its procedural rules, through their involvement in the Assembly of States Parties. Thus every national will be treated according to the standards set and maintained by the States Parties and there is no need for States to go through elaborate procedures to safeguard their nationals from processes that they have no control over.

The distinct nature of the “surrender” must be viewed in a broader context of the special relationships between the Court and states. The Statute defines a relationship between the ICC and States Parties that is fundamentally different from the bilateral relationship between states arising from extradition treaties. There are at least three significant distinctions suggesting the diminished importance of sovereignty interests in the ICC context. The most obvious is that the ICC is not a state but an entity manifesting the will of all States Parties.<sup>28</sup> It could be said that when dealing with the ICC, a State Party is dealing with an international organization, of which it forms a constituent part. The relationship is not

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28. As at 23 October 2003, there are 92 States Parties to the Rome Statute.

intended to be reciprocal as the ICC is an instrument of the States Parties designed to serve their interests in complementary effective prosecution. This observation is further supported and strengthened by the fact that the Statute provides in its Part 9 two separate and distinct mechanisms for international assistance: one is triggered by the Court (request for assistance or surrender submitted by the ICC to a State Party), the other is initiated by the State Party seeking assistance from the Court.

Secondly, the State – ICC relationship under the Statute is much more complex and broader than the state – state relationship under extradition treaties. In the latter case, states' rights and obligations generally start and end with the request and extradition of the individual. In the ICC context, States Parties have many more rights, obligations and interests beyond the realm of surrender. Lastly, in contrast to extradition treaties, the Statute (supported by the Rules of Procedure and Evidence) provides for an extensive criminal procedure that aims to guarantee a fair trial and the due process rights of the accused. Concerns about sending one's national to face an uncertain trial or even an open discrimination in some alien jurisdiction are non-existent or significantly diminished in the ICC context.<sup>29</sup>

Perhaps the most visible and convincing sign of this "new reality" vis-à-vis the International Criminal Court is the significant absence of traditional grounds for refusal of extradition. Despite an elaborate system of such grounds, which have developed over centuries in inter-state relationships, they have not been retained in the Statute. The drafting history of this section of Part 9 is particularly revealing.<sup>30</sup> The debate within the Preparatory Committee demonstrated a general support for keeping a number of grounds for refusal, albeit limited to the most fundamental issues, in the Statute. At its fifth session, the Committee drafted new provisions of surrender which contained five such grounds (with additional one mentioned in a footnote). Although such a solution was strongly supported by several states at the Rome Conference, their concerns have been met by including special provisions and guarantees in other parts of the Statute. Eventually, these states agreed to have their reservations about the deletion of the grounds for refusal recorded in a footnote.<sup>31</sup> It clearly appears from

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29. As some authors observed, "surrender to the Court does not entail the same degree of abandonment of one's own nationals as extradition might." See Helen Duffy, Johnathan Huston, *Implementation of the ICC Statute: International obligations and Constitutional Considerations*, in 1 THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 45 (Claus Kreß & Flavia Lattanzi eds., 2000).

30. Young, *supra* note 4, at 343.

31. See Phakiso Mochochoko, *International cooperation and Judicial Assistance*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS,

the drafting history that it was an intention of delegations in Rome to remove all extradition grounds for refusal from the Statute.<sup>32</sup>

#### *D. Constitutionality of surrender*

Some of the provisions of the Statute may appear to conflict with constitutional requirements in some States, particularly those relating to surrender of a person to a tribunal outside of the State. When assessing the potential impact of the Statute on a State's constitution, it is important to keep in mind the values that the ICC seeks to uphold, namely, justice and an end to impunity for those who wield their power destructively and wantonly. It would be hard to find a constitution in the world that does not also aspire to these values. When States consider the interests that are intended to be protected in each case, they are sure to find ample common ground. This should point the way for reconciling any apparent inconsistencies between constitutional provisions and Statute requirements. The process of amending a constitution is often a difficult and time-consuming procedure in many countries. If possible, it would be more desirable to find another way to meet the particular ICC obligation. For example, some constitutions prohibit the extradition of nationals to another State. However, these constitutions do not specifically mention a prohibition against surrendering a national to an international tribunal. These States may be able to draft appropriately worded legislation that allows them to surrender their nationals to the ICC, without requiring a constitutional amendment. If a State needs to amend its constitution, it may be possible to accomplish this with a simple amendment that addresses a number of different issues at the same time.

#### *Language: legislative formulas*

However, while contemplating an amendment, two separate issues should be considered: language used in the relevant constitutional provision and arguments which are being put forward in order to justify the

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RESULTS 93 (Roy S. Lee ed., 1999). The footnote reads: "Some states reserved their position with respect to the deletion of this provision [refusal of surrender of own nationals – M.P.] as this would raise problems of compatibility with constitutional provisions and domestic legislation." See Report of the Working Group, U.N. Doc. A/CONF. 183/C.1/WGIC/L.11/Add. 4/Corr. 1 (15 July, 1998).

32. See Claus Kreß, *Penalties, Enforcement and Cooperation in the International Criminal Court Statute (Parts VII, IX, X)*, 6 EUR. J. CRIME CR. L. CR. J. 451 (1998).

prohibition of extradition of nationals. A review of such clauses as they appear in constitutions of several states reveals that each of them falls into one of the following five formulas:

absolute and full bar; an example can be found in the 1997 Constitution of the republic of Poland which reads as follows: “Extradition of a Polish national is prohibited” (Article 55 para. 1); The Constitutional prohibition is absolute and unconditional to the effect that every extradition request in every case must be denied; there is no room for any discretion that could be exercised by the Minister of Justice who makes the final decision. This prohibition is also “universal” (or “global”) in the sense that it applies not only to “foreign states” (or “governments”) but extends *mutatis mutandis* to any organ, organization, tribunal, etc. as long as the procedure to surrender a Polish national abroad is called “extradition”.<sup>33</sup>

ambiguous formula which uses a generic term “abroad”; an example can be found in the German Constitution whose Article 16 para. 2 reads as follows: “No German may be extradited abroad”; As German commentators admit, the meaning of the word “abroad” in this context is unclear.<sup>34</sup> Usually, this term refers to foreign states which would exclude the ICC. But it is arguable that the literal meaning of “abroad” extends to any jurisdiction outside Germany. Thus the interpretation which relies exclusively on this word is inconclusive, and German authors are divided on this point.<sup>35</sup>

a formula which is “half-open” and refers to “foreign authorities” – e.g. Article 25 para. 1 of the Federal Constitution of Switzerland reads as follows: “Swiss citizens may not be expelled from the country; they may be extradited to a foreign authority only with their consent”; Swiss

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33. See Michael Plachta, *Extradition under the New Polish Legislation of 1997*, 14 INT’L ENFORCEMENT L. RPTR. 35 (1998).

34. See Frank Jarasch, Claus Kreß, *The Rome Statute and the German Legal Order*, in 1 THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 101 (Claus Kreß & Flavia Lattanzi eds., 2000).

35. See e.g. an analysis of this problem in the context of the ICTY: Burkhard Schöbener & Winfried Bausback, *Verfassungs- und völkerrechtliche Grenzen der “Überstellung” mutmaßlicher Kriegsverbrecher an den Jugoslawien-Stragerichtshof*, 49 DIE ÖFFENTLICHE VERWALTUNG 621 (1996); Christian Tomuschat, *Sanktionen durch internationale Strafgerichtshöfe*, 2 VERHANDLUNGEN DES SECHZIGSTEN DEUTSCHEN JURISTENTAGES 53 (1994); Kirsten Schmalenbach, *Die Auslieferung mutmaßlicher deutscher Kriegsverbrecher an das Jugoslawientribunal in Den Haag*, 36 ARCHIV DES VÖLKERRECHTS 285 (1998). See also an opinion by Winfried Bausback on the non-applicability of Article 16 para. 2 of the German Constitution to the surrender of Germans to the ICC: *Art. 16 II GG und die Auslieferung Deutscher an den neuen Internationalen Strafgerichtshof*, NEUE JURISTISCHE WOCHENSCHRIFT 3319 (1999).

commentators argue that this provision does not cover surrender to the ICC. One of the arguments is that the term used in it, *ausländische Behörde*, is generally understood as the public authorities of another state.<sup>36</sup>

a specific (or narrow) formula which provides that its scope of application is limited to “foreign state(s)” – there are several examples of national constitutions which provides that a national (citizen) of state “X” may not be extradited to a foreign state, e.g. Slovenia (Art. 24), Croatia, Bulgaria, Azerbaijan (Art. 53), Moldova (Art. 17 para. 3), Ukraine (Art. 25), Yugoslavia (Art. 17 para. 3).

general formula – e.g. Article 14 para. 4 of the Czech Bill of Fundamental Rights and Freedoms provides that “No national of the Czech Republic may be forced to leave its territory.” Another example can be found in Article 23 para.4 of the Constitution of Slovakia which states that “Citizen can not be forced to leave his homeland”. However, there appears to be a general understanding that this provision will not preclude surrender of a Slovak citizen to the ICC.

### *Substantive arguments*

Another issue that the prospective States Parties to the Rome Statute may wish to consider before amending their constitutional provisions which prohibit extradition of their nationals is the question to what extent, if at all, the arguments in support of such a restriction are applicable to the surrender of persons to the ICC. They could be briefly summarized in the following paragraphs.<sup>37</sup>

In Great Britain, a Royal Commission was appointed in 1878 to inquire into all aspects of the law of extradition. Lord Cockburn C.J., who in the previous year had declared in court that the exception of nationals from the treaty with Switzerland was a “blot upon the law,”<sup>38</sup> was chairman of the Commission. The arguments in favour of exempting nationals from surrender were summarized as follows:<sup>39</sup>

A subject ought not to be withdrawn from his natural judges (*ius de non evocando*).

36. See Michel Cottier, *The Case of Switzerland*, in 1 THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 239 (Claus Kreß & Flavia Lattanzi eds., 2000).

37. For a more exhaustive presentation of this problem, see Michael Plachta, (*Non-Extradition of Nationals: A Neverending Story?*), 13 EMORY INT'L L. REV. 77 (1999).

38. R. v. Wilson (1877), 3 Q.B.D. 42, 44.

39. *Report of the Royal Commission on Extradition*, Parliamentary Papers, 1878, vol. 24, 907-917.

The state owes its citizens the protection of its laws (*Treupflicht*).  
It is impossible to place entire confidence in the justice of a foreign country.

It is a serious disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and his resources, and from those who could bear witness to his previous life and character.

The Commission rejected these arguments and concluded that a person residing abroad owes obedience to the laws of his country of residence – a consideration which overrides the arguments mentioned above. This opinion was later reflected in the ruling of the United States Supreme Court where Mr. Justice Harlan speaking for the majority of the Court stated authoritatively that the American citizenship of the relator grants him neither an immunity for offences committed abroad, nor a right to demand all procedural guarantees existing under the law of the United States:

“When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such modes of punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.”<sup>40</sup>

The rationale for the exemption of nationals from extradition rests on the notion that the relator is likely to receive ill treatment or an unfair trial in the requesting state.<sup>41</sup> To that extent it is a discriminatory treatment which differentiates between nationals and non-nationals.<sup>42</sup>

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40. *Neely v. Henkel*, 180 U.S. 109, 123 (1900). In the 1980s, some appellate courts appeared to be more receptive to the humanitarian and human rights considerations by allowing, in exceptional situations, an inquiry into the criminal procedure and punishment awaiting the extraditee in the requesting state. See e.g. *In the matter of the extradition of Burt*, 737 F. 2d 1477 (7th Cir. 1984).

41. This rationale was expressly formulated by the Supreme Court of Columbia: “The reason for prohibiting the extradition of nationals on the request of another state is (...) the risk of possible grave dangers in the trial abroad.” *In re Arevalo*, 10 Ann. Dig. 329 (S.C. 1942).

42. See the criticism of this practice by M. Cherif Bassiouni, *Two Models of Extradition in Law and Practice*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 365 (M. Cherif Bassiouni & Ved Nanda eds., 1973). To avoid possible misunderstanding, it has to be made clear in this context that even where we have an absolute prohibition against extradition of nationals it does not follow that, as a corollary, there is an equally absolute obligation to surrender each and every non-national by the requested state. Each case has to be examined on its merits and the decision must take due account of both the pertinent treaty stipulations and the domestic legislation. Cf. OTTO LAGODNY, *DIE RECHTSSTELLUNG DES AUSZULIEFERENDEN IN DER BUNDESREPUBLIK DEUTSCHLAND* 52 (1987).

The justification of the rule of non-extradition of nationals largely derives from a jealously guarded conception of national sovereignty and presupposes the existence of sharp contrasts in the administration of criminal justice between states resulting in potentially unfair treatment. However, as the Harvard Research pointed out: "If justice as administered in other States is not to be trusted, then there should be no extradition at all."<sup>43</sup> Other arguments advanced against the surrender of nationals are the following:

- fundamental right of asylum;
- popular instinct of society;
- disparity in domestic legal systems with respect to both substantive law and procedure;
- potential of bias and prejudice against the surrendered person based solely on his foreign origin and nationality.<sup>44</sup>

If it is agreed that the very reason for not surrendering nationals is a special relationship between them and their home country, it is where the *Treupflicht* comes into play. This theory was developed and advanced by German writers although its meaning remains unclear.<sup>45</sup> Recently it has been criticized for being devoid of any practical significance.<sup>46</sup> This concept was not completely unknown in the common law countries. For example, in an English case, the counsel for the extraditee argued: "As a British subject the prisoner owes allegiance to the Queen, in return for which he is entitled to her protection, for nationality involves a '*duplex ligamen*.'"<sup>47</sup> On the other hand, the rule of non-extradition of nationals may be perceived as a manifestation of "*solidarité mal placée*" between the state and its citizens.<sup>48</sup>

## 2 The Context of the European Union

Practical problems inherent in the inter-state mechanism of delivering up offenders are almost as old as the extradition itself. No one knows them better than law enforcement officers as well as public prosecutors and the employees of the criminal justice system (especially judges and magistrates) for whom the mounting obstacles on the way towards effective prosecution

43. See Harvard Research in International Law, *Draft Convention on Extradition*, 29 AM. J. INT'L. L. SUPP. 128 (1935).

44. See I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 120 (1971); DOMINIQUE PONCET & P. NEYROUD, L'EXTRADITION ET L'ASILE POLITIQUE EN SUISSE 45 (1976).

45. See H. MEYER, DIE EINLIEFERUNG 73 (1953).

46. See DIETRICH OEHLER, INTERNATIONALES STRAFRECHT 181 (2d ed. 1983).

47. In re Galwey (1896) 1 Q.B. 230, 233.

48. See ANDRE HUET, R. KOERING-JULIN, DROIT PENAL INTERNATIONAL 357 (1994).

are often a major source of frustration. The efforts undertaken so far to improve the situation by modernizing the procedure and up-dating the existing legal instruments, have achieved limited results. One of the major problems has been the diversity of legal systems and practice among the states. It was, therefore, felt that any more significant and meaningful results can only be possible on a regional scale, that is, restricted to countries that are closer and whose ties include common tradition and culture as well as shared values.

#### A. *Background and origin*

Seen from this perspective, the European Union may be considered a “laboratory” in which several new and interesting ideas have developed and some “experiments” have been carried out in the field of international cooperation in criminal matters. The perceived need to improve the efficiency and effectiveness of extradition among the member states of the EU dates back over 20 years. Undoubtedly, the most significant achievements in this process are the 1995 Convention on simplified extradition procedure<sup>49</sup> and the 1996 Convention relating to extradition between the Member States of the EU.<sup>50</sup> Although they embodied several modernizing and innovative features and were intended to accelerate and simplify the mechanisms of the 1957 European Convention on Extradition<sup>51</sup> there was a price to pay for such solutions: to almost all of them the reservation clause was attached thereby greatly diminishing practical effects of their provisions. Moreover, these conventions did not break with the traditional extradition mechanism which is by definition political and intergovernmental. And to make things even worse, the level of acceptance within the EU – measured by the number of ratifications – has been rather low: the 1995 Convention has received nine ratifications, while the 1996 Convention – only eight.

Under such circumstances, it comes as no surprise that high political figures in the EU have become increasingly disillusioned about the future development of the extradition system within this organization. There were also fully aware that the situation will only get worse with ten more

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49. O.J. C 78, March 30, 1995, p. 2.

50. O.J. C 313, October 13, 1996, p. 12.

51. See, e.g. Gert Vermeulen & Tom van der Beken, *Extradition in the European Union: State of the Art and Perspectives*, EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 200 (1996); M. Mackarell, S. Nash, *Extradition and the European Union*, 46 INT’ & COMP. L.Q. 954 (1997).

countries waiting for accession. It was obvious that something has to be done: quickly and radically. That explains, to some degree, why the heretofore “evolutionary” approach to the modernization of extradition has been abandoned and replaced by a “revolutionary” step. Although the first “seeds” of this new idea were sown at the Tampere meeting of the European Council in October 1999, the necessary political momentum to carry it out came with the terrorist attacks on the United States of September 11, 2001.

The new “European” approach to extradition is based on two ideas: (1) building an area of freedom, security and justice within the EU and (2) striving to achieve mutual recognition of judicial decisions rendered by the criminal justice organs of the member states. The final outcome might be “the long-term possibility of the creation of a single European area for extradition” as articulated in Recommendation 28 of the Strategy of the European Union for the next millennium as regards prevention and control of organized crime. Although the concept of mutual recognition is by no means unknown in the criminal justice in its practical application, it has been limited to final judicial judgments, mostly as a pre-condition for their enforcement and execution. However, it received a new meaning in the EU context, mainly by extending it to all decisions which are made during the criminal proceedings, not just those imposing criminal sanctions. According to the final document adopted at the Tampere Council meeting (the “Conclusions”) enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorsed the principle of mutual recognition which, in its view, should become “the cornerstone of judicial cooperation” in both civil and criminal matters within the EU (item 33).

With regard to extradition, the Conclusions contain a pair of mutually inconsistent statements: on the one hand, the European Council “urges Member States to speedily ratify the 1995 and 1996 EU Conventions,” while on the other – “it considers that the formal extradition procedure should be abolished among the Member States”. One cannot stop wondering why these instruments are to be ratified if a qualitatively new mechanism is to replace the traditional extradition? The Tampere Conclusions continue by imposing a self-restraint on the “abolitionist” move: it should be limited to persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast-track extradition procedures, without prejudice to the principle of fair trial (item 35). Most likely, the “fast-track extradition procedures” would include

simplified extradition and other similar mechanisms. The reading of the Tampere final document does not allow a conclusion that the Council's intention was to put an end to extradition. First and foremost, the Conclusions make a clear distinction between pre and post conviction cases. The drastic measures were foreseen for the latter ones. It is noteworthy that this distinction was upheld in the follow-up document, adopted by the Council on 30 November 2000.<sup>52</sup> However, in the end of the day, it was dropped from the final version of the Framework decision with the following explanation: "no bilateral or multilateral instrument makes this distinction, for which there is no justification in practice."

