London School of Economic and Political Science

CLOSING THE ENFORCEMENT GAP: THE INTERNATIONAL CRIMINAL COURT AND NATIONAL AUTHORITIES

A Thesis Submitted By
Rod A. Rastan

University of London
Thesis Submitted for the Degree of Doctor of Philosophy in
Law
2006

ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

Abstract

The disparity between norms and their enforcement is a recurrent theme in international law. An examination of theory and practice undertaken in the first part of the research reviews national, internationalised/hybrid and international judicial processes. This identifies both normative and structural weakness in the existent system for the enforcement of international criminal law. The second half of the study compares the relationship that is established between the International Criminal Court and national authorities with previous models to determine whether the Rome Statute promises heightened prospects for actual enforcement.

The study suggests that the reliance of the ICC on the support of national authorities will result in a persistence of enforcement gaps in the compliance levels of States with their pre-existing duty to prosecute crimes; in the ability of the Court to secure enforcement of its requests and orders; and in the own Court's operational capacity.

Evidence suggests, nonetheless, that the ICC is also helping to close enforcement gaps. At the national level, in particular, because of the Court's jurisdictional and admissibility regime, the ICC is altering incentive structures for national authorities and profoundly altering State behaviour. This has been driven primarily by the desire of States to limit admissibility challenges to domestic jurisdiction based on legislative inconsistencies or domestic inaction.

The research shows that the successful closing of enforcement gaps will require the close and effective interaction of national and international jurisdictions. For the treaty signed in Rome is not just about a Court, it is about a system; a global system based on national States. Without national authorities, the ICC will be unable to act. But also conversely, without the catalytic presence of the ICC, it is unlikely that national authorities would be willing to act. As such, the ICC Statute acts as both a standard setting instrument and a compliance-inducing mechanism.

Acknowledgments

This thesis could not have been written without the unconditional support of my parents, their constant encouragement throughout and the many sacrifices they made. The thesis is dedicated to them.

I am also indebted to my supervisor Prof. Christopher Greenwood for his guidance and advice. The thesis has greatly benefited from his valuable comments, encouragement and suggestions.

I would also like to thank Dino Kritsiotis and Prof. Nigel White who assisted me greatly in formulating the original thesis proposal.

Finally, thanks are due to Dominique Orsini and to Shamim Razavi who assisted with the preparation of the final text.

Table of Contents

Summary

Table of Contents

Outline

Abbreviations

ACHR	American Convention on Human Rights
AMIS	African Union Mission in Sudan
ATCA	Alien Tort Claims Act
AU	African Union
BiH	Bosnia and Herzegovina
CCL No.10	Control Council Law No.10
DPA	Dayton Peace Agreement
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ECMM	European Commission Monitoring Mission in BiH
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
FCO	Foreign and Commonwealth
GFAP	General Framework Agreement for Peace
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
KFOR	Kosovo Force
KWECC	Kosovo War and Ethnic Crimes Court
L.R.T.W.C.	Law Reports of the Trial of War Criminals
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
OG	Official Gazette
OHR	Office of the High Representative
OSCE	Organisation for Security and Cooperation in Europe
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee for the Establishment of an International Criminal Court
PrepComm	Preparatory Commission for the International Criminal Court
RS	Republika Srpska
SCG	Serbia and Montenegro
SCSL	Special Court for Sierra Leone
SFOR	Stabilisation Force
SFRY	Socialist Federal Republic of Yugoslavia

SOFA	Status of Force Agreements
SOMA	Status of Mission Agreements
SRSG	Special Representative of the Secretary-General
TNI	Tentara Nasional Indonesia (Indonesian Armed Forces)
TRC	Truth and Reconciliation Commission
TVPA	Torture Victims Protection Act
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Law of the Sea Convention
UNMIK	United Nations Interim Administration in Kosovo
UNMIS	United Nations Mission in the Sudan
UNTAET	United Nations Transitional Administration in East Timor
U.S.	United States
USSR	Union of Soviet Socialist Republic
VCLT	Vienna Convention on the Law of Treaties
WWII	World War II

Introduction

The disparity between norms and their enforcement in practice is a recurrent theme in international law.[1] In the absence of an international enforcement agent, the decisions of international courts are implemented indirectly by States, who are the proximate source of compliance. States comply on a voluntary basis or are otherwise induced or coerced to do so by third States. Because decisions on these choices are guided by numerous policy considerations, amongst which legality is but one element, the notion of impartial and routine observance of international law has encountered deep resistance.[2]

The inability of the international system to effect regular compliance with its rules raises questions of fundamental importance for judicial institutions. If a court cannot guarantee the enforcement of its decisions, the nature and relevance of the law it applies is brought into doubt. Is it a purely 'legal' system or rather a series of standards subject to discretionary modes of sanction?

In the field of the law of armed conflict and human rights, this mismatch between norms and enforcement has been exacerbated by the absence of robust compliance demands on convention members. Traditional formulations governing the *jus in bello* under Hague and Geneva law, for example, were drafted under the premise of auto-enforcement via the national laws of signatories. This subjected international regulation to the modalities, interpretation, reservations and effective discretion of each State. Moreover, the exclusion of a serious sanction mechanism was arguably a pre-requisite for the adoption of these instruments. Thus, although agreements such as the 1949 Geneva Conventions enjoy almost universal adherence,[3] the record of history bears out the culture of impunity where prosecutions, with rare

[1] As Berman notes, "[i]t seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is "satisfactory" or not, but rather how to secure or compel compliance with the law at all. It may be that we have now passed from a great phase of law-making to a period where the focus is not on new substantive law but on how to make existing law effective." 'Preface', Fox and Meyer, eds., *Armed Conflict and the New Law. Effecting Compliance* (1993), xii

[2] Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 60

[3] *See* Roberts and Guelff, *Documents on the Laws of War* (1995)

and selective exceptions, simply have not occurred. Negotiating a Statute for a permanent international criminal court with the authority to hold national authorities accountable for their failings has altered these assumptions in a fundamental way, by shifting the paradigm from self-scrutiny to supranational accountability.

The efforts leading to the establishment of the Rome Statute and beyond suggest that notions about the purpose of international law are changing. Increasingly the responsibility to protect is serving to qualify an absolute assertion of sovereignty where States fail their own primary responsibility. This normative development, however, has not been matched by a maturity in compliance mechanisms. Instead, an ever greater gap has formed between the norms of internationally criminal conduct and the 'institutionalisation' of enforcement apparatus. The International Criminal Court ('ICC'/'the Court') sits, thus, in a vacuum of global mechanisms. This lacuna creates both normative and structural ambiguities. The Court is supra-national in authority, yet it cannot enforce its jurisdiction without State cooperation. Thus, the implementation of international justice remains dependant on the irregular system of national support (including through international organisations) for all matters pertaining to the collection of evidence, the compelling of persons, the issuance of travel authorisations for witnesses to travel to the Court, the conduct of searches and seizures, the forfeiture of assets, the execution of arrest warrants, and the surrender of persons. Indeed, without such cooperation from States the Court cannot exercise its jurisdiction.[4] In this sense, the enforcement regime established by the Rome Statute has not fundamentally altered the 'inter-national' framework of inter-State relations.

What impact will this have for the ICC? What consequence will accrue from relying on domestically determined modalities for the enforcement of the Court's requests? Particularly in post-conflict settings, how will the ICC function if it must depend on the cooperation of the same national authorities that have been deemed unwilling or unable to conduct genuine domestic proceedings? Moreover, to what extent does the complementarity regime established by the Rome Statute portend the evolution of a system of international criminal justice?

The research will show that the reliance of the ICC on the support of national authorities will result in an unsatisfactory enforcement. Enforcement gaps will occur

[4] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) EJIL 10, 164

at different levels: (a) there will remain a gap in the compliance levels of States with their pre-existing duty to prosecute crimes at the domestic level; (b) there will be a gap between the orders issued by the Court and its ability to secure their enforcement against recalcitrant States, impeding as a result the exercise of the Court's powers; and (c) because of resource constraints set by States Parties there will be gaps in the activism of the Court as to the number of situations it can concurrently handle and the number of persons it can try.

The study suggests, nonetheless, that while the bonds of dependency between the ICC and national authorities will result in a persistence of enforcement gaps, they may also prove to be the Court's greatest strength. This is because the complementarity framework and the accompanying admissibility provisions grant the Court strong supervisory powers over domestic proceedings and create powerful incentives to promote compliance. Indeed, compared to the oft unfulfilled obligations created by previous regimes, the Statute establishes a far more profound set of interactions between international norms and domestic practice, resulting in heightened prospects for actual enforcement. In this sense, the entry into force of the Rome Statute is about more than the creation of a new court: it signals the inauguration of a new relationship between national and international authorities. The Statute, thus, binds national authorities in to an institutional framework for the application of international criminal law. The success of this new global system, however, will rely on the balance struck between incentive and coercion. It is the impact of this system on actual practice and its prospect for closing the gaps identified that is the focus of the present study.

From the outset the term 'enforcement' should be distinguished from related words such as 'compliance', 'implementation' or 'adherence'. In particular, while 'compliance' deals with the general aspect of conformity with a particular set of rules, 'enforcement' refers to the specific obligation to suppress violations of those rules. In the context of the study, this relates to the obligation to investigate and prosecute internationally criminal activity. At the same time, the term is not employed within the particular meaning of Part 10 of Rome Statute which deals with the enforcement of sentences, and should be distinguished, similarly, from the other provisions dealing with the enforcement of fines, forfeiture orders, reparation orders, and offences against the administration of the Court.

Furthermore, the research gives primary focus to those 'core crimes' that give

rise to individual liability directly under international law and that have formed the subject matter jurisdiction of the ICC, namely genocide, crimes against humanity and war crimes.[5] Other treaty based international crimes, such as hostage-taking, terrorism, apartheid and drug trafficking receive only passing examination. Moreover, the thesis focuses primarily on issues related to jurisdictional competence, rather than on the substantive construction of the elements of those crimes.

The research is divided into four sections. Part I explores the theoretical and policy frameworks guiding the exercise of international criminal jurisdiction. Chapter 1 begins with a clarification of basic concepts regarding international criminal law, reviews the legal capacity of individuals under international law, and concludes by examining jurisdictional questions related to criminalisation, the exercise of jurisdiction, differences in enforcement regimes, and actual implementation. Chapter 2 reviews compliance theories to explain the difference between the obligations of States and their actual behaviour. The section goes on to introduce the themes of horizontal and vertical powers and dualist and monist perspectives which recur throughout the analysis that follows.

Part II reviews international and domestic practice in the pre-ICC setting. Four different enforcement models are reviewed: international, national, 'hybrid' or 'internationalised' courts, and decisions not to prosecute at all. The two chapters in this part demonstrate how difficult the investigation and prosecution of war crimes related offences have proven and how poorly State practice has faired. Domestic war crimes prosecutions have been highly selective and exceptional, subject to substantive and procedural variations. With the notable exception of the International Military Tribunals ('IMT') at Nuremberg and Tokyo, international and internationalised processes have likewise suffered from irregular enforcement. Moreover, blanket amnesties have served as a bar to prosecution in many States.

Part III turns to the ICC and explores, in four chapters, the tensions between national discretion and the Court's powers. In Chapter 6, the preconditions to the exercise of ICC jurisdiction are set against the interaction of competing interests between State Parties, the Security Council and the Prosecutor. The analysis suggests that the complementarity regime offers a balanced approach to resolving those

[5] The ICC Statute crime of aggression, which remains to be defined, is for that reason not considered in depth

tensions where parties act in good faith, but allows considerable scope for procedural abuse by States bent on employing avoidance techniques.

The possibility for States to frustrate Court action through the lodging of challenges is discussed in the next chapter. Here, the Court's ability to determine its own jurisdiction against competing jurisdictional claims is a critical strength. The section offers a set of criteria for assessing complementarity in practice.

The eighth chapter looks at the Prosecutor's ability to secure cooperation, and the numerous obstacles that may be placed in his way. As experience shows, even with Security Council mandated authority, the *ad hoc* Tribunals have not been able to ensure compliance. Without the adoption of external incentive-inducing or coercive measures by the international community, the ICC may lack tools adequate for the performance of its functions.

State cooperation will also depend on effective implementing legislation. The last chapter in this Part reviews national practice on incorporation. Examination also focuses on the extent to which a gap may remain where the Court exercises jurisdiction due to an unwillingness or inability by national authorities to shoulder a distribution of caseloads, resulting in a continuation of impunity for lower level offenders.

Part IV offers a series of concluding observations on the extent to which, with the entry into force of the Rome Statute, the various gaps identified in the research look set to close or persist.

The primary text examined below is the ICC Statute and Rules of Procedure and Evidence,[6] together with drafting history contained in documents issued by the International Law Commission ('ILC'), the *Ad Hoc,* Preparatory Committee, Plenipotentiary Conference and Preparatory Commission on the ICC and the Assembly of State Parties.[7] Domestic legislation and national jurisprudence, international customary and conventional law, as well as the Statutes and practice of the International Criminal Tribunal for the former Yugoslavia[8] ('ICTY') and the International Criminal Tribunal for Rwanda[9] ('ICTR') and more recent internationalised or 'hybrid' forums are also examined. Moreover, the research draws

[6] A/CONF.183/9(1998); ICC-ASP/1/3 (part II-A)(2002)
[7] *See* A/49/10(1994); A/50/22(1995); A/51/22(1996); A/51/10(1996); PrepCom classifications A/AC.249/1997..., A/AC.249/1998 ....; A/CONF.183/2/Add.1(1998)
[8] S/RES/827(1993)
[9] S/RES/955(1994)

on professional experience at the ICC and in the field, as well as interaction with colleagues from other judicial forums and acquaintances in diplomatic and non-governmental organisation circles who have been involved with the establishment of the ICC over the last decade.

Part I: Establishing International Criminal Jurisdiction

I

National and International Law

Chapter 1 will examine the theoretical framework that guides the exercise of international criminal jurisdiction by analysing the norms that define the repression of international criminal conduct and the obligations incumbent on States to give effect to their jurisdiction. The purpose of this section will be to discover if there are gaps in the applicable enforcement regimes; where these gaps occur, and why; and whether they matter. The discussion will set the context for an assessment of national and international practice in Parts II and III.

1. INTERNATIONAL CRIMINAL LAW

The concept of international crimes is neither new nor untested: records from the earliest annals of history, from the Sixth Century BC writings of Sun Tzu on *The Art of War*, to Herodotus' expatiations on Greek warfare, to the later Roman principle of *noxae deditio* governing relations between sovereign criminal jurisdictions, dealt with the duty of individuals beyond the confines of municipal law. The first recorded instance of the establishment of an international criminal court dates back to 1474, in the convocation of 28 judges from Alsace, Austria, Germany and Switzerland to try Peter von Hagenbach for murder, rape, perjury and other crimes in violation of "the laws of God and man" following his siege and occupation of the town of Breisach.[1] It was not until more recent times, however, that the momentum was generated towards the first serious efforts in creating a permanent international criminal tribunal (see below, Chapter 2).

[1] Schwarzenberger, *International Law as Applied by Courts and Tribunals* (1968), 462-466

The term international criminal law can be thought of as comprising two elements: the *international aspect* of domestic criminal law, and the *criminal aspect* of international law.[2] The international aspect of domestic criminal law encompasses crimes under national law that have international aspects, and transnational crimes that are based on domestic law, but which are subject to international agreements governing issues of jurisdiction, apprehension, extradition and judicial cooperation. The criminal aspect of international law can be said to overlap, at a minimum, with traditional concepts of individual criminal liability under the *jus in bello*, and more generally to crimes that give rise to individual liability directly under international law. International criminal law may be prosecuted at the domestic or international level, but can be disguised also as internationally criminal conduct prosecuted domestically, for issues of preference, under comparable domestic rather than international norms.

(a) The international aspect of domestic criminal law

The international aspect of domestic criminal law in some ways acts as the counterpoint to questions of conflict of laws in civil cases.[3] It derives its primary historical basis from the need to clarify what domestic courts should do when faced with criminal cases involving foreign elements. These included questions of jurisdiction to punish crimes committed abroad or crimes committed domestically by foreigners; the choice of criminal law to be applied; and the recognition of foreign criminal judgements and limitations upon domestic jurisdiction. At this stage, international rules merely limited the extent to which a State might apply its domestic criminal law to alleged offences committed by a foreigner acting outside of the territory of the prescribing State, such as in the case of piracy on the High Seas.[4] Other early international elements to the considerations of domestic law dealt with exceptions with respect to diplomatic immunity and asylum, and forms of cross-boundary cooperation between States in criminal matters such as extradition.[5] Such transnational practice governing activity across national boundaries forms the

[2] *See generally this section* Paust, Scharf, Sadat, Bassiouni, Gurulé, Zagaris, and Williams eds., *International Criminal Law: Cases and Materials* (2000), 3
[3] Wise,'Terrorism and the Problem of an International Criminal Law' (1987) Conn. L. Rev.19, 802
[4] Rubin, *The Law of Piracy* (1988), 337
[5] Wise (1987), 801-804

antecedents for a number of modern day regulations on cooperation between States. These include, *inter alia*, the transfer of criminal proceedings; the transfer of prisoners; the execution of sentences abroad; the seizure and forfeiture of assets deriving from criminal activity; and the taking of testimony and discovery of evidence in countries other than where the legal proceedings take place. These have been coupled with formal and informal cooperation between national law enforcement, such as though Interpol.

(b) The criminal aspect of international law

The criminal aspect of international law may be said to refer, broadly, to international custom and treaties that obligate States with respect to the administration of criminal justice in their own domestic courts. This may be through standard setting instruments governing procedural guarantees, as in article 14 of the International Covenant on Civil and Political Rights ('ICCPR'), or through the articulation of substantive offences requiring incorporation in each convention party's national law, as in the numerous *aut dedere aut judicare* treaties.

A more narrowly defined criminal aspect of international law relates to a 'core' set of international crimes that give rise to individual liability directly under international law, without a necessary nexus to the State.[6] Such offences attract particular condemnation as crimes which shock the conscience of humanity and threaten international peace and security,[7] and may give rise to direct enforcement on behalf of shared community interests by an international tribunal. International criminal law is treated in the present research in this latter sense, to refer specifically to those core crimes that have formed the subject matter jurisdiction of the Nuremberg and Tokyo Tribunals, the *ad hoc* Tribunals and the ICC. Moreover, in its treatment of these crimes, the thesis focuses on issues related to jurisdictional competence rather than on the substantive elements of the crimes themselves.

[6] Derby, 'A Framework for International Criminal Law, in Bassiouni ed., *International Criminal Law*, (1986), 33; Broomhall (2003), 9-10

[7] *See* Preamble, ICC Statute; *see* 'Martens Clause', Preamble, Hague Convention IV

(c) International crimes and domestic offences

Must an international crime be committed at the instigation or the toleration of a State authority? Schwarzenberger opines that there is a distinction between international crimes and domestic offences on the basis of the active role of the State in the former. As such, he holds piracy, slave trading, terrorism, drug trafficking, environmental damage by private entities to be *stricto sensu* domestic offences, not international crimes. The rules of international law with respect to extraterritorial jurisdiction over criminal offences, he suggests, merely authorise States to assume "an extraordinary criminal jurisdiction under their own municipal law".[8] The tension suggested above is dispositive of the dual aspects of international criminal law noted above. Within the United Nations ('UN'), the process of the codification and progressive development of offences has tended towards prohibiting offences under international law whether committed by State or non-State actors.

2. INDIVIDUAL CRIMINAL LIABILITY UNDER INTERNATIONAL LAW

Classical legal positivism regards States as the sole subject of international legal regulation, making international liability attributable to States alone.[9] A second postulate suggests individuals also may be criminally liable under international law to the extent that they act as representative of the State. This is typified by the formulation of criminality expounded by the International Military Tribunals ('IMT') at Nuremberg and Tokyo.[10] A third approach holds the individual directly culpable for internationally recognised criminal conduct before an international court without a required nexus to the State.[11]

Early discussions in the ILC over the establishment of an international criminal court often centred around the fact that there was no clearly defined corpus

---

[8] Schwarzenberger (1968), 27

[9] *See*,.e.g., contentious and ultimately abandoned draft art.19 of 1996 ILC *Draft Article on State Responsibility*, A/51/10(1996). *See generally* Simpson, 'War Crimes: A Critical Introduction' in McCormack and Simpson, eds., *The Laws Of War Crimes, National and International Approaches* (1997), 17-19

[10] *Charter of the International Military Tribunal*, 82 UNTS 279; *Charter of the International Military Tribunal for the Far East*, 4 Bevans 20, 27; *see also* ILC Draft Code of Crimes Against the Peace and Security of Mankind, A/51/10(1996)

[11] *See above*; Simpson (1997), 18-19

of law for such a court to apply, raising concerns of violations of the principle of *nullem crimen nullem poena sine lege*, in echo of the Nuremberg trials.[12] While there is little general consensus on the definition and classification of all possible international crimes,[13] today customary and conventional norms offer a basis for considerations of international criminal jurisdiction.

The Nuremberg and Tokyo judgments,[14] together with subsequent proceedings under Control Council Law No.10 for Germany,[15] clearly recognised individual criminal liability for violations of international law:

> That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[16]

Similarly, the *Flick Case* held,

> It can no longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals.... International law, as such, binds every citizen just as does ordinary municipal law.... The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty.[17]

The Nuremberg Tribunal upheld individual criminal responsibility with respect to violations of 1907 Hague Convention (IV), recognised as declaratory of customary law, and for the crimes listed in its Charter: 'crimes against the peace', (relating to the *jus ad bellum*), 'war crimes' and 'crimes against humanity' (respecting the *jus in bello*). UN General Assembly Resolution 95 (I) unanimously affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal". This affirmation led shortly thereafter to the adoption of the 1948 Genocide Convention. The prosecution of crimes against humanity at

---

[12] *See* A/CN.4/15(1950); A/1316(1950); A/2136(1952)

[13] *See generally* Schwarzenberger, *The Frontiers of International Law*,(1962),181-197; Malekian, *International Criminal Law* (1991), 3-10; Bassiouni, *International Crimes: Digest/Index of International Instruments* 1815-1985 (1985)

[14] 22 IMT 447(1946); 2 IMTFE 1176 (1948)

[15] 3 Official Gazette Control Council for Germany (1946), 50-55

[16] 22 IMT 447

[17] *Flick case, Law Reports of the Trial of War Criminals ('L.R.T.W.C.'), Vol. IX*(1949), 1191

Nuremberg filled a lacuna in the law where a State committed crimes of mass violence against its own nationals (such as Nazi Germany's pogrom of its Jewish, Romany, and disabled populations) and therefore fell outside of the protected persons regime of the 1929 Geneva Convention. The IMT at Nuremberg held that atrocities committed against civilians were no longer simply a matter of sovereign internal prerogative, but were crimes that offended humanity as a whole. The effort set the ground for much of the human rights dialogue that was to follow. The four Geneva Conventions of 1949, superseding those of 1864, 1899, 1906, 1907 and 1929, further developed the principle of individual responsibility by requiring Contracting Parties to "undertake to enact any legislation necessary to provide effective penal sanction for persons committing, or ordering to be committed, any of the grave breaches of the present Convention". In more recent times, Security Council resolutions such as number 670 (1990) in relation to Kuwait, Resolution 814 (1994) on Somalia, Resolution 764 (1992) on Bosnia and Herzegovina ('BiH'), have affirmed that "persons who commit or order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches." Moreover, post-WWII proceedings and later trials before the ICTY and ICTR have confirmed that individuals cannot escape responsibility for violations of international law by pleading lawfulness under domestic statutes.[18]

As to the scope of individual liability under customary humanitarian norms, the Secretary-General in his Report on the establishment of the ICTY opined:

> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.[19]

The Report was unanimously approved by the Security Council acting under Chapter

---

[18] See *inter alia, U.S. v Von Leeb (High Command case)* L.R.T.W.C. Vol.XII, 489: "International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of the state."

[19] S/25704(1993); compare *Report of the Secretary-General*, S/1995/134(1994), ¶12

VII in Resolution 827 (1993) and was later recalled by the International Court of Justice ('ICJ') in its *Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons.*[20] Debate and developments continue over the customary classification of other violations of humanitarian law and the norms applicable under non-international armed conflict. The ICTY Appeals Chamber in its landmark decision in the *Tadic* case, for example, held that customary international law imposes criminal responsibility for serious violations of humanitarian law committed in internal as well as international armed conflicts (see below).[21] More recently, the ICRC has completed a study at the request of States on customary international humanitarian law that seeks to contribute to the promotion of respect for and compliance with the customary rules of the law of armed conflict.[22]

As to the scope of individual criminal responsibility, article 7 of the ICTY Statute (article 6, ICTR Statute) provides jurisdiction over persons who planned, instigated, ordered, committed or otherwise aided and abetting in the planning, preparation or execution of a crime listed its statute. Action carried out in an official capacity neither excludes nor mitigates responsibility, while acts committed by subordinates do not relieve a superior of personal liability if he knew or had reason to know of their commission and failed to take reasonable measures to prevent or punish their occurrence.[23] ICTY Chambers have held that this provision "extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority" and applies to "not only persons in *de jure* positions but also those in such position *de facto*".[24] Article 7(4) states that the superior orders may only be considered in mitigation of punishment. Note should also be taken of interpretative statements on adoption of Security Council 827 stating, *inter alia*, that superior order may be offered as a defence where the accused "did not know the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful".[25]

---

[20] 35 ILM 809(1996), 29

[21] *Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,*(2 October 1995)('*Tadic Interlocutory Appeal*'), ¶128, ¶134

[22] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005)

[23] As Grotius, writing in 1625, has stated: "A community or its rulers may be held responsible for the crime of a subject if they knew of it and did not prevent it when they could and should prevent it"; *De Jure Belli Ac Pacis Libri Tres*, Bk.II, Ch.XXI, section ii

[24] *Delalic et al case, Judgment,*(16 November 1998), ¶¶319-400. *Tojo case,* L.R.T.W.C. Vol.XIV; *German High Command case*, L.R.T.W.C. Vol.XII; *Hostages case* (*US v List*), L.R.T.W.C. Vol.VIII; *Yamashita case*, U.S. Mil. Comm'n (Dec 7 1945) 13 ILR 255 (1946)

[25] Interpretative statement U.S. Representative, S/PV3217(1993)

The corresponding provisions of the ICC Statute are similar in most respects. A person is criminally responsible and liable for punishment where he commits or attempts to commit, orders, solicits or induces, aids, abets or otherwise assists in the commission of a listed crime, or in any other way contributes intentionally to the commission or attempted commission of a crime by a group of persons acting with a common criminal purpose (article 25). Jurisdiction and sentencing apply irrespective of official capacity, immunities or other special procedural rules under national or international law (article 27). A military commander or person effectively acting as a military commander (meaning, *inter alia*, a civilian) is criminally responsible for the conduct of forces under his or her effective command and control, or effective authority and control ('effective' denoting *de jure* and *de facto* command), where he knew or should have known that the forces were committing or were about to commit a listed crime, and failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution (article 28(a)). In other superior and subordinate relationships not described in paragraph (a) (i.e. other civilian or political officials), a superior is criminally responsible for crimes committed by subordinates where the superior either knew, or 'consciously disregarded' information which clearly indicated, that the subordinates were committing or were about to commit such crimes (a higher threshold than 'should have known'); the crimes concerned activities that were within the effective authority and control of the superior; and the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. In a considered retreat during compromise negotiations from the Nuremberg threshold, superior orders may relieve a person of criminal responsibility for war crimes where the person was under a legal obligation to obey orders of the Government or the superior in question, he did not know that the order was unlawful, and the order was not manifestly unlawful; with the caveat that orders to commit genocide or crimes against humanity are manifestly unlawful (article 33). Interpretative guidance from the Element of Crimes document in the context of war crimes further provides that "[t]here is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; [i]n 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; [t]here 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"."[26]

In summary, the individual under international law may bear criminal responsibility for acts or omissions under both customary and conventional norms. This may be adjudicated before either domestic or international forums. Normative classification, to date, has been piecemeal and of varying precision. To this end, the statutes and jurisprudence of the ICTY, ICTR and ICC are enabling the emergence of a well defined corpus of substantive law to be applied consistent with requirements of the principle of legality.

3. ASSERTING CRIMINAL JURISDICTON

For which specific acts can individuals be held criminally liable under international law, and by whom? The assertion of jurisdiction over individuals for international crimes will be influenced by a number of factors. (1) It must be established whether particular conduct is illegal under international law, and (2) if so, whether it attracts individual criminal responsibility, i.e. is it criminal?[27] Clearly, the fact that an act is prohibited under customary or conventional norms does not necessarily mean that an individual bears responsibility for it. (3) Who can exercise jurisdiction over the proscribed offence? This will require a careful review of the bases under international law by which a State may assert jurisdiction. (4) What obligation lies with that State to give effect to its jurisdiction: is the rule merely permissive, or is there a mandatory duty to do so? (5) What mechanisms are available to ensure compliance where a State declines to assert its criminal jurisdiction? Each factor will be assessed in order to identify possible gaps in the normative and institutional apparatus for the enforcement of international criminal law.

[26] Introduction Article 8, ICC Elements of Crimes; ICC-ASP/1/3 (part II-B)(2002)
[27] *See* approach adopted by Greenwood, 'International Humanitarian Law and the *Tadic* Case' (1996) EJIL 7, 277

(a) Illegality

The illegality of conduct may derive from a prohibition formulated in either customary law or by convention. Examples of variants include piracy which began as a prohibition in customary international law and later became codified in 1958 Convention on the High Seas;[28] the prohibition on the employment of poison or poisoned weapons in armed conflict originally stipulated in Hague Convention IV, but later recognised as reflective of international custom;[29] torture or inhuman treatment of prisoners of war under the grave breaches regime of Geneva Convention III;[30] and the prohibition on arbitrary arrest or detention under the ICCPR.[31]

(b) Criminality

The question of criminality may be specified in a number of ways. As noted above, this may include, *inter alia*, an explicit identification of a particular conduct as a crime under international law; a requirement to ensure that the proscribed conduct is an offence under domestic criminal law; or the formulation of a duty to prosecute or extradite alleged offenders or to cooperate in their investigation and prosecution.[32] Thus, for example, the Geneva Conventions require State Parties to "enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention".[33] Similarly, under the Convention on the High Seas, national authorities are required to cooperate to the fullest extent in the repression of piracy and all States are affirmed as possessing broad bases of jurisdiction to arrest and punish offenders.[34] The prohibition on arbitrary arrest or detention in ICCPR, by contrast, is not the object of criminal sanction since responsibility for the violation under the convention rests with the State and not with the perpetrator. Parties to the convention are required to adopt

---

[28] *Convention on the High Seas* (1958); *Convention on the Law of the Sea* (1982) ('UNCLOS')
[29] Art.22-23, *Hague Convention IV* (1907)
[30] Art.130, *Geneva Convention III* (1949)
[31] Art.9, *ICCPR*
[32] Bassiouni (1985), leaves open the possibility for an inference of criminal liability in the absence of specific characterisation of an offence as a crime, where a breach of conduct nonetheless incurs individual responsibility
[33] Art.129-130, *Geneva Convention III*
[34] Art.14-22, *Convention on the High Seas*

legislation giving effect to the right not to be arbitrarily arrested or detained, to ensure effective remedies through competent judicial, administrative or legislative authorities, and to enforce such remedies.[35] The individual who violates the prohibition, however, is not held directly liable under the convention. Hague Convention IV similarly omits reference to individual criminal responsibility and instead declares that Parties are "responsible for all acts committed by persons forming part of its armed forces", and "shall, if the case demands, be liable to pay compensation".[36] Subsequent interpretation by the Nuremberg Tribunal, however, has held that the convention must be read as imposing individual criminal liability even in the absence of explicit stipulation, by virtue of the necessary implication flowing from the express responsibility placed on States.[37] The question of individual liability formed a central feature of litigation at Nuremberg given the absence of explicit criminal sanction in treaties before 1949. The issue of individual liability arose also in the *Tadic* case before the ICTY with respect to the non-grave breach offences of the Geneva Conventions and the Protocols additional thereto, as well as in relation to violations of Common Article 3 in non-international armed conflict. In its landmark interlocutory judgment, the Appeals Chamber held that the non-grave breach violations of the laws and customs of war, including violations of Common Article 3 in non-international armed conflict, imposed criminal liability also with respect to those offences.[38]

Where the conduct in question is prohibited solely under customary norms it is necessary to examine State practice and *opinio juris*. Evidence of custom may be derived from numerous sources including: "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces, etc., comments by governments on drafts of the International Law Commission, State legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties of the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly." "Obviously", as Brownlie observes, "the value of

[35] Art.2 and 9, *ICCPR*
[36] Art.3, *Hague Convention IV*
[37] 22 IMT 447
[38] *Tadic Interlocutory Appeal*, ¶¶86-95, ¶¶127-137. *See* Greenwood (1996), 279-81

these sources varies and much depends on the circumstances".[39] The issue may be pertinent in situations where a State is not a signatory to a relevant convention, or where, despite subsequent codification of a customary offence, the time period applicable in a certain case occurred prior to its codification. For example, the customary crime of piracy *jure gentium* in its strictest sense is categorised in Oppenheim as having always been considered outlawed.[40] Similarly, torture, by the time of its explicit criminalisation in the 1984 Torture Convention, was already illegal and subject to criminal sanction under customary law. As Burgers and Danelius note, the Convention did not create torture as an international crime, but aimed rather "to strengthen the existing prohibition" under customary law.[41]

In summary, not every prohibition under international law, whether custom or convention, can be considered an international crime. Secondly, not every international crime carries individual criminal liability, indeed a relatively small number do so. Where the conduct in question is subject to criminal sanction, this may be specified through conventional formulation or, exceptionally, may be established through subsequent judicial interpretation.

(c) Grounds by which a State may seize jurisdiction

After establishing that an offence under international law carries criminal sanction, it is necessary to consider issues of jurisdictional competence. The exercise of jurisdiction under international law can be distinguished into three forms. Executive (or enforcement) jurisdiction refers to the power of a State to enforce its own laws. This is normally limited to the territory over which a State is sovereign. As the Permanent Court of International Justice ('PCIJ') stated in the *Lotus* case: "the first and foremost restriction imposed by international law upon a State is that - failing the

---

[39] Brownlie, *Principles of Public International Law*, 6th ed. (2003), 6. Mendelson notes State behaviour does not count as State practice if it is not communicated to another State – customary processes being ones that are express and tacit, and thus not evidenced by covert practices or confidential legal advice nor secret instructions to armed forces. In appropriate circumstances, therefore, omissions can count as state practice also; Mendelson, 'The Formation of Customary International Law', *Recueil des cours* (1998), 204-209

[40] Jennings and Watts, eds., *Oppenheim's International Law* (1996), §299

[41] Burgers and Danelius, *The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Handbook on the Convention* (1988); *see* also *R v Bow Street Magistrate, Ex parte Pinochet*, [2000] 1 AC 147 (*'Pinochet III'*)

exercise of a permissive rule to the contrary - it may not exercise its power in any form over the territory of another State.".[42] Where a State does attempt to enforce its jurisdiction abroad by, for example, effecting an arrest, it can be said to violate both the territorial sovereignty of the host State, unless consent has been obtained,[43] and arguably the rights of the individual who is not to be deprived of his or her liberty except in accordance with the law.[44]

By contrast, prescriptive jurisdiction and adjudicative jurisdiction may encompass activity occurring outside a State's own territory. Prescriptive jurisdiction refers to the power of a State to legislate a particular offence, whether by enactment of criminal or civil or administrative codes. Adjudicative jurisdiction relates to the power to try accused persons in a State's own courts for unlawful acts.[45] As the *Lotus* decision went on to hold: "[i]t does not ... 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."[46] Accordingly, the PCIJ held that restrictions on the ability of States to extend the application of their laws and the jurisdiction of their courts cannot be presumed. Rather, in the absence of a prohibitive rule, States may be said to enjoy "a wide measure of discretion".[47] In summary, enforcement jurisdiction cannot exist unless there is prescriptive and adjudicative jurisdiction, but there can be prescriptive and adjudicative jurisdiction without any scope for routine enforcement.[48]

The general principles on the basis of which a State may seek to prescribe and adjudicate criminal conduct occurring abroad are reviewed in the 1935 *Harvard*

---

[42] *France v Turkey* (*Lotus case*), PCIJ, Series A. No.10 (1927), 18

[43] Akehurst suggests that an act of one State in the territory of another may usurp the sovereign powers of the latter either because the *nature of the act* is such that only officials of the local State are entitled to perform (e.g. arrest), or because of the *purpose for which the act is done* is contrary to international law absent permission (e.g. by a State conducting inquiries on the territory of another for the purpose of enforcing its own laws); 'Jurisdiction in International Law', (1972-73) BYIL 46, 146-7

[44] See *Lawler Incident*, (1860) 1 McNair Int'l L Opinions 78; *France v GB* (*Savarkar case*), Scott, Hague Court Reports, 275 (1911); *Reg. v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42, (95 ILR 380); *R v Staines' Magistrates' Court, Ex parte Westfallen* [1998] 4 All ER 210; *R v Mullen* [1999] 2 Cr App R 143. Compare *U.S. v Alvarez-Machain*, 504 U.S. 669 (95 ILR 355)

[45] Akehurst (1972-73), 145; Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) BYIL 53, 1; Jennings and Watts (1996), §136

[46] *Lotus case*,19

[47] *Ibid. Compare* Brierly who argues for a valid rule international custom establishing such jurisdiction; (1928) LQR 44, 154. Such broad grounds for asserting jurisdiction were later restricted and remain contested: *see* Convention on the High Seas (article 11), based on the prior Brussels Convention on Penal Jurisdiction in Matters of Collision (1952), and repeated verbatim in UNCLOS (article 97)

[48] Bowett (1982), 1

Research Draft Convention on Jurisdiction with Respect to Crime.[49] The 'territorial' principle is the primary basis for the exercise of jurisdiction and is determined by reference to the place where the offence was committed. The principle is extended in transnational criminal activity by modification through the 'subjective territorial' principle, whereby the offence is said to occur in the territory where the offence is begun although it is not completed there, and the 'objective territorial' principle where, inversely, the completion of the offence occurs in a State, although it may not have begun there. An extra-territorial extension of the latter principle is controversially exercised by those States that attempt to regulate the conduct of foreigners abroad which cause effects within their own territory. The so-called 'effects doctrine', however, may be distinguished from the objective territorial principle since, whereas the effect caused in the latter is a constituent part of the offence, that arising in the former is a mere consequence or repercussion of conduct completed abroad.[50] Anti-trust laws in the United States ('U.S.'), as well as legislation aimed at restricting commercial activity abroad causing "direct effect in the United States" such as under the Foreign Sovereign Immunities Act 1976,[51] are notable examples. Concerns raised by third States at the time to this extreme assertion of jurisdiction brought U.S. courts into direct confrontation with European countries and resulted in the imposition of defensive blocking legislation. The United Kingdom ('UK') Protection of Trading Interests Act, for example, aimed to prohibit compliance with certain foreign requirements, such as the production of documents or information to courts or authorities in a foreign State.[52] In response, U.S. courts sought to temper the excesses of anti-trust legislation by introducing the notion of balancing competing interests in order to take into account the legitimate interests of other States. The unilateral exercise of such extra-territorial jurisdiction, thus, will need to be weighed against fundamental values such as those of non-intervention and sovereign equality.

The principle of 'nationality' or the 'active personality' grants criminal jurisdiction over acts committed abroad by a State's own nationals, even where the act

---

[49] 'Harvard Research Draft Convention on Jurisdiction with Respect to Crime' (1935) AJIL 29, Supp., 443

[50] Jennings and Watts (1996), §139; *Timberlane Lumber Co. v Bank of Maerica*, 549 F.2d 597(1976); *Laker Airwarys v* Sabena, 731 F.2d 909 (1984); *Hartford Fire Insurance v* California, 509 US 764,113 Sup.Ct.2891(1993); *F. Hoffman-LaRoche Ltd. v Empagran* S.A.124 S.Ct.2359(2004)

[51] 15 ILM 1388(1976); for extraterritorial application of anti-trust legislation in other States *see* Jennings and Watts (1996), §139, n.39 and n.43. *See also Cuban Liberty and Democratic Solidarity Act*, (1996) ('Helmes-Burton Act')

[52] 1980 c.11

is legal in the territory where it occurs. Examples include UK legislation prescribing criminal sanction for sexual tourism offences committed abroad by British nationals.[53]

The 'protective' principle provides that a State may prosecute acts committed by foreigners abroad which threaten the vital interests or security of the State. Besides the political or military offences of espionage, sedition, falsification of official documents and attacks against consular staff or property and the like, this may include economic offences such as counterfeiting of currency or possibly 'internet terrorism'. It may also include jurisdiction that is asserted on public health grounds, such as in the fight against drug-trafficking.[54]

By contrast, the principle of 'passive personality' refers to the assertion of jurisdiction over acts committed abroad by foreigners, but directed against the forum State's own nationals.[55] The principle was dismissed by Judge Moore in his dissenting opinion in the *Lotus* case, who objected against the situation "where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject".[56] While it has remained controversial, the principle has been applied with particular reference to terrorist attacks against a State's own nationals.[57] The main justification for the principle relates to crimes committed in uncertain jurisdictional contexts, such as on board aircraft where, rather than facing competing jurisdiction, there may be a risk that no State will exercise jurisdiction at all. It has, moreover, been applied to State-sponsored terrorism where the State of the nationality of the accused shields the offender from trial.

A final principle under the Harvard formulation of 'universality', determines jurisdiction not on the basis of any nexus with the forum State, but by virtue of

---

[53] Sex Offenders Act 1997(UK), s.7; *see also* Official Secrets Act 1989(UK),s.15; Crimes (Child Sex Tourism) Act 1994(Aus)

[54] See *Joyce v DPP* [1946] AC 347(treason); *U.S. v Bin Laden*,92 F.Supp.2d,189(2000) (attack on foreign embassy); *Liangsiriprasert v U.S. Government* [1990] 2 All ER 866 (drug trafficking); *R v Sansom* [1991] 2 All ER 145 (drug trafficking); *U.S. v Gonzalez* 776 F.2d 931(1985) (drug trafficking); Anti-Terrorism, Crime and Security Act 2001(UK), ss.47(7), 50(6), 51

[55] Jennings and Watts (1996), §139. *See generally* Dickinson, 'Introductory Remarks to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935' (1935) 29 AJIL, Supp., 443; Wolfrum, 'The Decentralised Prosecution of International Offences through National Courts' in Dinstein and Tabory, eds., *War Crimes in International Law* (1996), 233-235

[56] *Lotus case*, Dissenting Opinion of Judge Moore, 70

[57] *See* U.S. Terrorist Prosecution Act (1985) and Omnibus Diplomatic Security and Antiterrorism Act (1986); *U.S. v Yunis*, 924 F.2d, 1092. *U.S. v Ali Rezaq*, 134 F.3d 1121, 1130(1998); *U.S. v Bin Laden*

common interests which threaten the international community as a whole.[58] Thus, although an act may have been committed by a foreigner against a foreign target outside the territory of the State, jurisdiction is ceded as a matter of international public policy.[59] The offender "is treated as an outlaw, as the enemy of all mankind - *hostis humanis generis* - whom any nation may in the interests of all capture and punish".[60] A very limited number of crimes attract universal jurisdiction. The crime of piracy is the classical instance,[61] but the modern day classification can be said to include slave trading,[62] genocide,[63] apartheid,[64] and certain categories of war crimes, notably as reflected in grave breaches of the 1949 Geneva Conventions.[65] With respect to the latter, the British Manual of Military Law reads: "[w]ar crimes are crimes *ex jure gentium*" granting jurisdiction over persons of any nationality to the courts of all States.[66] The 1949 War Crimes Commission declared "the right to punish war crimes ... is possessed by any independent State whatsoever".[67] Similarly, the Supreme Military Tribunal of Italy in the *Wagener* trial held: "[t]hese norms [laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one ... They are .... crimes of *lese-humanite* ... and are to be opposed and punished, in the same way as the crime of piracy, trade in women and minors, and enslavement are to be opposed and punished, wherever they may have been committed."[68]

None of the above methods of conferring jurisdiction, however, *requires* a State to exercise its authority over criminal offences. Rather, they display permissive rules. This may be distinguished from the legal duty imposed upon States to either

---

[58] "[universal jurisdiction] is jurisdiction based solely on the nature of the crime", *Princeton Principles on Universal Jurisdiction and Commentary* (2001)
[59] Brownlie, 6th ed (2003), 304; *ibid*
[60] *Lotus case*, Dissenting Opinion of Judge Moore,70; *Eichmann case*, District Court of Jerusalem, 36 ILR 5 (1961)
[61] While there may be uncertainty as to the customary law definition of piracy (Jennings and Watts (1996), §.272), its customary status is beyond doubt. For a treaty definition *see* article 15, *Convention on the High Seas* (1958)
[62] Jennings and Watts (1996), §429
[63] *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep.1951, 15; *Barcelona Traction, Light and Power Company, Limited, Second Phase*, ICJ Rep.1970; *Report of the Secretary General*, S/25704, ¶35; *Restatement of the Law: Third Restatement of US Foreign Relations Law*, Vol.2 (1987), §702,3
[64] *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia,* ICJ Rep.1971, 57
[65] *Report of the Secretary General*, S/25704
[66] *British Manual of Military War* (1958),¶637
[67] 15 *War Crimes Reports* 26 (1949)
[68] 13 March 1950, *Rivista Penale* 753, 757 (unofficial translation)

prosecute or extradite offenders under the principle of the 'vicarious administration of justice'.[69] In this instance jurisdiction is based upon the liability of persons for punishment in another State.[70] According to this principle, a State commits itself to either try an offender in its own courts or to extradite him or her to a requesting State. The principle has found expression in a number bi- and multilateral extradition treaties as the obligation *aut dedere aut judicare*. Article 7 of the 1970 Hague Convention the Suppression of Unlawful Seizure of Aircraft provides the classic formulation:

> The Contracting States in the territory of which the alleged offender is founds shall, it if does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.[71]

Criminal offences under various multilateral treaties based on variants of the principle include slavery,[72] piracy,[73] genocide,[74] apartheid,[75] counterfeiting of currency,[76] war crimes,[77] drug trafficking,[78] hijacking[79] and sabotage of aircraft,[80] sabotage on the High Seas,[81] attacks on diplomats,[82] the taking of hostages,[83] and torture.[84]

In much of the legal literature on the subject, norms based upon the principle of the vicarious administration of justice are often conflated with those of the

---

[69] Meyer, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction', 31 Harvard ILJ 1 (1990), 108

[70] Dinstein, 'International Criminal Law' (1975) 5 Israel Yrbk on Human Rights 69; *see generally* Wolfrum (1996)

[71] Art.7, *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970)

[72] *Slavery Convention* (1926); and *Amending Protocol* (1953)

[73] Art.14-22, *Convention on the High Seas* (1958); art.100-107,UNCLOS (1982)

[74] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948)

[75] Art.II-IV, *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973)

[76] Art.17, *International Convention for the Suppression of Counterfeiting Currency* (1929)

[77] *Geneva Conventions*,(1949); *Additional Protocol I* (1979)

[78] Art.36(2)(iv) *Single Convention on Narcotic Drugs* (1961); art.4(2)(b) *Convention against the Illicit Traffic in Narcotic Drugs* (1988)

[79] Art.4, *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970)

[80] Art.5 *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (1971)

[81] Art.3, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988); art.2, *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (1988)

[82] Art.3, *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents* (1973)

[83] Art.5, *International Convention Against the Taking of Hostages* (1979)

[84] Art.5(2), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). A number of the treaties cited above were listed in the Annex to the 1994 ILC Draft Statute as possible 'treaty crimes' pursuant to draft article 20(e).

principle of universality such that *aut dedere aut judicare* treaties are spoken of as being dispositive of universal jurisdiction.[85] There are important differences, however, between the two based on both purpose and operation.[86] Under try or extradite provisions, a State is obligated because of the liability of an offender for prosecution in another State. There need not be an existent extradition request before this duty is put to test: in the wording of the relevant conventions, the State must prosecute even in the absence of a request since it is "obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."[87] Enforcement is required, moreover, through domestic legislation incorporating the penal standards inculcated in the treaty.[88] Finally, obligations to prosecute or extradite are owed to parties with a specific jurisdictional nexus. The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, for example, provides for jurisdiction based on territory, flag, or nationality of the accused. The Hostages Convention and Torture Convention add jurisdiction based on the nationality of the victim. The 1977 European Convention on the Suppression of Terrorism is the broadest in this range by not requiring any nexus beyond being a party to the convention. In each of these cases, the custodial State is vicariously enforcing a norm that the (harmed) State itself could repress under its own criminal law statutes.[89]

Under universal jurisdiction, by contrast, the offender is deemed liable for prosecution in all States pursuant to a public policy expression of the international community. States are under no obligation under international law, however, to exercise their jurisdiction. Moreover, the principle, given its universality, applies to criminal offences recognised under international custom. It may be correct to say that a treaty, by its intrinsic State-Party constraints cannot create a rule of universal jurisdiction applicable to all States. Rather, it can only establish a specified range of jurisdictional grounds linked to a try or extradite rule applicable to convention members.[90] A treaty, however, may later converge with the principle of universal

[85] Most recently, the *Princeton Principles on Universal Jurisdiction* state: "Universal jurisdiction is one means to achieve accountability and to deny impunity to those accused of serious international crimes. It reflects the maxim embedded in so many treaties: *aut dedere aut judicare,* the duty to extradite or prosecute", 50

[86] Wolfrum (1996), 236. *See generally* for this section

[87] Art.4, *Convention for the Suppression of Unlawful Seizure of Aircraft*

[88] Art.4 and 7,*ibid*

[89] Wolfrum (1996), 236

[90] *See* Higgins, *Problems and Process* (1996), 65

jurisdiction where its substantive provisions into customary law. Such has become the case with the prohibitions under Hague Convention IV or the grave breach provisions of the 1949 Geneva Conventions. Alternatively, a convention may codify an existing customary crime operating under universal jurisdiction, such as piracy or torture, and seek to provide a binding legal mechanism for its adjudication and enforcement.[91] In such an instance, the overlaying of a binding procedural rule over a prior permissive customary norm is only applicable to convention members. In both these cases, the treaty rule may be said to reflect universal jurisdiction, but, importantly, it does not create it.

In the case of the ICC, the Rome Statute neither creates universal jurisdiction nor does it impose an *aut dedere aut judicare* rule obliging non-Party States to surrender or otherwise prosecute persons in relation to an identified situation.[92] It assumes, however, that such States will want to fulfil their pre-existing duty under international law in order to exclude the jurisdiction of the Court.[93] Moreover, the required jurisdictional nexus of territoriality and active personality listed in the Rome Statute represent the most traditional grounds under international law.

The discussion above has important consequences for the debate regarding the exercise of jurisdiction by convention States over nationals of non-State Parties. Much of the legal difficulty surrounding this issue arises out of the failure to differentiate, on the one hand, between the inviolability of third State versus a third State's nationals and to distinguish between *aut dedere aut judicare* treaties and universal jurisdiction on the other. Thus, the U.S. has objected to the jurisdiction of the ICC on the basis that the Rome Statute erroneously provides for the exercise of jurisdiction over nationals of States not party.[94] In support, it cites article 34 of the Vienna Convention on the Law of Treaties ('VCLT') which holds that "[a] treaty does not create either rights or obligations for a third State without its consent".[95] The assertion of jurisdiction on these grounds is said to represent thus a form of collective extra-territoriality towards that non-obligated third State and amounts to unilateral, interventionist action. There is an important distinction, however, between an action that is sought against a third State, and an action taken against a national of a third

[91] E.g. Torture Convention, *see above*
[92] The only exception is where a situation has been referred to the ICC by the Security Council acting under Chapter 7
[93] See below, Chapter 9
[94] Scheffer, 'The United States and the International Criminal Court' (1999) AJIL 93, 12
[95] Art.34-37, *Vienna Convention on the Law of Treaties* (1969) ('VCLT')

State. In the latter scenario, no obligations are created by a treaty for the third State. On the contrary, the right of a State Party to proscribe and adjudicate certain conduct, including conduct committed abroad, is an expression of sovereignty. Thus, as noted above, the exercise of jurisdiction under an international convention over nationals of a non-Party State is not novel. It represents a generally recognised right of all States to assert extraterritorial jurisdiction pursuant to international cooperation in the suppression of a treaty-based crime. The U.S. itself has been among the strongest advocates of such extraterritoriality in areas of national interest. The only difference in the case of the ICC is that State Parties have authorised the Court to substitute itself for their own jurisdiction. The framer of the Nuremburg Charter established its jurisdiction on the same basis.[96] The ICC, moreover, locks the regime into an institutional and vertical, rather than diplomatic or horizontal, mechanism for resolution. Another argument detractors could make is that the jurisdiction of international bodies differs from that of national forums because the protections under law of State immunities can be set aside by an international court. This arguably deprives a non-Party State of internationally recognised protections that seek to ensure the unimpeded conduct of foreign relations and non-interference in the performance of official functions. It is precisely for this purpose, however, that the Statute recognises applicable limitations under international law to the exercise of criminal jurisdiction over third State nationals based on State or diplomatic immunity or non-surrender agreements (article 98, ICC Statute).[97] Thus, as argued elsewhere, U.S. objections to the jurisdiction of the ICC appear particularly misplaced given the multiple procedural safeguards in the Rome Statute.[98] Indeed, the U.S. more recently has placed less reliance on this particular line of reasoning for its objections to the Court.[99]

[96] "The Signatory Powers ... have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law"; IMT Nuremberg, *Judgment*, 48

[97] See below, Chapter 8

[98] Scharf, 'The ICC's Jurisdiction Over The Nationals Of Non-Party States: A Critique of the U.S. Position' (2001) Law & Contemp. Probs. 64, 67; Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and their Possible Implications for the Relationship between the Court and the Security Council' (2000) Nordic JIL 69:1

[99] Wedgwood 'The International Criminal Court: An American View' (1999) EJIL 10, 93

(d) Obligation incumbent on States to give effect to their jurisdiction

None of the forms of jurisdiction reviewed above establish an enforcement duty to ensure that States assert their jurisdiction. Certain offences, such as those governed purely by customary international law, are often poorly defined and lack an explicit enforcement requirement. Other, treaty-based norms vary considerably in their enforcement demands. Under the non-grave breach provisions of the Geneva Conventions, for example, Contracting Parties are merely obliged to "take measures necessary for their [*sic*] suppression".[100] The Genocide Convention creates a loose set of obligations which includes the enactment of necessary legislation and the provision of effective penalties. Actual prosecution is left to the territorial State where the crime occurred or to a competent international tribunal, where it exists.[101] Even under the principle of the vicarious administration of justice, as enumerated in numerous *aut dedere aut judicare* conventions, although a State may be held in breach of its treaty obligations where it fails to implement domestic legislation incorporating the penal standards inculcated in the treaty, a failure to assert jurisdiction in a specific case will not trigger any sanctioning mechanism. On the contrary, national practice has shown that States with no direct connection to a particular offence have proved reluctant to implement their obligation to try offenders in the absence of an extradition request.[102]

The normative regime governing the enforcement of the grave breach provisions of the Geneva Conventions represents the most robust among the various mechanisms reviewed above. Under the Conventions, Contracting Parties are obliged not only to pass special legislation enabling their national authorities to try or extradite offenders, but also to search them out.[103] As the ICRC Commentary to the Geneva Conventions underscores, this "imposes an active duty" on Contracting Parties:

> As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrest and prosecuted with all dispatch. The necessary police

[100] *See R. v Zardad*, [2004] Central Criminal Court (Old Bailey) (5 October 2004) rejecting the claim of a duty in English law to try or extradite a hostage taker in an internal armed conflict under the Geneva Conventions or Additional Protocols

[101] Genocide Convention, art.V-VI; 1969 Genocide Act [UK]

[102] Roberts, 'The Laws of War: Problems of Implementation in Contemporary Conflicts', (1995) Duke J. Comp.& Int'l L.6, 36-37

[103] Art.49 GCI; art.50 GCII; art.129 GCIII; art.146 GCIV

> action should be taken spontaneously, therefore, and not merely in pursuance of a request from another State.[104]

Even here, however, State practice in actively implementing this obligation has proved exceptional and sporadic.[105]

The failure to establish a truly mandatory regime has arisen because of the absence of a serious mechanism to enforce convention norms against a State that fails to exercise its treaty obligations. To date, the principal international agency with coercive powers, the UN Security Council, has rarely held States accountable for a breach of their obligations towards other States.[106] Thus, although there may be a legal duty to obtain a specific result, extra-legal considerations dictate that such issues are typically left to the effective discretion of States. As longstanding ILC debates attest to the difficulty of defining and enforcing notions of State responsibility,[107] jurisdiction may be described as effectively permissive or discretionary because of the absence of a mechanism that would convert specific obligations into a sanctionable legal duty.