*B. Framework Decision on the European Arrest Warrant: revolution in extradition?*

The significant moment in the modern history of extradition came on 13 June 2002 when the European Council adopted the Framework Decision on the European arrest warrant and the surrender procedures between the Member States (hereinafter: the "Framework Decision").<sup>53</sup> In its Preamble, the Council proclaimed that the European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation. The Council was convinced that the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally. Instead, this task, by reason of its scale and effects, could be better achieved at Union level. Therefore, the Council decided to adopt this measure in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In doing so, the Council went even further than the proposals submitted by the European Commission shortly after 11/09/2001.<sup>54</sup>

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52. *Program of measures to implement the principle of mutual recognition of decisions in criminal matters*, O.J. C 12 E (15.01.2001), p. 10-22.

53. For an overview of the Framework Decision and highlight of its major issues, see William Gilmore, *The EU Framework Decision on the European Arrest Warrant: An Overview from the Perspective of International Criminal Law*, 3 ERA FORUM 8 (2002).

54. *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*, European Commission, 25.09.2001 COM(2001) 522 final/2, 2001/0215 (CNS).

*Extradition order in the context of mutual recognition*

By placing extradition in the context of the concept of mutual recognition both the Commission and the Council assumed that the implementation of this principle means that each national judicial authority should *ipso facto* recognise requests for the surrender of a person made by the judicial authority of another Member State with a minimum of formalities. In this regard, an extradition order is considered as one of the procedural decisions being made by the criminal justice authorities. However, in order to achieve this desired result, the extradition procedure had to be re-structured. Traditionally, the decision whether or not to deliver up an offender is being made by the administrative body, usually the executive authority of the state. Therefore, such a decision would lie outside the realm of the new concept of mutual recognition. The only way to bring it in was through the “judicialisation” of the extradition process. Although courts have traditionally been involved in this procedure (albeit the form and extent of this involvement vary considerably among states), their role is limited to rendering an opinion – which is not binding on the government in all cases – on the admissibility of extradition in legal terms. However, generally, the courts have been helpless where the politicians intervene – particularly in high profile cases – to prevent extradition which was otherwise legally possible. Such instances has been a source of friction between states and concerns (particularly by law enforcement).<sup>55</sup> The newly established mechanism for delivering up offenders was meant not to leave any “political safe heavens” within the EU.

Fundamental to the whole concept embodied in the Framework decision is the definition of the “European Arrest Warrant” (hereinafter: EAW). It is found in Article 1 (1) which reads as follows: *The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.* Interestingly, this definition differs from the proposal submitted by the European Commission.<sup>56</sup> Although the

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55. The Pinochet case, where the British Government refused to extradite the former president of Chile to Spain, is but one illustration of this phenomenon.

56. The European Commission’s proposal contained the following definition: “*European arrest warrant*” means a request, issued by a judicial authority of a Member State, and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in Article 2 (Article 3 (a)). See *supra* note 54.

purpose of the European arrest warrant is the enforced transfer of a person from one Member State to another a careful reading of the Framework Decision does not allow a conclusion that this instrument amounts to an “automatic extradition” or surrender on demand. The new procedure replaces the traditional extradition procedure. It must be pointed out and underscored that what we have in the Framework Decision is a *horizontal* system, as opposed to a vertical one.

The EAW is not restricted *ratione criminis*. Article 2 (1) provides that the warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

### *Double criminality*

One of the most visible features of the new system is an attempt to remove the traditional requirement of double criminality, that is, the rule which demands that extradition is allowed only where acts which are stipulated in the request are also qualified as criminal by the domestic law of the requested state.<sup>57</sup> However, it has to be said at the outset that the Framework Decision fell short of total abolishment of this fundamental extradition standard. Article 2(2) contain a list of 32 generic types of offences for which it removes the possibility of examination of double criminality. This provision stipulates that these offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant. The very broad coverage appears to have been heavily influenced by the 1995 Europol Convention Annex.<sup>58</sup>

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57. See Michael Plachta, *The Role of Double Criminality in International Cooperation in PenalMatters*, in *DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL CRIMINAL LAW* 84 (Nils Jareborg ed., 1989).

58. The offences include e.g. participation in a criminal organisation, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia.

Undoubtedly, the most troubling item on this list is “terrorism”, for no definition of this type of activities have been agreed upon on the international level and, as the progress of the work on the new comprehensive, U.N.-sponsored, convention against terrorism clearly indicates,<sup>59</sup> no such universal definition is in sight. The EU-made definition,<sup>60</sup> which is more a makeshift description, raises serious concerns, mainly from the point of view of its consistency with the principle *nullum crimen sine lege certa*.<sup>61</sup> It is noteworthy that outside the scope delimited by these 32 categories of offences,<sup>62</sup> the double criminality requirement still prevails. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described (Article 2(4)).

#### Grounds for no-execution of the EAW

One of the biggest stumbling blocks for any efforts to modernize and substantially modify the extradition system is the question of grounds for refusal the surrender of the requested person.<sup>63</sup> The European Commission and the Council also faced this problem. The way it has been resolved is very much along the traditional lines of the extradition legislation. The solution has resulted in two provisions inserted in the Framework Decision; they embody both the mandatory and optional grounds for non-execution of the EAW. According to Article 3 the execution of such a warrant shall be refused in the following cases:

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59. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. J. INT'L L. 83 (2002), at 93.

60. *Council Framework Decision on combating terrorism*, 13 June, 2002, (2002/475/JHA), O.J. 22.6.2002, L 164/3.

61. Michael Plachta & Wojciech Zalewski, *Controversies around the Definition of Organized Crime under the 2000 UN Convention against Transnational Organized Crime* (in Polish), PRZEGLAD SADOWY 2003, No. 3.

62. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

63. See Michael Plachta, *Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle Aut Dedere Aut Judicare*, 57 UNAFEI RESOURCE MATERIAL SERIES 64 (2001).

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4 provides for the following grounds for optional refusal:

1. double criminality – for acts which fall outside the list of 32 types of specific offences;
2. *lis pendens*;
3. statute of limitations;  
*res judicata* (based on a judgment passed in a third state);  
non prosecution;<sup>64</sup>
6. two jurisdiction-related grounds: if an offence is regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or an offence has been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside its territory.

Based on the concept of the “European (Union) citizenship” the Council concluded that the traditional exception made for nationals of the requested state – as a ground for refusal of extradition<sup>65</sup> – should no longer apply. That explains the absence of this circumstance in both of the lists discussed above. The council was of the view that the primary criterion is not nationality but the place of the person’s main residence, in particular with regard to the execution of sentences. Provision is made for facilitating the execution of the sentence passed in the country of arrest when it is there

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64. Where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.

65. See Plachta, *supra* note 37, at 77.

that the person is the most likely to achieve integration, and moreover, when a European arrest warrant is executed, for making it possible to make it conditional on the guarantee of the person's subsequent return for the execution of the sentence passed by the foreign authority (Article 5(3)). This possibility for "conditional surrender" notwithstanding, the solution adopted in the Framework Decision will create serious legal problem for countries which have constitutional prohibition on extradition of nationals.

#### *"Judicialisation" of the surrender*

Arguably the most striking feature of the extradition system based on the Framework decision is its removal outside the realm of the executive. The sole responsibility for this procedure has been placed in the hands of the judiciary. Both the issuing and executing authorities shall be such judicial authorities which are competent to issue or execute the EAW by virtue of the law of the issuing or executing state (Article 6). The proposal for the Framework Decision submitted by the European Commission was more specific by referring to "the judge or the public prosecutor" in the definition of such an authority. It seems that the same holds true for the terms used in the final version although this reference has been abandoned. Since the procedure for executing the European arrest warrant is primarily judicial the political phase inherent in the extradition procedure is abolished. Accordingly, the administrative redress phase following the political decision is also abolished.

The elimination of the executive from the process has been achieved also by entrusting two separate functions with a single decision: the EAW serves both as a warrant for arrest and detention as well as a warrant for surrender of the requested person. The Framework Decision does not use the term "request". As a consequence, the role of the "central authority" in the new extradition system has been significantly diminished. Its involvement, restricted to certain types of tasks which should be exhaustively listed, is meant to be an exception rather than a rule. Article 7 provides that a Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority (or authorities) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

#### *Simplification and speedy process*

Several solutions adopted in the Framework Decision should contribute to achieving one of the main goals: simplification and speed of

the process. One such example is the transmission of the EAW: instead of traditional diplomatic channels the Council provided for an alternative mechanism: (a) When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority (Article 9(1)); (b) If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network,<sup>66</sup> in order to obtain that information from the executing Member State (Article 10(1)). Another important feature are very short time limits imposed on both the execution of the EAW and the actual surrender of the requested person. In addition to a general statement to the effect that such a warrant must be dealt with and executed “as a matter of urgency,” the Council demands that the final decision on the execution of the EAW be made either within 10 days (in cases where the requested person consents to his surrender) or 60 days (in other cases) (Article 17). Where in specific cases the European arrest warrant cannot be executed within these time limits, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days. On a top of these short time limits, Article 23 stipulates that the requested person shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant. However, if the surrender of that person within this period is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

### Rule of speciality

The framework Decision represents yet another attempt to eliminate one of fundamental principles of extradition: the rule of speciality. Already, the 1995 Convention made a step in this direction, by reversing the presumption: instead of assuming – as it is being done traditionally – the lack of consent by the requested state for further prosecution and/or re-extradition of the *extraditurus*, the Convention suggested that the consent is implicit, unless stated otherwise. The Framework Decision follows that

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66. Council Joint Action 98/428/JHA on the creation of a European Judicial Network, 29 June, 1998, O.J. L 191, 7.7.1998, at 4.

concept – except the solution has been based on a system of notifications that may be submitted by individual Member States. Article 27(1) provides that each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender. Other than that, the Council has adopted the traditional formula for non-prosecution, accompanied by seven circumstances in which this protection does not apply. Similar solution has been adopted for re-extradition of the requested person to another Member State (Article 28). It is noteworthy that the Framework Decision specifically provides that the consent of the requested state for the surrender of the extraditee to another Member State shall (or may) be refused on the same grounds which are stipulated for the non-execution of the European Arrest Warrant itself.

#### Other issues

An interesting step has been made by the Council to solve two particularly difficult and controversial issues involved in the extradition system: convictions (judgments) *in absentia* and life imprisonment. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment (Article 5(1)). As for the other problem, if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing

Member State, aiming at a non-execution of such penalty or measure (Article 5(2)).

It was only logical to expect that such deep modifications to both the extradition procedure and conditions will require a major revamping of legal instruments which govern extradition among Member States of the EU. The Council decided (Article 31(1)) that without prejudice to their application in relations between Member States and third States, the Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;

(d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

### *C. "Surrender": a misnomer?*

Terminology is not the strongest part of the Framework Decision. Several terms and expressions are used in rather inconsistent manner whereas in other places, the language is ambiguous. One of the such instances is the list of 32 types of offences in respect of which the double criminality requirement has been abolished (Article 2(2)). In addition to "terrorism" a few other terms which appear on this list will create considerable difficulties in the process of practical application of this instrument, such as "computer-related crime," "racketeering" and, above all, "swindling." To make things worse, the Framework Decision does not include a provision which would correspond to Article 3 of the proposal submitted by the European Commission; that provision contained a set of definitions. Nor has been an official explanatory report annexed to the Decision.

In the same vein, the Decision uses the term “surrender” throughout its provisions for what used to be known as extradition. The question arises as to whether this change in name means also the change in substance. In other words, has the Council created in its Framework Decision a new form of international cooperation among the member states of the EU – a form which is different and separate from extradition? The background of this Decision and origin of the idea embodied in it might suggest that this is the case. Some support for this proposition may also be found in provisions and solutions adopted in the Decision – particularly those which signifies a departure from the traditional standards of the extradition law. However, what is seriously questionable is the term which was adopted for this new procedure. Given the lack of any official enunciation on this matter we can but speculate why this particular term, “surrender,” was chosen: did the Commission and the Council run out of appropriate terms? or was it done on purpose – to send a clear message to member states, governments and national legislators: the procedure based on the European Arrest Warrant is not an extradition, instead this is a form that the states have already been familiar with through the statutes of international criminal tribunals (courts). If the last hypothesis were true, this would be a very unfortunate terminological coincidence. Furthermore, one could even argue that – viewed from the perspective of recent developments in international criminal law – the language adopted in the Framework Decision is misleading.

It is submitted in this paper that the word “surrender” used in the Decision is a misnomer and the procedure based on the EAW does not bring about a qualitatively new form of international cooperation; instead, this is extradition under a different name. It would have been probably less objectionable had other name been chosen. The present choice is particularly regrettable in view of serious obstacles on the way towards ratification of the Rome Statute and tremendous efforts made by several countries to overcome one of the constitutional impediments, that is, the prohibition of extradition of nationals. The first part of this paper has demonstrated that the major and prevailing line of arguments in favor of the “interpretative approach” was to point out and prove that “surrender” is a distinct form of delivering up requested persons which is operated between a state and an international criminal tribunal (or a court). These arguments have been advanced and articulated before national parliaments. Now, ignoring these developments and events, the Council has come in with the Decision which purports that the process of delivering up persons between states is a “surrender.” If this term were to be treated seriously and

literally it seems that most likely reaction from the parliamentarians would be for them to say that they were misled during the ratification of the ICC Statute. It could be also argued that the change in name is an arbitrary decision which has no material substance in the Framework Decision.

There are several reasons why this author cannot take this change nor the new name seriously. One of the most obvious is that it would set a very dangerous precedent: we create a new structure just by changing the name of the existing one. It seems to be commonly accepted that it is not the name that matters, nor the institution (or authority) that is involved. Otherwise, unrestricted arbitrariness allowed in the legislative work and process would bring total chaos in the legal system. With regard to extradition this would mean that one day, two states sign a bilateral treaty under which they commit themselves to deliver up offenders but call this procedure “*hulagula*.” The governments pretend to create a new form of international cooperation by pointing out to some of the features of this new procedure, such as: the term “request” has been replaced by “order”, it must be written on a pink paper, it has to be delivered by special forces (or a secret agent), the “order” must be decided within 48 hours (no matter what), the only competent authority in the matter of this new procedure is the Supreme Court, etc. etc. The whole exercise was undertaken in order to circumvent the constitutional restraints imposed on extradition (e.g. non-extradition of nationals, life imprisonment, political offence exception).

To avoid further attempts to ridicule the extradition system it is time to stress fundamental differences between “extradition” and “surrender.”<sup>67</sup> There is only one primary difference; there may be also several other differences but they are of secondary importance to the central issue. From a methodological point of view it would be a serious mistake to overlook the primary difference and concentrate on secondary ones. No matter how many of them would be pointed out this would not change the substance and nature of the process. The primary difference between “extradition” and “surrender” lies in the level of the relation between parties: while extradition can only be considered between states, the surrender has been created only recently for the relationship between a state and an international criminal tribunal (court). This distinction is sometimes referred to as “horizontal model” as opposed to “vertical model” of international cooperation.<sup>68</sup> Both the origin and history of extradition have demonstrated that the very nature

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67. See Mosconi & Parisi, *supra* note 18, at 314; Rinaldi & Parisi, *supra* note 23, at 345.

68. See Krefß, Prost, Schlunck & Wilkitzki, *supra* note 25, at 1048; Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 144 (1999).

of this procedure can only be justified in the context of inter-state relations. Extradition does not operate in the vacuum – and it never did. All the safeguards and procedural mechanisms which have developed over the centuries make sense only if related to the relationships between states. The main determinants of such cooperation are sovereignty and equality of partners, reciprocity, the existence of mutual interests (or the lack thereof), and the need to protect individuals against unfair treatment abroad.

In the first part of this paper, several arguments have been advanced to support the view that process of handing over of a person to the ICC (or another international criminal tribunal) should not be subjected to the same procedural mechanism as in ordinary extradition cases.<sup>69</sup> It was also pointed out that the Rome Conference has succeeded in creating a special regime for delivering up persons accused or convicted of crimes within the scope of the jurisdiction of the ICC. It was then appropriate for the Statute to underline this fundamental (“primary”) difference by choosing the name “surrender” for the process of delivering up persons for the ICC – instead of “extradition.” This approach has been followed, albeit not without considerable difficulties, by states parties to the Rome Statute; they have created special procedural regime in their domestic systems in order to accommodate the distinct nature of the ICC. Under such circumstances, an attempt made the Council to simply re-label these procedures cannot succeed.

It is noteworthy that the European Commission, when confronted with this problem, inserted the following explanation in its Draft Framework Decision: “It [the proposed procedure, MP] is to be treated as equivalent to it for the interpretation of Article 5 of the European Convention of Human Rights relating to freedom and security.”<sup>70</sup> Specifically Article 5(3) provides that: “Everyone arrested or detained in accordance with the provisions of para 1(c) of this article<sup>71</sup> shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.” However, if the deprivation of liberty is effected “(...) with a view to deportation or extradition”, this

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69. See also Bert Swart, *International Cooperation and Judicial Assistance: General Problems*, in 2 THE ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1592 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones eds., 2002).

70. *Proposal for a Council Framework Decision*, supra note 54.

71. “The lawful arrest or detention of a person effected for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offence or when it is reasonably to be considered necessary to prevent his committing an offence or fleeing after having committed so,” ECHR, Article 5 (1)(c).

safeguard is not available (Article 5 (1)(f)). If we took that the Framework Decision has created a new mechanism, distinct and separate from extradition, then logically, all the procedural safeguards provided for in Article 5 of the ECHR would be fully applicable. Paradoxically, the whole body of the Strasbourg jurisprudence on extradition, intended to relax the procedural requirements with regard to extradition, would become obsolete for the purpose of “surrender.” It is hard to believe that this is what the drafters of the Framework Decision really had in mind. Therefore, it is submitted that the procedure adopted in the Decision and labeled “surrender” is in fact an extradition – for all purposes, not just in the context of Article 5 of the ECHR.

This approach has already been adopted by some member states of the EU. One of them is Austria which has received a transitional period until the end of 2008 for amending Article 12(1) of its Extradition and Legal Assistance Act (ARHG) which prohibits extradition of Austrian nationals.<sup>72</sup> Interestingly, Austria had no problem in interpreting this provision as consistent with both the Statute of the ICTY and the ICC. However, when it came to the Framework Decision Austria came to the conclusion that using the word “surrender” does not do the trick; as Roman jurists would put it: *Idem non est idem*. The German government made an “pre-emptive” step already in 2000, by amending its Constitution (*Grundgesetz*): to the existing Article 16(2), which stipulates the prohibition of the extradition of German nationals, a new sentence was added which allows extradition of nationals to international criminal courts and to member states of the EU.<sup>73</sup> Finally, the United Kingdom does not consider the “surrender” as adopted in the Framework Decision to be a new and separate mechanism nor a *sui generis* procedure. For the purpose of implementing the Decision the Draft Extradition Bill 2002 addresses the necessary amendments in the context of the existing system of extradition.<sup>74</sup>

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72. This particular provision, although it appears in a statute, has a ring of a constitutional norm.