(e) Mechanisms to ensure compliance

It is only with the establishment of international tribunals with potentially coercive powers that obligations on States can be placed in a hierarchical and institutionalised context. For the IMT at Nuremberg and Tokyo, the issue was hardly one of State cooperation, given that the Allied powers were exercising executive administrative powers in occupied Axis territory. In the case of the former Yugoslavia and Rwanda, the *ad hoc* Tribunals have been established as Chapter VII enforcement measures and thus require the mandatory cooperation of all States according to article 25 of the UN

---

[104] Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, Vol.III (1952), 623

[105] See below, Chapter 3. Roberts (1995) notes "much of the compliance system [relating to the laws of war] scarcely has worked at all and shows few signs of doing so now", 72

[106] For rare exceptions *see* S/RES/731(1992) whereby the Security Council called on Libya to respond to requests by U.S., UK and France for the arrest and extradition of two suspects in the Lockerbie case, but did not rely on the try or extradite provisions of the 1971 Montreal Convention invoked by Libya; by S/RES/748(1992) and S/RES/883(1993) the Council imposed and extended sanctions against Libya. See *Questions of Interpretation and application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Jamahiriya v United States of America)*, ICJ Rep. (1992), 114; Michael Plachta, *'The Lockerbie Case: The Role of the Security Council in the Enforcing of the Principle Aut Dedere Aut Judicare'* (2001) EJIL 12, 129. *See also* S/RES/1333(2000) demanding that the Taliban regime arrest and surrender Usama bin Ladan.

[107] *See* comments of States on ILC Draft Articles on State Responsibility, A/54/10(1999); ILC *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, A/56/10(2001)

Charter. Security Council Resolution 827 (1993), for example, specifies that all States shall cooperate with the Tribunal, shall take all measures necessary under their domestic law to implement the provisions of the resolution and the Statute, and shall comply with request for assistance and orders issued by the Tribunal under article 29 of the Statute.[108] It might perhaps be argued that the obligations on States with respect to the grave breach provisions of the Geneva Conventions, the Genocide Convention and of the laws and customs of war are thereby given compulsory form by the *ad hoc* Tribunal. The correct view, however, is that the Security Council has established a specific binding regime for State cooperation with the ICTY and ICTR. This is borne out by the fact that although the crimes under the Statutes of both Tribunals are reflective of the subject-matter of particular treaties, they depart from the procedural mechanisms established by those conventions and do not rely on the grounds of jurisdiction established therein. Indeed, outside cooperation with the Tribunals, the obligations of States with respect to their conventional duties is not altered. Thus, the failure of a State to try or extradite an accused not indicted by the Tribunals is not subject to scrutiny by either Tribunal. In short, the source of obligation for States with regard to the ICTY and ICTR is not the conventions, but the duty, under article 25 of the UN Charter, to comply with binding decisions of the Security Council. That obligation takes priority, by virtue of article 103 of the Charter, over obligations under any other treaty.[109]

The ICC is often considered the weaker sibling of *ad hoc* Tribunals because of its complementary framework. The institutional relationship created between the ICC and national authorities, however, is far more profound that of the *ad hoc* Tribunals. A State Party to the Rome Statute is not only required to cooperate with the Court in course of its investigations and trials, but is obligated first and foremost to try the alleged offenders in its own domestic courts. Under complementarity, if a State Party is unwilling or unable to undertake genuine investigations and prosecutions, it must surrender jurisdiction to the Court.[110] Moreover, the ICC has a central role in evaluating the effectiveness of national enforcement of humanitarian norms where a State fails to do so since the activation of the Court's jurisdiction is intimately linked

[108] *See* ICTR article 28, S/RES/955 (1994); *Prosecutor v Blaskic*, 110 ILR 607 (29 October 1997)('*Blaskic Subpoena Appeal*')
[109] See below, Chapter 9
[110] Non-Party States may be placed in a similar position where a situation is referred by the Security Council (see below, Chapter 8)

to such efforts. The Rome Statute, thus, compels States to enforce humanitarian norms in a way the International Tribunals have been unable to.[111]

The overlaying of an international judicial forum over international norms, however, will not be sufficient to ensure compliance. An agency capable of securing routine enforcement will be necessary. Lacking this, international courts and tribunals will remain dependant on State cooperation for the exercise of their powers. Where such support is not forthcoming, an international court alone will be unable to compel compliance. The enforcement of international criminal law, thus, must be placed in the wider context of extra-legal motivations that may induce or coerce State action. It is the explanation of this disparity between State obligations under international regimes and their actual behaviour, which forms the focus of the next chapter.

[111] See below, Chapter 3 on the supervisory powers of the ICTY over certain national proceedings via Rule 11*bis*

II

National and International Authorities

1. BETWEEN NORMS AND PRACTICE

In general, most States routinely comply with their obligations under international law. From meteorology to aviation law, international sale of goods to the law of treaties, conflict of jurisdictions to diplomatic immunity, to international law that has been incorporated into national law, there is much of a legal system that covers of most, if not all, aspects international life. As Jessup notes, "the vast majority of such engagements are continuously, honestly, and regularly observed even under adverse conditions and at considerable inconvenience to the parties . . . The record proves that there is a 'law habit' in international relations."[1] This represents the functional core of international life where States comply either because the multilateral agreements concerned are coordination mechanisms that States have a strong incentive to participate in (such as trade and monetary regimes) or are modest regulatory frameworks that place few demands on parties and reflect existing practice (such as arms proliferation regimes).[2]

Notwithstanding this general habitual law-abidingness, the regulatory frameworks contained in an international agreement that require a more ambitious departure from actual State behaviour frequently encounter problems with enforcement.[3] Among the most ambitious set of agreements where non-compliance is obvious are those in the field of human rights and international humanitarian law.[4] Moreover, the most persistent violators of such regimes often are poor, weak or

[1] Jessup, *A Modern Law of Nations* (1948), 6-8

[2] As Brierly observes, "The volume of this work is considerable, but most of it is not sensational ... it means that international law is performing a useful and indeed a necessary function in enabling states to carry on their day-to-day intercourse along orderly and predictable lines", *The Law Of Nations* (1963), 68-76; Downs and Trento, 'Conceptual Issues Surrounding the Compliance Gap', in Luck and Doyle, eds., *International Law and Organization: Closing the Compliance Gap* (2004), 36

[3] Downs and Trento (2004), 20

[4] *ibid*, 21. Bassiouni (1985) notes that offences with the least political content, such as piracy, are typically contained in instruments with the greatest penal and enforcement apparatus, whereas those targeting political and military officials/leadership often suffer from want of clearly formulated and binding enforcement provisions.

undemocratic States in conflict situations or post-conflict transitions.

Using compliance as a measure of effectiveness depends also on the relative demands the regime places on parties and their resultant behaviour. A treaty monitoring mechanism that requires States to merely report on their activities may enjoy high levels of compliance, but may not be particularly effective in altering deviant practice. Conversely, a regime that places onerous duties on parties may suffer from under performance despite the genuine efforts of States to enforce its norms. There will, thus, be a level of non-compliance that the regime can be expected to bear between full enforcement and flagrant violation.[5] As Colemen and Doyle point out, a number of will factors influence this balance, including "the willingness to invest in compliance, the cost of defections and the social benefits of compliance, whether defection is a matter of will or capacity ... and whether the regime is designed for homogeneous agents or covers leaders and laggards".[6] Full compliance by a State with its duties under international criminal law, for example, will be subject to public policy considerations and may require a trade-off with resources available for other societal goals.

Another consideration is the political effect of non-compliance and its impact on a State's overall reputation on the international sphere. As Downs and Trento point out, compliance rates vary across different areas of international law. The incentives structures built into the world's trade and finance regimes mean that the prospect of exclusion reduces the likelihood of significant or repeated divergence from required standards. By contrast, non-compliance with its environmental obligations, while it may impact on credibility of State in relation to further environmental treaties, typically will not undermine its future participation in other international initiatives nor incur direct penalties. Differentiation in the reputational assignment of States occurs because behaviour in one sector is seldom linked to behaviour in another.[7] Where linkage has occurred, States have been willing to grant conditional loans and subsidies or technical assistance (such as technology transfers) in order to create positive incentives for compliance. The 'soft-power' pull of the European Union ('EU') for aspirant Member States and its European Neighbourhood Policy, nonetheless, is a rare but effective example of linking trading benefits not

[5] Colemen and Doyle, 'Introduction: Expanding Norms, Lagging Compliance', in Luck and Doyle, (2004), 6
[6] *ibid*, 7
[7] Downs and Trento (2004), 23-24

only to minority and human rights, but also to cooperation with war crimes prosecutions. The North Atlantic Treaty Organisation ('NATO') has engaged in a similar process in the Balkans in return for participation in its Partnership for Peace programme. In general, however, the use of linkage strategies to coerce compliance has remained rare and has been employed only in connection with priority or high profile issues.[8]

The effectiveness of such compliance-inducing measures is dependent also on the relative strength of the actor concerned. The exceptionalism claimed by non-compliant powerful States, for example, will less easily succumb to incentive-structures, which in turn may serve to erode the normative strength underpinning the regime concerned. Moreover, certain compliance structures may be biased in favour of powerful States and designed to protect their interests. Examples include conventional prohibitions which seek to curb nuclear arms proliferation, but fail to address weapon stockpiles.[9]

A number of approaches to systems theories have been developed by international relations scholars to assess compliance.[10] The realist school essentially sees international laws and organisations as "arenas for playing out power relationships between self-interested States concerned primarily with their own relative power".[11] The task of world institutions is to add stability to the balance of power between States in order to prevent resort to all out war.[12] Compliance with international law occurs where there is a convergence with State's own interests, or it is coerced into doing so by a more powerful actor.[13]

The transformationalist or rationalist school is inspired by the Grotian view of why States obey international rules, including those that are inconvenient. The development and application of international laws and institutions, it is held, will gradually serve to transform the society of sovereign States to the extent that

---

[8] Compare, notably, the competing linkage strategies on ICC issues employed by the U.S. (bilateral immunity agreements) and the EU (Cotonou Agreement with the African, Caribbean and Pacific Group of States) in their relations with third States.

[9] Feiveson and Shire, 'Dilemmas of Compliance with Arms Control and Disarmament Agreements', in Luck and Doyle (2004), 15

[10] *See generally* this section Downs and Trento, 26-31; Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) Yale L.J. 8, 2599-2660; White, *The Law of International Organisations* (1996), 1-23

[11] Downs and Trento (2004), 26

[12] Goodwin, 'World Institutions and World Order', in Cosgrove and Twitchett, eds., *The New International Actors: The United Nations and the European Economic Community* (1970), 63

[13] Haas, 'Why Comply? Or Some Hypothesis in Search of an Analyst', in Weiss, ed., *International Compliance with Nonbinding Accords* (1997)

participants come to place community interests above their own.[14] Applied to the contemporary setting, the school argues that world institutions provide a framework for the transformation of State behaviour through the application of universally valid moral and legal principles. This will lead to the eventual establishment of a rule of law system analogous to that found at the domestic level.[15] Moreover, international organisations will become increasingly autonomous with centralised coercive powers over parties as the international system develops.[16]

The Kantian liberal school argues that States will exhibit a 'compliance pull' out of a sense of moral obligation. The thesis has been adapted by Thomas Frank who argues that a system's durability and effectiveness in securing compliance will depend on the extent to which the regulatory framework it establishes is perceived to be fair or just.[17] The democratic process school offers a related approach, suggesting that compliance will be predicated by the contextual political infrastructure of each actor. Democratic States, buttressed by the rule of law, transparent government and public scrutiny, it is argued, will reduce the incidence of non-compliance because of the value placed by national authorities on legitimacy.[18] In a further variant, the transnationalist school looks to the internalisation of norms at the national level into domestic legal systems through a trickle-down process of "vertical domestication". This internalisation occurs through the influence of a variety of agents including transnational actors, governmental authorities, national legislative bodies, administrative compliance procedures, and issue linkages.[19]

The functionalist school describes international norms and institutions in terms of the incremental development of areas of cooperation according to the strict functional needs of the international system. At the micro-analytical level, this translates into a teleological approach to treaty interpretation which concentrates on the objects and purpose of a particular organisation as embodied in its founding legal instruments.[20] At the macro level, functionalism asserts that world bodies will incrementally take on increasingly complex areas of common interest starting from basic fields such as telecommunications or postal services, but without creating an

[14] Wendt, *Social Theory of International Politics* (1999)
[15] Goodwin (1970), 55-57
[16] White (1996), 10
[17] Frank, *Fairness in International Law and Institutions* (1995)
[18] Slaughter-Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) AJIL 87, 205-39
[19] Koh (1997), 2599
[20] *See*, e.g., approach of ICJ in the *Reparations case*, ICJ Rep. 1949, 174; White (1996), 2

overall-all political authority.[21] As White observes, the difference between the functionalist perspective and that of rationalists is the view that "[w]orld government would stultify the natural development inherent in the functional approach because any change would require the agreement of the States within the world body leading inevitably to confrontation on purely political grounds ... fuelled by the dogma of State sovereignty and State equality".[22]

In the field of political economy, the strategic school looks to the incentive structures created by international agreements and to the potential for nuancing these incentives in individual cases in order to increase the benefits a State may accrue from cooperation and the costs it will encounter through non-compliance.[23] Likewise, the managerial school treats non-compliance as a problem-solving exercise, rather than deviant practice requiring sanction. The 'problem' concerned may be affected by a number of external and internal factors, such as treaty ambiguity or a State's genuine inability to implement an agreement. As with the strategic school, non-compliance may best be overcome by carrot and stick negotiation and by the creation of positive incentives such as conditional loans and technical assistance.[24]

As will be seen below, these approaches are not necessarily mutually exclusive. Each serves to highlight one element of the broader picture of how different States behave in different sectors and at different stages in the evolution of the international system.[25] All of the approaches help to explain some aspect of non-cooperation and under-performance by States with their duty to repress crimes under international law generally and their specific obligations under the Rome Statute. In particular, the study examines factors influencing non-compliance, including the degree of unwillingness and inability, as well as whether compliance-inducing incentive and coercive structures exist to encourage State action. Since the present study looks at the relationship between the ICC and national authorities, it concerns itself primarily with the causal impact the existence of the Court will have on State practice in the enforcement of international norms, not on its potential deterrent

[21] Mitrany, *A Working Peace System* (1943)
[22] White (1996), 6
[23] Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law' (1996) Harvard ILJ 37; Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) Yale JIL 14
[24] Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995)
[25] Luck, 'Gaps, Commitments and Compliance Challenges', in Luck and Doyle (2004), 323

effect on the perpetrators of crimes.[26]

2. NATIONAL AND INTERNATIONAL LEGAL SYSTEMS

a. Jurisdiction

Another theme which runs throughout the research is the notion of 'horizontal' versus 'vertical' powers to describe the structural relationship between national and international jurisdictions. As employed by the ICTY Appeals Chamber, the concept attempts to describe the consensual and reciprocal legal framework governing inter-State mutual legal assistance in criminal matters as distinguished from the hierarchical and supranational relationship of an international court towards national authorities.[27] Similarly, Falk distinguishes between 'statist logic', representing the predominant horizontal ordering of international society since the Peace of Westphalia that is associated with the will of the territorial sovereign State, and a 'supranational logic' that aspires to a vertical ordering from above.[28]

In the horizontal model, a court can only exercise legislative or prescriptive jurisdiction, together with the power to adjudicate such crimes in its own national courts, but it has no enforcement jurisdiction beyond the territory over which it is sovereign. The model is typified by the existing relationship between national authorities, whereby one jurisdiction cannot force compliance with its request abroad, nor execute coercive powers on the territory of other States. As Swart notes, in inter-State practice there is no customary rule of international law imposing a duty of States to cooperate in criminal matters beyond their treaty obligations. "Sovereignty, equality, reciprocity, the existence or absence of mutual interests, and, to a greater or lesser extent, the need to protect individual persons against unfair treatment by the requesting State are the main determinants of inter-State cooperation."[29] Treaty obligations arising out of requests for extradition and mutual assistance in criminal

[26] On prevention see, *inter alia*, Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) AJIL 95, 7

[27] The ICTY Appeal Chamber employed these terms in the *Blaskic Subpoena Judgment*, borrowing from the *Amicus curiae* brief submitted by Frowein *et al.*, (15 September 1997)

[28] Falk, 'Theoretical Foundations of Human Rights', in Falk, ed., *Human Rights and State Sovereignty* (1981), 33

[29] Swart, 'General Problems', in Cassese, Gaeta, Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1591

matters between States are normally executed in accordance with the law of the requested authority, are based on undertakings of reciprocity, and contain various provisions enabling refusal by the requested State. Direct contact with individuals or the conduct of investigations on a State's territory by another State is normally excluded. Implementing procedures, moreover, are often cumbersome and protracted, with few mechanisms for resolving disputes beyond the voluntary referral to third party arbitration.[30]

In the vertical model, an international court enjoys supra-national authority over domestic jurisdictions. It can issue binding orders to national authorities and require mandatory cooperation according to a set of obligations that override inconsistent domestic legislation.[31] Thus, for example, the repeated refusals of the Federal Republic of Yugoslavia ('FRY') to surrender persons to the ICTY by invoking the constitutional bar to extraditing nationals has not been recognised by the Tribunal.[32] Similarly, the traditional prerogative of States in mutual legal assistance to refuse cooperation on the basis on national security is subjected to judicial examination (ICTY Rule 54 *bis*). Moreover, a State may not invoke a lacuna in its own domestic law, or deficiencies thereof, as justification for its failure to perform a treaty.[33] Non-compliance with an international court can led to collective enforcement action by the international community. This may take the form of Security Council imposed measures (ranging from condemnation to military intervention) or the adoption of regional and bilateral sanctions (such as the imposition of trade and aid conditionality measures, travel bans, and the freezing of assets).

Under the Statutes of the ICTY and ICTR, the Tribunals are said to enjoy 'vertical' powers that emanate from their establishment under Chapter VII of the UN Charter.[34] This results from the obligation on UN Member States under article 25 of the UN Charter to comply with decisions of the Security Council, and to afford such

---

[30] *ibid*

[31] Cassese (1999), 164-5

[32] ICTY Rule 58. *See also* dismissal in the *Tadic Interlocutory Appeal* of the plea of *jus de non evocando* (right to be tried by one's national courts) which features in a number of national constitutions, holding that "[t]his principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations"; ¶¶62-3

[33] Art.27 VCLT; *Alabama Arbitration*, Lapradelle et Politis, ii (1924), 891 ; *Jurisdiction of the Courts of Danzig* (1928) PCIJ, Series B, No.15, 26-7; *Greek and Bulgarian Communities Case* (1930) PCIJ, Series B, No.17, 32; Jennings and Watts (1996), 84

[34] *Blaskic Subpoena Judgment*, ¶¶47,54

obligations precedence over other those arising from any other treaty.[35] Accordingly, the Secretary-General noted in his Report to the Security Council on the establishment of the ICTY that "... an order by a Trial Chamber ... shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[36] Thus, pursuant to article 29 of the ICTY Statute and article 28 of the ICTR Statute, the voluntary discretion of States to cooperate is replaced by a duty to comply which prevails over any other domestic or international impediment. Moreover, no reciprocity is owed by the Tribunal to States beyond such forms of assistance as the Tribunal's organs may voluntarily agree upon. Where a State fails to cooperate, the Prosecutor may seek a binding order from the Trial Chamber to effect compliance.[37] Non-compliance with decisions and orders of the Tribunals may also expose a State to sanction by the Security Council. Where a State is unwilling to cooperate, the ICTY Appeals Chamber has declared that the Tribunals are competent to enter into direct contact with individuals acting in their private capacity and otherwise subject to the sovereign authority of the State concerned without going through official channels, if it is necessary to prevent that State from jeopardising the Tribunals' functioning. Such an individual would fall within the "ancillary criminal jurisdiction" of the Tribunals, and would be "duty bound to comply with its orders, requests and summonses".[38] Furthermore, requested States cannot impose grounds for refusal. Even with regard to disclosure that may prejudice national security interests, the requested State does not enjoy a right of refusal, but, at most, may file a notice of objection.[39] Traditional extradition-based obstacles to transfer do not apply to surrender to the Tribunals (ICTY/ICTR rule 58). Finally, it is for the Tribunals, not the requested State, to determine the scope of cooperation owed. In this manner, the Tribunals function as a compulsory dispute settlement mechanism with respect to the obligations owed by State under their Statutes.[40]

As displayed below, as a treaty text arising from inter-State negotiations, the Rome Statue creates a mixture of horizontal and vertical powers. The manner in which tensions are resolved will be central to the relationship between the ICC and national authorities.

---

[35] Art.103, UN Charter. See below, Chapter 9
[36] *Report of the Secretary General*, S/25704, ¶126. *See also* S/RES/978(1995) and S/RES/1031(1995)
[37] *Blaskic Subpoena Judgment*, ¶31
[38] *ibid*, ¶55-56
[39] ICTY rule 54*bis*; *ibid*, ¶65
[40] Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002), 87

b. Applicable law

A related concept dealing with the interaction between national and international law is the well known distinction between monism and dualism. The dualist and monist debate is well rehearsed and need not detailed repetition here, suffice to highlight a number of issues of relevance to consideration of the relationship between domestic and international criminal law and issues of enforcement arising therefrom.

Both theories seek to resolve questions of supremacy where competition arises between the national and international law. Dualism holds that the two legal orders represent distinct and autonomous systems governing different subject-matter: the sovereign internal laws of the State and the relations between States.[41] Because they operate in separate spheres neither legal order has the authority to alter the governing rules of the other. As such, there can be no relationship of subordination between the two. Where there is a question of apparent conflict between international and national law in a domestic dispute, domestic law will always take precedence.

Monism essentially asserts the supremacy of international law in both international and domestic domains. This is partly based on a view of individuals as subjects of international law, and partly on a basic distrust of the State to safeguard international standards.[42] As such, international treaty obligations are held to take precedence over conflicting domestic legislation, even in purely 'domestic' cases.

An alternative approach, focusing on considerations of co-ordination in international and domestic practice, attempts to distance itself from the whole notion of conflict between two systems in a common sphere. Municipal and International law are held to each operate in distinct fields, in which each is supreme. As Anzilotti writes "there cannot be conflict between rules belonging to different judicial orders .... To speak of a conflict between international law and internal law is as inaccurate as to speak of conflict between the laws of different States".[43] Rather than a clash between systems, Fitzmaurice posits a conflict of obligations, or "an inability for the State on the domestic plane to act in the manner required by international law". In

---

[41] Brownlie, 6th ed (2003), 33

[42] *See* Lauterpacht, *International Law and Human Rights* (1950); Kelsen, *General Theory of Law and the State* (1945), 363-80; *see generally* Brownlie *ibid*

[43] Anzilotti, *Corso di diritto internazionale*, cited in Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *Hague Recueil* 5 (1970 II)

such an instance, the State's domestic laws are not abrogated, but it will have committed a breach of its international obligations for which will be held internationally responsible, and for which it cannot plead provisions of its own laws or deficiencies therein.[44]

An alternative model presented by Delmas-Marty, called 'pluralism', substitutes normative interaction for hierarchical subordination to more accurately reflect the interaction between different national legal systems between themselves and with international law. Pluralism is characterised by the 'hybridization' of norms which occurs through a process of synthesis and balance between the world's legal systems. This process, it is held, will lead to the elaboration of common international rules and to the 'harmonisation' of the implementation of domestic law around these principles in order to render legal systems more compatible with each other.[45] Developments in the sphere of the EU Member State activity mirrors this approach.[46]

Two basic principles of treaty formulation bring these debates into focus: one, that an international convention may refer to national law as a means of describing a status to be created or protected,[47] and the other the rule that a State cannot plead provisions of its own laws, or deficiencies thereof, in answer to a claim against it for an alleged breach of its obligations under international law.[48]

The potential for conflict between these twin principles is exemplified by the *Breard* case. In that case, the U.S. Supreme Court had to rule on the reception in domestic law of a provisional measure indicated by the ICJ.[49] The order had been sought by Paraguay in order to stay the execution of one of its national on death row pending consideration on merits of allegations of a violation of article 36(1) of the 1963 Vienna Convention on Consular Relations. In refusing the measure, the Supreme Court centred its argument on a rejection of the above stated principles. It held first that under international law "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the

---

[44] Art. 27, VCLT; Fitzmaurice, 70-80

[45] Delmas-Marty, 'L'Influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in Cassese and Delmas-Marty, eds., *Crimes internationaux et juridictions internationales*,(2002),95

[46] *See*, e.g., *European Arrest Warrant*, Council Framework Decision 2002/584/JHA(13 June 2002) and *European Evidence Warrant*, Proposal for a Council Framework Decision COM/2003/0688(2003)

[47] Brownlie, 6th ed (2003), 39. *See*, e.g. art.49, 50, 129 and 146 of four Geneva Conventions respectively

[48] Art. 27, VCLT; see above n.33

[49] *Breard case, Order of 10 November 1998*, ICJ Reports.1998, 426

treaty in that state".[50] Moreover, it declared that the 1996 U.S. Anti-Terrorism and Effective Death Penalty Act (which denies a habeas petitioner alleging a violation of a treaty if he has failed to develop a factual basis for the claim in court) superseded and trumped the 1963 Vienna Convention. The decision placed international law and national legislation, thus, on an equal footing and suggested, moreover, that domestic legislation can override international norms and obligations.[51] The problem this approach is that granting States full interpretative powers to determine the extent of their obligations under international conventions, or the power to derogate therefrom through domestic legislation, undermines treaty-making principles, which in turn creates doubts about the nature and relevance of international law.[52]

The above approach can be contrasted with the well established hierarchy of laws under regional mechanisms in Europe. The European Court of Human Rights under the Council of Europe,[53] and the European Court of Justice under the European Community and later European Union treaties[54] are empowered by Member States with the capacity to review a judgment of a national court and to give a binding pronouncement which is directly enforceable in domestic law. Such findings may implicate the State in changing its laws and paying compensation to the aggrieved party.