73. BGBl 2000 I, p.1633; Bundestag 14/2668.

74. See Bruce Zagaris, *Blair Administration Introduces Bill to Simplify Extradition*, 19 INTERNATIONAL ENFORCEMENT LAW REPORTER 13 (2003).

# **The Modalities of International Cooperation in Penal Matters and their Expansion: Report**

**Otto Lagodny\***

This session under the chair of Hans-Jürgen Bartsch reflected tremendous changes in the area of international cooperation as far as the European arena is concerned. In this sense it was mainly Eurocentric, however, reflecting also the U.S. development since September 11th, 2001.

In his presentation, Julian Schutte focused the current problems in 11 points:

1. If, in a process of regional integration, one wants to create police and justice functionalities at a centralized, federal level, then one has at the same time to create a central, federal court system, as well as a mechanism of political accountability for the organisation of these police and judicial structures, subject to the exercise of effective democratic control over such an organisation. Within the European Union, in its present form, the necessary structures are lacking for the attribution of political accountability for the setting up and running of such federal organisational structures.

2. As far as the European Union is concerned, the better the direct cooperation between the law enforcement services of the Member States is functioning, the less there is a need for the setting up of a European federal police service (Europol) with executive enforcement powers.

3. And: the better the regulation and functioning of direct cooperation between judicial authorities of the Member States, the less there is a need for creating a European federal public prosecution service.

4. It is not realistic to expect that Eurojust, which has been set up as a body which is to facilitate the coordination between the competent prosecuting authorities of EU-Member States of criminal prosecutions in complicated cases with trans-border ramifications, could be transformed into a European Prosecution Service which would itself conduct criminal investigations and bring cases before the courts of the Member States.

5. Operational police cooperation, involving the exchange of intelligence and other information, should be subject to guarantees ensuring:

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– the protection of personal data, providing directly concerned persons with enforceable rights to have direct access to data, to have errors corrected, to have outdated data removed from files and to the payment of damages in cases of incorrect or illicit use of such data;

– that data - personal data and other data – are used exclusively for the purposes for which they have been collected and provided (unless the providing party explicitly consents to use for other purposes), and that access to data is limited to those who need to have such access in the performance of their official tasks;

– that the fact of providing and receiving data is recorded, as well as the use made of such data, and that such records are preserved for a reasonable period of time;

– control over the data processing by the police by an independent control authority.

6. The utility and practical value of the creation of joint investigation teams, in which law enforcement officials of several States participate, still has to be demonstrated. When attributing direct operational powers to such teams (running informants, under-cover penetration in criminal organisations, interception of telecommunications, searches, arrests, seizures, etc.), one may expect serious practical and organisational complications, which may affect the effectiveness of the action of such teams. It might be advisable to first gain experience with joint strategic teams, which may design the strategic approach for the investigations to be undertaken against internationally operating criminal organisations and decide on the means to be deployed to that end, while leaving the taking of practical measures in the field to national law enforcement services.

7. It is often asserted that in the absence of harmonised provisions in Europe as to the incrimination of certain types of conduct and as to the level of sanctions applicable to such harmonised offences, organised crime will direct its activities to the territories of States with the least developed incrimination and the lowest level of sanctions. This, however, has never been sustained by any figures based on solid scientific research. Harmonisation of substantive provisions of criminal law and criminal sanctions is, however, useful and necessary for purposes of effectively countering violations of norms which are ethically neutral (norms on technical prescriptions and on the regulation of a common market, etc.).

8. The recently introduced notion of “mutual recognition” of judicial decisions as “the cornerstone” for the development of cooperation in criminal matters between the EU Member States, will primarily lead to a diminished role for the executive (government departments) in the operation

of such cooperation, and consequently a diminished political responsibility for the quality of the relations between the EU Member States. It still remains to be seen whether, as expected, as a result of the introduction of instruments based on « mutual recognition » the volume and speed of cooperation activities will drastically increase and whether forms of international cooperation, which so far have been sparingly applied (transfer of the enforcement of sentences and the transfer of criminal proceedings), will start to develop.

9. Recent developments and adaptations of rules and arrangements in the field of mutual legal assistance can to a large extent be explained as reactions to modern technological developments, in particular in the field of information technology. However, these adaptations and developments have not altered the essence and basic principles of the mechanisms of mutual legal assistance in criminal matters.

10. It is often asserted that the requirement of “dual criminality” constitutes an important obstacle to an effective application of extradition law between the EU Member States. This, however, is not based on any coordinated research as to how extradition functions in practice. It is not known in how many instances extradition is refused for that reason or in how many instances one has refrained from requesting extradition. In the EU it has been decided to introduce a “European arrest warrant” and no longer to allow a “dual criminality requirement” to be invoked when giving effect to such arrest warrants issued in respect of any offence appearing on a commonly established list of offences. It remains to be seen whether, as a result of this decision, the number of cases in which persons will be surrendered between the EU Member States will increase. – In this respect, Vassalli pointed out in the discussion that the principle of equality will be violated by the European arrest warrant as to the reasons legitimizing arrest.

11. In the discussions within the EU on the possible abolition of requirements of dual criminality when shaping new instruments on cooperation in criminal matters between the Member States, the essence of the distinction between “primary” and “secondary” cooperation is largely ignored. According to this distinction, mutual legal assistance and extradition are forms of secondary cooperation, through which a requested State enables the requesting State to fully realise its claims to exercise its criminal jurisdiction. Transfer of the enforcement of sanctions and transfer of proceedings are forms of primary cooperation, through which the requested State takes over, in whole or in part, and upon request, the responsibility for the case from the requesting State. There is even a tendency to deny the relevance of the distinction between primary and

secondary cooperation, at least as far as the transfer of the enforcement of sanctions is concerned, and to treat the latter as a form of secondary assistance.

Judge *Wolfgang Schomburg*'s main criticism was that he misses a systematic approach. There are three levels, the global, the regional, and the national level of crimes and of punishment thereof. Both have to correspond and should not be mixed.

On the European regional level, he pointed out the tension between the European Union with its 15 member states and the Council of Europe with its 44 member states. Both are creating new legal instruments; however, the so-called "mother-conventions" of the Council of Europe, e.g. the European Convention on Extradition, should remain the basis. The latter vanishes with regard to the European Arrest Warrant which in his view is a good idea in principle but the realization in this European instrument shows too many contradictions and lacunae (e.g. in the list of non-double-criminality crimes: what is "terrorism;" "swindling"?). In the aftermath of September 11th this instrument was given highest priority. This has led to the creation of an absolutely necessary instrument without discussion. This was a missed chance.

In his view, it is necessary to promote synergies between action by both the EU and the Council of Europe, thereby making optimum use of the complementary nature of their work. In addition, the Council of Europe should be associated to the work of Europol and Eurojust. In general, one should build a Europe without dividing lines and consolidating it through a network of interlocking institutions. He appealed to politicians to refrain from unserious hyperactivity and to return to solid solutions in the interest of combating transnational crime effectively.

He came to the conclusion that even after completion of the enlargement process of the EU currently underway, almost half of the states of Europe will remain outside the European Union. Therefore, the Council of Europe will continue to be the only truly European organization in which all European states cooperate on an equal footing. Therefore also in future one should stick to the well-established systematic approach: What is possible on the European level should be resolved there.

Mario Pisani focussed on the new possibilities offered by transnational videoconferences which bring states more closely together. This involves a change from cooperation "at distance" to "participating-cooperation". He stressed that this causes problems with regard to the rule of the *lex loci*: Which law is applicable? Still the law of the *lex loci* or also/only the law of the *lex fori*? The model of "participating-cooperation" finally shows the

limits of requests and the problem that proceedings more and more take place outside the courtroom. This could create the risk to sacrifice the basic rule of contradictory proceedings.

In his view, a solution should not be to transfer the authorities and the parties to the requested state but rather to transfer e.g. witnesses to the forum state, i.e. the requesting state. In this context, a video life-link offers new possibilities. A witness may refuse to appear in the requesting state and demand that a life-link be installed. The requested state has to consent to such proceedings which may not be contrary to its basic principles of law. Then the requested state may force the person to appear. The life-link takes place in the presence of a judicial authority of the requested state which is assisted by an interpreter. Protection of the witness has to be convened of by both states. In a life-link-situation, the law of the requesting state may be applied. However, the right to refuse testimony has also to be offered according to the law of the requested state. The effect of such proceedings is a virtual unification of both places. Pisani pointed out that such a model has already been followed by different new instruments such as in art. 10 of the EU-Convention of 2000 or – in a different way - the 2nd Additional Protocol of the Council of Europe.

In sum, the life-link offers in a way that might be characterized as nearly “magic” as it overcomes the distance in time and space.

Christopher Blakesley stressed that September 11th had caused terrible consequences within the U.S. law, especially promulgating the exchange and use of intelligence information in criminal proceedings. The result is that effectivity wins over civil liberties. With regard to the European problems he juxtaposed them with inter-state cooperation within the U.S. (see supra points 1-3 of Schutte – centralization): The U.S. has 11 Federal Circuits and 50 states with separate laws and procedures. The recent sniper case who acted in different states shows the consequences because every state’s prosecutor wanted to get the case. In addition: federal crimes often are created to establish a competence of the F.B.I. This institution often involves a federal state in order to achieve at something which would not be feasible on the federal level.

As far as to points 9/11 of Schutte concerning new methods of gathering evidence, he showed concern about making use of intelligence information in criminal proceedings. This is now officially legalized by the Homeland Security Act. There are no mechanisms to prevent or sanction abuse. Effectivity (or what one holds for this) wins over civil liberties; and in addition: it is not at all effective. Finally he observes a tendency to a “Polizeistaat.”

When reflecting the whole panel, I was reminded of the type of paintings of *Hieronymus Bosch* (1450-1516), who created several triptychons, like the “*hay wagon*.” The three parts of the *Œuvre* show paradise, earth, and hell. Bosch was very realistic by showing all faces of human problems and at the same time surrealist by using artificial creatures as symbols.

With this in mind, one could call the painting of the panel: “Time of transition.” In the *paradise*-part we find the “area of freedom, security and justice” which is declared by the Treaty of Amsterdam. In addition we find “mutual trust” as a basis for mutual recognition. The underlying pattern of “mutual trust” caused very sceptical remarks in the discussion: There has to be something else than mere “trust” to control governments (Blakesley).

Juxtaposed to this, we find on the reality of *earth*: the global/regional and the national level which have to be perceived. In Europe, the bases for this are the Council of Europe mother conventions. Discussion showed doubts about the role of the European arrest warrant in this situation: has it flown into it like an aircraft into the twin towers with comparable consequences or is it not more than just a paper-flyer selling old wine in new pipes? At least something modern like video life-links promises some relief for practice.

In hell we realize the consequences of September 11th: proliferating terrorism by combating terrorism and thereby extinguishing civil liberties.

The latter is in my view the decisive point of the current development. After the war on drugs, we now experience the war on terrorism with more and more restrictions on what has been called civil liberties. Together with this an attitude in the U.S. can be observed already reported by Thucydides in ancient wars: “Who is not in favour of me is against me.” And it is the irony of history that it is just the overreaction of the U.S. on what happened on September 11th which creates – in my view – one of the most serious crises of liberty. In this sense, the terrorists surely reach one of their goals. They do not use bombs, they use the explosive mélange of fear and power concentrated in the U.S.; in other words: they use their targets to destruct themselves; however not physically, but the western culture of freedom and liberty.

The argument is seducing that there are not intensive restrictions on freedom and liberty for the single person, for the “good,” i.e. non-terrorist individual. This is like cutting a sausage into slices: another slice, and another slice, and another and you may still call the remaining part a sausage. However, at some time, the sausage is gone.

**International Criminal Law: Quo Vadis?  
3 December 2002**

**Panel 7: Victims' Rights**

*Chair:* H.E. Dr. Mohammed Fathy Naguib (Egypt)  
Chief Justice, Supreme Constitutional Court, Arab  
Republic of Egypt

*Presenter:* Professor William Schabas (Canada)  
Professor of Law and Director, Irish Centre for Human  
Rights, National University of Ireland; Member, Sierra  
Leone Truth and Reconciliation Commission

*Panel of Experts:*

Professor Reynald Ottenhof (France), Emeritus Professor of Law,  
University of Nantes Faculty of Law; Vice President, ISISC; Vice President,  
AIDP

Professor Ved Nanda (India), Professor of Law, Vice Provost for  
Internationalization, University of Denver School of Law

Professor Otto Triffterer (Austria), Emeritus Professor of Austrian and  
International Criminal Law and Criminal Procedure, Institute for Criminal  
Law, Criminal Procedure and Criminology, and Former Dean; University of  
Salzburg Faculty of Law

Mr. Peter Wilkitzki (Germany), Director-General, Federal Ministry of  
Justice, Germany; Member of the Board, ISISC; Deputy Secretary-General,  
AIDP

*Rapporteur:* Dr. Machteld Boot

**Panel Questions:**

1. In view of the fact that no international criminal law convention specifies penalties for crimes, how are these penalties arrived at and in what way are the modalities employed by international tribunals such as the ICTY, the ICTR and the ICC satisfy the principles of legality?
2. Are international human rights norms and standards established by the United Nations and by regional treaties and judicial institutions such as in the European and Inter-American systems binding on international judicial institutions such as the ICTY, the ICTR, and the ICC? And to what extent are they binding on national legal systems applying international criminal law?
3. What are the procedural rights of victims in the context of international tribunals and national tribunals applying international criminal law? What are the substantive rights of victims for different forms of redress before international judicial and administrative organs and before national institutions applying international criminal law?

## The Place of Victims in International Criminal Law

William A. Schabas\*

Victims appear to have taken an increasingly prominent place in our contemporary system of international criminal law. In particular, there are several references to their role and their interests within the *Rome Statute of the International Criminal Court*,<sup>1</sup> including the right of victims to intervene in proceedings,<sup>12</sup> the establishment of a Victims and Witnesses Unit within the Registry,<sup>3</sup> and the recognition of entitlement of victims to reparations.<sup>4</sup> The preamble of the *Statute* recognises that ‘during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.’ In addition, in September 2002, the Assembly of States Parties adopted the Rules of Procedure and Evidence, which contain the following ‘General principle’: ‘A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with Article 68, in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence.’<sup>5</sup>

If this seems self-evident to some, it is worth reflecting upon the varied and often quite insignificant roles given to victims in national systems of criminal justice. Some approaches, notably the ‘civil law’ or continental-type systems, enable victims to participate directly in proceedings, and

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1. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9; e.g., arts. 53(1)c), 53(2)c), 54(1)b), 57(3)c), 57(3)e), 64(2), 64(6)e), 65(4), 68, 87(4), 93(1)j). See generally, Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 77 (Herman von Hebel, Johan G. Lammers & Jolien Schukking eds., 1999); David Donat-Cattin, *The Role of Victims in ICC Proceedings*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 251 (Flavia Lattanzi & William A. Schabas eds., 2000); Christian P.J. Muttukumar, *Reparations for Victims*, in *ibid.*, at 303; Sam Garkawe, *The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimology Analysis*, 8 INT’L REV. VICTIMOLOGY 284 (2001).

2. *Ibid.*, arts. 15(3), 19(3), 82(4)

3. *Ibid.*, arts. 43(6), 68(4).

4. *Ibid.*, arts. 75, 79, 110(4)b).

5. *Rules of Procedure and Evidence*, ICC-ASP/1/3, pp. 10-107, Rule 86.

subsequently authorise them to use issues adjudicated during the criminal trial so as to resolve matters that are fundamentally private in nature. To many French lawyers and legal academics, criminal or penal law falls within the rubric of *droit privé*, an assessment that common lawyers find utterly puzzling. Under the common law, criminal prosecution is seen as essentially a matter of public policy in which victims have a role that is marginal at the best of times.<sup>6</sup> Those on the ‘defence side,’ in particular, are suspicious of efforts to promote victim participation, seeing this as a threat to distort further the purported ‘equality of arms’ balance said to exist between accused and accuser. Nevertheless, recent years have seen a softening of this resistance, perhaps a result of the growing popularity of restorative justice discourse.

In order to appreciate the growing importance of victims in international criminal law, it may be useful to consider the origins of this discipline, which is still relatively young and underdeveloped. It is generally agreed that international criminal prosecution – whether we date it from the isolated medieval prosecution of Peter von Hagenbach<sup>7</sup> or the more modern effort that followed the First World War<sup>8</sup> – evolves from efforts at the enforcement of international humanitarian law. It cannot be gainsaid that until recently, international humanitarian law focussed on the methods and materials of war, and had relatively little to say with respect to victims, at least to the extent that victims were considered to be ‘innocent’ civilian non-combatants (as contrasted with wounded soldiers or sailors, or prisoners of war). For example, the Regulations annexed to the fourth Hague Convention of 1907 do not use the term ‘victims’ at all. There are, perhaps, some indirect references, such as the preambular paragraph that declares the Convention’s provisions to be ‘inspired by the desire to diminish the evils of war, as far as military requirements permit’ and that they are ‘intended to serve as a general rule of conduct for the belligerents in their relations and in their relations with the inhabitants.’<sup>9</sup>

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6. See Christopher Muttukumaru, *Reparation to Victims*, in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 263 (Roy S. Lee ed., 1999), at 263-264.

7. See M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court*, 10 *HARV. HUM. RTS. J.* 11 (1997).

8. *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919; *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, London: His Majesty’s Stationery Office, 1921.

9. *Convention (IV) Respecting the Laws and Customs of War by Land*, [1910] UKTS 9, annex.

It is really only with the 1949 Geneva Conventions that the victims of armed conflict start moving to the centre stage of international humanitarian law, adopted, as they were, by the Diplomatic Conference for the Establishment of International Conventions for the Protection of *Victims* of War.<sup>10</sup> The 1977 additional protocols are even more explicit: the word 'victims' appears in the title.<sup>11</sup> And yet even these instruments, although they address the situation of victims, fix the question within the general context of the interests of the State. The real victim of a violation of one of these humanitarian law instruments, from a legal standpoint, is the State. That the paradigm is one of State rights and obligations is revealed by article 4 of the fourth Convention:

Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

If the core of the Conventions was truly about victims, it is indeed hard to grasp why these distinctions, whose justification can only be found if the rationale is State-focused, are necessary at all. But it was to take fifty years from the adoption of the Geneva Conventions before judges manifested their discomfort with these provisions, precisely in order to ensure that *all* victims of armed conflict are more adequately protected.<sup>12</sup>

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10. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, (1950) 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilians*, (1950) 75 UNTS 287.

11. *Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts*, (1979) 1125 UNTS 3; *Protocol Additional to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 UNTS 609.

12. See the discussion in the Appeals Chamber ruling in *Tadic*, appropriately entitled *The Status of the Victims: Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999, paras. 163-171.