The debate over horizontal or vertical, monist or dualist approaches to the relationship between domestic and international law will be central to considerations of the complementarity as a framework for the obligations of State Parties under the Rome Statute. As discussed in the proceeding chapters, the Statute establishes a *sui generis* approach to resolving the tensions between domestic and international criminal jurisdiction and applicable law.

---

[50] *ibid*

[51] *See* Sands 'After Pinochet: the Proper Relationship between National and International Courts', *Institute of Advance Legal Studies Lecture Series* (4 November 1999), 5

[52] *See* ICTY Appeals Chamber: "Although it is a general principle of international law that it is for the State to determine how it will fulfil its international obligations, a State cannot impose conditions of form on the fulfilment of these obligations by enacting national legislation which results in the derogation thereof"; *Prosecutor v Blaskic, Decision on the Objection of the Republic of Croatia to the Issuance of* Subpeona Duces Tecum, (18 July 1997) (*'Blaskic Subpeona Decision'*)

[53] Art.19, *Convention for Protection of Human Rights and Fundamental Freedoms* (1950)

[54] Art.234, EC Treaty (formerly art.177, 1957 Treaty of Rome)

c. Immunities

A final aspect which serves to distinguish adjudication at national and international levels and which has a decisive bearing on the ability of courts to enforce international criminal law norms is the issue of State immunities. The law of State immunity is a manifestation of the principle of the sovereign equality of States and derives primarily from the rule that one State may not claim jurisdiction over another.[55] It represents a time honoured doctrine aimed at ensuring the smooth and unimpeded conduct of foreign relations between States and non-interference in the performance of official State functions.[56] The immunity provided serves to protect the State itself, and can only be waived by such a State.[57] In order to prevent the indirect abuse of the rule, State immunity applies also to agents of the State that act on its behalf abroad.[58] This derivative form of immunity for State officials has been codified in the 1961 Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963).[59] The primary focus of the present study is the effect of State immunities on criminal jurisdiction, although parallel developments in area of civil liabilities are briefly referenced.

The immunity attaching to State officials can be distinguished into two types. Immunity *ratione materiae* (or 'functional immunity') pertains to the official acts of all State agents. Because the functions carried out on its behalf remain attributable to the State, functional immunity persists even after such an agent leave office. Moreover, the person is excluded from individual liability under domestic and international law absent the waiver from his State because the acts in question cannot

---

[55] *Par in parem non habet imperium.* See *The Schooner Exchange v McFaddon* 7 Cranch 116 (1812)

[56] See *U.S. v Iran*, ICJ Rep.3 (1980), 25; *Convention on Jurisdictional Immunities of States and their Property*,A/RES/59/38(2004) (yet to enter into force); *European Convention on State Immunities* (1972)

[57] On the inviolability of State immunity with respect to civil suits brought in foreign jurisdictions, *see Kuwait Airways Corporation v Iraqi Airways Co.* (No. 1), [1995] 1 WLR 1147; *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536; *Siderman de Blake v Republic of Argentina*, 965, F.2d 699 (9thCir.1992); *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 488 U.S.428; *Princz v Federal Republic of Germany*, 26 F.3d 1166 (D.C.Cir.1994); *Al-Adsani v U.K.*, 34 EHRR 273(2001) (ECtHR); *Bouzari v Iran*, 243 DLR (4th) 406 (Ontario Court of Appeal); *Jones v Saudi Arabia* [2004] EWCA Civ 1394 (CA)

[58] See *Propend Finance Pty Ltd v Sing* [1997] 111 ILR 611(CA), holding that employees or officers of a foreign State must be afforded protection "under the same cloak as protects the State itself"; *Church of Scientology case*,(1978)65 ILR 193(German Supreme Court); *Jaffe v Miller* (1993) ILR 446 (Ontario Court of Appeal); *Herbage v Meese* (1990) 747 F.Supp.60 (U.S.). But see *Jones v Saudi Arabia* (CA) [2005] QB 699

[59] See also *Convention on Special Missions* (1969)

legally be imputable to him.[60] Overlaid on top of functional immunity, a limited class of State officials, such as the serving Head of State and diplomats, additionally enjoy immunity *ratione personae* (or 'personal immunity'). This form of immunity attaches to the person of State agent and aims to ensure absolute inviolability. As a result, the incumbent post holder enjoys immunity for any official and private acts conducted while in office, as well as those carried out prior to taking office. Since inviolability is only functionally necessary so long as the individual directly represents the State, personal immunity is lost upon cessation of office, leaving only immunity *ratione materiae.*

The application of State immunities for perpetrators of international crimes is an area of emerging State practice where national authorities have sought to resolve the competing tensions between the principle of sovereign equality and the need to uphold fundamental community values.[61] Relatively straightforward is the situation where a State exercises its prerogative to assert its criminal jurisdiction over its own nationals or otherwise to waive the immunity of its officials for prosecution abroad.[62] A more far-reaching exception was applied by the House of Lords in the *Pinochet* ruling. The Law Lords held that while immunity *ratione personae* of an incumbent Head of State before a foreign jurisdiction is absolute, a former Head of State's claim to immunity *ratione materiae* for his 'official acts' must be considered in the light of conventional prohibitions against international crimes, including those committed by State officials.[63] As succinctly put by Lord Browne-Wilkinson: "[h]ow can it be for international purposes an official function to do something which international law itself prohibits and criminalises?"[64] Accordingly, acts such as torture committed while in office were held to deprive an official or former official of his functional immunity. Despite the opinion of two Law Lords that the exception to immunity *ratione materiae* derived from the customary prohibition of torture, the majority held that exceptions to functional immunity must be based on a clearly defined treaty crime that requires the criminalisation of the offence under the domestic law of its State Parties and applies irrespective of the official capacity of the accused.

---

[60] See *Church of Scientology case*; Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) EJIL 13, 863

[61] See *Congo v Belgium*, ICJ Rep.2 (2002), Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ¶73

[62] In some jurisdictions certain office holders are guaranteed constitutional protections from legal process, *see* Chapter 9

[63] *See*, e.g., the prohibition against torture by State officials in the Torture Convention

[64] *Pinochet III*, 20

The ICJ recalled elements of the House of Lords Judgment in the *Yerodia* case.[65] In its judgment, the ICJ upheld the claim brought by the Congo that Belgium had violated State immunity by instituting proceedings against an incumbent Minster of Foreign Affairs. The judges held that the role of a Foreign Minister entitles the post holder to occupy a position under international law similar to that of a Head of State or Head of Government, thereby enabling the enjoyment of "full immunity criminal jurisdiction and inviolability".[66] Although not stated explicitly in the decision, the categorisation of such immunity as absolute suggests the judges were referring here to immunity *ratio personae*. In the ICJ went on to elaborate in obiter dicta several exceptions to State immunity, including the following:

> [A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[67]

This passage has been criticised for failing to distinguish adequately between the categories of State immunity outlined above.[68] It, nonetheless, does appears to distinguish between the personal immunities that a post holder will lose upon leaving office ("he or she will no longer enjoy all of the immunities accorded by international law"), and the residual functional immunity that will remain. More problematic is the distinction that is made between official and private acts. Since international crimes will almost always be conducted in the capacity of an official, the ICJ appears to have denied any exception to functional immunity that is not conducted in a private capacity or otherwise for purely personal motives. This would vastly limit the scope of proceedings against former post holders for international crimes committed while they were in office.[69] It also would place the decision at odds with the House of Lords judgment which the ICJ recalled with approval. Under the Torture Convention, for example, the offence must be conducted by a person "acting in an official capacity".

---

[65] ICJ Rep.2 (2002)
[66] *Congo v Belgium*, ¶¶53-54
[67] *ibid*, ¶61
[68] *See, inter alia*, Cassese (2002); Wirth, 'Immunity for Core Crime? The ICJ's Judgment in the Congo v Belgium Case' (2002) EJIL 877
[69] Cassese (2002), 868

Such a narrow construction of the dictum, however, may be unwarranted, since the term 'private acts' may be read as encompassing either acts that are carried out for purely personal motives (such as self-aggrandisement or a perhaps instance of rape) or those acts which, while conducted in the capacity of an official, cannot be considered as legitimate expression of such authority (borrowing the Law Lord's reasoning).[70] Support for the latter view is emphasised in the separate concurring joint opinion of judges Higgins, Kooijmans and Buergenthal. Thus, if one is to avoid an interpretation that would undermine emerging State practice, it can reasonably be surmised that the ICJ, notwithstanding the ambiguity of the majority decision, intended the latter categorisation.

A final, generally accepted exception to State immunity is applicable where an international court exercises criminal jurisdiction over State officials. Drawing on the precedent of the Charter of the Nuremberg Tribunal, the official capacity of a person, as Head of State or Government or otherwise, cannot be a bar to jurisdiction.[71] Thus with respect to an international trial, both immunity *ratione personae* and immunity *ratione materiae* can be set aside.

Emerging practice on State immunities will continue to impact on the scope for enforcement of international criminal law. It is unlikely that exceptions to immunity *ratione personae*, even for international crimes, will come to be accepted by national courts at the expense of disrupting inter-State relations and the principles of independence and non-interference.[72] For the same reason, it is increasingly likely that the international community will turn to trials by a neutral international forum in cases involving incumbent senior State officials. Domestic State practice, however, appears to suggest a gradual acceptance of exceptions to functional immunities for certain international crimes.[73] Moreover, as discussed in Chapter 9, the introduction of

---

[70] *Congo v Belgium*, Separate Opinion of judges Higgins, Kooijmans and Buergenthal, ¶85

[71] *See* art.7 Nuremberg Charter; A/RES/95(1); art.6 Tokyo Charter; art.7(2) ICTY Statute; art.6(2) ICTR Statute; art.27 ICC Statute; *Congo v Belgium*, ¶61; *Prosecutor v Charles Taylor, Decision on Immunity from Jurisdiction*, (SCSL-2003-01-I) (31 May 2004)

[72] *See, inter alia, Mugabe*, Bow Street Magistrate (14 January 2004) and *Mofaz*, Bow Street Magistrate (12 February 2004), reproduced in (2004) ICLQ 53,769-774; *Bo Xilai*, Bow Street Magistrate (8 November 2005), unreported; *Fidel Castro*, Audiencia Nacional, Order (auto) no.1999/2723 (4 March 1999)(Spain); *Gadaffi*, Cour de Cassation (13 March 2001),125 ILR 490 (France)(the claimants in this case are taking France to the ECtHR over the grant of immunity)

[73] *See, inter alia, Pinochet III* (1998); *Pinochet*, Audiencia Nacional, Order (auto) no.1998/22605, (Spain); *Scilingo*, Audiencia Nacional, Order (auto) no.1998/22604 (Spain); *Bouterse*, Gerechtshof Amsterdam [Court of Appeal] (20 November 2000) (The Netherlands); *Cavallo*, Supreme Court, Amparo en Revisión 140/2002 (10 June 2003) (Mexico). Compare *Habré*, Cour de Cassation (20 March 2001),125 ILR 569 (Senegal)

national implementing legislation by ICC State Parties has caused States to re-examine sovereign immunities.

3. ESTABLISHING INTERNATIONAL CRIMINAL JURISDICTION

As noted earlier, historically there has been a gap in enforcement of international humanitarian law. In order to contextualise the analysis undertaken in Parts II and III of national and international practice, a brief discussion of historical efforts to create a permanent international enforcement mechanism may be helpful.

Modern day proposals to create a permanent international criminal court date back to Gustave Moynier, one of the founders of the International Committee of the Red Cross. In 1872, outraged by the atrocities of the Franco-Prussian War, he laid out detailed but generally ignored proposals that touched on trigger mechanisms, subject matter jurisdiction and the definition of offences, election of judges, parties to disputes, procedure, award of damages, and financing.[74] After the First World War, the Treaty of Versailles provided for the establishment of an ad hoc international criminal tribunal to prosecute Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties", with ancillary trials in Allied military tribunals.[75] With the flight of the Kaiser to the Netherlands, and the refusal of the Dutch to extradite him, however, the Allied Powers made no serious attempts to seize custody and efforts to establish a court died in their tracks. Furthermore, after objections by German authorities to the 895 strong list of alleged war criminals compiled by the Allies for extradition, an agreement was entered into for the transfer of indictments to the jurisdiction of the German Supreme Court in Leipzig. There, a revised list of 45 of the most serious offenders was reduced, by unavailability of custody, to 12 defendants, of which half were acquitted on lack of evidence and defences such as superior orders, while the remainder received light sentences.[76] The trials outraged the French and Belgians, but the British refused to pursue the matter

[74] Hall, 'The History of the ICC Part I', *CICC Monitor* 6 (1997). *See generally* Pella, 'Towards an International Criminal Court' (1950) AJIL 44, 37-68

[75] Art.227-230, *Treaty of Peace between the Allied and Associated Powers and Germany* (Versailes 28 June 1919). See *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1920) AJIL 14, 116

[76] A proviso reserved the right of the Allies to enforce the original Treaty provisions if they were unsatisfied of due process guarantees. *See* Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (1921)

and no further Allied action was taken.

Despite their show trial quality, the Leipzig hearings served an important role in the evolution of international criminal liability by developing the concept of Volkerstrafrecht,[77] "Criminal Law of Nations", as part of German domestic law and consolidated the norm of individual liability for war crime offences.[78] As Mullins States, "great principles are often established by minor events.... [These trials] undoubtedly established the principle that individual atrocities committed during a war may be punishable when a war is over".[79]

An even greater lack of commitment met attempts to prosecute war crimes violations committed by the Ottoman Empire following the Armenian massacre of 1915 after the original Treaty of Sèvres providing for trials was replaced by the Treaty of Laussanne and its accompanying Declaration of Amnesty for war crimes committed during World War I.[80]

Several attempts were made to address the issue of international criminal jurisdiction during the inter-war period. In 1921 Baron Deschamps of the Advisory Committee of Jurists appointed by the League of Nations to draft a statute for the Permanent International Court of Justice proposed the establishment of a High Court of International Justice "to try crimes against international public order and the universal law of nations".[81] Deschamps recommendations were rejected by the League's Third Committee on the opinion that the establishment of an international criminal court would be impossible "since there was no defined notion on international crimes and no international Penal Law".[82] A preferable mechanism, the Committee's Rapporteur advanced, would be to create a special chamber within the Permanent International Court of Justice, although such a move was deemed "premature".[83]

---

[77] The German writer Beling coined the still extant term to refer to individual liability for violations of the law of nations; Mueller and Besharov, 'The Existence of International Criminal Law and its Evolution to the Point of its Enforcement Crisis', in *A Treatise on International Criminal Law*, Bassiouni and Nanda (1973), 26

[78] *See* Bassiouni (1992), 202-3

[79] Mullins (1921), 202-3

[80] Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982), 153-156

[81] Baron Deschamps, PCIJ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*,(1920); reprinted in Ferencz, *An International Criminal Court - A Step in the Right Direction?* (1980), 223-4

[82] *Report of the Committee No.III on the Recommendations by the Committee of Jurists at the Hague*, reprinted in Ferencz (1980), 240

[83] *ibid*

In response, a number of non-governmental organisations, such as the International Law Association, the Inter-Parliamentary Union, and the International Congress of Penal Law, prepared and presented their own draft statutes. Although these received hostile criticism, they did generate greater awareness and support from a number of organisations and perhaps represented the first attempt to outline a statute and a possible structure and procedure for an international criminal court.[84]

The movement towards creating a permanent criminal court was finally acknowledged by the League in 1937 when France, at the Conference on the International Repression of Terrorism, pushed for the adoption of a Convention for the Creation of an International Criminal Court. The proposed Court would have parallel and jurisdictional reference to the simultaneously adopted Geneva Supplementary Convention for the Prevention and Punishment of Terrorism. The two treaties failed to enter into force due of lack of signatories and the outbreak of World War II.[85]

Proposals during WWII to establish a permanent court to try Axis war criminals were rejected in favour of an ad hoc international tribunal for the most serious offenders, with complementary national trials. The London Agreement of 8 August 1945, establishing the legal basis for the Nuremberg and later Tokyo Tribunals.[86] The principles of international law contained in the Statute and Judgment of the IMT at Nuremberg were subsequently affirmed by the UN General Assembly at its inaugural session.[87]

Shortly thereafter, General Assembly Resolution 177 (II) (1947) directed the ILC to formulate the Nuremberg principles and to prepare a draft code of offences against the peace and security of mankind. Seven principles were drafted in 1950 and adopted by the General Assembly.[88] In 1954, the ILC adopted a text on first reading for the Code of Offences Against the Peace and Security of Mankind.[89]

Also in 1947, the General Assembly had taken up the issue of establishing a permanent court to enforce the Genocide Convention, but deferred on taking specific

---

[84] *ibid*

[85] Texts reprinted in Ferencz (1980), 380-98; Simpson, 'War Crimes: A Critical Introduction', in McCormack and Simpson (1997), 54-55

[86] *Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis* (8 August 1945) ('London Agreement')

[87] A/RES/96(1946)

[88] A/RES/488(1950); *Report of the ILC*, A/1316, Supp.No.12 (1950)

[89] A/50/22, ['draft Code']. The draft Code was renamed in 1991 as the draft Code of *Crimes* Against the Peace and Security of Mankind

action beyond providing the possibility of prosecution by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[90] On the same day as it adopted the Genocide Convention, however, the General Assembly, in Resolution 260 B (III) (1948) directed the ILC to study the desirability and possibility of establishing an international criminal court to try perpetrators of genocide and other international crimes. The Commission responded in 1950, characterising the effort as both "desirable" and "possible".[91]

The ILC followed a twin track approach linking the two projects together from the beginning. As such, a basic Statute was envisaged applying the substantive formulations of the Code. In 1954, the General Assembly postponed taking further action pending the formulation of a definition of the crime of aggression.[92] Despite conclusion of a definition in 1974,[93] progress on a legal code and statute was held in abeyance during the ensuing Cold War years. Meanwhile, Article 5 of the 1972 Apartheid Convention also called for the creation of international criminal jurisdiction to prosecute the crime, but was never implemented.[94]

In 1981 the General Assembly invited the ILC to resume work on the draft Code.[95] The Commission presented a preliminary Code in 1991 (which received widespread criticism for its expansive ambitions)[96] and a final text in 1996.[97] Meanwhile, the possibility of establishing an international criminal court came to a head through the confluence of a number of different factors. In 1990, after repeated requests from the ILC for an institutional mechanism to give effect to the draft Code, and following calls from a coalition of Caribbean and Latin American States led by Trinidad and Tobago for the establishment of an international criminal court to prosecute illicit drug trafficking across national frontiers,[98] the General Assembly once again requested the ILC to consider the possibility of establishing an

---

[90] Article VI, *Genocide Convention*
[91] *Report of the* ILC (1950), ¶140
[92] A/RES/898(1954); A/RES/1187(1957)
[93] A/RES/3314(1974)
[94] *See* Bassiouni and Derby, 'Final Report on the Establishment of an International Criminal Court of the Implementation of the Apartheid Convention and Other Relevant Instruments' (1981) 7 Hofstra L. Rev, 523
[95] A/RES/36/106(1981)
[96] *Comments and Observations of Governments on the Draft Code of Crimes against the Peace and Security of Mankind*, A/CN.4/448 (1993)
[97] A/51/10. The ILC decided to separate the two projects in 1992; *Report of the ILC* (A/47/10)
[98] A/RES/44/39(1989)

international criminal court.[99] At the same time, the appeals of the U.S., UK and France to Libya over the extradition of terrorist suspects; early pledges to prosecute Saddam Hussein and Iraqi troops after invasion of Kuwait; the public appeal for an international forum to try Pol Pot after sham trials in Cambodia; and the unprecedented establishment in 1993 of the ICTY, and of the ICTR in 1994, all converged to lend political viability to the project.[100] In 1993 the General Assembly requested the ILC to complete work on the draft statute "as a matter of priority". The Commission presented its final draft in 1994 and recommended that it be submitted to a conference of plenipotentiaries.[101] The proposal was defeated in the Sixth Committee, but an Ad Hoc Committee was established in 1995 by way of compromise to study the text.[102] By 1996, sufficient support had been generated within the General Assembly to set up a Preparatory Committee ('PrepCom') to meet in two sessions during 1996, and subsequently extended over 1997-1998, with a view to drafting a widely acceptable consolidated text of a convention for a permanent court, to be finalised and adopted at a diplomatic conference of plenipotentiaries convened in Rome, during June-July 1998. The Statute for the International Criminal Court was adopted by an overwhelming majority of States present at Rome.[103] Resolution F adopted as part of the Final Act at the diplomatic conference,[104] mandated the establishment of a Preparatory Commission ('PrepComm') to draft, *inter alia*, the Rules of Procedure and Evidence and Elements of Crimes, which were subsequently adopted by the Assembly of State Parties in June 2000.[105]

The sections that follow will analyse the efficacy of the pre-ICC system which relied primarily on the decentralised prosecution of mass crimes (Part II), and the challenges arising from the distribution of powers between the Court and national authorities under the ICC Statute (Part III), in order to assess whether the system established in Rome in 1998 will significantly impact on the routine enforcement of international criminal law (Part IV).

---

[99] A/RES/45/41(1990); *see* also A/RES/44/32(1989)
[100] *See* Crawford, 'Prospects for an International Criminal Court' (1995) 48 *Current Legal Problems*, 312
[101] A/49/10(1994)
[102] A/RES/49/53(1994)
[103] A/CONF.183/9(17 July 1998)
[104] A/CONF.183/10(17 July 1998)
[105] PCNICC/2000/1/Add.1 and Add.2(30 June 2000)

Part II: Pre-ICC Practice

III

National and International Trials

How have the norms governing international criminal jurisdiction developed in practice? Part II will assess the degree to which States effected compliance with international obligations arising out of treaty and customary law prior to the entry into force of the ICC Statute. It will seek to identify the persistent gaps in enforcement, and to assess why they have occurred. An examination of the pre-ICC system will help to draw out the lessons to be learned from past practice with enforcement mechanisms through national, international or internationalised efforts. The consideration arising from this review will be important for the study of the ICC, since the complementarity framework of the Rome Statute closely links the exercise of the Court's jurisdiction to the effectiveness of that of States.

Four approaches to prosecuting internationally criminalized conduct are reviewed in this and the proceeding chapter: prosecutions in international tribunals; prosecutions in national courts; prosecutions in internationalised or 'hybrid' courts; and the question of amnesties and decisions not to prosecute. The examples reviewed are illustrative rather than exhaustive as a cataloguing all modern day war crimes trials would be beyond the scope of the present research. Because the factors identified below distinguishing the immediate post-World War II ('WWII') period, the analysis focuses mainly on trials held in relation to subsequent conflicts. Examination will focus on the bases of jurisdiction claimed, the categorisation of offences under applicable law, and the resolution of any concurrent jurisdiction. The purpose of Part II will be to demonstrate how difficult the investigation and prosecution of war crimes related offences have proven and how poorly State practice has fared, particularly in States in conflict or in post-conflict transitions.

1. POST WORLD WAR II

(a) International Military Tribunals at Nuremberg and Tokyo

Starting with a review of the trials related to World War II (WWII) makes chronological sense, but sits rather oddly with the general pattern of State practice both before and after. In many ways, the trials arising from immediate post-war period were an aberration departing from a traditional inter-State practice which rapidly reasserted itself. A convergence of a set of unique circumstances allowed for these trials to take place. This included an absence of sovereignty claims by the vanquished State and the complete control of occupied territory by the prosecuting State authorities; custody over accused persons; and an unprecedented unanimity of political will among the allied powers to hold enemy offenders accountable.

The International Military Tribunals established after World War II were granted primacy over the concurrent jurisdiction of national courts, although primacy was more of a practical than legal reality. The exact international character of the Tribunals at Nuremberg and Tokyo is debatable, since their establishment was based on the exceptional exercise of territorial jurisdiction by the Allied powers over occupied territory.[1] The Nuremberg Tribunal derived its legal basis from the London Agreement and Charter of 8 August 1945 signed by the four Allied powers and later acceded to by nineteen additional States under the supervision of the United Nations War Crimes Commission.[2] The IMT at Nuremberg held that the Charter of the Tribunal "was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered".[3] The London Agreement furthermore based the exercise of jurisdiction on the broader authority "of acting in the interests of all the United Nations".

The Tokyo Tribunal was constituted by Special Proclamation by General MacArthur, Supreme Commander for the occupying Allied Powers in the Far East, acting on the authority granted him by the Moscow Conference of 26 December

---

[1] Another difficulty with the exercise of jurisdiction was the fact that only Axis offenders were brought before the IMTs. *See generally*, UN War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (1948), 203-4; Conot, *Justice at Nuremberg* (1983); Minear, *Victor's Justice: The Tokyo War Crimes Trial* (1971)

[2] *Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis* (8 August 1945)

[3] IMT Nuremberg, *Judgment* (30 September 1946)

1945.[4] Unlike at Nuremberg, the judges in Tokyo were in disagreement as to whether the Tribunal sat on the basis of exceptional exercise of territorial jurisdiction or via the consent of Japan.[5] The Japanese government formally retained its sovereign power after the war. In the Instrument of Surrender the government accepted the provisions set forth in the Potsdam Declaration of 26 July 1945, including the provision that "stern justice shall be meted out to all war criminals", and agreed to "take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to the Declaration".[6] The Instrument of Surrender could thus be read as constituting Japan's consent and the jurisdictional basis for the Tribunal.[7]

The international judges sat as representatives of the provisional occupying powers in Nuremberg, and as members appointed by the Supreme Commander for the occupying Allied Powers in Tokyo.[8] Despite the challenge of *ex post facto* application of law, the crimes listed in the statutes of the IMTs were held to be dispositive of international customary law obligations by 1939. Trials were held in Nuremberg against 24 accused persons,[9] and against 28 accused person in Tokyo.[10]

(b) National trials

(i) Trials during the immediate post-war period

The same set of unique factors noted above was present for subsequent trials held in each of the occupied zones. Immediately after WWII, the Allies were able to efficiently divide prosecution caseloads between the trial of the leadership at the

---

[4] *See* Communique and Report on the Moscow Conference (27 December 1945): "The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto"; *Charter of the International Military Tribunal for the Far East* ('IMTFE')

[5] Röling and Rüter, eds., *The Tokyo Judgment* (1977)

[6] *ibid*, 19

[7] Morris, 'High Crimes and Misconceptions: the ICC and Non-Party States' (Winter 2001) 64 Law & Contemp. Probs., 13

[8] Article 2, *Charter* IMTFE

[9] 12 of the accused were sentenced to death by hanging; 3 were acquitted; 3 were sentenced to life in prison; 4 were sentenced to between 10 and 20 years; Robert Ley committed suicide before trial and Gustav Krupp von Bohlen was declared medically unfit.

[10] 7 of the accused were sentenced to death by hanging; 16 to life imprisonment; 2 to lesser terms; 2 died of natural causes during trial; and one had a mental breakdown, was sent to a psychiatric ward, and was later released in 1948.

international level, while processing the bulk of cases through military or criminal tribunals established in the State where the crime had occurred. The 1943 Moscow Declaration held that "those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein".[11] The passage is repeated verbatim in the preamble to the 1945 London Agreement, which additionally provides, "[n]othing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals".[12]

Allied Control Council Law No.10 ('CCL No.10') sought to establish for the Allies in each of their respective zones of occupation "a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." CCL No.10 purported to give effect to the London Charter, but derived its legal basis from the authority of the four occupying powers acting as the surrogate government of Germany; with jurisdiction again based on territoriality. The substantive law reflected almost verbatim the crimes listed in the Nuremberg Charter, with the notable exception that the threshold for crimes against humanity was divorced from a nexus to armed conflict. There was, thus, a measure of uniformity in the substantive crimes enunciated. Procedural law and sentencing, however, varied considerably.[13] Despite a clear division of labour, there was no mechanism for international review of the numerous State-led proceedings.

Under Ordinance No.7 of the Military Government for Germany, U.S. Zone, the U.S. held twelve trials at Nuremberg, known as the *Subsequent Proceedings*.[14] These were accompanied by a number of trials based on CCL No.10 in each of the four occupied zones.[15] Woetzel notes that collectively, the U.S. convicted 1,814

---

[11] *Declaration Concerning Atrocities Made at the Moscow Conference* (30 October 1943) ('Moscow Declaration')

[12] London Agreement; *See also* Triffterer, 'Preliminary Remarks: The permanent ICC - Ideal and Reality', in Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (1999), 37-38.

[13] Art. III, CCL10: "...the rules and procedures thereof shall be determined or designated by each Zone Commander for his respective Zone"

[14] *See* UN War Crimes Commission, *Law-Reports of Trials of War Criminals* (1947-1949)

[15] *See*, e.g., *Heinz Eck et al* (*Peleus Trial*), British Military Court, Hamburg (17-20 October 1945)

persons, the UK 1,085, France 2,107, and the Union of Soviet Socialist Republic ('USSR') an inestimable figure;[16] while adjacent trials were held in Australia, Kuomintang China, Greece, The Netherlands and Poland. The vast majority of war crimes trials, however, were processed through the national courts of the Federal Republic of Germany which, between 1947-1990, is reported to have prosecuted some 60,000 cases.[17] Although there was no equivalent to CCL No.10 in Japan, Piccigallo estimates that between 1945 to 1951 Allied military tribunals throughout the Far East passed the death penalty on 920 Japanese from some 3,000 sentenced.[18] In contrast to Germany, very few cases were prosecuted by domestic authorities in Japan.

In combination, the IMT trials and the nationally run proceedings in the immediate post-war period offer a successful model of enforcement. The caseload was distributed effectively between complementary international and national jurisdictions as part of a common strategy adopted by the international community to hold perpetrators accountable. The model, however, does contain a number of structural weaknesses, not least of which is its reliance on the total collapse and capitulation of the State of nationality of the accused. The exclusive focus of these trials on crimes committed by Axis nationals also undermines the credibility of the system as an enforcement model. The substantial discrepancy between the different forums in their interpretation and application of international norms, moreover, undercuts the possibility for a systematic approach to enforcing international norms.

(ii) Later trials

Subsequent to this first wave of prosecutions after World War II there is almost a complete absence of war crimes trials. Mainly in the 1980s and 1990s, there was a resurgence of interest following reports that Nazi war criminals or collaborators were enjoying lives of peaceful retirement in their countries of emigration. Only a handful of cases led to trial.

In the trial of Adolf Eichman, the accused was charged with war crimes,

[16] Woetzel, *The Nuremberg Trials in International Law* (1962)
[17] *ibid*, 226
[18] Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (1987), xi

crimes against the Jewish people (modelled on Genocide Convention) and crimes against humanity under the Israeli 1951 Nazi and Nazi Collaborators Law. The court dismissed defence pleadings over unlawfulness of Eichman's rendition, as well as allegations relating to violations of *nullem crimen sine lege* through the retroactive application of law. The judgment was particularly notable for its assertion of universal jurisdiction in respect a German national for offences that has taken place outside of the territory of Israel and during a period when the State of Israel itself had not yet come into being.[19]

In the *Demjanjuk* case, the accused had his U.S. citizenship revoked after a federal court in Cleveland found that he was 'Ivan the Terrible' from the Treblinka death camp, in Poland. After losing a lengthy appeals process,[20] he was extradited to Israel in 1986, where he was tried on the basis of universal jurisdiction and sentenced to death. In 1993, the Israeli Supreme Court reversed the conviction after prosecutors discovered evidence from the Soviet Union revealing a case of mistaken identity.[21]

In France, the prosecution of war criminals was limited by the notable absence of a definition of war crimes in domestic legislation.[22] This extraordinary lacuna arose out of the legacy of defeat, occupation and collaboration during the 1940-44 period, and the interest of the French authorities after the war to resist the prospect of prosecuting scores of French citizens.[23] A handful of prosecutions were conducted pursuant to a law of 26 December 1964 declaring crimes against humanity, as defined in the Statute of the Nuremberg Tribunal, '*imprescriptibles*' (not subject to statute of limitations).[24] Three prosecutions, based on territorial and active personality jurisdiction, were successfully brought against *Barbie*,[25] *Touvier*,[26] and *Papon*.[27]

R. v. Finta[28] was the first case prosecuted in Canada under a 1987 statute enabling prosecutions for war crimes and crimes against humanity committed

---

[19] *Attorney-General of Israel v Eichman*; 36 ILR 5 (1961)
[20] *Demjanjuk v Petrovsky* 776 F.2d 571 (6th Cir.1985) (U.S.)
[21] Although the Israeli Supreme Court found that Demjanjuk had been a guard at camps in Sobibor, Trawniki, Majdanek and Flossenburg (Poland), the court released him on grounds that he had been extradited to stand trial on the charge of being Ivan the Terrible.
[22] Turns, 'Aspects of National Implementing Legislation of the Rome Statute: The United Kingdom and Selected Other States', in McGoldrick, Rowe, and Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 366-7
[23] *ibid*
[24] Nouveau Code penal de 1964, art.211(2),213(5)
[25] Cass.crim. [1983] Gaz.Pal.Jur.710; Cass. crim.,[1985] Bull. crim., no.7, 1038; [1986] JCP II. 20655 and Cass.crim. [1988] Bull.crim., no.1,637
[26] Cass.crim. [1975] D.J.Jur.386, [1975] Bull. crim., no.42,113
[27] Cass.crim. [1997], Bull.crim., no.502; [1996] Bull. crim., no.806
[28] *R. vFinta*, 50 C.C.C.3d. 236 (1994)

abroad.[29] Imre Finta was charged under alternate counts of unlawful confinement, robbery, kidnapping and manslaughter, with the charges characterised as domestic offences[30] and in the alternative as crimes against humanity and war crimes.[31] In addition to upholding his acquittal, the Supreme Court also unanimously dismissed the cross appeal challenging, in part, the alleged retrospective character of the legislation. Citing the jurisprudence of the Nuremberg Tribunal, it held that the relevant acts were already constituted offences by the time of their commission and that the IMT and subsequent national trials merely extended criminal jurisdiction over these pre-standing offences. As the Court stated, "[t]he rule against retroactive legislation is a principle of justice. A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, however, is an exception to the rule against *ex post facto* laws."[32]

In Australia, cases against *Polyukhovich*, *Mikolay Berezovsky*, and *Heinrich Wagner* were brought after the establishment in 1987 of a Special Investigations Unit for the prosecutions of war criminals. The unit was abandoned in 1992 after 841 investigations and the acquittal or dismissal of charges in the three cases brought to trial.[33] The cases were brought under the *War Crimes Amendment Act 1989* which amended the *War Crimes Act 1945* to include certain offences which occurred outside Australia during the period from 1939 to 1945. The Act defined war crimes as punishable by reference to the domestic law in force in Australia at the time the acts were committed, rather than by reference to international law.[34] In *Polyukhovich v Commonwealth*, Justice Brennan was particularly critical of the domestic offence approach and noted the "disconformity between the statutory offence purportedly created by section 9 of the Act and a war crime in international law". Accordingly, the bench held that universal jurisdiction under Australian law extended only to a crime defined by international law and not to ordinary offences. Before his later acquittal, Polyukhovich notably lost a challenge against the constitutional validity of the Act based on its alleged its retroactive effect in domestic law.[35]

In the first post-world war II trial before domestic courts in the UK, Anthony

---

[29] Sc.7(3.71) Canadian Criminal Code
[30] Criminal Code, RSC 1927,c.36
[31] S. 7(3.71) Criminal Code
[32] See above, Chapter 1 (illegality v criminality)
[33] *See* MacDonland, 'War crimes unit closed after five years, no results', *The Age* (5 January 2000)
[34] 172 CLR (1991), 579
[35] *ibid*, 501

Sewoniuk was sentenced to life imprisonment in 1999 after being found guilty of murdering two Jews. At the time he was one of 376 suspects investigated under the 1991 War Crimes Act. The Act was introduced as a counterpart to existing legislation granting jurisdiction over murder or manslaughter committed by British subjects abroad.[36] The new Act enabled application to persons who became British citizens after the alleged offence. As debates on the bill at the time of adoption reveal, the intended aim was not to create generic legislation enabling prosecutions of all war crimes offences, but rather to focus on an "identifiable mischief".[37] Thus in contrast to other countries, the legislation was limited by temporal, geographic and substantive scope to UK nationals, irrespective of their nationality at the time of the offence, accused of committing between 1 September 1939 to 5 June 1945, in Germany or territory occupied by Germany, murder or manslaughter or culpable homicide in violations of the laws and customs of war.[38] Given the assertion in the British Manual of Military Law that war crimes are "crimes *ex jure gentium*",[39] it is debatable whether it was strictly necessary for parliament to create statutory jurisdiction when UK courts could already assert jurisdiction through customary international law under common law.[40] The Hetherington-Chalmers Report, however, while noting that war crimes were already the subject of universal jurisdiction by 1939, stated that the Act was necessary to enable domestic jurisdiction.[41] It has also been suggested that jurisdiction could have been exercised under the pre-existing Royal Warrant of 1945, which formed that basis of post-World War II trials by British military courts "for the trial and punishment of violations of the laws and usages of war committed during any war in which WE have been or may be engaged at any time after the second day of September, nineteen hundred and thirty nine."[42] As Rogers has noted, "[t]he Royal Warrant of 1945, not having been revoked, is still in force."[43] The Hetherington Report, however, also rejected this assertion, doubting, firstly, whether military courts

[36] Offences Against the Person Act 1861[UK], sec.9
[37] *See generally* Greenwood, *The War Crimes Act 1991*, in Fox and Meyer (2003), 215
[38] War Crimes Act 1991[UK], sec.1(1)
[39] *British Manual of Military War* (1958) Part III, ¶637
[40] On the applicability of customary law in domestic English law *see also* Lord Millet's minority opinion in *Pinochet III*
[41] Hetherington and Chalmers, *War Crimes: Report of the War Crimes Inquiry, Presented to Parliament by the Secretary of State for the Home Department* (1989)
[42] Reproduced in *British Manual of Military Law* (1958), Part III, 347
[43] Rogers, 'War Crimes Trials under the Royal Warrant: British Practice 1945-1949' (1990) ICLQ 39, 795. Rogers, however, opines that the Royal Warrant could only be applied today (a) abroad in wartime or in a period of military occupation immediately afterwards, and (b) in the UK or any of its colonies during a state of martial law.

could sit lawfully in the UK and, second, whether military trials would be acceptable so long after the events.[44]

In summary, these later trials can be distinguished from those occurring during the immediate post-war period for a number of reasons. They occurred under normal peace-time conditions and were greatly distanced from the events. Enforcement relied on national discretion on the establishment of jurisdiction, the launching of investigations and prosecutions, and the securing of cooperation through inter-State mutual assistance and extradition. Moreover these trials, spanning a 60 year period since the end of WWII, have been highly exceptional and subject to sporadic and selective interpretation and enforcement of international norms.

2. FORMER YUGOSLAVIA AND RWANDA

(a) International Criminal Tribunals

The political will to establish the International Criminal Tribunals for the former Yugoslavia and for Rwanda arose out of failure of the international community to intervene effectively in those situations.[45] The inaction of Western nations to the first major conflict on European soil since WWII, in particular, stood in stark contrast to the promise of global unanimity after the end of the Cold War and the successful exercise of collective security in the wake of the Iraqi invasion of Kuwait. The 1993 debacle in Somalia and the resultant withdrawal of U.S. support for robust intervention in foreign conflicts created the need for a response that fell short of military engagement, but which would add to a portfolio of international efforts to manage these crises through diplomacy, peacekeeping, and negotiation. As displayed below, although the Tribunals were granted wide-ranging powers on paper, the record of enforcement by States and by the Security Council has proved unsatisfactory.

The legal authority for the establishment of the ICTY and ICTR is based on the exercise by the Security Council of its powers under Chapter VII of the UN

[44] Hetherington and Chalmers (1989)

[45] As Ralph Zacklin, UN Assistant Secretary-General for Legal Affairs, has written, the establishment of the ICTY and ICTR was more an acts of "political contrition" for the egregious failure of UN Member States to swiftly confront the situations in the former Yugoslavia and Rwanda; Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) J. Int. Crim. Just. 2, 542

Charter. The *ad hoc* Tribunals have been established as measures necessary for the restoration of international peace and security. In accordance with article 25 of the UN Charter the resolutions founding the Tribunals are legally binding on all UN Members States. The Tribunals function as subsidiary organs of the Council, exercising powers delegated to it.[46] The lawfulness of the establishment of the Tribunals was subjected to unsuccessful legal challenge in their first cases. It was argued, in part, that the Security Council cannot confer the exercise of judicial functions which it itself is not competent to exercise. However, as Sarooshi points out, "the Council has not delegated to the Tribunals the performance of its own functions but rather those powers that are necessary for the exercise of their designated functions".[47] In a similar vein, the ICTY Appeals Chamber held that the Tribunal serves an instrument for the exercise of the Council's function with respect to the maintenance of peace and security.[48]

Both *ad hoc* Tribunals enjoy primacy over national courts, meaning that they may at any stage in proceedings formally request a national court to defer to its competence.[49] The ICTY operates with a delimited geographic scope (States of the former Yugoslavia), but with open-ended temporal and personal jurisdiction. The temporal jurisdiction of the ICTR, by contrast, is restricted to crimes committed during 1994. Within that timeframe, however, the ICTR may exercise jurisdiction on the bases of territoriality (crimes committed in Rwanda) and nationality of the accused (crimes committed by Rwandan citizens in neighbouring States).[50]

The Statutes of the ICTY and ICTR contain only one provision on cooperation, which unequivocally compels all States to cooperate with the Tribunals (ICTY article 29, ICTR article 28). The duty to cooperate is absolute and unconditional. Any refusal, such as on the basis of national security, is subject to evaluation by the Tribunals themselves.[51] Moreover, the Appeals Chambers have stated that the provisions on cooperation "impose an obligation on Member States of the United Nations towards all other Member States or, in other words, an obligation

---

[46] *See* Sarooshi, 'The Powers of the United Nations Criminal Tribunals', 2 *Max-Planck Yrbk UN Law* (1998)
[47] *ibid*, 143
[48] *Tadic Interlocutory Appeal*, ¶38
[49] Art.9(2) ICTY Statute; art.8(2) ICTR Statute
[50] Art.1 ICTY Statute; art.1 ICTR Statute
[51] See above, Chapter 2; Sluiter, 'To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal' (1998) LJIL 11, 386; *Blaskic Subpeona Decision*, ¶77

'erga omnes partes'".[52]

Despite their delegated Chapter VII authority, the Tribunals have experienced considerable resistance and obstruction, including from third States not party to the conflicts.[53] Notwithstanding repeated notification by the Presidency of the failure of certain States to comply with the Tribunals, the Security Council has failed to take action to remedy these deficiencies beyond deploring and condemning non-cooperation.[54] As ICTR Prosecutor Hassan Jallow has stated, in echo of his predecessors, "[t]he most formidable challenges to the OTP lie in the field of international cooperation. Such support and cooperation is indispensable for the proper and effective administration of international criminal justice".[55]

Faced with the effective absence of judicial coercive powers to compel cooperation, the OTP has tended to rely less on requesting binding orders in the realisation that, ultimately, the Tribunals, much like national authorities in traditional mutual legal assistance, must rely on voluntary compliance by States acting in good faith.[56] Instead, the principal coercive tool at the disposal of the Tribunals has been political leverage. In the context of the Balkans, this has led to external policy linkages between ICTY cooperation and participation the EU Stabilisation and Association Process and NATO's Partnership for Peace programme. Similarly, the lifting of economic sanctions and the rendering of multilateral and bilateral assistance, notably by the World Bank and the U.S., has been made conditioned on substantive cooperation. Thus, while notifications of non-compliance have failed to result in the adoption of enforcement measures by the Security Council, they have had exercised considerable influence on multi- and bilateral assistance.

The ICTY and ICTR have made tremendous contributions to the development of authoritative jurisprudence, absent since Nuremberg and Tokyo trials. They have elucidated unsettled areas of law, such as the elements of crimes against humanity and the elaboration of command responsibility; defined notions with respect to the

---

[52] *Blaskic Subpoena Appeal*, ¶26

[53] Sluiter (1998), 386

[54] Meron has stated, "[v]erbal admonitions, even made under Chapter VII, not accompanied by credible sanctions or threats of use of force have not proved adequate to force compliance. The need to back up international criminal tribunals with power, power of enforcement, has been demonstrated once again." 'Comments in the ILA Panel on the ICTY' (1999) ILSA J. Int'l & Comp. Law 5, 347

[55] Jallow, *The OTP-ICTR: ongoing challenges of completion*, Guest Lecture Series of the ICC Office of the Prosecutor (2004)

[56] Interviews with senior officials of ICTY OTP; on file with author. *See also* Harmon and Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) J. I. Crim. Just. 2, 403-426

classification of armed conflicts; and adjudicated groundbreaking precedents in emerging areas of humanitarian law such as criminal liability during non-international armed conflict and the prosecution of sexual crimes. These gains, however, have come at a considerable financial cost. The two institutions, sharing more than 2,000 posts and a heavily bureaucratic structure, have grown to command a combined annual budget equivalent to more than 15 percent of the total regular budget of the entire UN Organisation.[57] Donor fatigue has combined with a sense that proceedings have been lengthy and inefficient. Moreover, although the Tribunals have contributed to isolating much of the war time criminal elite, they have failed to promote reconciliation in the region. The remoteness of the trials from the events has been exacerbated by the perception of victims and effected communities that the trials have failed to deliver on compensation, reparation, and the identification of missing persons.[58] Thus, despite their historic significance in establishing a modern prototype for international adjudication, it appears unlikely that the *ad hoc* Tribunals will to be replicated as models of enforcement.

(b) National trials in situations where there is an International Tribunal

As with IMT at Nuremberg and Tokyo, the *ad hoc* Tribunals have focused on only the most senior perpetrators while the vast majority of cases have fallen to domestic authorities. The situation facing the *ad hoc* Tribunals, however, was radically different to the immediate post-WWII environment where most of the offenders were in friendly States that could easily be relied upon to hand over the accused or to initiate their own proceedings.[59] Instead, the vast majority of perpetrators were shielded from domestic prosecution, and in many cases remained in power or had taken refuge in neighbouring States. At most, a few individuals were subjected to sham domestic proceedings in efforts to appease international calls against impunity. It was partly as a measure to guard against such abuse that the *ad hoc* Tribunals were granted wide-ranging primacy enabling them to seize jurisdiction "at any stage in the

[57] *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 (3 August 2004), ¶42
[58] Zacklin (2004), 542-545
[59] Triffterer (1999), 38

procedure".[60]

Operating in the opposite direction, and introduced as part of their completion strategies, Rule 11*bis* enables the Tribunals to reverse the process and refer a case to domestic authorities. A Referral Bench may order, either *proprio motu* or at the request of the Prosecutor, a referral of an individual to the authorities of a State "(i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case".[61] In determining a referral the Bench must consider, in accordance with the criteria set by the Security Council, the gravity of the crimes charged and the level of responsibility of the accused.[62] Rule 11*bis* also retains a degree of review over domestic proceedings by providing that the Referral Bench, at the request of the Prosecutor, may, at any time before the accused is convicted or acquitted by a national court and after affording an opportunity to the authorities of the State concerned to be heard, revoke the order and request the transfer of the accused back to the Tribunal.[63] Given the intention of the Tribunals to facilitate their completion strategies,[64] it is highly improbable that referred cases would be recalled however. The establishment of the mixed international-national War Crimes Chamber in BiH under close international supervision, among other efforts, is intended to forestall this outcome.

Given the nascent life span of the ICC and the dearth of complementary domestic efforts to date, the problems arising from domestic prosecutions related to the conflicts in the former Yugoslavia and Rwanda over the last decade are reviewed below in order to indicate the potential pitfalls that may lie ahead of the ICC.

(i) Bosnia and Herzegovina

Domestic war crimes trials began early on in the newly independent States of the former Yugoslavia.[65] Numerous local trials were held *in absentia* during the conflict

[60] ICTY Article 9 & Rule 9; ICTR Article 8 & Rule 9
[61] As revised on 30 September 2002; *see also* ICTR Rule 11*bis*
[62] *See* S/RES/1534(2004)
[63] *Address by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the UN Security Council* (27 November 2001). *See also* earlier withdrawal of charges (Chapter 1).
[64] As of end 2005, the Prosecutor had filed 12 referral motions involving 20 accused, the majority for transfer to the BiH War Crimes Chamber. The Referral Bench has granted five motions: four for transfer to BiH and one for transfer to Croatia.
[65] For an early report *see* Lawyers Committee for Human Rights, *Prosecuting War Crimes in the Former Yugoslavia* (May 1995)

alleging violations by members of rival ethnic communities who had since fled or been 'cleansed' from particular territories. These trials were often employed as tools of the war time machinery to prevent displaced persons and refugees from returning to their pre-war domicile, on pain of arrest pursuant to the *in absentia* verdict. In addition, large numbers of prisoners of war were held; although in most cases persons were detained for purposes of exchange rather than prosecution, and were often the subject of the most serious offences.

In the heightened tensions immediately following the signing of the Dayton Peace Agreement ('DPA'), authorities of the respective Parties to the Agreement fell into a pattern of politicised war crimes arrests in BiH. The tit-for-tat manner of such arrests accelerated at an alarming rate, leading to a suspension of prisoner of war exchanges, and soon came to jeopardise the freedom of movement between the Federation of BiH ('FBiH') and *Republika Srpska* ('RS') and the consolidation of the Peace Agreement. In order to counter the threat to peace and security in the region and to promote impartiality in domestic war crimes processes, the Parties, overseen by the Office of the High Representative ('OHR') and the Contact Group,[66] convened in Rome on 18th February 1996.[67] Article 5 of the Statement arising from the meeting was commonly referred to as the 'Rules of the Road' because of its impact on the freedom of movement. The provision stipulated that persons suspected of war crimes could only be arrested or detained in BiH after an order, warrant, or indictment had been reviewed by the ICTY OTP in order to determine its consistent with international legal standards.

Although this legal review was not strictly within the mandate of the ICTY, the Prosecutor agreed to the measure in the light of the common goal of restoring peace and security in the region. The procedure was also of direct benefit to the OTP since it enabled the Prosecutor to examine all domestic case-files, to include evidence and witnesses into ongoing investigations and prosecutions, and to seek deferral of relevant national prosecutions to the Tribunal.[68] The procedures and guidelines established by the OTP stipulated that after receipt of the case file and its supporting documents, it would undertake a legal review of the file applying prescribed

[66] France, Germany, Italy, Russian Federation, UK and U.S.
[67] *The Rome Statement on Sarajevo, Reflecting the Work of the Joint Civilian Commission Sarajevo* (18 February 1996)
[68] *War Crimes Prosecutions in Bosnia Herzegovina, Conference Materials* (Sarajevo, 10-11 October 2001), ICTY Rules of the Road Unit, Part B; on file with author

international standards for the conduct of criminal prosecutions, including the requirement for the establishment of a sufficient body of evidence to constitute a *prima facie* case for detention of an accused person.[69] The file would then be returned to the submitting authority with a series of standard markings indicating the conclusions of the review. As the OTP clarified, its review was only 'on the papers' meaning that it did not assess the credibility or veracity of the supporting evidence. It was also without prejudice to the existence of other incriminating or exonerating materials and to the outcome of any trial.[70] In practice, nonetheless, the procedure could not guarantee that cases reviewed and returned would result in domestic proceedings.[71] Approximately sixty individuals, less than ten percent of all reviewed cases, were prosecuted before BiH courts before the *Rules of the Road* unit was closed down in 2004 and incorporated into the prosecutor's office for the new BiH War Crimes Chamber.

The *Rules of the Road* review undertaken by the ICTY Prosecutor represented a novel approach to managing the distribution of caseloads between concurrent jurisdictions. Prior to the implementation of Rule 11*bis*, the procedure represented the only example of an international institution being vested with review functions over the exercise of domestic jurisdiction. There were, nonetheless, a number of significant differences with the complementarity regime of the ICC. The OTP reviewed only the contents and supporting documents of indictments submitted by domestic prosecutors, and not the actual conduct of these cases at trial.[72] Moreover, the institutional link created was between the Prosecutor's Office and domestic prosecutors/investigative judges, and not between the ICTY and national courts.

Alleged breaches by domestic authorities of the *Rules of the Road* were subject to review before local courts and the BiH Human Rights Chamber. Established under Annex 6 of the General Framework Agreement for Peace ('GFAP'), the Human Rights Chamber consisted of a mixed panel of international and national judges. It had competence to examine alleged or apparent violations of the European Convention on Human Rights ('ECHR') and of discrimination on any

[69] *Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996*,(10 September 1996)

[70] *Conference Materials, Procedures and Guideline*; *ibid*

[71] Bach, Björnberg, Ralston and Rodrigues, *The Future of War Crimes Prosecutions in Bosnia and Herzegovina: Consultancy Project Proposal* (May 2002)

[72] Note, Rule 11*bis* provisions on the monitoring of domestic trials relate only to cases referred by the Tribunal to domestic courts and not to cases reviewed under *Rules of the Road*

ground with respect to the enjoyment of the rights guaranteed by a series listed international agreements including the ICCPR.[73] While the majority of cases concerned property claims, the Chamber dealt with a significant number of petitions alleging irregularities in the *Rules of the Road* procedure. These included violations of ECHR articles 5 (liberty and security), 6 (fair trial) and 7 (no punishment without law) and ICCPR article 14 (fair trial).[74] In the *Hermas case*, for example, the Chamber found a violation of ECHR article 5(1) on the ground, *inter alia*, that the applicant had been arrested and detained in violation of the *Rules of the Road.*[75]

In spite of the indictment review role played by the Prosecutor, trial monitoring continued to expose serious shortcoming in domestic trials. In particular, doubts persisted over the ability of mono-ethnic police and judicial structures in rendering impartial justice, free from political and ethnic bias. The situation was exacerbated by the general lack of confidence in the safety of victims, witnesses and judicial personnel, the competence levels of BiH judges, and the failings of inter and intra-entity cooperation in war crimes cases.[76] As the International Crisis Group noted:

> Trials have been regarded as occasions for dispensing 'ethnic' justice or exacting revenge. Moreover, such trials are politically explosive, especially as various past and present national leaders are among those indicted or likely to be indicted. All this highlights the failings of the current system.[77]

Concerns over these failings led ultimately to the establishment of a hybrid national-international court within the State Court of BiH, as discussed in the next chapter.