Victims did not fare particularly well in the initial efforts at prosecution before the international military tribunals at Nuremberg and Tokyo. Although we may today look upon the development of the concept of crimes against humanity as the supreme accomplishment of the Nuremberg tribunal,<sup>13</sup> at the time this category of crime, which focuses so appropriately on civilian victims, was relatively marginalised. The punishability of crimes against humanity was contested in the work of the United Nations War Crimes Commission,<sup>14</sup> and the resulting provision, article VI(c), was an ugly compromise, with its *nexus* to armed conflict.<sup>15</sup> The International Military Tribunal famously declared that aggression, not crimes against humanity, was the 'supreme' crime.<sup>16</sup> Aggression was essentially a State-centred concept, holding one State answerable for breaching its obligations to another. As for the victims of the Nazis prior to September 1939, before the Nazis were engaged in international armed conflict, their interests and sufferings were ultimately betrayed by the Nuremberg judgment.<sup>17</sup>

The contemporary experiment with international criminal law really begins with the establishment of the International Criminal Tribunal for the

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13. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE* 219-220 (2000): 'But the greatest achievement of Nuremberg was count four: the crime against humanity – in effect, an ordinary crime committed on a scale of barbarism unimaginable until the Holocaust. This was the crime recognizable even to its architects when they saw the concentration camp films: the words of the Charter – "extermination, enslavement, deportation and other inhumane acts... persecution on political, racial or religious grounds in connection with any crime" – hardly conveys the unspeakable horror. These were not crimes against enemy soldiers, but against German civilians... They were not committed because of the exigencies of war...these were crimes that the world could not suffer to take place anywhere, at any time, because they shamed everyone. They were not, for that crucial reason, crimes against Germans (which therefore only Germans should punish); they were crimes against humanity. For this precedent alone, with its potential to destroy sovereign immunity, the Nuremberg judgment was one large legal step forward for mankind.'

14. See, for example, *Correspondence between the War Crimes Commission and HM Government in London Regarding the Punishment of Crimes Committed on Religious, Racial or Political Grounds*, U.N.W.C.C. Doc. C.78, 15 February 1945.

15. *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.)*, (1951) 82 UNTS 279.

16. *United States of America et al. v. Goering et al.*, International Military Tribunal, Judgment, 30 September-1 October 1946, 41 AM J. INT'L L. 172 (1947), at 186.

17. *Ibid.*: 'The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.'

former Yugoslavia, in May 1993. There is a reference to victims in the Security Council resolution establishing the Tribunal, but it is hardly a mandate for them to play an active role in proceedings: 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.'<sup>18</sup> Nothing comparable is present in the resolution establishing the International Criminal Tribunal for Rwanda.<sup>19</sup>

Any real interest in the rights of victims that can be found in contemporary international criminal law comes from outside the international humanitarian law/international criminal law tradition. A victim-focussed approach first developed within the distinct although related field of international human rights law. In contrast with international criminal law and international humanitarian law, where victim participation in proceedings has been slow to arrive, victims have been entitled to participate in international human rights law mechanisms essentially since the system's early beginnings, in the late 1940s. After some initial hesitation about the organisation's authority to even consider individual petitions from victims of human rights,<sup>20</sup> the relevant bodies within the United Nations, more specifically the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Protection and Promotion of Human Rights), developed elaborate mechanisms in order to process the hundreds of thousands of communications received in Geneva and New York.<sup>21</sup> The right to a remedy for individual victims of human rights was recognised explicitly in both regional<sup>22</sup> and universal<sup>23</sup> human rights treaties.

By the 1980s, new instruments began to emerge that were aimed at enhancing the position of victims within the general protection of

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18. U.N. Doc. S/RES/827 (1993), annex. Resolution 808, which launched the process leading to establishment of the Tribunal, doesn't even use the word 'victim.'

19. U.N. Doc. S/RES/955 (1994), annex.

20. U.N. Doc. E/259, Chapter V, §22.

21. See Nigel S. Rodley, *United Nations non-treaty procedures for dealing with human rights violations*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 64 (Hurst Hannum ed., 2d ed. 1992); Marc J. Bossuyt, *The development of special procedures of the United Nations Commission on Human Rights*, 6 HUM. RTS. L.J. 183 (1985); MARIE-LOUISE BARTOLOMEI, GROSS AND MASSIVE VIOLATIONS OF HUMAN RIGHTS IN ARGENTINA: 1976-1983, AN ANALYSIS OF THE PROCEDURE UNDER ECOSOC RESOLUTION 1503 (Institute of International Law: Lund, 1991).

22. *Convention For The Protection of Human Rights and Fundamental Freedoms* ('European Convention on Human Rights'), (1955) 213 UNTS 221, ETS 5, art. 13

23. *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 171, art. 2(3).

international human rights. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', a text that was subsequently endorsed by the United Nations General Assembly.<sup>24</sup> The Basic Principles recognise that victims should be treated with compassion and respect for their dignity, that they should have their right to access to justice and redress mechanisms fully respected, and that national funds for compensation to victims should be encouraged together with the expeditious development of appropriate rights and remedies. More or less in parallel, human rights treaty bodies and tribunals began establishing a body of jurisprudence approaching victim issues as 'horizontal' violations of human rights, and holding States responsible pursuant to their international treaty obligations even where there was no apparent link between the State and the perpetrator.<sup>25</sup>

This pioneering work was followed by efforts to develop more comprehensive guidelines on the right to remedy and reparation within the United Nations Sub-Commission and Commission, under the leadership of two prominent human rights experts, Theo van Boven<sup>26</sup> and M. Cherif Bassiouni.<sup>27</sup> The basic principles that were proposed by Professors van

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24. G.A. Res. 40/34. Roger Clark, *The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, in *THE LIVING LAW OF NATIONS* 355 (G. Alfredsson & A. Macalister-Smith eds., 1996). See also, the resolutions of the Economic and Social Council: *Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, ESC Res. 1989/57; *Victims of crime and abuse of power*, ESC Res. 1990/22.

25. Beginning with the Inter-American Court of Human Rights: *Velasquez Rodriguez v. Honduras*, 29 July 1988, Series C, No. 4. For the Human Rights Committee, see *Bautista de Arellana v. Colombia* (no. 563/1993), U.N. Doc. CCPR/C/55/D/563/1993, paras. 8.3. 10; *Laureano v. Peru* (no. 540/1993), U.N. Doc. CCPR/C/56/D/540/1993, para. 10. For the European Court of Human Rights, see *Streletz, Kessler & Krenz v. Germany*, European Court of Human Rights, 22 March 2001, para. 86; *Akkoç v. Turkey*, European Court of Human Rights, 10 October 2000, para. 77.

26. *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant Sub-Commission decision 1995/117*, U.N. Doc. E/CN.4/Sub.2/1996/17; *Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28*, U.N. Doc. E/CN.4/1997/104, annex.

27. *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43*, U.N. Doc. E/CN.4/1999/65; *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33*, U.N. Doc. E/CN.4/2000.62.

Boven and Bassiouni include a duty on States to prosecute serious violations of human rights (flowing from the obligation to respect and ensure respect, which is codified in common article 1 of the Geneva Conventions), the right of victims to a remedy and reparation, and the right to know the truth.

The attention given by the *Rome Statute of the International Criminal Court*, and by subsidiary instruments such as the *Rules of Procedure and Evidence*, to the role and the rights of victims is quite stunning when set beside the very secondary role they have been given historically by international criminal law and international humanitarian law. This is surely the result of the injection of human rights principles, derived from recent case law of the international treaty bodies and tribunals as well as the progressive development of law found in the van Boven and Bassiouni principles, and the work of bodies like the United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The agenda was also promoted by certain specialised non-governmental organisations, like Redress, and by national delegations for whom a victim-based approach to criminal law could be derived from their own traditions, like France. But whether or not the International Criminal Court will actually serve the interests of victims in an effective and satisfactory way remains to be seen.

Other contemporary attempts at addressing impunity through criminal law measures must surely be a big disappointment if the standpoint of the victim becomes the benchmark. Few of the victims of serious violations of international humanitarian law in the former Yugoslavia or Rwanda can feel particularly satisfied with the modest output of two international tribunals established by the Security Council. To be fair, the *ad hoc* Tribunals surely benefit the victims of crimes, particularly in their ability to clarify the historical truth,<sup>28</sup> one of the values that was stressed in the work of M. Cherif Bassiouni. But there is no compensation or reparation, and rarely even an apology.<sup>29</sup> In a statement signed alongside her plea agreement, former Bosnian Serb leader Biljana Plavsic said that by 'accepting responsibility and expressing her remorse fully and unconditionally, [she] hopes to offer some consolation to the innocent victims – Muslim, Croat and Serb – of the

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28. See, for example, the discussion entitled 'Genocide in Rwanda in 1994?', in *Prosecutor v. Akayesu* (Case no. ICTR-96-4-T), Judgment, 2 September 1998, paras. 111-128.

29. Former Rwandan Prime Minister Jean Kambanda, who pleaded guilty to genocide and crimes against humanity, 'offered no explanation for his voluntary participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber'; *Prosecutor v. Kambanda* (Case No. ICTR 97-23-S), Judgment and Sentence, para. 51.

war in Bosnia and Herzegovina.<sup>30</sup> The defence argued that her acknowledgement of the crimes and her personal accountability would contribute to ‘rendering justice to victims.’<sup>31</sup> The Trial Chamber seemed to recognise that there was something to this, in sentencing her to eleven years’ imprisonment, although it cautioned that ‘undue leniency’ could not ‘fully reflect the horror of what occurred or the terrible impact on thousands of victims.’<sup>32</sup>

Prosecution by national courts, under the principle of universal jurisdiction, is often held out as a valuable alternative to international justice. A great deal of energy and resources has been devoted to this subject in recent years. The most celebrated cases are those of Belgium, filed under new legislation that has allowed victims to initiate proceedings, even if they reside outside the country and if there is no other territorial or personal connection with the jurisdiction.<sup>33</sup> In contrast, other countries with universal jurisdiction, such as Canada, subject prosecution to prior authorisation from senior justice department officials, and this has the practical effect of eliminating most prospective cases.<sup>34</sup> By and large, universal jurisdiction has generated far more heat than light, with only a handful of convictions to show after years of effort. The same applies to somewhat idiosyncratic legislation like the United States Alien Tort Claims Act. The litigation is dramatic and the awards are sometimes stupendous, but has any victim ever actually enforced a judgment? A victim of human rights and humanitarian law violations is as likely to obtain satisfaction through these approaches as he or she is of being struck by lightning.

Where victims may have more hope of some significant and substantial results is before bodies like truth commissions.<sup>35</sup> As the name suggests, they

30. *Prosecutor v. Plavsic* (Case No. IT-00-39&40/1), Sentencing Judgment, 27 February 2003, para. 19; also paras. 71-72.

31. *Ibid.*, para. 68.

32. *Ibid.*, para. 132. For sentencing judgments that address the interests of victims, see also: *Prosecutor v. Krstic* (Case no. IT-98-33-T), Judgment, 2 August 2001, para. 702; *Prosecutor v. Erdemovic* (Case no. IT-96-22-A), Sentencing Appeal, 7 October 1997, para. 15; *Prosecutor v. Kayishema and Ruzindana* (Case no. ICTR-95-1-T), Sentence, 21 May 1999, para. 26; *Prosecutor v. Kordic & Cerkez* (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 852.

33. See the separate and individual opinions in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, Judgment, 15 February 2002.

34. *An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts*, S.C. 2000, c. 24, s. 9(3).

35. See, generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS, FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002).

are particularly well suited at establishing historical truth. By and large they will do this better than courts and tribunals, because they are mandated expressly to do this and because they have the tools and the flexibility to carry out their mission, including modest burdens of proof and a range of investigative powers that will rarely be given to a criminal prosecutor. Louis Joinet, in his report to the Sub-Commission, addressed this issue as one of the 'right to know':

This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a 'duty to remember' on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.<sup>36</sup>

Joinet recommended this be done by 'extrajudicial commissions of inquiry,' noting that 'the courts cannot quickly punish executioners and those who give them their orders.'<sup>37</sup> But in addition, truth commissions meet personally with thousands of victims, console them privately and even publicly in their grief, attempt to promote reconciliation by confronting perpetrators and victims, and in many cases have a significant role in encouraging and promoting reparation.

Citing 'decades of profits [that] were based on systematic violations of human rights,' the March 2003 final report of the South African Truth and Reconciliation Commission proposed a levy of 3 billion rand on South African firms, including Anglo-American Mining Corporation (which is itself a shareholder in the De Beers diamond business), and criticised an 800 million rand trust fund established by business as 'paltry.' The Commission pointed to a wealth tax levied in West Germany in order to rebuild East Germany following reunification as a model. Backing away from such a scheme, which threatened to confront multinational business interests head on, South African President Thabo Mbeki subsequently recommended a

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36. *Question of the impunity of perpetrators of human rights violations* (civil and political), Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc. E/CN.4/Sub.2/1997/20, para. 17.

37. *Ib id.*, para. 18.

one-time cash payment to victims of \$3,900.<sup>38</sup> Many will not be entirely satisfied, but nobody can argue with the claim that more victims will benefit concretely from the initiatives of the South African Truth and Reconciliation Commission than from all of the prosecutions before international *ad hoc* tribunals, and before national courts under universal jurisdiction, since the beginning of recorded time.

There is, of course, no need to see criminal prosecution and truth commission as contradictory approaches. The two can work side by side, in a cooperative and complementary manner, as primary options drawn from the palette of transitional justice initiatives.<sup>39</sup> Currently, the Sierra Leone Special Court and the Sierra Leone Truth and Reconciliation Commission, operating more or less in parallel, are demonstrating how victims can benefit from the synergy of the two.

The Truth and Reconciliation Commission is a creation of the Parliament of Sierra Leone,<sup>40</sup> in pursuance of an undertaking found in Article XXVI of the *Lomé Peace Agreement* of 7 July 1999: 'A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.'<sup>41</sup> The seven commissioners were sworn into office in July 2002, and the Commission began its work immediately. Although it is a national institution, the Commission has an international dimension because of the participation of the Special Representative of the Secretary-General and the High Commissioner for Human Rights in its establishment, including the appointment of its members, three of whom are not nationals of Sierra Leone. According to the enabling legislation, the Truth Commission was established 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the *Lomé Peace Agreement*; to address impunity, to respond to the

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38. See Ginger Thompson, *South Africa Will Pay \$3,900 to Apartheid Victims' Families*, N.Y. TIMES, 16 April 2003.

39. See the essays in POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002).

40. *Truth and Reconciliation Commission Act 2000*, Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9. See Richard Bennett, *The Evolution of the Sierra Leone Truth and Reconciliation Commission*, in TRUTH AND RECONCILIATION IN SIERRA LEONE 37 (UNAMSIL: Freetown, 2001).

41. *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, Lomé, 7 July 1999.

needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered'.<sup>42</sup>

In fulfilling this victim-centred approach, the Truth and Reconciliation Commission has taken more than 6,000 statements from victims and perpetrators. Interestingly, most victims do not request compensation, in the sense this is understood in Western legal systems. Rather, they seek access to medical care, education for their children, and tools and training with which to earn a living or build a home. It is as if their reactions had been guided by the *International Covenant on Economic, Social and Cultural Rights* rather than *Salmon on Torts*. During the hearings, which began in April 2003, the Truth and Reconciliation Commission has organised 'reconciliations' at which perpetrators confess their crimes and seek some measure of forgiveness from the victims. Its message has been broadcast throughout the country, with public hearings disseminated on radio in both English and the national *lingua franca*, Krio. But the Truth and Reconciliation Commission has also taken its hearings to remote corners of the country, where there is still no electricity or running water. As it completes its work, with an October 2003 deadline, the Commission is preparing recommendations aimed at addressing the needs of victims, including entitlement to reparation. The legislation states: 'The Government shall faithfully and timeously implement the recommendations of the report that are directed to state bodies and encourage or facilitate the implementation of any recommendations that may be directed to others.'<sup>43</sup>

Accordingly, the Truth and Reconciliation Commission directly addresses many of objectives enumerating in the van Boven and Bassiouni reports to the Sub-Commission and the Commission on Human Rights respectively, including the right of victims to a remedy and reparation, and the right to know the truth. It can even stigmatise perpetrators by 'naming and shaming' although, obviously, it cannot put them in jail. Thus, with respect to addressing impunity, its powers are limited. This is where the Special Court enters the scene.

The Special Court for Sierra Leone is an international organisation in its own right, created by treaty between the Government of Sierra Leone and the United Nations.<sup>44</sup> Institutionally, it largely resembles the *ad hoc* tribunals

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42. *Truth and Reconciliation Commission Act 2000*, *supra* note 40, s. 6(1).

43. *Ibid.*, s. 17.

44. *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Freetown, 16 January 2002. On the Special Court, see Micaela Frulli, *The Special Court for Sierra Leone : Some Preliminary Comments*, 11 EUR. J. INT'L L. 857 (2000); Robert Cryer, *A 'special court' for Sierra Leone?*,

for the former Yugoslavia and Rwanda, although the latter were created by the Security Council and are therefore blessed with the international enforcement powers that this entails. While the Special Court may deliver 'truth-seeking,' 'catharsis,' 'expiation of guilt,' and so on, its mission is primarily punitive: '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>45</sup> In March 2003, the Special Court indicted eight of the leading suspects. Although a few more indictments are expected, including possibly one directed against current Liberian Head of State Charles Taylor, it would be surprising if the eventual number of accused totalled more than fifteen. The applicable instruments dealing with the Special Court make perfunctory references to victims, but this is essentially with respect to their protection as witnesses.

Prior to the establishment of the two bodies, in mid-2002, there had been considerable interest within the international community in the 'relationship' between the two bodies. On 2 October 2000, subsequent to the Security Council resolution calling for establishment of a special court<sup>46</sup> but even prior to the Secretary-General's first draft statute,<sup>47</sup> the United States Institute of Peace and the International Human Rights Law Group convened an expert round table on how the two bodies would relate to each other.<sup>48</sup> The Secretary-General's report of 4 October 2000, which first set out the draft statute and the reasoning behind it, said that 'relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the

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50 INT'L & COMP. L. Q. 435 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185 (2001); Avril MacDonald, *Sierra Leone's Shoestring Special Court*, 84 INT'L REV. RED CROSS 121 (2002); S. Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT'L L. 635 (2001); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations' Special Court for Sierra Leone*, AUSTRALIAN INT'L L.J. 159 (2001); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002); Abdul Tejan Cole, *The Special Court for Sierra Leone*, 14 INTERRIGHTS BULLETIN 37 (2002); J. Cerone, *The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice*, 8 ILSA J. INT'L & COMP. L. 379 (2002).

45. *Statute of the Special Court for Sierra Leone*, art. I(1).

46. U.N. Doc. S/RES/2000/1315.

47. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915.

48. See Richard Bennett, *supra* note 40, at p. 43.

Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.<sup>49</sup> In November 2000, an international workshop organised by the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Assistance Mission for Sierra Leone (UNAMSIL) proposed establishing a consultative process 'to work out the relationship between the TRC and the special court.'<sup>50</sup> In December 2001, as part of its activities to prepare for the establishment of the TRC, the High Commissioner for Human Rights and the Office of Legal Affairs convened an expert meeting in New York City that discussed such matters as 'information sharing' and even joint institutions.<sup>51</sup> Many international and national non-governmental organisations joined in the excitement.

In the end, however, it has turned out that there is not much of a 'relationship.' Both bodies soon discovered that they had distinct tasks. While they have worked together in a friendly and cooperative manner, neither institution has seen any real interest in common investigations or other types of formal cooperation. The principal bridge between the two may come only at the completion of the Commission's work, in October 2003, shortly before trials actually begin. The 'impartial historical record' in the Commission's report could provide the Court with elements of the factual underpinning that may render unnecessary much of the contextual evidence that has been tendered and debated *ad nauseum* before the *ad hoc* tribunals for the former Yugoslavia and Rwanda.

The lesson here is that international criminal law, in the strict sense, has not proven to be particularly adequate in responding to the needs of victims. The ambitious proposals in the *Rome Statute* may signal a change, but they will only apply when national justice systems are unwilling or unable to investigate or prosecute. With respect to the interests of victims in accountability for serious violations of international humanitarian laws, truth commissions appear to offer a genuine 'complementarity,' in the best sense of the word. They can deal with broad issues where courts and tribunals are less flexible. They can tackle questions that, regrettably, still somewhat evade international criminalisation, such as the use of child soldiers or of mercenaries, and employment of types of weapons that cause unnecessary suffering or harm. No victim-centred approach to international criminal justice should overlook the fundamental role that can and is being played by truth commissions.

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49. See *supra* note 45, para. 8.

50. *Situation of human rights in Sierra Leone*, U.N. Doc. E/CN.4/2001/35, p. 13, para. 41.

51. U.N. Doc. E/CN.4/2002/3, para. 70.



## **Les Droits des Victimes en Droit Pénal International**

**Reynald Ottenhof \***

Les victimes ont été, pendant longtemps, les « grandes oubliées » du système de justice pénale. La raison de cet oubli est facile à comprendre : le droit pénal est né, comme chacun le sait, de l'éradication progressive de la vengeance privée. Le jour où le pouvoir central a été assez fort pour imposer la peine publique, la fonction étatique de la justice s'est trouvée affirmée. Plus l'Etat devenait fort, plus la victime se trouvait éloignée du prétoire pénal.

En contrepartie, là où l'Etat n'est pas assez fort pour imposer sa justice, la victime a tendance à se substituer à l'Etat, et à poursuivre elle-même la réparation individuelle (vendetta) ou collective (guerres tribales).

C'est l'un des mérites de la criminologie contemporaine d'avoir montré les limites du système de justice pénale à assumer son rôle de facteur de paix sociale, de restauration de l'ordre public, dès lors que la victime était écartée du procès pénal, au profit d'un dialogue singulier entre l'Etat, représenté par un accusateur public et le délinquant. En réduisant la peine à sa seule fonction rétributive, le droit pénal se borne, en définitive, à substituer la vengeance publique à la vengeance privée. L'action publique n'exerce pas pleinement sa fonction de restauration de la paix sociale.

A l'intérieur de la criminologie est né tout un courant destiné à restaurer la place de la victime dans le processus de réconciliation sociale, dont le procès pénal constitue l'instrument. Ainsi s'est développée et a prospéré, comme chacun le sait, la victimologie.

Le rappel est certes d'une grande banalité. Il mériterait d'être approfondi et nuancé. Il a seulement pour but de constituer l'arrière plan de notre propos d'aujourd'hui.

Le titre général de cette conférence est : le DPI : Quo Vadis ? Il nous invite à examiner l'état actuel du DPI, pour tenter d'en percevoir les développements futurs. A cet égard, la question des droits des victimes nous paraît exemplaire. En effet, s'il est incontestable que sous l'influence du courant victimologique, les droits des victimes se sont trouvés petit à petit,

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restaurés dans les législations nationales, on pourra constater combien ce rôle s'est trouvé amplifié sous l'influence du droit pénal international.

C'est en effet l'une des constatations majeures que cette conférence aura permis de mettre en évidence : l'évolution des législations internes est avant tout influencée par le rôle moteur joué par le droit pénal international, aussi bien en ce qui concerne le droit substantiel que la procédure pénale, voire la partie spéciale. C'est donc, ainsi, l'ensemble du système de justice pénale qui se trouve aujourd'hui façonné par le développement des grandes questions qui concernent la protection des droits de l'homme et le développement d'une justice pénale internationale, que ce soit au travers des tribunaux *ad hoc*, ou de la Cour pénale internationale.

Il n'est, bien entendu, pas question d'évoquer aujourd'hui tous ces aspects. Je voudrais me borner à évoquer seulement quelques-uns d'entre eux, comme éléments susceptibles d'alimenter la discussion générale qui suivra.

A cet égard, je me bornerai à évoquer trois points :

La définition de la notion de victime en droit pénal international

La place de la victime dans la définition des crimes internationaux

Le lien existant entre le droit de fond et la procédure à propos du rôle de la victime dans la justice pénale internationale.

## **I – La première question concerne la notion même de victime, telle qu'elle est définie en droit pénal international**

On connaît la tendance des législations nationales internes à contenir dans une définition étroite la notion même de victime. La raison de cette conception restrictive est bien connue : il s'agit de limiter autant que possible l'accès des victimes à la justice pénale, dans la mesure où la victime est considérée comme un élément perturbateur dans le débat entre l'auteur de l'infraction et l'autorité de poursuite.

En droit pénal international, il en va autrement. Deux exemples illustrent cette conception large de la notion de victime.

1. Il s'agit tout d'abord de la définition de la victime telle qu'elle figure dans les « Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire, en annexe du rapport final du Rapporteur spécial, le Professeur M. C. Bassiouni demandé par la Commission des Droits de l'homme des Nations Unies, en vue d'établir une version révisée des principes et directives fondamentaux élaborés par Théo Van Boven.

Le point V de ces « Principes » énonce la proposition suivante :

« On entend par « victime » une personne qui, par suite d'actes ou d'omissions constituant une violation des normes du droit international humanitaire ou des droits de l'homme, a subi, individuellement ou collectivement, un préjudice, notamment une atteinte à son intégrité physique ou mentale, une souffrance morale, une perte matérielle ou une atteinte à ses droits fondamentaux. Une « victime » peut être également une personne à la charge ou un membre de la famille proche ou du ménage de la victime directe ou une personne qui, en intervenant pour venir en aide à une victime ou empêcher que se produisent d'autres violations, a subi un préjudice physique, mental ou matériel ».

Cette définition retient :

- les victimes individuelles ou collectives,
- les victimes indirectes,
- les victimes sans auteur connu ou identifié (violations massives : cf viols collectifs, épuration ethnique).

2. Une autre définition large figure dans le Statut de la CPI.

En application de l'article 75 du Statut, le Règlement de procédure et de preuve (Règle 85) définit la victime comme :

- a) toute personne physique qui a subi un préjudice du fait de la commission d'un crime relevant de la compétence de la Cour.
- b) Toute organisation ou institution dont un bien consacré à la religion, à l'enseignement, aux arts, aux sciences ou à la charité, un monument historique, un hôpital ou quelque autre bien ou objet utilisé à des fins humanitaires a subi un dommage direct.

Le règlement de procédure et de preuve consacre donc la notion de victime personne morale, à raison d'un préjudice très large qualifié de « préjudice humanitaire ».

Cette conception large de la notion de victime est évidemment originale. Mais elle s'explique par la nature même des violations spécifiques que le DPI est amené à sanctionner.

C'est l'objet de mon second point.

## **II – La seconde question concerne la place éminente tenue par la victime dans la définition même des crimes internationaux**

Si le DPI a tant contribué à la protection et à la promotion des droits des victimes, c'est naturellement à raison du fait que les infractions internationales les plus graves (en particulier celles visées dans le Statut de la CPI) entraînent des victimisations majeures, des victimisations massives.

Les victimes ne sont plus le résultat provoqué par les actes punissables, elles en sont l'objet principal, le but même poursuivi par les auteurs.

Elles participent de la définition de l'infraction, en qualité d'éléments constitutifs : le génocide est évidemment l'exemple le plus typique de ce processus. Le plus souvent, la qualité de la victime permet de caractériser l'infraction ; qu'il s'agisse de son appartenance à une race, à une religion, une communauté sexuelle, etc.

La victime ne se présente plus alors devant la justice pénale comme un individu isolé, mais comme incarnant, au sein du groupe auquel elle appartient, une parcelle de l'humanité tout entière, au travers des valeurs qu'elle incarne.

Ceci explique, par conséquent, la nature tout à fait particulière du préjudice causé par ce type d'infractions, qui ne se confond pas avec la somme des préjudices individuels subis par chacune des victimes. De là, en particulier, le lien étroit qui en résulte entre la procédure et le droit de fond.

C'est l'objet de mon troisième et dernier point.

### **III – La troisième question concerne le lien étroit qui s'établit entre le droit de procédure et le droit de fond à propos de la victime en droit pénal international**

Chacun sait combien, dans la négociation des instruments internationaux en matière pénale, et, spécialement en ce qui concerne tout ce qui touche au fonctionnement des juridictions pénales internationales, le choix d'un modèle procédural soulève des difficultés considérables.

Les affrontements entre partisans du système accusatoire et partisans du système inquisitoire ont trouvé dans cette enceinte même des échos mémorables !

Les compromis auxquels conduisent les laborieuses négociations des Statuts, Traités ou Conventions trouvent leurs limites à l'occasion de la place qu'il convient de faire à la victime dans le déroulement de la procédure.

Force est de constater que bien souvent la sollicitude à l'égard de la victime ne va pas jusqu'à accorder à celle-ci un rôle actif dans le déroulement de la procédure.

En définitive, du choix du modèle de justice pénale dépend la satisfaction plus ou moins étendue qui sera accordée aux droits des victimes.

La véritable question est celle de la finalité que l'on entend accorder à l'exercice de l'action pénale.

– S'il s'agit d'établir la responsabilité de l'auteur de l'infraction afin de lui appliquer une peine, la victime se verra au mieux accorder une

indemnisation au titre du préjudice découlant directement de la commission de l'infraction, soit devant la juridiction civile, soit devant la juridiction pénale (système de la partie civile).

- S'il s'agit de faire en sorte que l'action pénale ait en outre pour but d'effacer le trouble social causé par la commission de l'infraction, la victime devra obtenir non seulement une indemnisation de son préjudice, mais aussi une véritable réparation, touchant les aspects psychologiques, sociaux, familiaux, etc. du dommage qu'elle a subi.

- S'il s'agit en outre de faire en sorte que l'action publique ait pour but d'effacer l'intégralité des conséquences entraînées par le processus de victimisation, à savoir de réhabiliter la victime dans sa situation antérieure à l'infraction (à l'image de la *restauratio in integrum* du droit romain), à l'indemnisation et à la réparation il faudra ajouter la restauration de la victime.

Indemnisation, réparation, restauration : c'est le mérite du droit pénal international d'avoir orienté les législateurs nationaux vers la prise en considération de ces trois fonctions. C'est ce qu'affirme clairement la Commission de Droits de l'Homme des Nations Unies dans sa Résolution 2002/44 prenant acte du rapport Bassiouni précité, en énonçant que, « conformément aux principes relatifs aux droits de l'homme internationalement reconnus, les victimes de violations graves des droits de l'homme ont droit, dans les cas appropriés, à restitution, à indemnisation et à réadaptation ».

Et puisqu'il est ici question de modèle de justice pénale, c'est sans aucun doute le modèle dit de « justice restaurative », inspiré par les tendances récentes de la victimologie, qui permet le mieux d'assurer cette triple fonction<sup>1</sup>.

Il est heureux que le DPI soit, de nos jours, la discipline qui contribue à la promotion d'un modèle de procédure aussi favorable à la promotion des droits des victimes.

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1. Ceci a été fort bien illustré lors du Colloque des 4 Associations qui s'est déroulé en marge du X<sup>e</sup> Congrès des Nations Unies à Vienne du 10 au 17 avril 2000, à propos du thème 4 du Congrès intitulé : « Délinquants et victimes : obligation de rendre compte et équité dans le système de justice ». Rapport Bassiouni.



# Victims' Rights: Emerging Trends

Ved P. Nanda\*

## 1. Introduction

Should victims claim rights *qua* victims? What rights are to be claimed? And who is a victim? Professor Markus Dubber has recently contended that claims of victims to rights, based on their status as victims, are incoherent and “also detrimental to [them].”<sup>1</sup> But that is essentially what the populist “victims’ rights” movement seeks: changes in the existing criminal justice system to secure more rights – such reparation and compensation, participation in the process and the outcome, and closure – for crime victims.

This movement, vilified by its critics<sup>2</sup> and highly commended by its proponents,<sup>3</sup> has made enormous strides in the recent past. In the following presentation, I will briefly sketch the current trends regarding the victims’ rights agenda in the United States and in the international arena, with a focus on restorative justice. As the discussion here will be solely in the criminal context, access to civil tort remedies is beyond the scope of the present work. Preceding my discussion of the recent developments, I will provide some background in an historical context.

## 2. Background

Although the victims’ rights movement is of recent origin, it is essential to note that the impetus for the movement lay in the perception that victims do not have adequate voice in the modern criminal justice system, that there

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1. MARKUS DUBBER, VICTIMS IN THE WAR ON CRIME – THE USE AND ABUSE OF VICTIMS’ RIGHTS 155 (2002) [*hereinafter* DUBBER].

2. A veteran in the criminal justice system and a distinguished participant at the conference observed to me that the victims’ rights movement and victimology studies have “polluted the criminal justice system,” whose main objective is retribution.

3. See, e.g., the World Society of Victimology’s newsletter, *The Victimologist*, published since April 2002.

is seemingly no room for them there, and that in fact they are marginalized. As is well known, it is under the modern state-centered system that the historical shift occurred from private to public prosecution.<sup>4</sup> Thus, under the prevailing criminal justice system the discretion on whether or not to prosecute, whether or not to initiate the case, and how to pursue and shepherd it once it is initiated, rests with the prosecutor and not the primary or secondary crime victims. The prosecutor, however, acts on behalf of the community at large and not the victim as such.

The U.S. Supreme Court's 1973 decision in *Linda R. S. v. Richard D.*,<sup>5</sup> in which the Court held that victims have no "judicially cognizable interest" in the prosecution of another,<sup>6</sup> and also extended the constitutional rights of the accused (as it has done in many other cases as well), is illustrative of the kind of pronouncement that spurred the victims' rights movement. Feminists' concern that under the criminal justice system, rape victims were discriminated against and unfairly treated,<sup>7</sup> also added momentum to the victims' rights movement, which has increasingly gained strength in the United States as the society wages war on crime.

### 3. Emerging Trends

#### A. Developments in the United States

##### 1. Federal and State Legislation

President Ronald Reagan bolstered the efforts of the victims' rights movement as he appointed a Task Force on Victims of Crime, which reported in 1982 that violent crime "strikes when least expected, often when the victim is doing the most commonplace things,"<sup>8</sup> and victims who survive their attack are "treated as appendages of a system appallingly out of balance . . . [which serves] lawyers and defendants, treating victims with institutionalized disinterest."<sup>9</sup> The Report's conclusion was that, under the current system, "innocent victims of crime have been overlooked, their

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4. See John Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973); J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 571-75 (3d ed. 1990).

5. *Linda R. S. v. Richard D.*, 410 US 614 (1973).

6. *Id.* at 619.

7. See generally Lynne Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1985); Lynne Henderson, *Revisiting Victims' Rights*, UTAH L. REV. 383 (1999).

8. President's Task Force on Victims of Crime, *Final Report*, vi (Dec. 1982).

9. *Id.* at 2.

pleas for justice have gone unheeded, and their wounds – personal, emotional, and financial – have gone unattended,” with a recommendation for the passage of a constitutional amendment to guarantee the protection of victims’ rights.<sup>10</sup> The Report proposed a broad agenda for implementing victims’ rights and services.

Both federal and state legislatures have taken action aimed at protecting victims’ rights. For example, the U.S. Congress has adopted several laws,<sup>11</sup> including the Victims of Crime Act in 1984.<sup>12</sup> Previously in 1982 it had adopted the Victim and Witness Protection Act, with the purpose “to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the federal government does all that is possible to assist victims and witnesses of crime . . . ; and to provide model legislation for state and local governments.”<sup>13</sup> Other such acts include the Crime Control Act adopted in 1990, which created the first federal bill of rights for victims of crime, called the “Victims’ Rights and Restitution Act of 1990.”<sup>14</sup> Under this Act, federal law enforcement officers, prosecutors and corrections officials are required to use their “best efforts” to ensure that victims are provided basic rights and services.<sup>15</sup>

In 1994 the Violent Crime Control and Law Enforcement Act established new rights for Victims of Sexual Assault, Sexual Exploitation, Child Abuse, Domestic Violence and Telemarketing Fraud.<sup>16</sup> Significant funding for combating domestic violence and sexual assault and a variety of crime prevention initiatives were included in the legislation. In 1996, mandatory restitution provisions were included in the Antiterrorism and Effective Death Penalty Act, by increases in felony conviction fines to be used to provide funding for victim compensation and assistance programs.<sup>17</sup> Also in 1996, the Megan’s Law Amendment was enacted to ensure that

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10. *Id.* at ii.

11. See Sue Anna Moss Cellini, *The Proposed Victims’ Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT’L & COMP. L. 839, 849-56 (1997).

12. Victims of Crime Act of 1984, 42 U.S.C. §§ 10,601-10,604.

13. Victim Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1249 (codified at 18 U.S.C. §§ 1512-1515; Fed. R. Crim. P. P 32).

14. Crime Control Act of 1990, Pub. L. No. 101-647, Title V, §§ 502-503, 104 Stat. 4820 (codified at 42 U.S.C. §§ 10606-10607).

15. 42 U.S.C. § 10606(a).

16. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title IV, §§ 40113, 40221, 40503; Title XXV, §§ 250002 (a)(2); Title XXIII, § 230101 (b), 108 Stat. 1904-2078 (codified at 42 U.S.C. § 10607 (c)(7), 14011 (b); 18 U.S.C. §§ 2263-2264, 2248, 2259; and at Fed. R. Crim. P. P 32).

17. 42 U.S.C. § 10601.

communities are notified of the release and location of convicted sex offenders.<sup>18</sup> In 1997, following the Oklahoma City bombing, Congress enacted the Victims' Rights Clarification Act,<sup>19</sup> ensuring victims' right to attend proceedings and also deliver or submit a victim impact statement. The same year, Congress adopted the federal anti-stalking law, under which crossing a state line to stalk another is made a federal offense.<sup>20</sup>

Several states have even amended their constitutions to specifically enumerate crime victims' rights. To illustrate, the Colorado amendment, entitled "Rights of Crime Victims," states:

Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process.<sup>21</sup>

Although the scope of these rights in different states varies, and capital cases raise special issues,<sup>22</sup> the U.S. Department of Justice has stated that most bills of rights that states have adopted contain basic provisions for victims to be treated with dignity and compassion, to be informed of the status of their case, to be notified of hearings and trial dates, to be heard at sentencing and parole through victim impact statements, and to receive restitution from convicted offenders.<sup>23</sup>

## 2. The Victims' Rights Amendment to the U.S. Constitution

Following the recommendation of the President's Task Force in 1982 for a constitutional amendment to protect victims' rights, serious attempts began in 1996 when both the Senate and House of Representatives deliberated on a victims' bill of rights Constitutional Amendment.<sup>24</sup> However, no action was taken despite repeated hearings in several sessions.