A further issue of relevance for all the States of the former Socialist Yugoslav Republic is the question of applicable legislation. To illustrate, at the time of commission the applicable provisions were contained in the Criminal Law of the former Socialist Federal Republic of Yugoslavia ('SFRY'), adopted as the law of the Republic of BiH by Presidential Decree in 1992 and continued under Annex 4 of the

---

[73] The Chamber ceased to exist end 2003, and its responsibilities were transferred to local institutions. For listed grounds of discrimination *see* art.II(2)(b), Annex 6 GFAP

[74] *See* http://www.hrc.ba/ENGLISH/DEFAULT.HTM

[75] *Hermas* case, *Decision on Admissibility and Merits* (CH/97/45)(18 February 1998). Regarding the legal status of the Rome Statement and the binding nature of its provision on the BiH and Entity authorities *see Čegar* case (CH/96/21); *Marčeta case* (CH/97/41); *V.Č. case, Decision on Admissibility and Merits* (CH/98/1366)(9 March 2000)

[76] Bach et al (2002), 1-2

[77] International Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina* (25 March 2002), 2

GFAP.[78] A new criminal code was introduced in the Federation of BiH in 1998,[79] in the *Republika Srpska* in 2000,[80] and Brcko District in 2000.[81] In early 2002, new set of harmonised criminal codes and criminal procedures codes were introduced at the level of the BiH State, the FBiH, the RS and Brcko District.[82] The latest codes radically altered the inquisitorial role of the investigative and trial judges by introducing elements from adversarial based criminal justice systems. In particular, it bolstered the relationship between the prosecutor and the police in the collection and presentation of evidence at trial. Several decisions imposed by the High Representative have also amended aspects of the criminal procedure.[83] The Rome Statement imposed a further set of specialised procedures. Finally, operating in a separate legal domain, the NATO-led Stabilisation Force ('SFOR') has conducted its own investigative activities on BiH territory related to terrorism offences, organised crime and persons indicted by the ICTY.[84] This constant transformation of the legal framework, coupled with several years of extensive reform, restructuring and re-training of the police and the judiciary, has taken its toll on the ability of judges, lawyers and the police to keep apace. As seen below, the challenges faced by domestic authorities in identifying, applying and interpreting relevant legislation are shared by other post-conflict States.

(ii) Croatia

As in BiH, a number of domestic war crimes trials were held *in absentia* during and after the conflict period against members of rival ethnic communities. Under Croatian law, persons arrested pursuant to *in absentia* convictions are guaranteed the right to a

[78] Official Gazette (OG) SFRY 44/76,36/77,56/77,34/84,37/84,74/87,57/89,3/90,38/90,45/90; OG Republic BiH 2/92,8/92,10/92,16/92,13/94

[79] OGFBiH 43/98,2/99,15/99,29/00

[80] OGRS 22/00,37/01

[81] Brcko District Criminal Code, OGBD 6/00,1/01; Brcko District Law on Criminal Procedure OGBD 7/00,1/01

[82] BiH CC & CPC,(OGBH 37/03,36/03); FBiH CC & CPC (OGFBiH 36/03,56/03); RS CC & CPC (OGRS 49/03,50/03); BD CC & CPC,(OGBD 10/03)

[83] *See* http://www.ohr.int/decisions/judicialrdec/archive.asp

[84] Although SFOR's mandate flows from Security Council and the DPA (Annex 1A), BiH courts have reviewed the legality of the actions undertaken by domestic authorities at the request of SFOR; *see* BiH Human Rights Chamber *Hadž Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar against BiH and FBiH* (CH/02/8679,CH/02/8689,CH/02/8690,CH/02/8691) (11 October 2002); *Nedjeljko Obradovic against BiH and FBiH* (CH/02/12470) (7 November 2003)

re-trial, although delays are not uncommon during pre-trial custody. Before Croatia underwent a change in the political climate from nationalists to moderates, the vast majority of war crime cases involved Serb accused persons. Since 2000, a large number of Serbs in pre-trial have had charges against them dropped or have been granted provisional release. Individuals whose cases were already completed, however, often remained imprisoned under verdicts of questionable integrity.[85] In late 2001, the State Prosecutor identified an initial group of approximately 1,850 cases to be reviewed by local prosecutors.[86] As the State Prosecutor noted "... at the time of the Homeland War and also afterwards, ... prosecutors ... were submitting investigation requests indiscriminately in a number of cases, and based on insufficiently verified criminal charges".[87]

As for cases that reached trial, international observers reported serious concerns over the bias against Serb defendants and in favour of Croat defendants at all stages of procedure from arrest to conviction.[88] As the Organisation for Security and Cooperation in Europe ('OSCE') noted in a 2003 report:

> Observations during the last year indicate that these cases remain highly charged and require particular attention to assess impartiality and professionalism. Thus, the Gospic County Court found a Serb returnee guilty not only for war crimes, but also of a 500-year history of Serb crimes against Croatia, and explicitly criticized the provision of Government assistance to returned refugees.[89]

The Supreme Court has had repeated occasion to order the retrial of cases. Irregularities by lower courts in war crimes cases, mainly related to insufficient fact-finding led to 18 out of 19 lower court convictions being reversed in 2002, for example. Other concerns have included the intimidation and general security risks to which victims, witnesses and judicial personnel are routinely exposed; difficulties in securing evidence from witnesses living abroad, particularly in Serbia; and the overall lengthy delays in proceedings.[90] Despite instructions to the contrary from the State

[85] OSCE Croatia, *Status Report No. 13* (December 2003), 13-14
[86] In mid 2003, with 1,467 cases pending, 99 percent of cases involved non-Croat suspects; *ibid*
[87] OSCE Croatia, *Status Report No. 12* (03 July 2003)
[88] OSCE Croatia, *Status Report No.13* (2003): "While 83 per cent of Serbs (47 of 57) were found guilty, only 18 per cent of Croats (3 of 17) (although based on a limited number of cases) were convicted. Conversely, 17 per cent of Serbs were acquitted or the prosecution dropped, while 82 per cent of Croats were found not guilty."
[89] *ibid*
[90] A new Law on Witness Protection was adopted by the Croatian Parliament in September 2003

Prosecutor,[91] reports from 2005 continued to reveal that local prosecutors and courts were pursuing *in absentia* proceedings.[92]

While irregularities and bias persist at the local level,[93] the last years have witnessed some improvement in high profile cases subject to the Supreme Court's oversight . Thus in March 2006, eight former Croatian military policemen in the *Lora case* were convicted on retrial, after the original verdict had been dismissed by the Supreme Court in 2004 as a miscarriage of justice.[94] On 14 September 2005, also, the ICTY Referral Bench transferred its first case to Croatia after having satisfied itself as to domestic guarantees of genuine willingness in relation to the particular forum to which the case would be referred.[95]

(iii) Serbia and Montenegro

The judiciary in Serbia and Montenegro ('SCG'), formerly FRY, has tried only a handful of offenders, usually ordinary soldiers or lower-ranking officers. The immediate post-Milosevic government confirmed the existence of evidence indicating large scale grave tampering and removal/destruction of evidence by the security forces.[96] In more recent years efforts have been undertaken to strengthen domestic capacities following repeated calls for war crimes trials to be conducted domestically and in the light of the Rule 11*bis* transfer procedure.

Legislation was introduced in 2003 establishing a War Crimes Panel within the Belgrade District Court.[97] The law established an Office of the War Crimes Prosecutor, a War Crimes Investigation Service, and a Special Detention Unit. Applicable law is the existing provisions of the Basic Criminal Code,[98] with the

[91] OSCE Croatia, *Status Report No.10* (21 May 2002), 7-8
[92] OSCE Croatia, *Status Report No.17* (10 November 2005), 15-17
[93] OSCE Croatia, *Status Report No. 13* (2003), 13; *Status Report No.17* (2005), 15-18
[94] 'Lora Policemen Convicted In Retrial', IWPR *Tribunal Update No. 442* (3 March 2006); *see* also *Gospic Group case*; OSCE *Status Report No.12* (2003), 16
[95] *See Prosecutor v Ademi and Norac, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis (14 September 2005)
[96] Completed cases have concerned, *inter alia*, war crimes against civilian populations in BiH, Kosovo and Croatia; *see* OSCE Serbia and Montenegro, *War Crimes before Domestic Courts* (October 2003)
[97] *Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes* (1 June 2003)
[98] *Criminal Code* (FRY), renamed the *Basic Criminal Code,* (OGSFRY Nos.44/76, 36/77, 34/84,37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90; OGFRY No.35/92, 16/93, 37/93, 24/94 and 61/2001; OG Republic of Serbia No.39/2003). *See also* Criminal Procedure Code OGFRY No.70/2001 and 68/2002

inclusion of a new crimes against humanity provision that cross-references article 5 of the ICTY Statute. The law contains a number of omissions, however, that will hamper the prosecution of the wartime political and military leadership. Principal among these is the continued non-recognition of command responsibility. The definition of genocide continues also to suffer from a failure to incorporate the crimes of conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. Notably absent, moreover, are provisions relating specifically to sexual offences. The crime of instigating a war of aggression, as included in the law, is not defined at all in the Basic Criminal Code, rendering its application doubtful. The law also fails to mention the non-applicability of statute of limitations to the listed crimes or of immunities with respect to official capacity.[99]

As the first fruit of these efforts, nonetheless, on 12 December 2005, the Belgrade District Court War Crimes Panel rendered its verdict against 14 Serb members of the Serb Territorial Defence forces of Vukovar and the Leva Supoderica paramilitary unit for the 1991 massacre of 200 Croat prisoners in the hamlet of Ovcara. Eight of the accused were given the maximum sentence of 20 years in prison, three to 15 year prison terms, one to a 9-year term, and one to 5 years in prison, and two were acquitted.[100] A number of other important trials are pending before the Belgrade Panel.[101]

The lack of regional cooperation in criminal matters between the States of the former Yugoslavia has been another inhibiting factor in the successful investigation and prosecution of war crimes throughout the Balkans. Despite some progress in regional efforts,[102] the legal framework remains woefully below European standards in areas such as cooperation and judicial assistance; transfers of accused persons; recognition of judgments and admissibility of evidence; and cooperation in enacting witness protection measures.[103]

---

[99] OSCE and International Bar Association, *Review of the Draft law on Organisation and Jurisdiction of Government Authorities in Prosecuting Persons Guilty of War Crimes*, on file with author.

[100] 'Court sentences Vukovar war crimes convicts', *Southeast European Times* (13/12/05). The facts of the case are related to the *Mejakic et al.* ('Vukovar Three') case before the ICTY.

[101] *See, inter alia*, related proceedings in the trial of *Milan Bulic* (sentenced 10 January 2006) and the case of *Sasa Radak*; unreported

[102] OSCE Croatia, *Status Report No.17* (10 November 2005), 18

[103] See *European Convention on Extradition* (1957); *European Convention on Mutual Assistance in Criminal Matters* (1959), and Additional Protocol (1978); *European Convention on the Validity of Criminal Judgments* (1970); *European Convention on the Transfer of Criminal Proceedings* (1972)

(iv) Rwanda

The devastating scale of the crimes committed in Rwanda during the 1994 genocide, and their decimating effect on all aspects of the society, including the judiciary, is perhaps unparalleled in recent history. Moreover, the genocide and the ensuing armed conflict followed a long period "of human rights violations, the entrenchment of a culture of impunity and the polarization of the Rwandese nation".[104] Efforts to undertake impartial and independent trials have, thus, posed considerable challenges. With the ICTR focussing on only the principal leaders and major perpetrators, the vast bulk of trials have fallen to national courts. There has been no equivalent domestic indictment review procedure to that performed by the ICTY Prosecutor under the *Rules of the Road.* Indeed, the relationship between the ICTR and the Rwandan authorities has been strained from the start. Wide discrepancies between national and international processes have created also the perverse anomaly whereby serious offenders receive rigorous due process guarantees and relatively comfortable penal conditions unavailable to lesser offenders, who additionally may face the death penalty. Although the ICTR has adopted a Rule 11*bis* procedure, it has appealed to third States that do not apply the death penalty to take on cases for domestic trial.[105]

During the first two years following the 1994 genocide, a pattern of massive and wide scale reprisal arrests led to the detention of over 120,000 persons in severely over-crowded facilities. The events of 1994 devastated what little existed of a judicial infrastructure wracked by corruption and incompetence even prior to the genocide. Most persons were unlawfully and extra-judicially detained on the basis of un-investigated oral accusations and in the absence of case files containing *prima facie* evidence. By some accounts, overcrowding and unsanitary conditions within detention facilities led to 11,000 deaths.[106] Early efforts to release detainees met with repeated resistance from the military, police and hardliners, including through re-arrest or reprisal killings.

In August 1996, the Rwandan National Assembly adopted its long awaited and

[104] Amnesty International, *Gacaca: A question of justice* (December 2002), 41
[105] *See*, e.g., 'ICTR Prosecutor Requests Transfer of Bagaragaza Case to Norway for Trial', *ICTR Press Release* ICTR/INFO-9-2-471.EN (15 February 2006)
[106] Amnesty International, *Rwanda: End of provisional release of genocide suspects* (2003); Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: the ICTR and National Trials* (1997)

much debated specialised legislation on the prosecution of genocide and crimes against humanity.[107] Covering the period of 1 October 1990 to 31 December 1994, the law provides greater temporal scope than the ICTR. It provides for Specialised Chambers each with several benches in the twelve Courts of First Instance (*Cours de première instance*). The law creates four categories: (1) planners, organisers and leaders of the genocide, persons acting in positions of authority, notorious killers distinguished by their zeal or excessive malice and persons committing acts sexual torture; (2) perpetrators and conspirators of accomplices to intentional homicides or serious assaults causing death; (3) other serious assaults; and (4) property related offences. The central feature of the legislation, which aims at the expeditious prosecution of large numbers of the '*génocidaires*' is a plea bargaining procedure for category 2, 3 and 4 defendants. Those in category 1 face the death penalty in the absence of mitigating circumstances. In practice, the implementation of the plea bargaining arrangement, a feature previously alien to Rwanda's civil law tradition, resulted in only 20 percent pleading guilty.[108] Defendants were ill-informed or misinformed of the plea-bargaining terms, or otherwise feared reprisals at the hands of fellow inmates with whom they were co-housed.[109] As a result, the process suffered a loss of credibility and its ability to expedite trials was severely curtailed.

Other related problems relating to trials before Specialised Chambers have included failings in securing defence counsel, witnesses or sufficient preparatory time; concerns over the competence, impartiality and independence of some judges and lawyers, and the removal or suspension of others; and the environment of intimidation and fear that has led to witnesses retracting statements or failing to appear, and to defence lawyers and witnesses alike disappearing, being killed, or themselves being charged with genocide.[110] In addition, no credible effort has been undertaken to prosecute offences committed by the victorious Rwanda Patriotic Front/Rwanda Patriotic Army.

---

[107] *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Law No.8/96, (30 August 1996). *See generally* Schabas, 'Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems' (1996) *Criminal Law Forum* 7:3, 551; Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', 7 Duke Jrn'l Comp. & Int'l Law, 349-374

[108] Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case* (2001) AJIL 95, 1

[109] *ibid*,69. *See also* Sarkin, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach In the New Millennium of Using Community Based Gacaca Tribunals To Deal With the Past' (2000) International Law FORUM du droit international 2, 112–121

[110] AI (2002), 14-16

Having failed to process the massive backlog of cases, a new law was passed in 2001 establishing a radical alternative.[111] The new legislation provided for the creation of '*Gacaca* Jurisdictions' based on a traditional form of Rwandese community conflict resolution for inter-family and community dispute settlement, but adopted to incorporate certain modern legal characteristics. The *Gacaca* Jurisdictions exercise competences similar to ordinary criminal courts: they can hear testimonies; issue summons; order or conduct searches; take protective measures; pronounce sentences and fix damages; order the normalisation of an acquitted persons' property; and issue arrest and provisional detention warrants. Applicable law and temporal jurisdiction are borrowed from the Specialised Chambers and individuals are classified into the familiar four categories. Persons in category 1 can only be tried by the Specialised Chambers.[112] In line with its traditional precursor, the elected members of the local community who serve in the *Gacaca* Jurisdiction act simultaneously as parties, witnesses and judges. Hearings are public, but exceptionally may be held *in camera.* All decisions are deliberated in secret and are reached by consensus or otherwise by absolute majority. Judgements are given in public and must be reasoned. Decisions can be appealed to higher level *Gacaca* Jurisdictions. 10,000 *Gacaca* Jurisdictions are in the process of being established, with the aim to resolve the caseload of 100,000 genocide suspects over a projected five-year period.

There is concern, however, that the legislation establishing the *Gacaca* Jurisdictions fails to guarantee a number of basic fair trial standards. This includes the presumption of innocence; equality of arms; the right of a defendant to be informed of the charge against him/her and to have sufficient time to prepare a defence; the absence of provisions excluding confessions obtained under torture or duress; and the lack of *ne bis in idem* guarantees, resulting in some persons acquitted by ordinary courts being reportedly placed on *gacaca* lists. There have been concerns also with respect to judicial independence and political inference; the competence levels of the *gacaca* lay judges, who must preside over serious criminal cases with cursory legal training; the high degree of deference by most *gacaca* benches towards the often

[111] *Organic Law on the Establishment of "Gacaca Jurisdictions" and the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994*, Law No 40/2000, Rwanda Official Gazette (26 January 2001)

[112] The only difference is in Category 2 which additionally includes intentional attempted homicide resulting in serious assault.

poorly constructed case files prepared by public prosecutor's office; the influence of lobby groups on proceedings, including via the existence of so-called 'syndicates of denunciation' who, for a small fee, will offer to denounce any person; the climate of recrimination, fear, intimidation and discrimination that exists in most communities in which hearings are held; and the general climate of insecurity, particularly for defence parties and witnesses.[113] Finally, there is concern that the plea-bargaining procedure incorporated into the *gacaca* law encourages self-incrimination, since persons in category 2, 3 and 4 who have already been detained for more than 9-10 years will normally be eligible for immediate release upon confession.

However, it is equally clear that neither the ICTR prosecuting some fifty individuals, nor the Specialised Chambers dealing with approximately 20,000 individuals, will be able to clear the massive backload of cases against detained persons in an expedited manner. Experience to date indicates that the traditional justice experiment may result in serious substantive and procedural irregularities in criminal law. However, the *gacaca* model may offer also an innovative strategy to resolving the current impasse, and may be a preferable response than continued indefinite pre-trial detention. In addition, the community based nature of the adjudications offers some hope, despite the above noted failings, for the operation of reconciliation and truth telling processes at different levels throughout the country.

(v) Trials in third States

A number of domestic prosecutions have been undertaken in third States in connection with the situations in the former Yugoslavia and Rwanda. Security Council Resolutions 827 and 955 oblige States to enact implementing legislation to enable cooperation with the Tribunals. In the course of adopting such legislation or otherwise acting under existing penal codes, a number of States have asserted their own concurrent jurisdiction over persons not indicted by the *ad hoc* Tribunals for acts arising from these situations.[114]

[113] AI (2002), 31-41

[114] See generally this section Fiona Mckay, to whom I am indebted, *Universal Jurisdiction in Europe, Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide*, Redress Trust (30 June 1999)

In 1994 at the height of conflict in Bosnia, Dusko Cvjetković was brought to trial in Austria for charges of genocide and murder under article 65(1)(2) Austrian Penal Code. The provision confers jurisdiction over foreigners in respect of offences committed abroad in situations where the accused cannot be extradited to the territory where the crime occurred due to reasons other than the nature and characteristics of the offence (such as the 'political offence' exclusion) and the double criminality requirement is met.[115] At trial, Cvjetković was acquitted for insufficient evidence.[116]

In *Prosecutor v Refik Sarić*, the accused (a Bosnian Muslim) was convicted by the Danish High Court for grave breaches of the Third and Fourth Geneva Conventions (torture of prisoner of war and civilian detainees).[117] Jurisdiction in this case was established under article 8(5) of the Penal Code, which requires Denmark to prosecute crimes it is under international treaty obligations to prosecute.

In Germany, Novislav Djajić was convicted on war crimes charges for abetting the murder of 14 unarmed Bosnian-Muslim civilians and the attempted murder of one other.[118] Jurisdiction was established under article 6(9) of the Penal Code, whereby the State has a duty to prosecute offences committed abroad by non-nationals if it is under an international obligation to do so. In this case, the Supreme Court of Bavaria found the State had a duty to prosecute under articles 146 and 147 (grave breaches) of Geneva Convention IV and Additional Protocol I. The victim, the accused and the territory on which the crimes occurred were all alien to Germany. Jurisdiction under article 6(1) of the Penal Code (genocide) was also the basis for earlier proceedings before the Bavarian High Court against Dusko Tadic prior to his transfer to the ICTY.[119] In another case, Nikola Jorgic (a former leader of a paramilitary Serb group) was convicted and sentenced to life imprisonment for genocide, murder, assault and deprivation of liberty under articles 6(1) (genocide) and 6(9) (grave breaches) of the Penal Code.[120] In the more recent case of *Sokolović*, the

---

[115] Judgment of the Oberster Gerichstshof, Vienna (13 July 1994) regarding a challenge to jurisdiction.
[116] *Republic of Austria v Cvjetkovic*, Landesgericht, Salzburg (31 May 1995)
[117] *Public Prosecutor v N.N.*, High Court (Ostre Landsrets), 3rd Division (25 November 1994). Confirmed on appeal in *Public Prosecutor v T*, Appeal Court (Hojesteret) (15 August 1995)
[118] *Public Prosecutor v Djajic*, Case No. 20/96, Bayrisches Oberlandesgericht (Supreme Court of Bavaria), 3d Strafsenat(23 May 1997). *See* Safferling, '*Public Prosecutor v Djajic*', International Decisions (1998) AMIJ 92, 528
[119] *Dusko Tadic case*, Bundesgerichtshof [Federal Supreme Court] (13 February 1994) 1 BGs 100/94
[120] Oberlandesgericht Düsseldorf [Düsseldorf High Court] (26 September 1997); Bundesgerichtshof [Federal Supreme Court] (30 April 1999), 3 StR 215/98, NStZ 1999, 396. Note the traditional view expressed in this case that a "legitimizing link" is required to allow Germany to exercise its jurisdiction over crimes perpetrated outside its territory by foreigners against foreigners.

Federal Supreme Court ruled that where jurisdiction is provided for in an international convention, such as the Genocide Convention, German courts are entitled to try persons for the offence under the Criminal Code absent any link between Germany and the crime, the victim or the offender (universal jurisdiction).[121] This reversed the previous practice which required the prosecutor to establish a justifying link to Germany before cases could proceed.[122]

In The Netherlands, Darko Knežević was charged with war crimes before the Military Chamber of the Arnhem Court of Justice, under article 8 of the Criminal Law in Wartime Act (1952) enabling jurisdiction over, *inter alia*, grave breaches of the Geneva Conventions.[123]

In Switzerland, the Code Pénal Militaire enables jurisdiction of Swiss military tribunals to hear violations of the laws and customs of war, including the 1949 Geneva Conventions and Additional Protocols (articles 108-114). In the case of *G.G.*, Goran Grabež was tried and acquitted for violations of the laws and customs of war (beating and degrading treatment of civilian prisoners).[124] Jurisdiction was established by application of article 2(9) of the Code, which provides for jurisdiction over offences against international law and custom during an armed conflict committed abroad by civilians and members of foreign armed forces.[125]

A number of cases have also been brought in relation to the Rwandan genocide. In France, Rwandan priest Wenceslas Munyeshyaka was initially investigated in 1995 for genocide, crimes against humanity on the basis of articles 211 and 212 of the French Penal Code, and article 689 of the Criminal Procedure Code, which govern the operation of extra-territorial jurisdiction. On appeal, the *Cour de Cassation* held that legislation implementing Security Council Resolution 955 exceptionally enabled the operation of universal jurisdiction for French courts to prosecute grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity.[126]

---

[121] *Judgment*, Bundesgerichtshof [Federal Supreme Court] (21 February 2001), 3 StR 372/00. See also *Djuradi Kusljic case*, Bundesgerichtshof [Federal Supreme Court] (21 February 2001), 3 StR 244/00

[122] *See* Wirth, 'Germany's New International Crimes Code: Bringing a Case to Court' (2003) JICJ 1

[123] *See Decision on Jurisdiction*, Hoge Raad Der Nederlanden [Supreme Court], Criminal Division, No.3717 Besch, (11 November 1997), unofficial translation in Yrbk IHL, Vol.1(1998)

[124] *In Re G.*, Military Tribunal, Division 1, Lausanne, Switzerland,(18 April 1997). *See* Ziegler, '*In re G.*', International Decisions (1998) AJIL 92, 78

[125] *ibid*

[126] Nîmes Court of Appeal (20 March 1996); Cour de Cassation, Chambre Criminelle (6 January 1998), No. X96-32.491 PF; *see* Law No. 96-432,(22 May 1996)

In Switzerland, the case of *In Re N* concerned a former Rwandan mayor charged with war crimes, crimes against humanity and genocide before the Military Tribunal of Lausanne. The crimes were charged under article 108(2) of the Swiss Code Pénal Militaire, which extends jurisdiction to treaty provisions applicable in non-international armed conflicts and to customary law. The Tribunal held that there was no jurisdiction in Swiss courts to try genocide solely under customary law, since Switzerland had not ratified the Genocide Convention. The charges of crimes against humanity under customary law were also dismissed. The accused was convicted of war crimes and sentenced to life imprisonment.[127]

In Belgium, although the Geneva Conventions and Additional Protocols were incorporated into domestic law in 1952 and 1986 respectively, legislation was introduced in 1993 for the repression of grave breaches of these treaties based on the principles of *aut dedere aut judicare*.[128] In 1999, an amending Act added genocide and crimes against humanity and extended the application of grave breaches to both international and non-international armed conflicts.[129] Under the law, Belgian courts could exercise jurisdiction irrespective of the place of commission, the nationality of the victim or that of the accused (universal jurisdiction). Trials could, moreover, be held *in absentia*. To bring a claim, an individual did not have to be a Belgian national or reside in Belgium. The law did not recognise immunities on the basis of the official position of the person.[130] On adoption, the Belgian Government stressed that this jurisdiction enabling legislation reflected pre-standing treaty and customary law. By providing for a procedural mechanism for the enforcement of these norms, the enlisted crimes could be prosecuted retrospectively. The legislation was the basis for convictions obtained against the 'Butare four' for grave breach violations of the Geneva Conventions and Additional Protocols I and II.[131]

More than forty other cases, including against a number of high profile figures, were brought under the Belgian legislation, but failed to reach the stage of

---

[127] *In Re N.*, Military Tribunal, Division 1, Lausanne, Switzerland,(30 April 1999)

[128] *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions* (Moniteur Belge, 5 août 1993)

[129] Article 1(3) 1999 Act; *Report of the Justice Commission, Sénat de Belgique Session de 1998-99* (1 December 1998) 1-749/3, pp.18-20

[130] *Proposition de loi relative à la répression des violations graves du droit international humanitaire*, Belgian Senate 1 December 1998, 1-749/4; 38 ILM 921 (1999). *See* Smis and Van der Borght, 'Introductory note - Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law'(1999) ILM 38, 918

[131] Assize Court of Brussels (8 June 2001)

adjudication before the law was amended. One of these cases, against then Congolese Foreign Affairs Minister Abdoulaye Yerodia Ndombasi, was challenged before the ICJ. As noted in Chapter 2, the Democratic Republic of Congo ('DRC') challenged the legality of the Belgian legislation and the arrest warrant issued there under by contesting, *inter alia*, the law's derogation from established rules of State immunity.[132] In 2003, the legislation was amended to make it consistent with the ICJ ruling, by recognising applicable immunities established under international law as a procedural bar to criminal jurisdiction.[133] Following sustained diplomatic pressure from, *inter alia*, the U.S. and Israel, a second set of amendments limited also the jurisdictional reach of the legislation. The new law observes more traditional formulations of jurisdiction based on the principles of active personality and, exceptionally, passive personality. In the case of the latter, Belgian courts can only accept petitions if the State of nationality of the accused does not criminalize genocide, war crimes and crimes against humanity or cannot guarantee a fair trial: a recourse that is somewhat similar to the complementarity regime of the ICC.[134]

3. NATIONAL TRIALS IN SITUATIONS WHERE THERE IS NO INTERNATIONAL TRIBUNAL

(a) Criminal prosecutions in national courts

Space permits consideration of only one example, the *Pinochet* case, encompassing legal actions brought, *inter alia*, in Spain, France, Belgium and the UK. The purpose of the case study is to illustrate the divergences of approach to prosecuting international crimes even amongst legal systems and States as relatively closely related as those of Europe. In each of these forums the grounds for jurisdiction and the categorisation of offences was different. The case also illustrates the fact that there is no regulation under international law governing forum determination where different

[132] *Congo v Belgium*, ICJ Rep.2 (2002)

[133] *Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire, p. 24846* (23 April 2003); Moniteur 7 mai 2003 no.167

[134] Ref; *See* Smis and Van der Borght, 'Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives' in *ASIL Insights* (July 2003)

national jurisdictions seek to prosecute the same offender (see below, Chapter 7).