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18. Megan's Law Amendment to the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Act, 42 U.S.C. § 14071.

19. 18 U.S.C. § 3510 (1994 & Supp. IV 1998).

20. 18 U.S.C. § 2261A.

21. Colo. Const. Art. II, sec. 16a.

22. See generally Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215 (2001-2002).

23. U.S. DEPT. OF JUSTICE, *NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY* 3 (1998) [*hereinafter* NEW DIRECTIONS].

24. S.J. Res. 52 and H.R.J. Res. 174, 104th Cong. (1996).

The pertinent part regarding provisions to protect the rights of crime victims in Senate Joint Resolution 3, which was before the Congress in 1999-2000, reads:

A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;

to reasonable notice of a release or escape from custody relating to the crime;

to consideration of the interest of the victim that any trial be free from unreasonable delay;

to an order of restitution from the convicted offender;

to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

to reasonable notice of the rights established by this article.<sup>25</sup>

The major criticism of the amendment is that rights due victims on account of their status do not belong in the Constitution, and that special attention on victims' participation in the criminal process might detract from defendants' rights.<sup>26</sup> Professor Dubber makes a strong case: "Victims' rights will be vindicated only after we abandon the concept of victims' rights and

25. S.J. Res. 3, § 1, 106th Cong. (1999).

26. See, e.g., Russell Feingold, *Statement on "The Victims' Rights Amendment,"* at <http://judiciary.senate.gov/32499rf.htm>; James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87 (1987); Bruce Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, THE NATION, Feb. 10, 1987, at 11; and Robert E. Mosteller, *Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053 (1998).

reform our law to indicate instead the rights of persons.”<sup>27</sup> This, he says, is the challenge of the criminal process and the criminal law, in general.

### 3. Appraisal

Although progress has been made both on the federal and state levels to protect victims’ rights, many victims’ rights laws are not fully implemented or enforced, and they are not consistent around the country. Thus victims still lack adequate legal remedies when their rights are violated. And, as the U.S. Department of Justice has noted,

most states still have not enacted fundamental reforms such as consultation by prosecutors with victims prior to plea agreements, victim input into important pretrial release decisions such as the granting of bail, protection of victims from intimidation and harm, and comprehensive rights for victims of juvenile offenders.<sup>28</sup>

Consequently, victims’ rights advocates continue to seek amendment to the U.S. Constitution and further reforms in the criminal justice system.<sup>29</sup>

## B. International Developments

### 1. Introduction

There is wide variation among countries regarding participatory rights accorded to crime victims. In some countries, these rights include the assistance provided by an ombudsman toward the enforcement of the victim’s rights, the right to review evidence, the right to legal assistance paid by the government, the right to ask questions during the trial and appeal the prosecutor’s decision not to file his/her case.<sup>30</sup> Several countries, including Brazil, New Zealand, and South Africa, have undertaken initiatives to provide special services to victims of domestic violence.<sup>31</sup> Action by the European Parliament, Council and Commission on setting standards and

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27. DUBBER, *supra* note 1, at 342.

28. NEW DIRECTIONS, *supra* note 23, at 4.

29. *See generally* *id.* at 8-408.

30. *See id.* at 415.

31. *Id.* at 416.

providing compensation and special assistance to crime victims has been ongoing.<sup>32</sup>

Several nongovernmental organizations (NGOs), including the International Institute of Higher Studies in Criminal Sciences (ISISC), have conducted studies, drafted guidelines, and proposed recommendations for national and international action to strengthen the existing mechanisms and fashion new ones where needed to protect victims' rights.<sup>33</sup> Their contribution has been pivotal in reforming the law.

## 2. U.N. Initiatives

The landmark 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the U.N. General Assembly,<sup>34</sup> is considered a Magna Carta for victims of crime. Aimed at opening the criminal justice process to victims, the Declaration acted as a catalyst for changes introduced by many countries to advance the interests of victims, especially in guaranteeing them participation in criminal proceedings. The Declaration recognizes that victims "should be treated with compassion and respect," and that they are "entitled to access to the mechanisms of justice and to prompt redress . . . for the harm that they have suffered."<sup>35</sup> Basic principles of justice for crime victims in the Declaration include:

Judicial and administrative mechanisms should . . . enable victims to obtain redress through formal or informal procedures;

The responsiveness of judicial and administration processes to the needs of victims should be facilitated by:

a. informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases ...;

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32. See, e.g., European Commission, "Crime Victims in the European Union – Reflexions on Standards and Action," Com. (1999) 349 final (July 14, 1999); European Union Council of Ministers, "New Rights for Victims of Crime in Europe – Council Framework Decision on the standing of victims in criminal proceedings," 2001/220/JHA; European Commission, "Opinion of the Economic and Social Committee on the Green Paper on compensation to crime victims (COM (2001) 536 final)," SOC/91 March 20, 2002; and European Commission, "Green Paper – Compensation to crime victims," COM (2001) 536 final (Sept. 28, 2001).

33. Three years after the adoption of the Declaration, ISISC convened a meeting of the Committee of Experts in Siracusa, which proposed specific recommendations for the implementation of the Declaration, along with providing a commentary.

34. GA Res. 40-34, Annex (1985).

35. *Id.* part A (4).

- b. allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings . . . ;
- c. providing proper assistance to victims throughout the legal process...<sup>36</sup>

The Declaration provides for the right to protection of physical safety and privacy, the right of compensation, from both the offender and the state, and the right to counsel.<sup>37</sup>

Several countries have implemented the Declaration in different ways. And the U.N. has fostered its implementation worldwide by taking further initiatives. For example, in 1996, the United Nations Commission on Crime Prevention and Criminal Justice adopted at its fifth session a resolution proposing the development of an international victim assistance training manual, so that countries could be helped to develop appropriate programs for crime victims.<sup>38</sup> Subsequently, a Handbook on Justice for Victims and a Guide for Policymakers were developed.<sup>39</sup> The Commission on Crime Prevention and Criminal Justice at its successive Congresses has further elaborated on the principles and suggested measures toward this end. Similarly, the United Nations Commission on Human Rights has also played an active role. A few such developments will be highlighted here.

Professor M. Cherif Bassiouni, appointed as the Special Rapporteur and an independent expert by the U.N. Commission on Human Rights, submitted his final report, a revised version of the Basic Principles and Guidelines on the “Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms.”<sup>40</sup> He defined a victim in this context as

a person . . . where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of that person’s fundamental legal rights. A “victim” may also be a

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36. *Id.* 6 a, b, c.

37. *Id.* 8-17.

38. NEW DIRECTIONS, *supra* note 23, at 418.

39. *Id.* See UN Office for Drug Control and Crime Prevention, Center for International Crime Prevention, Guide for Policymakers on the Implementation of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (1999).

40. U.N. Commission on Human Rights, 56th Sess., item 11(d) of the provisional agenda, UN Doc. E/CN.4/2000/62, Jan. 18, 2000.

dependent or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.<sup>41</sup>

Further, “[a] person’s status as ‘a victim’ should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.”<sup>42</sup>

States’ obligations extend, *inter alia*, to its duties to:

- (a) Take appropriate legal and administrative measures to prevent violations;
- (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;
- (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the victim;
- (d) Afford appropriate remedies to victims; and
- (e) Provide for or facilitate reparation to victims.<sup>43</sup>

Victims are to be treated “with compassion and respect for their dignity and human rights,”<sup>44</sup> and the specifically enumerated rights fall into three categories: victims’ right to a remedy;<sup>45</sup> victims’ right to access justice;<sup>46</sup> and victims’ right to reparation.<sup>47</sup> A separate section identifies the forms of reparation a victim should be provided: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.<sup>48</sup>

At its 2002 session, the Commission on Human Rights, after noting Professor Bassiouni’s recommendations, called upon the international community to “give due attention to the right to a remedy and, in particular, in appropriate cases, to receive restitution, compensation and rehabilitation, for victims of violations of international human rights law.”<sup>49</sup>

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41. *Id.*, Annex A, V (8).

42. *Id.* V.9.

43. *Id.* II.3.

44. *Id.* VI.10.

45. *Id.* VII.11.

46. *Id.* VIII.12-14.

47. *Id.* IX.15-20.

48. *Id.* X.21-25.

49. Per Commission Resolution 2002/44, operative para. 1, April 23, 2002.

The Commission requested the Secretary-General to circulate to all interested parties the text of the document and to seek their comments. It then requested the High Commissioner for Human Rights to hold a consultative meeting for interested parties with a view to finalizing the basic principles and guidelines on the basis of the comments received and to submit the consultative meeting's outcome for the consideration of the Commission at its 59th session.<sup>50</sup>

#### 4. The New Frontier – Restorative Justice

Recently entering the international criminal justice arena is the trend toward programs in restorative justice, which has important implications for promoting the rights of victims. Under this approach, the focus of the system is shifted from punishment alone to a more holistic response to the offense, with healing as the ultimate objective. It can be defined as “a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by crime.”<sup>51</sup> The practice is founded on the principles that:

1. Justice requires that we work to restore those who have been injured.
2. Those most directly involved and affected by crime should have the opportunity to participate fully in the response if they wish.
3. Government's role is to preserve a just public order, and the community's is to build and maintain a just peace.<sup>52</sup>

Through facilitators, a process is undertaken to heal the wounds caused by the crime, not only to the victim, but also the offender and the community. There is thus a greater chance for meaningful rehabilitation and reintegration of the offender back into society than in the traditional system that is concerned principally with removing offenders from the community. This procedure may also involve others, including families of both the offender and the victim, as well as other affected community members. The importance of victims' rights is clear in this system.

A number of states in the U.S. employ restorative methods in their criminal justice systems, including Vermont, Colorado and Oregon, and nations are doing the same. Mexico has amended Article 20 of its

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50. *Id.* at operative paras. 2-4.

51. *What is Restorative Justice?*, Restorative Justice Online, <http://www.restorativejustice.org>. (1999-2002).

52. *Id.*

Constitution to recognize the rights of victims and has undertaken several projects for restorative justice, including “informal processes featuring reconciliation and healing of the harms” following years of conflict in the state of Chiapas.<sup>53</sup>

In April 2000, during the Tenth U.N. Congress on Crime Prevention and the Treatment of Offenders, as member states addressed the various grave challenges facing the world community from serious international crimes, the concept of restorative justice received special attention. Under the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century that came out of that Congress, delegates also “decide[d] to introduce, where appropriate, . . . action plans in support of victims of crime, such as mechanisms for . . . restorative justice . . . [and] encourage[d] the development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties.”<sup>54</sup>

Pursuant to that pledge, a group of experts compiled a proposed a set of guidelines and basic principles for submission to the meeting of the Eleventh Session of the Commission on Crime Prevention and Criminal Justice in April 2002,<sup>55</sup> for subsequent recommendation to the Economic and Social Council (ECOSOC). The Draft Declaration on Restorative Justice was adopted by ECOSOC on July 24, 2002.

The Draft Declaration aims at guiding the development and operation of programs in restorative justice in member states. In its annex, it sets forth the “basic principles on the use of restorative justice programmes in criminal matters,”<sup>56</sup> including language giving significant emphasis to the rights and interests of victims, such as, “this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure.”<sup>57</sup> It goes on to set out guidelines for the use of the system by states interested in doing so.

However, one victimology authority questions whether the Draft Declaration adequately serves victims.<sup>58</sup> She expresses concern about risks for secondary victimization that are increased in encounter situations and

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53. See Lynette Parker, *Introducing Restorative Practices to Mexico*, Restorative Justice Online, [www.restorativejustice.org](http://www.restorativejustice.org) (August 2002).

54. Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, U.N. Doc. A/RES/55/59, Annex, paras. 27-28 (Jan. 17, 2001).

55. Commission on Crime Prevention and Criminal Justice, Report on the eleventh session, U.N. Doc. E/CN.15/2002/14.

56. *Id.*, Annex.

57. *Id.*

58. Jo-Anne Wemmers, *Declaration of Basic Principles of Restorative Justice*, 1 THE VICTIMOLOGIST 5 (April 2002).

other special concerns of victims that are not recognized in the Draft. In fact, the Draft only recognizes victims as parties to a procedure, and not as having special interests of their own.<sup>59</sup> And, while victims are considered by the Draft Declaration as subjects for reintegration into the community, she notes, it is silent as to reparation to and restoration of the victim.<sup>60</sup>

It will be seen what progress for victims' rights actually comes from not only Draft Declaration on Restorative Justice, but also the practice itself, in the international criminal justice community.

## **5. Conclusion**

In the last three decades, the victims' rights movement has made meaningful progress. However, as suggested earlier, much more needs to be done. One promising development is the restorative justice concept, which of course will be explored further and implemented by governments.

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59. *Id.*

60. *Id.*

**International Seminar for the Young Penalists Section of  
the International Association of Penal Law (AIDP)**

**16-22 June 2002\***

*“Contemporary Perspectives on Terrorism”*

*Session 1*

**“Historical and Contemporary Manifestations and the Effectiveness  
of National and International Control”**

**Rapporteur: Michela De Carli**

We the Young Penalists Section of the International Association of Penal Law (AIDP) are deeply concerned about the threat of global terrorism, a recent and horrific example of which was the attack in the United States on the World Trade Center and Pentagon on September 11th 2001. We reiterate that international terrorism is a threat to international peace and security as stated by the United Nations Security Council in, inter alia, Resolutions 1267 and 1373 thus invoking Chapter VII of the UN Charter.

We recognize that international terrorism is an age-old phenomenon, the causes of which are frequently discrimination, economic disparity, oppression, lack of political voice and abuse of human rights. We also recognize that terrorism is not uncommonly sponsored and carried out by States. Further, groups engaging in terrorism frequently seek to legitimize their violation of international law. Moreover, due to asymmetry of means the weaker side is often forced to resort to increasingly violent means of communicating its message.

We note the importance of the media both to terrorist entities and to States. By the former to publicise their cause and by the latter to justify overly repressive measures to eradicate the terrorist threat.

During the first session of the Young Penalists congress on Contemporary forms of terrorism which took place in Noto on the 17th of June 2002, we examined the historical and contemporary manifestations of

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\* Reports in this section were edited for publication by Mr. Eric Blinderman, Attorney at Law, New York, New York.

terrorism and assessed the effectiveness of national and international control mechanisms.

We noted that there is no internationally accepted definition of terrorism and that there is in existence a number of international and regional treaties on terrorism (see Annex I). We believe that international law on terrorism is marked by gaps and ambiguities and that there is a lack of inter-State cooperation in penal matters.

We considered the response of the United Nations to the events of September 11th and in particular noted Security Council Resolutions 1373 (28th September 2001) and 1390 (16<sup>th</sup> January 2002). It was observed that Resolution 1373 is far-reaching and in particular that States are compelled to, *inter alia*, criminalise certain conduct, prevent the financing of terrorism and freezing the assets of terrorist entities. By calling for certain actions to be criminalized the Security Council has in some instances, required Member States to amend their domestic laws. We noted also the existence of the Counter Terrorism Committee and the obligation upon States to report on measures taken to implement the Resolution. However, it was recognized that Resolution 1373 is not sufficiently detailed or forceful on matters of international penal cooperation.

We considered also Security Council Resolution 1390 in which it was reaffirmed that States shall freeze the assets of entities connected with Usama Bin Laden, Al-Qaida and the Taleban, and add their names on an international list. It was observed that there are, in existence, no transparent mechanisms under which entities are added or removed from this list. It was recognized that such measures should be balanced with sufficient due process guarantees.

Moreover, we considered in detail the national laws recently adopted in the United States, United Kingdom and Greece in response to terrorist acts. We undertook a comparative analysis of both substantial and procedural issues with a view to highlighting the conflict between the need to suppress international terrorism and the protection of the fundamental principles and rights of the accused recognized by modern legal systems. Furthermore we analysed the way in which some provisions of these new laws may endanger the rights and guarantees of the accused in respect of:

- (1) Preventative arrest and the detention of suspects;
- (2) Changes in the venue of trials;
- (3) Changes in the synthesis of the court;
- (4) The right to counsel;
- (5) The right to be informed of the nature and the cause of the charges;
- (6) The right to cross-examine witnesses.

We reached the conclusion important thought the combating of terrorism is, the due process guarantees and the fundamental rights of the accused should always be respected and the rule of law should prevail.

### **Recommendations to International Organizations, Regional Organizations and States.**

The issue of terrorism is to be addressed in different ways at the international, regional and domestic level.

#### *On the International level*

*Calling on* Members of the United Nation to adopt the Draft Comprehensive Convention on International Terrorism.

*Recognising* the need to establish a universally accepted definition of terrorism. Bearing in mind the difficulties of reaching the above mentioned definition due to the political relativism factors, criteria and recommendations should be established that can be used as guidelines for States in the process of combating this phenomenon.

*Stressing* the need for States to complement international cooperation and mutual assistance by adopting the necessary measures.

*Acknowledging* the importance to States of bringing the perpetrators of terrorist acts to justice whilst upholding human rights principles and due process guarantees of the suspects and/or detained persons during the process of investigation, interrogation and trial. We call upon all States to observe General Assembly Resolution 54/164 (24-2-2000).

*Reaffirming* that the said phenomenon originates from the unwillingness of States to find solutions to serious problems arising from illiteracy, poverty, lack of equal opportunities and the absence of fairness and justice whether in the economic, social or political domain.

*Praising* the historical event of the establishment of the International Criminal Court as one of the basic pillars for the establishment of International Criminal Justice the jurisdiction of which could be extended in the future to cover other *jus cogens erga omnes* violations.

#### *On a Regional level*

Considering that some effective measures shall be taken at the regional level:

##### a) Preventative measures:

- establishing a common database to collect and analyze data on terrorist elements groups, movements and organizations. Monitor developments of the phenomenon and share best practice experiences in combating it, in order to achieve a common operational policy.

- exchanging of expertise, whilst keeping separate the security intelligent activities from law enforcement activities.

In the above measures ensure that adequate respect is given to the right of privacy and put in place sufficient checks and balances and due process guarantees.

*b) Regional State cooperation*

- Emphasizing the necessity of effective implementation of the six forms of international cooperation at the regional level as well as exploring new methods of international cooperation among States.

- Developing and sharing best practices in the administration of justice.

*On the National Level*

- Ensure States have adequate legislation criminalizing international crimes and terrorism.

- Emphasizing that any legislative measures in this field should incorporate the protection of the fundamental rights and guarantees.

We would like to express our appreciation and gratitude for the contribution of the ISISC in developing and enhancing the norms of human rights and international criminal justice. This congress was an invaluable opportunity for young penalists to examine the critical and challenging issue of terrorism and to compare perspectives from differing jurisdictions.

## ANNEX

### *List of international conventions and protocols relating to terrorism*

- Convention on Offenses and Certain Other Offenses on Board of Aircraft – Tokyo 14.9.1963
- Convention for the Unlawful Seizure of Aircraft – The Hague 16.12.1970
- Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft- Montreal 23.9.1971
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel – New York 14.12.1973
- European Convention for the Suppression of Terrorism- Strasbourg 27.1.1977
- Convention Against the Taking of Hostages- New York 17.12.1979
- Convention on the Physical Protection of Nuclear Materials- Vienna 3.3.1980
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, complementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft - Montreal 24.2.1988
- Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft- Montreal 24.2.1988
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms on the Continental Shelf- Rome 10.3.1988
- Convention on the Marking of Plastic Explosives for the Purpose of Detection- Montreal 1.3.1991
- UN Convention for the Suppression of Terrorist Bombings- New York 15.12.1997
- UN Convention for the Suppression of Financing of Terrorism- New York 9.12.1999

### *U.N. Resolutions and Declarations of the General Assembly*

- A/ RES/ 49/60 9 Dec. 1994
- Declaration on Measures to Eliminate International Terrorism 1994
- Declaration to supplement the 1994 Declaration
- A/ RES/ 50/53 (1995)
- A/ RES/ 51/210 (1996)
- S/ RES/ 1267 (1999)
- S/RES/ 1269 (1999)

- S/RES/ 1333 (2000)
- S/RES/ 1368 (2001)
- S/RES/ 1373 (2001)
- S/RES/1390 (2001)

## Session Two

### Criminological and Victimological Perspectives

Rapporteur: Costantino Grasso<sup>1</sup>

#### Introduction

This particular aspect of the conference reflected the difficulties that jurists all over the world have encountered in finding a definitive and common legal definition of “terrorism” and the importance of the victimological and criminological perspectives to this debate.

In the session’s opening, Prof. Reynald Ottenhof<sup>2</sup> illustrated the importance of the criminological approach to “terrorism.” A criminological approach to terrorism is important because it allows one to understand the motivation behind terrorist attacks and provides insight into the reasons why the phenomenon of terrorism exists in our society. For more than thirty years, criminologists sought to assist jurists in finding a scientifically acceptable definition of terrorism. Unfortunately, no concrete definition was ever created. Prof. Ottenhof has stated that in order to resolve this debate, three levels of interpretation related to defining terrorism need to be understood. They included:

- 1) The crime = The terror;
- 2) The criminal = The terrorist, and
- 3) The criminality = The terrorism

Analysing the criminal element, Prof. Ottenhof then reached some interesting conclusions. In particular, Prof. Ottenhof commenced his analysis from the point of view that those committing a “terror” crime wish to psychologically impact a targeted society. In line with this thought, Prof. Ottenhof suggested that those seeking to understand the crime of “terror” need to consider terror itself as a form of language. He reasoned that language is utilized to communicate an idea and also to convince individuals or entities to modify their behaviour. In order to satisfy the natural need to share experiences, which is a need common in every society, certain methods have been developed to communicate. These methods include, in part, verbal language, written language, and body language. In certain

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2. Vice Président ISISC, Vice Président AIDP; Professeur Emérite de Droit, Université de Nantes; Directeur Observatoire de la Délinquance, Pau (France).

situations, the dialogue between two people may involve sensitive interests that are opposite to each person's thoughts. When this occurs, the attempt to communicate may fail. If the two people continue to try and communicate, notwithstanding the failure, the communication may become degraded and eventually become pathological. If the communication reaches a pathological level, the person may use whatever form of communication at his or her disposal to insult or hurt the other person with whom they are communicating.

Taken to its extreme, the process may eventually result in violence, sometimes manifesting themselves as forms of what may conventionally be understood as "terrorism." If the communication has devolved into such a state, the likelihood of it returning to a non-pathological form of communication without a third party's intervention is almost impossible. For this reason, mediation between those that engage in terrorism and those that are the victims of terror attacks is a critical aspect of preventing such attacks from occurring again in the future. Thus, defining terrorism from a criminological perspective is a paramount concern when trying to understand the "terrorism phenomenon." Notwithstanding this truth, States involved in the fight against terrorism have only inserted a juridical definition of the term "terrorism" into their legal vernacular and have not taken the criminological definition adequately into account. The lack of a set legal definition, when combined with the difficulty of establishing a proper criminological definition, make it apparent that a comprehensive definition of the term still needs to be sought and developed. Fortunately, the decision to convene this conference as well as the thoughtful debate it provoked give hope that the objective sought is still attainable.

### **Definitional Aspects of Terrorism**

The phenomenon of terrorism has been thrust into each of our lives. In response to this unfortunate reality, our respective national governments have attempted to address this threat. However, national governments have not and do not sufficiently respond to this threat. Moreover, the existing machinery used in the past to combat these manifestations of terrorism on the national level have been insufficient and, in some cases, impotent to confront the threats at hand. Although the discussants were not privy to the entire range of such national legislation, the discussion shed light onto two primary forms of these endeavours.

One such method has been to define terrorism

*per se.*

For example, Judge Michel Meraunt<sup>3</sup> noted that French Law has defined terrorism<sup>4</sup> as “an individual or collective enterprise, the purpose of which is to seriously disrupt public order through intimidation or terror.” Further illustrative of this definitional endeavour is the definitional quagmire that exists in the United States, where several definitions of terrorism are used. The State Department defines terrorism as “premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents, usually intended to influence an audience.” In another attempt to produce a definition, Paul Pillar, a former deputy chief of the CIA’s Counter Terrorist Center, argues that there are four key elements of terrorism:

1. It is premeditated—planned in advance, rather than an impulsive act of rage.
2. It is political—not criminal, like the violence that groups such as the mafia use to get money, but designed to change the existing political order.
3. It is aimed at civilians—not at military targets or combat-ready troops.
4. It is carried out by subnational groups—not by the army of a country.

This fragmentation, that reflects the different chartered purposes these particular agencies who act in regard to terrorism endeavour to achieve, offers a clear illustration of the difficulties States have in coming up with an ironclad definition that any functional capacity in a legal context.

The second technique used to respond to terrorism is creating a penal definition of terrorism in term of criminal enterprise. Judge Helmut Epp<sup>5</sup> explained the utilization of such a technique in regard to the German and Italian experience with the Red Brigades in 1970s. Both Germany and Italy utilized principles involved in the criminalization of the concept of criminal enterprise to derive a definition of terrorism by which their legal system could respond in term of investigations and prosecution. In 1979, Article 270 was inserted in the Italian penal code, addressing “Enterprises with the

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3. Premier Substitut, Tribunal de Grand Instance de Paris, Section Anti-Terroriste Paris.

4. Chap. I, Title II, Book IV of the penal code.

5. Judge, Parliamentary Secretary Austrian Parliament Vienna, Board of Directors ISISC, Secretary General AIDP.

aim of terrorism and of subversion of the democratic order.” This article punishes anyone who promotes, forms, organises or directs enterprises that have the aim to commit violence acts in order to subvert the democratic order.<sup>6</sup> In a very similar way Article 129-A of the German penal code uses criminal enterprise as a theory of responsibility. This definition is not limited to terrorism but covers a wide range of crimes such as murder, kidnapping, jeopardizing national security and others. Furthermore, this technique enabled the criminalizing of acts done in preparation of terrorist attacks. However, this process also created problems, particularly in that the creation of several definitions of “criminal enterprise” only complicated efforts of international cooperation and assistance.

The panel also discussed about the utility and functionality of a potential legal definition of terrorism and, even though unanimous *consensus* wasn't achieved, proceeded to discuss both the disadvantages and the advantages of promulgating a definition.

One of the primary disadvantages is the problem inherent in putting a definitional label on such a phenomenon. Such a method stands to be either too specific or too broad. The dangers in these positions are evident. Too specific a definition would be rigid and inflexible, not providing for newer and emerging forms of terrorism. Too broad a definition would necessarily threaten individual human rights and may more easily be used as a tool of repression. Concerning this issue, Dr. Rodrigo Costa de Souza<sup>7</sup> noted how penal law must be focused in maintaining the necessary juridical protection and guarantying freedom. He also noted that, politically speaking, it is necessary to understand the extreme utilization of the penal law as *ultima ratio*. He concluded that, assuming penal law as the most serious intervention in the above-mentioned freedom, penal law must be restrained to the portion minimally needed for reprehension. The same functionality and utility of such a definition was also doubted, in that current forms of criminal codes provide the machinery by which these crimes (i.e. mass murder, kidnapping, extortion, menace) may be prosecuted. The insertion in these codes of a specific definition of terrorism, based on the motivation of the crime, would easily lead to different punishments and treatments for criminals that have committed act of violence. Another critique lies in the

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6. It's important to note that, as a response to the massacre of the 11th September 2001, the Italian Government added (by the DL 374/2001) several new articles in order to fight terrorism. As a result it is punished also anyone who commit terrorist acts against foreign States and anyone give assistance in anyway to terrorist. However, no definition of terrorism *per se* was given. In actuality, therefore, in the Italian legal system is totally up to the judges to decide when a criminal has to be considered a terrorist or not.

7. Post graduated student, University of Rio de Janeiro (Brasil).

fact that the subjective elements inherent in the phenomenon of terrorism are legally problematic; particularly in establishing motivation and intent within the construct of a courtroom. Moreover, concern was expressed that labelling a crime as “terrorism” or a person as a “terrorist” may wrongly elevate that crime or person’s status to a conception higher than that of a common crime or criminal. Lastly, critique regarding the particular interests protected by such laws was expressed. It was found to be very difficult in specifically delineating a few particular interests.

Advantages of defining terrorism in a criminal code were also proposed and discussed. It was stressed that the effective and efficient functioning of international cooperation modalities would be increased by an internationally accepted common definition of terrorism. A similar benefit would be found in national legal procedural matters. Such matters are wide ranging in effect and would engage national witness protection and security programs, pre-attack investigation measures, and other national programs implicated by these acts. Secondly, a concern was expressed regarding the positive psychological effects on the citizenry, an effect that in some systems is defined as “positive general prevention effect” of penal law. In theory, the public will be assuaged by the knowledge and awareness that the governments are active in protecting them, and this would counter the negative psychological effect of terror spread by terrorists. Lastly, one such proposal was that a definition of terrorism would benefit the victims of such heinous acts.

### **Victimological Perspectives**

The panelists recognized that the victims of terrorism cannot be considered as common victims of other crimes. Dr. Cecile Tournaye<sup>8</sup> clearly explained how the victims of terrorism are particularly defenceless because of their extraneousness to the cause claimed by the terrorists. Moreover, her illustration of how, in recent years, terrorism is frequently connected to mass murders and has reinforced the general recognition of the necessity for the development of a new compensation system for the victims. Concerning the issue mentioned above, Dr. Ghislaine Doucet<sup>9</sup> spoke of special French statute for victims of terrorism. In France, according to this new statute, victims of terrorism are considered differently from victims of other crimes. They are designated as “*civil victims of war*” (1990 Law Act). Important practical results derive from such an innovative conception. According to this definition, victims of terrorism could apply for special disability

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8. Legal Officer, ICTY, The Hague (The Netherlands).

9. Conseiller Juridique, SOS Attentats et CICR, Paris (France).

pensions or for special employments not usually available. In addition, it has also created a special fund of guarantee for these victims. All these compensations would not be available to those victims without a legal definition of terrorism.

From a similar perspective, Dr. Cecile Tournaye illustrated the role reserved to victims of terrorism during the trial. In particular, the discussion commenced with an analysis of the national criminal procedures, then focused on the role of victims before the *ad hoc* international criminal courts. The discussion then recognised the innovations foreseen by the Rome Statute for the International Criminal Court.<sup>10</sup>

The function of the prosecution in regard to the victims was also stressed. First, it was noted that prosecution is relevant to protect the interest of victims to see terrorists punished. In this regard, both the rights of the victims to obtain information about the stage of prosecution and the witness protection programs are considerable. Secondly, it has the essential function to restore the *status quo ante* through the compensation.

The differences in the role reserved to such victims by national legislation in both common law systems and continental law systems were delineated. The following is a brief summary of the discussion results. In common law systems, victims have a fundamentally passive role during the trial. Compensation is assigned to them by the court by means of a compensation order that is considered as a sanction. Although in this procedure victims do not have any substantial initiative, the main advantage is that it is wholly up to the State to execute this compensation order. In continental law systems, however, a more active role is reserved to the victims; in fact, their intervention as an injured party during the trial is a frequent occurrence. However, no compensation is assigned to them without a specific claim, and in most cases, the execution phase of the judgment is up to them.

Finally the role of the victims before the *ad hoc* international criminal courts was examined. In particular it was noted that before the International Criminal Tribunal for the former Yugoslavia<sup>11</sup> the role of victims is very

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10. The ICC is a criminal tribunal that will prosecute individuals. The two *ad hoc* war crimes tribunals for the former Yugoslavia and Rwanda are similar to the ICC but have limited geographical scope, while the ICC will be global in its reach. The ICC, as a permanent court, will also avoid the delay and start-up costs of creating country specific tribunals from scratch each time the need arises.

11. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council Resolution 827 on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations. The ICTY is located in The Hague, The Netherlands.

limited. In fact, they are relevant during the trial only as witnesses<sup>12</sup> and they cannot make a claim for any compensation. In order to obtain compensation, victims have to make a claim before their national criminal courts. However, The Statute of Rome for the International Criminal Court<sup>13</sup> has considered this issue. Before the ICC, victims are not considered only as witnesses, but they have the right to make a claim in the same court for fair compensation. In addition, a Trust Fund<sup>14</sup> shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. The fact that the ICC can award reparations to victims, including restitution, compensation and rehabilitation, and by the fact that States parties have to enforce those awards, is an important advance in international law.

### **Conclusions & Recommendations**

The difficulties and complexities involved in the phenomenon of terrorism are manifested in each of the issues discussed within the group topics. The fact that consensus was unable to be reached in each of these areas is testament to this fact. We must note, however, that even though such a variety of perspectives are held, even the vast differences in national legislation and policy considerations regarding terrorism illustrate some subtle lines of agreement. Concern for security and safety, both in regard to State and citizen concerns permeate each piece of legislation. However, tempered by these common concerns, we must strive to find the requisite balance between collective security and individual human rights.

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12. Article 22 of the Statute in fact only provides that The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

13. The Statute outlining the creation of the court was adopted at an international conference in Rome on July 17, 1998. After 5 weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it (including China, Israel, Iraq, and the United States) and 21 abstained. The Rome Statute entered into force on 1<sup>st</sup> July 2002.

14. Article 79 of the Rome Statute.



**Séminaire International pour la Section des Jeunes Pénalistes  
de l'Association Internationale de Droit Pénal (AIDP)  
"PERSPECTIVES CONTEMPORAINES SUR LE TERRORISME"  
Noto (Siracusa) 16-22 Juin 2002.**

**Rapport Conclusif 5<sup>ème</sup> Session  
Financement et Blanchiment<sup>1</sup>**

**Rapporteur: Dr. Mario La Rosa**

**Introduction**

L'importance du thème du terrorisme nous a conduit, dans les différents groupes de travail, à traiter les multiples aspects de ce phénomène. Dans le cadre de la cinquième session, concernant le financement et le blanchiment, on s'est intéressé aux relations entre ces deux sujets et le terrorisme. En ce qui concerne ce dernier, en éliminer les sources veut dire l'anesthésier, du fait que l'argent est le moyen de l'action criminelle du terrorisme.

Avant de donner quelques indications pour combattre la criminalité organisée, particulièrement sur le terrain du blanchiment, et pour protéger la collectivité du terrorisme, face à l'ampleur mondiale prise par celui-là, il nous semble opportun de souligner la diversité entre le financement et le blanchiment.

Il est connu que le blanchiment est un champ privilégié de la criminalité organisée depuis plusieurs années. Il s'agit de l'ensemble des opérations de nature économique et financière visant l'insertion dans le circuit légal de capitaux provenant d'activités illicites. Donc, les sources du blanchiment sont des sources illicites et l'action répressive veut empêcher leur lavage.

« Au prix de détail, il s'est vendu en 1996 aux Etats-Unis 30 milliard de dollars de cocaïne, 18 milliards de dollars d'héroïne. En billets de 5, 10 et 20 dollars, ces 48 milliards de dollars pèsent au total 6200 tonnes. Les trafiquants doivent donc absolument transformer leur cash en argent électronique : Un million de dollars dans une banque, c'est une ligne de crédit qui ne pèse rien et qui peut s'investir dans l'économie honnête. Ainsi, le blanchiment prend désormais l'allure d'une « lessiveuse mondiale » pour l'argent sale. »<sup>2</sup>

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1. Ce rapport rassemble les interventions de M. Meurant (Premier Substitut, Tribunal de Grande Instance de Paris, Section Anti-Terroriste, Paris, France); M. Marton Szutz (Assistant professeur, ELTE Université, Budapest, Hongrie); Dr. Khaled Serry M. Hussien Seyam (Maître de Conférence, Faculté de droit, Ein Shams Université, Cairo, Egypte); Dr. Dimitris Ziouvas (Avocat, LL.M, LL.B., Grèce).

2. Marie-Christine Dupuis, Finance Criminelle, *Comment le crime organisé blanchit l'argent sale*, PUF, Paris, juin 1998.

Au début, la lutte contre le blanchiment s'inscrivait dans un contexte limité, parce que d'un côté les réponses données par les différents pays étaient des réponses au niveau national, et de l'autre, l'incrimination de ce phénomène était liée au trafic de stupéfiants. Les pays dans lesquels le crime du blanchiment a fait sa première apparition (l'Italie, la France, les Etats-Unis) voulaient en effet contrôler et réprimer l'utilisation des produits du trafic des stupéfiants. Evidemment, cette mesure pouvait être utile pour limiter le recours au trafic des stupéfiants par le crime organisé, mais moins utile en ce qui concerne les effets négatifs du blanchiment sur l'économie nationale et internationale.

Pourtant, il était nécessaire d'envisager le blanchiment à travers de formes de coordination entre les différents pays pour que la lutte contre le crime du blanchiment soit une lutte au niveau international. De là, alors, l'adoption de textes internationaux qui ont pour effet de pousser tous les états à les criminaliser ou à renforcer leurs législations nationales en étendant les crimes sous-jacents à d'autres infractions graves différentes du trafic de stupéfiants<sup>3</sup>.