In Spain, the Criminal Division of the Audiencia Nacional (Supreme Court) unanimously upheld the jurisdiction of Spanish courts to hear allegations of genocide, terrorism and torture (included as a crime within genocide) committed abroad, further to orders issued by Judge Garzon of Investigating Court No.5.[135] The Supreme Court relied on article 23(4) of the 1985 Judicial Branch Act which grants domestic courts extra-territorial jurisdiction over, *inter alia*, genocide and terrorism (as defined under Spanish criminal legislation) or other international crimes, committed abroad by either Spanish subjects or foreigners.[136] As in other national jurisdictions, the Supreme Court held that the application of the Act to conduct occurring before its entry into force did not violate the principle of legality since the substantive criminal norms concerned were the object of criminal sanction at the time of the alleged offence. The Act provided for the retroactive application of a procedural and not a substantive norm. The Supreme Court went on to find *prima facie* grounds for violations of genocide under article 607 of the Spanish Criminal Code (incorporating the 1948 Genocide Convention) by interpreting a 'national group' to include any distinct national group, including opposition political groups. The interpretation appears strained given the express intent of the drafters of the Genocide Convention to exclude political groups,[137] and as confirmed by *ad hoc* Tribunal jurisprudence.[138] The Supreme Court, nonetheless, reasoned that the concept of genocide was incomplete if the definition of a distinct group excluded persons who, although they fell outside of the standard definition of the Convention, were nonetheless specifically identified and targeted because of their common affiliation. On terrorism, the proof of terrorist intent to subvert the national order was held to apply irrespective of whether the State so endangered was Spain or another country, such as Chile. Torture, deemed a constituative offence within genocide, was not considered separately.

In France, several complaints were filed by French victims against Pinochet alleging offences of crimes against humanity, sequestration, torture and

---

[135] Spanish National Court, Criminal Division, Case 19/97 (4 November 1998); Case 1/98 (5 November 1998). *See* Carrasco and Fernández, *In Re Pinochet* (Spanish Report) (1999) AJIL 93, 690-696

[136] *Ley Orgánica del Podor Judicial* (1985)

[137] See *travaux préparatoires* of the Genocide Convention, *inter alia*, E/447,E/794,A/C.6/SR69(1948). Political groups were excluded from the Convention based in part on their lack of permanence, as opposed "to 'stable' groups objectively defined and to which individuals belong regardless of their own desires"

[138] *Prosecutor v Rutaganda, Judgement and Sentence* (6 December 1999), ¶¶55-58; *Prosecutor v Jelisic, Judgement* (14 December 1999), ¶69

disappearance.[139] The *juge d'instruction* of the *Tribunal de grande instance* (Paris) issued two international arrest warrants, followed by a request for extradition to the UK. Jurisdiction was not based on universality, which, in general, is not recognised by the French legal system,[140] but on passive personality jurisdiction.[141] The principal conduct was not charged as genocide, given the doubtful satisfaction of the discriminatory intent requirement, nor as terrorism, but as a crime against humanity. At trial, the Tribunal dismissed all the crimes against humanity charges holding that the relevant provisions of the Penal Code (articles 211-12) did not enter into force until 1 March 1994. The remaining charges of sequestration accompanied by torture (article 224-2(2)) faced a statute of limitations. The Tribunal, however, held that in the cases of enforced disappearance occurring in connection with sequestration or torture, the crime remained ongoing until the victim is found and as such was not subject to temporal prescription.[142] In creative application, the Tribunal held that while enforced disappearance did not form a discrete offence under French law, its suspensive effect on an act of sequestration or torture rendered the alleged conduct triable in France.

In Belgium, resident Chilean victims filed criminal complaints against Pinochet under the 1993 legislation regulating the suppression of grave breaches.[143] After holding that Pinochet was not immune from personal jurisdiction,[144] the Brussels Tribunal of first instance held that the legislation served as procedural instrument enabling jurisdiction over pre-existing common crimes (murder, manslaughter, assault, hostage-taking and torture). The Tribunal went on to hold the 1993 legislation inapplicable given the absence of an armed conflict in Chile at the relevant time. Exercising *ex officio* powers, however, the *juge d'instruction* found existence of a *prima facie* case against Pinochet for crimes against humanity under customary international law and as reflected in the ICTY, ICTR and ICC Statutes. This customary prohibition was said to possess a *jus cogens* character, was expressive of a universal obligation to suppress and trumped statute of limitation considerations.

---

[139] *See* Stern, '*In Re Pinochet* (French Report)' (1999) AJIL 93, 696-700

[140] See above, n.126. The exception is legislation enacting obligations towards the ICTY and ICTR Statutes; Law No.96-432 (22 May 1996) [ICTR]; Law No.95-1 (2 June 1995) [ICTY]

[141] Articles 113-7, *Code de Procédure Pénale* provides for criminal jurisdiction on the basis of territoriality, active personality and passive personality

[142] See below, Chapter 4

[143] Tribunal of first instance [Brussels] (8 November 1998). *See* Reydams, '*In Re Pinochet* (Belgian Report)' (1999) AJIL 93, 700-703

[144] The alleged acts could not be constituted under 'official capacity'; *ibid*

In the UK, Pinochet was arrested pursuant to a provisional warrant issued by a magistrate acting under the 1989 Extradition Act on the basis of the request issued in Spain. Pinochet successfully appealed his arrest to a Divisional Court of the Queen's Bench Division, followed by an appeal by the Crown Prosecution Service, on behalf of Spain, to the House of Lords. In the extradition request Pinochet was charged with genocide (later dropped from the case), murder, torture and hostage-taking. After the first House of Lords decision was set aside, the reconstituted Appellate Committee held that Pinochet was immune from the charges of murder and conspiracy to commit murder outside Spain, leaving only the charges of conspiracy to commit murder in Spain. The charges of hostage taking were also dismissed, since the elements of the crime under the 1982 Hostages Convention had not been met. On torture, the double criminality rule dramatically reduced the scope of charges to those occurring after 29 September 1988, the date by which Chile, Spain and the UK had all ratified the 1984 Torture Convention.[145] As noted in Chapter 2, the majority held the immunity *ratione materiae* attaching to a former head of State persists only for acts conducted in an official capacity in the exercise of head of State functions, and therefore cannot include torture.[146] On murder and conspiracy to murder, by contrast, Pinochet was entitled to immunity for ordinary offences that were not the subject of an international treaty regime.[147]

On 3 March 2000, Pinochet was released from house arrest in the UK on the ground that he was medically unfit to stand trial. On his return to Chile fresh charges were brought by the Chilean judicial authorities relating to human rights abuses, tax evasion and corruption. The Chilean courts circumvented an amnesty law preventing prosecutions for crimes committed between 1973 and 1978 by holding disappearance as ongoing crimes, and therefore not subject to the amnesty. In August 2000, the Chilean Supreme Court stripped Pinochet of his parliamentary immunity as senator-for-life, publicly revealing numerous facts surrounding his alleged crimes and opening the way for his prosecution. Since then, the Chilean courts have repeatedly

[145] *Pinochet III*, 871. Subsequent to the decision, the Spanish authorities sought to add further charges to their request, relating to additional offences occurring after this date.
[146] As Lord Browne-Wilkinson remarked, this was the first time that "a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes"; *ibid*,16
[147] *ibid*,848

lifted Pinochet's legal immunity for each separate case, as required under domestic law.[148]

(b) Civil suits in national courts

Faced with the difficulties of effecting criminal jurisdiction, litigants in recent years have increasingly sought relief through civil action in third States.

In the 1980s, a number of civil claims began to be brought in U.S. courts under the long dormant Alien Tort Claims Act ('ATCA'). The Act establishes original federal district court jurisdiction over "all causes where an alien sues for a tort ... [committed] in violation of the law of nations...", thus enabling prosecution of human rights violators for offences committed abroad against non-U.S. nationals.[149] In *Filartiga v Pena-Irala*, the first in a series of civil claims, the plaintiffs, Paraguayan citizens, brought proceedings for damages alleging wrongful death by torture of their son and brother against the former head of police in Asuncion.[150] The confirmation of jurisdiction by the Court of Appeals recognised the prohibition of torture as part of U.S. common law, holding that "for the purpose of civil liability, the torturer has become - like the pirate and slave trader before him – *hostis generis*, an enemy of all mankind".[151] Although no claim of State immunity was brought, the defendant on appeal relied on the act of State doctrine. In dismissing the argument, the Court of Appeal stated "we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterised as an act of state".

A number of later ATCA cases dealt with issues related to State immunity under the U.S. Foreign Sovereign Immunities Act. In particular, these cases distinguished between the absolute immunity from civil jurisdiction of a foreign State,[152] and claims against State officials. Anticipating arguments later adopted by the House of Lords, U.S. courts held that certain conduct, such as torture, could not be considered as the legitimate functions of State officials and so properly fell outside

[148] For most recent stripping of Pinochet's legal immunity by Santiagio Appeal Court *see* Associated Press, 'Pinochet Stripped of Legal Immunity' (11 January 2006)
[149] Judiciary Act 1789, 28 USC§1350(1993)
[150] 630 F.2d 876 (2d Cir.1980)
[151] *Ibid*, p.890. *See also Sosa v Alvarez-Machain*, 542 US 692 (2004) (U.S. Supreme Court)
[152] *Siderman de Blake v Republic of Argentina* (1992)

the scope of State immunities.[153]

The Torture Victims Protection Act ('TVPA')[154] was introduced in 1992 to clarify the legal basis of ATCA, to enable claims also by U.S. citizens.[155] Litigants seeking civil redress for abuses committed abroad under the TVPA must establish jurisdiction via the ATCA. The TVPA provides "a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing".[156] Personal jurisdiction under both Acts is obtained by serving the defendant with a suit while he is physically present in the U.S..

Two war crimes related cases were filed against Radovan Karadzic for offences committed by Bosnian Serb forces during the Bosnian war. In *Doe v Karadzic*, a class action (group petition) was filed on behalf of victims of Bosnian Serb atrocities seeking remedy, *inter alia*, for rape and sexual assault. *Kadic v Karadzic* concerned an individual claim seeking injunctive relief and damages.[157] The two cases, joined at preliminary stages, were originally dismissed by the New York District Court for lack of jurisdiction, holding that the accused could not be considered a State official given that the *Republika Srpska* was not a recognised State entity. The Court of Appeals reversed the ruling and held that customary international human rights law prohibited official torture without distinguishing between recognised or unrecognised States. It went on to hold that Karadzic could not enjoy immunity as a Head of State of an unrecognised entity, and also dismissed the possibility for objections under the act of State doctrine. As such, the Court of Appeals concluded that "Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a State actor, and that he is not immune from the service of process".[158] The two

---

[153] *See Chuidian*, (1990) 912 F.2d 1099; *Trajano v Imee Marcos* (1992) 978 F.2d 493; *In re Estate of Marcos Human Rights Litigation*,(1994) 25 F.3d 1467; *Cabiri v Assasie-Gyimah* (1996) 921 F.Supp.1189 (SDNY)

[154] Pub.L.No.102-256, 106 Stat.73 (1992), 28 U.S.C.§1350

[155] *Senate Committee on the Judiciary, The Torture Victims Protection Act of 1991*, S. Rep. No.102-249, 3

[156] *ibid*, 3

[157] *Doe v Karadzic*, No.93-878(SDNY,1993); *Karic v Karadzic*, No.93-1163(SDNY,1993). *See* Ratner and Stevens, 'Using Law and the Filartiga Principle in the Fight for Human Rights' in *American Civil liberties Report* (December 1993)

[158] 70 F.3d 232(2d Cir.1995), 116 S.Ct.2524(1996). Compare *Tel-Oren v Libyan Arab Republic* case (726 F.2d 774, 824 D.C.Cir.1984). *See* Enslen, 'Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with its Decision in *Kadic v Karadzic*' (1997) Albany LR 48, 695

cases were sent back for trial, resulting in awards in excess of $5 billion against Karadzic.

As in the original *Filartiga* case, these cases have highlighted the inherent limitations of civil proceedings. The awards have been notable for the official recognition lent victims and judicial record provided for abuses that may otherwise have remained unheard.[159] The judgments, however, have proved largely ineffective in enforcing their rulings against persons absent from U.S. territory and whose assets are not deposited in the U.S.. In the future, efforts to extend recognition of judgements between States may enable more effective remedies for the recovery of reparations from assets seized in a third State. In *Hilao v.Estate of Marcos*,[160] the Federal Supreme Court of Switzerland relied on the civil judgment obtained in the U.S. to order the release of assets from Swiss banks to a fund in the Philippines to compensate human rights victims.[161] The Swiss Court relied on the State obligations under article 14 of the Torture Convention to "ensure that the victim of torture receives indemnification and has an actionable right to fair and reasonable compensation, including the means for rehabilitation that is as complete as possible."[162] Any such outcome will only be possible where the accused has financial resources deposited overseas.

Beyond the examples of ATCA and TVPA in the U.S., State practice on the award of a civil remedy for human rights abuses committed abroad remains rare.[163] The decisions of most national courts have confirmed the entitlement under international law to immunity from civil proceedings of officials for acts committed outside the forum, even where the acts are offend *jus cogens*.[164] This is based on the argument, as held in *Propend*, that any suit against a State official would indirectly

---

[159] *See* Isenberg, 'Genocide, Rape, and Crimes Against Humanity: an Affirmation of Individual Accountability in the Former Yugoslavia in the *Karadzic* Actions' (1997) Albany LR 60, 1051

[160] 103 F.3d 767 (9th Cir.1996)

[161] In *re Federal Office for Police Matters*, Case 1-A.87/1997/err (10 Dec.1997)

[162] *Ibid*, at I 7(a)(bb). *See* Dubinsky, *Hague Conference on Private Int'l Law Working Document No. 117: Proposals of the Hague Conference and Their Effect on Efforts to Enforce International Human Rights Through Adjudication* (November 1998)

[163] See *Prefecture of Voiotia v Federal Republic of Germany*, case no 11/2000, Areios Pagos (Hellenic Supreme Court) (4 May 2000) wherein the Hellenic Supreme Court found that the *jus cogens* norms arising from German atrocities in Greece during the Second World War overrode claims of state immunity; (2001) AJIL 95, 198

[164] See *Kuwait Airways Corporation v Iraqi Airways Co.*(No. 1),[1995]1 WLR 1147; *Al-Adsani v Government of Kuwait*(1996)107 ILR 536; *Siderman de Blake v Republic of Argentina*, 965, F.2d 699 (9th Cir.1992); *Argentine Republic v Amerada Hess Shipping Corporation*, (1989) 488 U.S. 428; *Princz v Federal Republic of Germany*, 26 F.3d 1166 (D.C.Cir.1994); *Al-Adsani v The United Kingdom*, ECtHR, 34 EHRR 273 (2001); *Bouzari v Iran*, Ontario Superior Court of Justice 114 ACWS (3d)57, 2002 ACWS

implead the State itself and interfere with the internal affairs of another State. The recent ruling of the Court of Appeal in *Jones v Saudi Arabia*, however, indicates that English law may be moving towards recognising such exceptions to functional immunity under civil law for certain international offences as the *Pinochet* decision held with respect to criminal matters.[165] Currently on appeal to the House of Lords, the ruling distinguishes between the absolute personal immunity from civil claims attaching to a foreign State (and its senior officials), which it upheld, and the functional immunity attaching to its ordinary officials. In particular, the Court of Appeal considered whether the cloak of State immunity should extend to acts or omission of ordinary State officials amounting to systematic torture. As Lord Justice Mance held, absent a rule expressly providing otherwise under the State Immunity Act, "it can no longer be appropriate to give blanket effect to a foreign state's claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture". To do so, the decision observed, could deprive the right of access to a court under article 6 of the ECHR of real meaning where victims of serious human rights abuses had no effective recourse in the State where the offence took place. The decision, nonetheless, sets out a number of qualifications that seek to balance the exercise of jurisdiction against such factors as proportionality (i.e. as to the availability of effective domestic remedies) and the pursuit of legitimate aims (i.e. the repression of serious human rights violations), as well as jurisdictional issues related to discretionary principles and *forum non conveniens*.[166]

The *Pinochet* case and related national decisions, together with Appeals Court decision in *Jones* and established U.S. jurisprudence, indicate an emerging acceptance of exceptions to functional immunity for criminal or civil claims brought in respect of international criminal conduct offending *jus cogens*. This will have important consequences for the ability of national courts, in the absence of an international forum, to enforce international criminal law norms against State officials.

[165] *Jones v Saudi Arabia* [2004] EWCA Civ 1394 (CA)
[166] *Ibid*,¶¶92-99. Note: in the context of the appeal sought, the decision rejected exceptions to functional immunity for acts falling short of torture.

IV

Other Responses to Criminal Jurisdiction

Located at a midway point between domestic and international trials is a mixed national-international model that has emerged in recent years. National courts have become 'internationalised' by combining international judges and lawyers with national counterparts and applying a hybrid of national and international law. Internationalising national trials has aimed to overcome the deficiencies experienced in domestic processes noted in Chapter 3. At the same time, such courts offer relief from the colossal resource and administrative costs required to establish a fully international body.[1] Practice to date, however, indicates that this alternative model of enforcement has fallen short of expectations. Partly, this has resulted from practical factors such as under-resourcing and poor planning. Of greater concern, however, are the limited powers of internationalised courts. By operating on the horizontal plane of competing political and legal interests, they face the same limitations of purely national courts in situations where an accused person or evidence is located in the territory of a foreign State, and are, equally, unable to set aside the rules governing the immunity of foreign officials.

The chapter also examines an alterative response to accountability: the complete absence of criminal trials. The second section below reviews the status of amnesties and pardons under national and international law, and the extent to which truth and reconciliation processes can complement prosecutions.

1. HYBRID COURTS

Following the creation of the ICTY and ICTR the UN was increasingly turned to by countries devastated by conflict for technical and financial assistance in setting up war

[1] Ingadottir, 'The Financing of Internationalized Criminal Courts and Tribunals', in Romano, Nollkaemper and Kleffner, eds., *Internationalized Criminal Courts and Tribunals*,(2004),271

crimes trials which they were unable or unwilling to conduct alone.[2] In the face of 'tribunal fatigue' and in the absence of a permanent international criminal jurisdiction to which these situations could be referred, the Security Council tasked the UN Secretariat to come up with a mechanism that would dispense international justice, but fell short of requiring new international bodies.[3]

In 1997, the Government of Cambodia asked for UN assistance in prosecuting Khmer Rouge crimes. The ensuing negotiations that led to the proposal for a national court of mixed composition and jurisdiction formed the basic template which was adapted, with variations, for Sierra Leone, and later for Kosovo, East Timor, BiH and Burundi. Typical characteristics of these 'hybrid' courts include their location *in situ* in the territory where the crimes occurred, a mixed composition of national and international judges and lawyers, and the application of both domestic and international norms and standards. The various courts, nonetheless, do not form a uniform model.[4] They vary considerably in the circumstances of their establishment, the scope of their jurisdiction, their organisational arrangement, and the degree of their internationalisation.

To date, internationalised criminal courts have been set up, primarily, in two manners: (a) in territories under UN administration and (b) pursuant to an international agreement negotiated between the State concerned and the UN.

(a) Courts established under UN Administration

Although it was the discussions surrounding Cambodia and Sierra Leone that gave rise to the mixed jurisdiction model, chronologically the concept was first tested in Kosovo and then in East Timor. The UN Administrations for Kosovo and East Timor were established by Security Council Resolutions 1244 (1999) and 1272 (1999) respectively to exercise the full range of legislative and administrative powers in the each territory and to re-establish and/or reform governance structures, including the justice sector. The United Nations Interim Administration in Kosovo ('UNMIK') embarked upon internationalising criminal trials in reaction to the biased

[2] Zacklin (2004), 541-545; Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in Romano et al. (2004), 15, *see generally*
[3] Shraga (2004), 15. Note, the various internationalised courts discussed below all relate to situations that would have fallen outside temporal jurisdiction of the ICC.
[4] *ibid*

administration of post-conflict justice by domestic courts. In East Timor, by contrast, the Security Council had specifically tasked the United Nations Transitional Administration in East Timor ('UNTAET') to bring to account the perpetrators of the post-referendum violence. In both territories, the enterprise required the reconstruction of a new judicial system *ad hoc* in the wake of a conflict.[5]

(i) Internationalised Courts in Kosovo

UNMIK was able to re-establish the judiciary with the first weeks of its mission in mid 1999 due to the presence of a substantial number of predominantly Kosovan judges and prosecutor in the territory.[6] Concern was soon raised, however, that the judiciary was unable to render impartial justice, particularly in complex and sensitive war crimes cases. Judges were exposed either to violent threats and attacks or fell prey to corruption. Decisions based on scant evidence led to previously convicted ethnic Albanians being released from jail and Serbs being placed in indefinite pre-trial detention.[7] In September 1999, the Special Representative of the Secretary-General ('SRSG') set up a commission to study the structure and administration of the judiciary and prosecution service.[8] The commission recommended the establishment of a special tribunal, the Kosovo War and Ethnic Crimes Court ('KWECC'), which would have mixed national and international composition and would stand outside of the existing court structure.[9]

The idea to create a special court was soon overtaken as events sparked in February 2000 led to a serious outbreak of violence in the divided city of Mitrovica.[10] In the face of the widespread lack of confidence in the impartiality of the judiciary to deal impartially with the aftermath of the violence, the SRSG issued Regulation 2000/6 (15 February 2000). The Regulation for the first time allowed international judges and prosecutors to participate in domestic proceedings in Kosovo for all new and pending criminal cases before the District Court in Mitrovica. The measure was

[5] Hansjörg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) AJIL 95, 46
[6] Cady and Booth, 'Internationalized Courts in Kosovo: An UNMIK Perspective', in Romano et al. (2004), 59
[7] Bar Human Rights Law Committee (UK), *Report on Kosovo 2000*
[8] UNMIK/REG/1999/6
[9] Cady and Booth, in Romano et al. (2004), 60
[10] *ibid*

soon extended to all courts throughout the territory by UNMIK Regulation 2000/34 (27 May 2000). Under the applicable law, serious criminal cases had to be heard before a panel of two professional and three lay judges, meaning that even with the appointment of two international judges the international presence would represent a minority on the bench. Accordingly, Regulation 2000/64 (15 December 2000) enabled the SRSG to designate, at any stage in criminal proceedings, on the application of the prosecutor, the accused or defence counsel, a panel consisting of three judges which would include at least two international judges, one of whom would sit as the presiding judge (the so-called 'Regulation 64 Panels'). The Regulation also enabled the SRSG to change the venue of the trial. As a result of these incremental measures, the need for a KWECC gradually became obsolete.[11] As a result, the Kosovo experience is the only example of an internalised process that is not located in a specific court or panel, but rather is suffused throughout the entire judiciary as an intervention measure that can be applied on a case-by-case basis to any criminal process throughout the territory.[12]

Given the immediate need to re-establish legal structure after the conflict, both UNMIK and UNTAET initially chose to apply pre-existing national law, adapted where necessary in the light of international standards and supplemented, as necessary, by specific Regulations to fill in legislative gaps.[13] The application of the law of the former regime, however, proved difficult to apply in practice.[14] There was fierce opposition from Kosovar Albanian politicians and lawyers on the grounds that the FRY criminal laws were among the most active tools of discrimination. Eventually, UNMIK issued an amendment providing that the applicable law would be the law in force in Kosovo prior to 23 March 1989, the year Serbia first moved to restrict the constitutional autonomy of Kosovo.[15] The task of identifying which laws and regulations were inconsistent with international standards, however, proved onerous for local lawyers. With little relevant training and practice, they were tasked to construe, interpret and apply international instruments to domestic penal codes, and to grapple with the complexities of creative substitution and incorporation for

[11] *ibid*

[12] Cerone and Baldwin, 'Explaining and Evaluating the UNMIK Court System', in Romano et al. (2004), 41. The ability of UNMIK to implement its regulations in Serb dominated areas, nonetheless, has been hampered by the continued use of parallel structures reporting directly to the Belgrade authorities; *see*, e.g., OSCE Kosovo, *Parallel Structures in Kosovo* (7 October 2003)

[13] UNMIK/REG/1999/1 (25 July 1999)

[14] Strohmeyer (2001), 59

[15] UNMIK/REG/1999/24 (12 December 1999), amended by UNMIK/REG//2000/59(27/10/00)

inconsistent laws.[16] Supplementary regulations issued by the SRSG sought to react to specific problems as they arose, creating piecemeal solutions to the complex problems at hand.[17] These interim measures eventually succumbed to the need for a comprehensive review of all legislation and the drafting of new criminal codes and criminal procedure codes.[18] At the same time, as in BiH, operating on an extra-legal sphere, the NATO led Kosovo Force ('KFOR') peace-enforcement operation conducts its own investigative activities in accordance with its Chapter VII mandate, beyond the scope of local judicial review.[19]

The presence of international judges and prosecutors in Kosovo has served to enhance the perception of impartiality in sensitive cases. The vast majority of prior war crimes convictions were overturned under the Regulation 64 Panels, and new investigations and prosecutions incorporated an international component from the outset. The court system established by UNMIK, nonetheless, has struggled for a number of reasons, including a lack of resources, *ad hocism* in strategic planning, and the pressures of a highly charged political environment. Moreover, many of the international judges and prosecutors, like their national counterparts, lacked the professional experience or the background required for complex war crimes cases. Even at the level of the Supreme Court, whose role is to ensure the highest standards of legal interpretation and legal reasoning, internationalised judgements have been criticised for their "brevity (the average length of decisions is three to four pages), poor legal reasoning, absence of citations to legal authority, and lack of interpretation concerning the applicable law on war crimes and human rights issues".[20] This has limited the possibilities for capacity building. The court system has also suffered from problems common to other countries in post-conflict settings such as insufficient witness protection and inadequate security. Moreover, although Kosovo technically remains part of the sovereign territory of Serbia and Montenegro pending a decision

---

[16] Strohmeyer (2001), 59

[17] *See*, e.g., UNMIK/REG/2002/6 (18 March 2002) *On the use in criminal proceedings of written records of interviews conducted by law enforcement authorities*; UNMIK/REG/2002/7 (28 March 2002) *On covert and technical measures of surveillance and investigation.*

[18] *See* Bolander, 'The Direct Application of International Criminal Law in Kosovo', Kosovo Legal Studies vol.1, 2001/1, at 7. OSCE Kosovo, *Kosovo's War Crimes Trials: A Review* (September 2002), 29-31

[19] The OSCE has criticised, in particular, the lack of formal charging related to KFOR detentions; OSCE Kosovo, *Review of the Criminal Justice System* (March 2002-April 2003), 33-34

[20] *Kosovo's War Crimes Trials: A Review*, 48; OSCE Kosovo, *Review 4: The Criminal Justice System in Kosovo,*(29 April 2002), 26-37. For a contrary view *see* Cady and Booth (2004)

on its final status, the internationalised panels have not been able to rely on the cooperation of the Belgrade authorities of that of third States.