En ce qui concerne le financement,<sup>4</sup> l'argent permet aux organisations criminelles de poursuivre leur but : la réalisation des actes de terrorisme. Donc, l'argent constitue un moyen pour la commission des crimes. Pour cette raison, mettre en évidence les flux financiers sert à interrompre la connexion entre le financement et le terrorisme. Les sources que la criminalité veut blanchir sont, sans doute, illicites, au contraire les sources qui soutiennent le terrorisme peuvent être autant illicites que licites. En soulignant ce point, il est important d'avoir une disposition concernant le financement, car il est impossible de criminaliser un financement licite. Il est connu, qu'il y a des sources officielles comme les aides publiques nationales ou internationales aux associations, ou encore, dans le cadre du financement licite, on assiste, par exemple en France, à un flux d'argent qui arrive de l'Arabie afin de soutenir les mosquées, dont la présence et la prise

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3. Depuis la fin des années 1980 plusieurs initiatives multilatérales ont eu lieu, notamment au niveau international la Convention des Nations Unies sur le Trafic Illicite des Stupéfiants et des Substances Psychotropes en 1988 (Convention de Vienne), et au niveau régional la Convention du Conseil de l'Europe n° 141 relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime, 8 juin 1990 (Convention de Strasbourg), la directive européenne n°91 – 308, 10 juin 1991 relative à la prévention de l'utilisation du système financier à des fins de blanchiment des capitaux, pour en citer quelques-unes. Plus récemment la Convention de Nations Unies contre la criminalité transnationale organisée de l'année 2000 ou la directive européenne n°97– 2001.

4. V. récemment la Convention de Nations Unies pour la répression du financement du terrorisme en 1999, suivi par les résolutions de Conseil de sécurité n°1373 (2001) et n°1390 (2002)

de pouvoir sur le territoire augmentent. On peut retrouver des fonds en faisant aussi appel à la générosité publique.

Pour ce qui est des sources illégales, les formes les plus abouties pour les retrouver sont des pratiques qu'on retrouve dans toutes les organisations criminelles comme l'extorsion de fonds, les jeux clandestins, le trafic des stupéfiants ou l'escroquerie par les cartes bancaires. Pour le reste, on tombe sur des figures communes. Quelles que soient les sources envisagées on va les utiliser à l'intérieur pour soutenir le groupe ou on les introduit dans les circuits licites. Donc, à ce niveau il est difficile de faire un parallèle entre le financement du terrorisme et le blanchiment. Il est vrai, par contre, que quelques fois on retrouve dans le financement certaines techniques du blanchiment d'argent, mais en général, comme on a souligné, il s'agit de deux phénomènes différents.

### **La criminalisation du financement du terrorisme en France**

Le nouveau code pénal français donne une définition d'acte de terrorisme comme acte commis intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler l'ordre public par l'intimidation ou la terreur. Ce texte prévu par l'article 421-1 du code pénal incrimine les vols, les extorsions, le recel du produit et des instruments de l'infraction etc. Il s'agit, donc, de figures communes. Cet article a été objet de plusieurs modifications par des lois successives depuis 1994. Jusqu'à l'entrée en vigueur de la loi n°2001-1062, on ne disait rien du financement du terrorisme, même si la disposition relative à l'association des malfaiteurs, prévue au titre V du code pénal<sup>5</sup>, nous aurait permis de punir des actes qui n'étaient pas des infractions, mais qui étaient au niveau préparatoire comme le financement licite. Tout de même, depuis le 15 novembre 2001 le recours au texte concernant l'association des malfaiteurs a perdu son importance. La loi nommée n° 2001 – 1062 relative à la sécurité quotidienne a modifié l'art. 421-2-2 en introduisant le financement du terrorisme parmi les actes de terrorisme. Maintenant, on réprime spécifiquement « le fait de financer une entreprise terroriste ». Le choix du législateur français ne peut que susciter un débat et, en effet, parmi le groupe de travail de la cinquième session des doutes sur ce point ont été exprimés. Quelqu'un a effectivement souligné que faire du financement un

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5. Code pénal français, Art. 450-1 : Constitue une association de malfaiteurs tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un ou plusieurs crimes ou d'un ou plusieurs délits punis d'au moins cinq ans d'emprisonnement.

acte de terrorisme, vaudrait dire mettre sur le même plan la conduite de celui qui réunit ou gère des fonds pour leur utilisation à fins terroristes et la conduite de celui qui place de l'explosif pour causer une tuerie (dans l'attente qu'il va produire des morts), même si l'intention est celle de susciter de la terreur ou de l'intimidation. Dans le respect du principe de légalité la France a choisi de donner une définition de terrorisme et de punir le financement en tant qu'acte terroriste.

Par contre, on a souligné, tout au long des les travaux du séminaire, que la plupart des actes de terrorisme sont caractérisés par leurs effets (power outcome) sur la collectivité, mais on a quand même conclu qu'il est très dur, sinon impossible, de donner une définition de terrorisme.

En ce qui est de la loi du 15 novembre 2001, le texte prévoit des mesures pour combattre le financement du terrorisme, comme par exemple la responsabilité pénale des personnes physiques et morales à travers la confiscation complète de tout ou partie de leurs biens. Il s'agit, d'une part, d'une peine complémentaire et, d'autre part, elle est adressée à tout le patrimoine quelle que soit la nature de biens, meuble ou immeubles, divis ou indivis.

Pour rendre le cadre plus complet, il est prévu que tout le produit des sanctions financières ou patrimoniales sera destiné au fonds de garantie pour l'indemnisation des victimes d'actes de terrorisme et d'autres infractions.

#### **Les 40 recommandations du GAFI suivi par les lois sur le blanchiment en Hongrie et en Egypte**

Face aux préoccupations croissantes qui suscite le blanchiment de capitaux, depuis la fin des années 1980, plusieurs initiatives ont eu lieu, autant au niveau national ou régional qu'au niveau international.

Une attention particulière mérite le Groupe d'action financière sur le blanchiment des capitaux (GAFI) créé lors du Sommet du G7 à Paris en 1989 afin de mettre au point une action coordonnée à l'échelle internationale vis-à-vis de ce phénomène. Le GAFI est un organisme intergouvernemental qui effectue des études et prépare des évaluations sur les tendances et les techniques de blanchiment et sur les contre-mesures nécessaires. L'action la plus importante est celle d'assurer la promotion et l'application de ses normes, plus connues comme les 40 recommandations, par les états membres. Les pays ou les organismes régionaux qui font partie du GAFI s'engagent à appliquer les 40 recommandations qui sont désormais reconnues comme les critères fondamentaux auxquels chacun doit regarder pour combattre efficacement le blanchiment. Ces indications sont

complétées par 25 critères auxquels le GAFI recourt pour l'évaluation de la législation d'un pays. Ce type d'évaluation extérieure est périodique. De toute façon, chaque état peut faire aussi une auto-évaluation en envoyant son propre rapport national au GAFI.

Généralement les blanchisseurs ont tendance à rechercher des zones dans lesquelles ils courent peu de risques de détection des produits de l'infraction sous-jacente, en raison de la faiblesse du système de contrôle mis en place par ces états. Il s'agit surtout des pays dont l'économie est en expansion ou en cours de développement. Pourtant, les contrôles étant inadaptés, ces centres financiers sont particulièrement vulnérables et ils constituent un terrain idéal pour rendre propre l'argent sale. Les disparités entre les différents régimes nationaux de lutte contre le blanchiment vont donc être exploitées par les criminels et, par conséquent, les flux financiers sont déplacés en déterminant des effets négatifs au niveau économique.

Le GAFI a rédigé une liste des pays dits coopérants et des pays non-coopérants en raison de leurs lois internes face aux 40 recommandations.

Entre les pays non-coopérants on pouvait trouver autant la Hongrie que l'Égypte, jusqu'à l'année dernière. Autant pour l'un que pour l'autre on peut, sans doute, affirmer que le GAFI, et son action, a été décisif pour le changement législatif contre le blanchiment.

La Hongrie, qui a besoin d'investissements du fait de sa situation politique et sociale, a du prendre des mesures contre ce phénomène, étant pays candidat, dans le cadre de l'élargissement de l'UE à l'Est. Il faut souligner qu'en Hongrie il y avait beaucoup de comptes bancaires anonymes car chaque citoyen ne peut avoir qu'une propriété. De plus, les institutions financières n'avaient pas l'obligation d'identifier les bénéficiaires réels ou de renouveler l'opération d'identification lorsqu'on n'était pas certain que le client agissait pour son propre compte. Ainsi était la situation en Hongrie avant l'accueil des 40 recommandations du GAFI. Maintenant, après la loi n° 88 du 27 novembre 2001, la Hongrie est sortie de la liste relative aux pays non coopératifs. 50% de comptes bancaires ne sont plus anonymes, car il est demandé aux opérateurs d'enregistrer le nom de celui qui ouvre le compte bancaire et de celui qui en bénéficie. Les comptes anonymes déjà existant doivent être convertis en comptes nominatifs. De plus, il est prévu l'introduction de l'obligation d'identifier le bénéficiaire de la transaction et de renouveler cette opération en cas de soupçon. Le nouveau texte étend ces mesures aux « non-banking » secteurs.

L'Égypte, par contre, reste dans la liste des pays non coopératifs, même si récemment a appliqué les 40 recommandations à travers l'introduction d'une nouvelle loi (juin 2002) qui doit encore être objet d'évaluation par le

GAFI. On peut, quand même, donner quelques indications générales qui peuvent se résumer en trois points, trois lignes fondamentales.

Tout d'abord, le respect du principe de légalité, à travers la définition de l'acte du blanchiment, vu que l'absence d'une qualification pénale convenable du blanchiment de capitaux était la première remarque faite par le GAFI à la législation égyptienne. Dans plusieurs conventions ou autres textes internationaux ou régionaux, on parle du résultat auquel l'acte du blanchisseur est adressé,<sup>6</sup> par contre le législateur a préféré définir en quoi consiste l'acte de blanchir.

Le texte criminalise le blanchiment des produits des différentes infractions soumises, du trafic des stupéfiants au terrorisme, de la fraude à la criminalité organisée.

Il prévoit, aussi, la responsabilité pénale des personnes morales, principe pas reconnu par la législation égyptienne jusqu'à l'introduction de cette loi. Une nouveauté aussi importante est représentée par le projet d'institution d'une cellule de renseignements financiers, plus connue comme FIU,<sup>7</sup> auprès de la Banque Centrale d'Egypte.

Il est connu que l'argent peut changer de main en quelques instants ou être viré de l'autre partie du globe simplement avec un doigt qui pousse un bouton sur le clavier. Pour cette raison, les organismes chargés de

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6.V. art. 3 Convention de Vienne (1988), dont le contenu est repris respectivement par l'art.6 de la Convention de Strasbourg du Conseil de l'Europe (1990), par l'art. 1 de la directive européenne n°91 - 308 (1991), et enfin par l'art. 6 de la Convention de Nations Unies contre la criminalité transnationale organisée (2000).

Convention de Vienne, Art. 3 lett.b : Chaque Partie adopte les mesures législatives qui se révèlent nécessaires pour conférer le caractère d'infraction pénale conformément à son droit interne lorsque l'acte a été commis intentionnellement à : la conversion ou au transfert de biens dont celui qui s'y livre sait que ces biens constituent des produits, dans le but de dissimuler ou de déguiser l'origine illicite des dits biens ou d'aider toute personne qui est impliquée dans la commission de l'infraction principale à échapper aux conséquences juridiques de ses actes ; la dissimulation ou le déguisement de la nature, de l'origine, de l'emplacement, de la disposition, du mouvement ou de la propriété réelle de biens ou de droits relatifs, dont l'auteur sait que ces biens constituent des produits ; et, sous réserve de ses principes constitutionnels et des concepts fondamentaux de son système juridique : l'acquisition, la détention ou l'utilisation de biens, dont celui qui les acquiert, les détient ou les utilise sait, au moment où il les reçoit, qu'ils constituent des produits ; la participation à l'une des infractions établies conformément au présent article ou à toute association, entente, tentative ou complicité par fourniture d'une assistance, d'une aide ou de conseils en vue de sa commission.

7. Aux termes de cette définition, l'expression « cellule de renseignements financiers » désigne « un organisme national central chargé de recevoir (et, s'il y est autorisé, de demander), d'analyser et de communiquer aux autorités pertinentes, des renseignements financiers : se rapportant au produit soupçonné d'une activité criminelle ou exigés par la législation ou la réglementation nationale, aux fins de lutter contre le blanchiment d'argent. »

l'application de la loi et des poursuites judiciaires, doivent pouvoir compter sur un échange d'informations qui soit le plus rapide possible. Cette rapidité est encore plus indispensable quand elle vise à la détection d'une activité criminelle éventuelle. Par contre, il faut, en même temps, protéger les informations concernant des personnes ou sociétés innocentes contre la manipulation éventuelle ou l'usage irrégulier par les autorités compétentes.

Dans ce cadre, les FIU jouent le rôle de « tampon », d'intermédiaire impartial entre le secteur financier privé et les autorités publiques chargées de l'application de la loi et des poursuites judiciaires.

### **Le blanchiment d'argent d'un point de vue européen**

Initialement liée au trafic de stupéfiants, comme le recommandait la Convention de Vienne en 1988, l'infraction de blanchiment a été progressivement élargie à d'autres infractions par des instruments normatifs internationaux successifs.

Au niveau européen, pendant les dernières années on faisait référence à la Convention du Conseil de l'Europe en 1990 et à la directive n° 308-91 de l'Union Européenne. Notamment leur portée géographique est différente, étant l'une (la Convention de Strasbourg) un accord international classique, en conséquence soumis au bon vouloir des états qui doivent le ratifier, l'autre un acte obligatoire pour les états membres de l'UE quant à l'objectif poursuivi.

Récemment, le Parlement Européen et le Conseil ont adopté une directive, précisément la directive n°97-2001, qui apporte des modifications au texte de la directive n°308-91. Cet instrument du « premier pilier » peut être défini comme une directive « *inter pilier* », du fait de sa connexion étroite avec les thèmes propres au secteur JAI.

Pourtant, elle s'inscrit dans le cadre du Plan d'action contre la criminalité organisée, approuvé par le Conseil Européen à Amsterdam en juin 1997. Elle intervient sur deux plans, l'un objectif, vu l'extension de « *predicate offences* », l'autre subjectif en étendant le nombre des sujets auxquels sont adressées les obligations de contrôle et d'information relatives aux opérations financières.

Quant au premier point, la directive n°308-91 obligeait les états à criminaliser le trafic de stupéfiants en tant qu'activité illicite à travers laquelle on a obtenu des produits ou biens qui pourraient être blanchis par les voies du système financier, mais laissait les pays libres d'inclure, dans le cadre des infractions sous-jacentes, d'autres infractions graves. La directive

n°97-2001 modifie la structure du crime de blanchiment en obligeant les pays membres à augmenter le cadre des infractions principales.<sup>8</sup>

Les sujets chargés des obligations contre le blanchiment (identifications des clients, registration des opérations et renseignement des opérations soupçonnées) sont augmentés sensiblement. L'attention du législateur communautaire s'est posée également sur des activités ou professions à caractère non financier, vue leur capacité de mobiliser d'énormes flux de capitaux (casinos) ou de les immobiliser (agents immobiliers). Mais, la nouveauté, sans doute la plus importante et en même temps la plus discutée, concerne les notaires et les autres professions légales. En effet, la directive limite les obligations dites aux opérations ayant caractère financier, mais de toute façon le rôle joué par les avocats ou les notaires ou les conseillers est particulièrement délicat en raison du secret professionnel.

On peut souligner, donc, la nécessité d'une intervention globale pour lutter contre le blanchiment, et surtout préventive. Au départ, les instruments proposés par les états étaient des instruments visant à trouver les produits pour remonter à l'infraction principale. Maintenant, aux mesures successives, telles que la confiscation ou la saisie, on a joint des mesures préventives en imposant des obligations aux opérateurs à *haut risque* de blanchiment.

### Conclusions

• En considérant la nécessité de lutter par tous les moyens, conformément à la Charte des Nations-Unies, contre les menaces à la paix et à la sécurité internationales et en considérant la nécessité de tarir les sources du terrorisme, les états doivent prendre « toutes les mesures licites », comme souligne la Résolution 1373 (2001) adoptée par le Conseil de sécurité, permettant la détection, la prévention et la répression du financement du terrorisme.

• A cet effet les compétences des cellules de renseignements, déjà en place dans le cadre de la lutte contre le blanchiment d'argent, pourraient être étendues ou la mise en place de structures comparables spécifiques au

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8. Directive n° 97-2001 Art. 1 lett. E) : Sont considérées infractions graves : les activités des organisations criminelles, telles que définies à l'article 1<sup>er</sup> de l'action commune n°733-98 ; la fraude, au moins la fraude grave, telle qu'elle est définie à l'article 1<sup>er</sup>, paragraphe 1, et à l'article 2 de la Convention relative à la protection des intérêts financiers des Communautés européennes ; la corruption ; une infraction susceptible de générer des produits substantiels et qui est passible d'une peine d'emprisonnement sévère, conformément au droit pénal de l'Etat membre.

financement du terrorisme.

- En raison de la multiplicité des sources du financement du terrorisme et particulièrement du financement par des voies légales ou dites légales, il est indispensable d'ériger en infraction pénale le financement du terrorisme, des actes terroristes et des organisations terroristes.

- La provenance de l'argent étant indifférente, les institutions financières ont une importance primordiale en la matière. En effet, dès que l'argent est introduit dans le système financier, sa trace est perdue. Pour cette raison les institutions financières, et notamment les institutions financières nationales, devraient être assujetties à la mise en place d'un système assurant la transparence des transactions et l'identification du donneur d'ordre permettant ainsi la surveillance et la détection des opérations suspectes. La conservation des données devrait être assurée pendant une période suffisante.

- Les institutions financières devraient être tenues de déclarer rapidement leurs soupçons aux autorités compétentes sans pouvoir faire l'objet de poursuites pour violation du secret professionnel.

- De par, l'implication des personnes morales, entendues par opposition aux personnes physiques (visant notamment les associations à but non lucratif particulièrement fragiles en la matière), et prenant en compte les différences entre les systèmes juridiques, les états doivent adopter des sanctions *proportionnées, efficaces et dissuasives*, en empruntant le contenu de l'arrêt de la Cour de Justice du 21 septembre 1989 relative à l'affaire du mais grec, afin de mettre en jeu la responsabilité des personnes morales.

- En ce qui concerne l'intervention successive, il conviendrait de prendre des mesures visant à la confiscation des fonds et d'autres biens des terroristes et de ceux qui contribuent au financement du terrorisme. Il s'agit, donc, de mesures déjà prises dans le cadre de la lutte contre le blanchiment des capitaux.

- En raison du caractère éminemment fluide des fonds et du risque de leur disparition par le biais des virements électroniques internationaux, les pays devraient adopter des dispositions permettant le gel immédiat des fonds ou d'autres biens des terroristes et de ceux qui financent le terrorisme et les organisations terroristes.

- Une structure visant à l'indemnisation des victimes pourrait être mise en place et être rendue attributaire des capitaux et des biens ainsi confisqués.

- Les mesures relatives à la lutte contre le financement du terrorisme, ainsi que contre le blanchiment, doivent s'inscrire dans le respect des droits fondamentaux de la personne. Il convient également de rester vigilant afin d'éviter qu'au nom de l'efficacité de la lutte contre ces formes de criminalité, il ne soit pas porté atteinte à la liberté des transactions financières qui est une des conditions nécessaires au développement de l'économie.

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