(ii) Special Panels for Serious Crimes in East Timor

Unlike in Kosovo, the departure of the Indonesian authorities after the violence that swept East Timor in September 1999 left the country in an administrative and legal vacuum. Almost the entire legal professional elite had departed after the referendum, leaving a bare handful of inexperienced young East Timorese lawyers and the physical administrative infrastructure that was all but destroyed. In response to the violence, the International Commission of Inquiry and the three thematic Special Rapporteurs sent by the UN Commission on Human Rights unanimously called for the creation of an international tribunal.[21] In the face of fierce resistance from Indonesia and lack of consensus within the Security Council, the Secretary-General recommended a twin process. An international panel would be set up as part of the domestic judiciary in East Timor following the KWECC model then being considered for Kosovo, and Indonesia would be given the opportunity to fulfil its pledge to create a special human rights court in Jakarta. The two forums were meant to exercise concurrent jurisdiction and to cooperate in matters of legal assistance.

By Regulation of the UN Transitional Administrator, Special Panels for Serious Crimes were created in the District Court in Dili with exclusive jurisdiction over genocide, war crimes, crimes against humanity, and certain domestic offences committed between 1 January 1999 and 25 October 1999.[22] The prosecution service was internationalised through the creation of the Serious Crimes Unit, headed by a UN appointed Deputy General Prosecutor for Serious Crimes.[23]

Unlike Kosovo where international criminal law was applicable through pre-existing domestic legislation, UNTAET Regulation 2000/15 enumerated applicable international offences. Notably, the substantive crimes and much of the general part of the Regulation were based on verbatim extractions from the Rome Statute. This meant

[21] *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, A/54/726, S/2000/59 (2000); *see also* A/54/660 (10 December 1999)
[22] UNTAET/REG/2000/11 (6 March 2000). International offences were subject to universal jurisdiction; UNTAET/REG/2000/15 (6 June 2000)
[23] UNTAET/REG/2000/25 (3 August 2000)

that many of the standards, definitions and principles contained in the Rome Statute were applied for the first time by an internationalised domestic panel sitting in East Timor.[24] This included, somewhat oddly, a provision mirroring article 27 of the ICC Statute which stipulated that the immunities attaching to the official capacity of a person, as Head of State or Government or otherwise, "whether under national or international law", would not bar the Special Panels from exercising their jurisdiction (article 15, Regulation 2000/15). Since the Panels were established as domestic bodies, it is doubtful that they could have relied on the Regulation alone to require Indonesia or a third State to waive either constitutional or State immunities for persons sought. Such an obligation could more appropriately have been established had the Security Council adopted a Chapter VII resolution requiring States to render the Panels full cooperation and to waive applicable immunities.[25]

The Special Panels ceased operation on 20 May 2005 by decision of the Security Council. By that date, the Serious Crimes Unit had filed 95 indictments indicting 391 persons,[26] and the Panels had tried 87 defendants, 84 of whom were convicted of crimes against humanity and other charges, and three were acquitted. At end of its mandate, the Serious Crimes Unit estimated it had investigated approximately half of the projected number of cases arising from the 1999 violence alone. Charges were pending against a further 339 accused, who remained at large beyond the jurisdiction of East Timor.[27] These statistics, however, belie the reality that most cases involved low to mid-ranking Timorese militia members. The 10 priority cases identified by the Serious Crimes Unit against 202 accused involved at least 183 persons who remained at large. Particularly notable was the absence of trials against persons bearing the greatest responsibility.[28] In February 2003, the Serious

[24] Linton suggests the incorporation of ICC provisions "has imported a regime created for a radically different setting ... into the district court of one of the world's poorest nations", thereby creating "a tremendous legal and financial burden", 'Rising from the Ashes: the Creation of a Viable Criminal Justice System in East Timor' (2001) Melbourne Uni. LR 25, 148-150. More generally *see* Katzenstein 'Hybrid Tribunals: Searching for Justice in East Timor' (2003) Harv Hum. Rts. J; Yayasan HAK Briefing Paper, *Serious Concerns regarding the Independence of the Judiciary under United Nations Transitional Administration in East Timor* (24 July 2001); *Reports of the Secretary-General*, S/2000/738, S/2001/42

[25] See discussion above on enhanced cooperation, Chapter 8

[26] The total number of defendants in cases before the Panels was 440, since some accused persons faced multiple charges; see *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999* ('Commission of Experts on East Timor Report'), S/2005/458 (26 May 2005)

[27] *End of mandate report of the Secretary-General on the United Nations Mission of Support in East Timor*, S/2005/310 (12 May 2005)

[28] Commission of Experts on East Timor Report, ¶359

Crimes Unit issued an indictment against *Wiranto et al.*, charging the former Indonesian Minister of Defence and Commander of the Indonesian Armed Forces (*Tentara Nasional Indonesia* or 'TNI'), together with six high-ranking TNI commanders and the former Governor of East Timor. The indictment sparked a furore of controversy and was immediately disowned by the political leadership in East Timor, including the President, the General Prosecutor and the UN. Political expediency and the over-riding interest to achieve reconciliation with its powerful neighbour meant that the East Timorese government was unwilling to back the Special Panels in their pursuit of Indonesian officials. The Panels also failed to secure the required financial and administrative support, and had difficulties hiring and retaining international judges for the duration of trials. Other more familiar problems included inadequate interpretation and application of relevant laws; inexperience and lack of training on the part of both the international and domestic lawyers; poor secretarial and legal research resources; inadequate security; and the limited scope for capacity building.[29]

On review, the Commission of Experts appointed by the Secretary-General to examine the trials concluded that the Special Panels had achieved a measure of justice for victims and their families and had contributed to community reconciliation and the strengthening of the rule of law in the country.[30] Its most serious flaw, however, was its inability to secure any cooperation from Indonesia.[31] Particularly problematic was the non-implementation of a memorandum of understanding signed between Indonesia and UNTAET providing for the sharing of information and arrest and transfer of suspects, in consequence of the Indonesian parliament's refusal to ratify the agreement.[32] Moreover, the Jakarta government publicly stated it did not recognize the jurisdiction of the Special Panels to try Indonesian citizens.[33] As Nicholas Koumjian, former Deputy General Prosecutor for Serious Crimes, has stated,

---

[29] *ibid*, pp.18-37. The Commission also noted that criticisms that the Serious Crimes Unit had initial adopted an arbitrary prosecution strategy based on the availability of suspects rather than a coherent focus, *ibid. See also* Bertodano, 'East Timor: Trials and Tribulations', in Romano et al. (2004), 79-97

[30] Commission of Experts on East Timor Report, ¶357-358

[31] Bertodano (2004), 80-81

[32] See *Memorandum of Understanding between the Republic of Indonesia and the UNTAET Regarding Co-operation in Legal, Judicial and Human Rights Related Matters*, (6 April 2000), UNTAET/GAZ/2000/Add.2,93; *Progress report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S/2001/719 (14 July 2001), ¶30

[33] Commission of Experts on East Timor Report, ¶82

> Had Indonesia abided by the agreement on cooperation, the results of the work of the Special Panels would undoubtedly have been very different. But without voluntary cooperation from Indonesia, the Special Panels have always been a flawed solution with no realistic chance of bringing to justice those high-level perpetrators most responsible for the crimes.[34]

The absence of cooperation was even more galling in the light of the total failure of the parallel judicial process in Indonesia. Legislation was passed on 6 November 2000 to establish special Human Rights Courts.[35] The Indonesian Commission of Inquiry into Human Rights Violations in East Timor (KPP HAM) submitted a comprehensive and credible report on the post-referendum violence Attorney-General naming 22 suspects in the military and the police command. From the list, the Attorney-General proceeded with charges against 18 individuals, notably omitting General Wiranto and Intelligence Chief Zacky Anwar Makarim both named in the KPP HAM report.[36] The judicial investigations focussed on a geographical and temporarily limited number of incidents, rather than on a widespread and systematic nature of the abuses throughout 1999 or the previous twenty-five years of occupation. The resultant prosecutions were poorly prepared and suffered from serious lacunae in investigations, in protection of witnesses and victims, and the presentation of evidence. At several stages during trial proceedings, the prosecution itself moved to have the cases dismissed for lack of evidence. Of the eighteen accused, all were acquitted at trial or on appeal except for one, Eurico Guterres, an East Timorese former militia leader, who remains free pending his appeal. None of the accused was detained pending trial or after conviction, except for one, who was released after serving four months. None of the military officers accused were suspended from active military duties pending trial or appeal, and often failed to appear in court. The highest ranking military officer who was charged, Major-General Adam Damiri, was promoted to command operations in Aceh Province during his trial and pending his appeal. Another accused, Brigadier-General Tono Suratman, was promoted to chief spokesman for the TNI.[37] The proceedings were marred by an overwhelming environment of intimidation against both witnesses and judges. The different court

---

[34] Nicholas Koumjian, *Accomplishments and limitations of one hybrid tribunal: experience at East Timor*, ICC-OTP Guest Lecture Series (14 October 2004, The Hague); on file with author.
[35] *Law on Human Rights Courts*, Act No.26/2000
[36] *See*, e.g. Indonesian Commission of Enquiry (KPP-Ham) Report on East Timor (31 January 2000)
[37] Commission of Experts on East Timor Report, ¶171

panels took divergent approaches to the application of international human rights standards and in their treatment of evidence, reached inconsistent verdicts and factual findings, and displayed poor legal reasoning in their decisions. As the UN Commission of Experts concluded, "the judicial process before the Ad Hoc Court was manifestly inadequate with respect to investigations, prosecution and trials, and has failed to deliver justice. The atmosphere and context of the entire court proceedings were indicative of the lack of political will in Indonesia to seriously and credibly prosecute the defendants."[38]

(b) Courts established by an international agreement

(i) Special Court for Sierra Leone

In 2000, in response to request by the Government of Sierra Leone to the UN for the establishment of an international court and faced with a lack of support for a third *ad hoc* Tribunal, the Secretary-General proposed the creation of a hybrid court. The Security Council accordingly mandated the Secretary-General to negotiate a treaty between the UN and the Sierra Leonean authorities for the establishment of a Special Court for Sierra Leone ('SCSL').[39]

Like other hybrid courts the SCSL has a mixture of national and international and judges, prosecutors and administrative staff; applies both international and domestic law; and sits in the territory where the offences took place.[40] In the case of the SCSL, however, it may be more correct to talk of a 'nationalised' international court. Whereas the other forums considered in this section sit as a 'court within a court', the Special Court operates outside of the domestic judicial system altogether. Instead, much like the *ad hoc* Tribunals, it enjoys primacy over Sierra Leonean courts

[38] *ibid*,¶375; E/CN.4/2003/65/Add.2(13 January 2003); Cohen, 'Intended To Fail - The Trials Before the Ad Hoc Human Rights Court in Jakarta', ICTJ (2003)
[39] S/RES/1315(2000)
[40] Substantive international crimes comprise crimes against humanity (based on Article 3 ICTR Statute); violations of common article 3; and other serious violation of IHL, including attacks against civilian populations, attacks against humanitarian assistance and peacekeeping missions (based on article 8(2)(e)(iii) ICC Statute), and abduction and forced recruitment of children under 15. Genocide was excluded given the determined absence of discriminatory intent. The omission of grave breaches, meanwhile, has the effect of pre-determining the conflict as non-international despite the intervention of other States; *see* Smith, 'Sierra Leone: The Intersection of Law, Policy, and Practice', in Romano et al. (2004), 135-136; S/2000/915, ¶¶32-38

and has the power to request a deferral of a case at any stage in the proceedings. The treaty establishing the SCSL, moreover, creates an international obligation for the Sierra Leonean authorities to render cooperation. The SCSL applies the ICTR Rules of Procedure and Evidence (subject to possible amendments), and its appellate level is guided by the decisions of the ICTY and ICTR Appeals Chamber.[41] Moreover, the Special Court has a number of features classically associated with international organisations, such as legal personality and the capacity to enter into international agreements. In the light of these and related characteristics, the SCSL has declared itself as "a truly international criminal court".[42]

There are a number of features, nonetheless, that distinguish the SCSL from purely international criminal courts. Because the SCSL has been established by a treaty between the UN and one State, the agreement binds only Sierra Leone. [43] The Special Court's primacy powers, for example, do not extend to the national courts of third States. Similarly, it lacks the authority to require compliance from other States.[44] The international characteristics of the SCSL, therefore, arguably apply only with respect to its relationship with Sierra Leone.

The status of the Special Court formed the subject of the SCSL Appeals Chamber's *Decision on Immunity from Jurisdiction.* Citing the ICJ ruling in *Congo v Belgium*, the Appeals Chamber recalled that while a domestic court must respect the inviolability of a sitting Head of State, the jurisdiction of an international criminal court could act as an exception to such procedural immunity.[45] Based on the factors outlined above, the decision went on to conclude that the SCSL was, indeed, an international criminal court. The reasoning behind the decision is troubling on a number of fronts. Particularly problematic is the suggestion that the SCSL Statute overrides the rights and obligations of third States under the international law on State immunities. As the ICJ indicates, for an exception to immunity to apply, a criminal

---

[41] Art.20, SCSL Statute. In his Report, the Secretary-General advised against the appropriateness of one option proposed by the Security Council (S/RES/1315) that the SCSL share its Appeal Chambers with that of the *ad hoc* Tribunals, based on budgetary and practical grounds; *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*,S/2000/915 (4 October 2000)

[42] *Prosecutor v Charles Taylor, Decision on Immunity from Jurisdiction* (SCSL-2003-01-I)(31 May 2004); *Decision on Constitutionality and Lack of Jurisdiction* (SCSL-04-14)(13 March 2004), ¶80

[43] *See* Romano and Nollkaemper, 'The Arrest Warrant Against The Liberian President, Charles Taylor' *ASIL Insights* (June 2003)

[44] "Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific"; S/2000/915

[45] *Congo v Belgium*, ¶61

court must be (a) international and (b) it must have jurisdiction.[46] Irrespective of the international characterisation of the court, the Appeal Chamber failed to articulate the manner in which jurisdictional competence is obtained under international law. The jurisdiction of a court over persons entitled to immunities under international law may be established in two ways: on the basis of consent or by virtue of a Security Council Chapter VII decision. The latter, in turn, may take the form of either a delegation of powers to a judicial body (as with the ICTY/R) or the adoption of a Chapter VII resolution directing UN Member States to render full cooperation to a court (as with the ICC). Thus, the *ad hoc* Tribunals posses jurisdiction over persons otherwise entitled to immunity under international law because they are constituted as subsidiary organs of the Security Council exercising such powers as are delegated to it. The ICC, by comparison, exercises jurisdiction over the officials of State Parties on the basis of the consent of those States to be bound by a treaty. With respect to officials of non-Party States who are entitled to immunity under international law, the ICC can only exercise jurisdiction with the consent of that State (article 98) or in consequence of a Security Council Chapter VII referral (article 13(b)).[47] At the time of the indictment was issued against then President Charles Taylor, by contrast, the SCSL could not rely on either the consent of Liberia or the authority of Chapter VII powers.

In its decision, the SCSL Appeals Chamber went to some lengths to infer delegated powers citing, *inter alia*, "the high level of involvement" of the Security Council in the Special Court's establishment.[48] It also recalled the Council's affirmation, in its initial resolution requesting the Secretary-General to negotiate an agreement, that the situation in Sierra Leone constituted a threat to international peace and security.[49] These features, however, cannot be equated with measures capable of modifying the obligations of third States not Party to the Agreement. As noted earlier, for this to occur, the Security Council would be required to adopt a Chapter VII decision calling on State to implement specific measures, which would thereby prevail over the obligations of Member States arising from any conflicting

[46] *ibid*
[47] For further discussion on these twin issues see Chapter 8. In the case of the IMT at Nuremberg and Tokyo, as discussed above, the basis of jurisdiction can be characterised either as (i) extraordinary territorial jurisdiction or (ii) on the basis of the will of the community of States comprising at the time the 'united nations'.
[48] *Decision on Immunity from Jurisdiction*, ¶¶34-36
[49] S/RES/1315(2000)

international agreement (articles 25 and 103, UN Charter). The SCSL was not established on the basis of a decision of the Security Council, nor is there any Chapter VII resolution requiring States to render cooperation to the court.

In the alternative, the Appeals Chamber posited an argument based on consent. It suggested that since the Security Council had initiated the Agreement (Resolution 1315), and since the Council acts on behalf of UN Member States, the "Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone".[50] While the Appeal Chamber's pronouncement may reflect an expression of collective political will, it is clear that the Agreement cannot create legal obligations for States not parties without their express consent to be bound. As a result, the rights and obligations of States not party to the Agreement between the UN and Sierra Leone remain unaffected. For these reasons, the SCSL cannot be considered an international criminal court with jurisdictional competence to set aside the entitlement to personal immunity under international law of an incumbent foreign Head of State absent Liberia's consent or the Security Council's intervention.

The temporal jurisdiction of the Special Court is among other problematic aspects of the SCSL Statute. Article 1 provides that jurisdiction runs from 30 November 1996 onwards, the date of the Abidjan Peace Agreement.[51] The choice of dates, at the mid-point of a conflict beginning in 1991 has been questioned by numerous commentators, including the Sierra Leonean government itself.[52] More problematic is the impact of the amnesties previously granted under the 1999 Lomé Peace Agreement. Article 10 of the Statute provides that amnesties will not be a bar to jurisdiction with respect to international crimes.[53] The provision, however, has the effect of accepting amnesties with respect to domestic crimes listed in the Statute. This means that the SCSL, in relation to a conflict that began in 1991, can only consider international crimes committed after 30 November 1996, and domestic offences occurring after 7 July 1999.

---

[50] *Decision on Immunity from Jurisdiction*, ¶37

[51] *Ninth report of the Secretary-General* on UNAMSIL, S/2001/228 (14 March 2001), ¶54. *See also* S/2000/915, S/2000/1234, S/2001/40 and S/2001/95, and *Tenth report of the Secretary-General* on UNAMSIL, S/2001/627 (25 June 2001)

[52] The start date of 23 March 1991 was rejected on practical considerations as placing too onerous a burden on the investigations and prosecution process; *see* Smith (2004), 130-132

[53] *See* S/2000/915, ¶¶22-24

The decision to focus the Special Court only on persons bearing the greatest responsibility, perhaps, has been the biggest perceived failing. In Resolution 1315, the Security Council had recommended that personal jurisdiction extend to those "who bear the greatest responsibility for the commission of the crimes". In response, the Secretary-General suggested the phrase be understood to refer to both "command authority and the gravity and scale of the crime".[54] The Security Council confirmed that "the members of the Council share your analysis of the importance and role of the phrase 'persons who bear the greatest responsibility'", but maintained its preference, as reflected in the final wording of article 1 of the Statute, to retain an emphasis on those who played a leadership role.[55] The SCSL Prosecutor, in turn, interpreted his mandate restrictively by indicting only thirteen leadership suspects. Of these, nine were taken into custody; the indictments against two were withdrawn as a result of their death;[56] Charles Taylor was granted asylum in Nigeria; and Johnny Paul Koroma remains at large. Critics have argued that this approach has left a large gap of impunity with respect to other individuals who also bear the greatest responsibility for the conflict's most brutal atrocities. The exclusive focus on hierarchical command structure, moreover, ignores informal command relationships within the organisations involved and degrees of culpability.[57] As Kendall and Staggs point out, the Prosecutor's pragmatic approach was guided by a number of extra-legal considerations including "completing the mandate within a politically acceptable amount of time, the 'diplomatic and political blowback' from particular indictments, and refraining from issuing indictments that could threaten the continuation of the court".[58] Irrespective of the quality of the SCSL's jurisprudence, these temporal, political and financial constraints have served as inhibiting factors. The overall contribution of the SCSL to peace and security in the region, moreover, has been limited.[59] The absence of the legal authority with respect to third States, in particular, has to date rendered the SCSL powerless to obtain custody over its most wanted

---

[54] S/2001/40(2001)

[55] S/2000/1234(2000), S/2001/95(2001)

[56] *Prosecutor v Sam Bockarie* (SCSL-03-04), *Withdrawal of Indictment*,(8 December 2003); *Prosecutor v Foday Saybana Sankoh* (SCSL-03-02), *Withdrawal of Indictment*,(8 December 2003)

[57] Kendall and Staggs, *From Mandate to Legacy: The Special Court for Sierra Leone as a Model for "Hybrid Justice"* (Berkeley War Crimes Studies Center: April 2005)

[58] *ibid*

[59] Arguably, the most significant impact of the SCSL was the reputational risk attaching to Taylor's indictment. His resultant de-legitimisation and marginalisation precipitated the final stages of the Liberian conflict, leading to his ouster, which in turn contributed to regional peace and security.

target. Instead, the court has been left to await the outcome of negotiations conducted by external parties to determine the fate of Charles Taylor. The SCSL was projected by its staunchest supporters as a lean and efficient alternative to both the *ad hoc* Tribunals and to the much-lambasted ICC. However, despite its assertions to the contrary, the SCSL cannot exercise the same powers as its fully international counterparts.

(ii) Extraordinary Chambers for Cambodia

If the SCSL views itself as predominantly an international court, the Extraordinary Chambers in the Courts of Cambodia has been designed as a predominantly national with an international component.[60] It is the least internationalised court considered in this section.

Calls have long been made for prosecutions in relation to the genocidal rule of the Khmer Rouge 1975-1979, which resulted in over 1.7 million deaths.[61] In 1997, the Government of Cambodia requested the assistance of the UN in bringing to justice persons responsible for genocide and crimes against humanity committed during the period of the Democratic Kampuchea.[62] In 1999, the Group of Experts appointed by the Secretary-General recommended an international tribunal should be established.[63] This option was rejected by Cambodia, which instead asked for UN technical assistance for the creation of a special national court which would include international judges and prosecutors. In 2000, Articles of cooperation were concluded between the UN and Cambodia,[64] and domestic legislation was passed a year later.[65]

---

[60] *See generally* Meijer 'The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge', in Romano et al. (2004), 207-232

[61] In 1979, a puppet government installed by Vietnam sentenced Pol Pot to death *in absentia*, along with former foreign minister Ieng Sary and several other close aides. When a peace accord was signed in 1991, Phnom Penh refused the inclusion of a genocide tribunal, as did China. In 1996, PM Hun Sen declared an official amnesty for Ieng Sary after negotiating the surrender of several middle-ranking cadres. Pol Pot died in 1998 without being brought to trial. Boyd, *Cambodia's legal system on trial*, Asia Times Online: Southeast Asia (May 20, 2003)

[62] *See* A/51/930-S/1997/488, A/52/132

[63] A/53/850-S/1999/231

[64] *Articles of Cooperation Between the United Nations and the Royal Government of Cambodia [in/Concerning] the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*; published in Phnom Penh Post, Issue 9/22, October 27-November 9, 2000.

[65] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, NS/RKM/0801/12, No.174 Ch.L (Phnom Penh, 10 August 2001)

The latter, however, differed from the agreement with the UN, by allowing, most notably, the dominance of Cambodian judges and lawyers. Talks broke down in February 2002 and the UN withdrew from the process. The impasse was resolved only in February 2003 when the UN General Assembly welcomed the Cambodian law and mandated the Secretary-General to resume negotiations without delay, with the proviso that the law be amended to allow for certain due process guarantees, an appellate chamber (resulting in a two and not the three-tiered structure), and to regulate the status and independence of judges and prosecutors.[66] As a result, the Secretary-General was severely restricted in his scope for negotiation, and was unable to secure agreement on a number of other critical issues that had caused prior UN withdrawal.[67]

The principal features of the Extraordinary Chambers differ substantially from previous models of internationalised courts and are therefore treated in some detail below. The Extraordinary Chambers is to be established within the domestic judiciary. A Pre-Trial Chamber composed of three Cambodian and two international judges will act as an internal dispute settlement mechanism; the Trial Chambers will be composed of three Cambodian and two international judges; and the Supreme Court Chamber of four Cambodian and three international judges. Decisions are to be reached supermajority, meaning that at least one international judge must vote in favour. The Extraordinary Chambers will have two co-investigative judges and two co-prosecutors, comprised of a domestic and international official each. Dispute between the co-investigative judges or co-prosecutors may be referred by at least of them to the Pre-Trial Chamber. If the Pre-Trial Chamber fails to reach a decision by supermajority, the investigation or prosecution will proceed. Subject matter jurisdiction includes genocide as defined in the Genocide Convention, crimes against humanity as defined in the Rome Statute, grave breaches of the Geneva Conventions, and other crimes including the domestic offences of homicide, torture and religious persecution, and violations of the 1954 Hague Convention on Cultural Property and the 1961 Vienna Convention on Diplomatic Relations. Temporal jurisdiction runs from 17 April 1975 to 6 January 1979. Personal jurisdiction is limited to senior leaders of Democratic Kampuchea and those who were most responsible for crimes falling within its jurisdiction (i.e. a focus on leadership suspects as well as on the most

[66] A/57/228A(2003)
[67] A/57/769, ¶¶17,23; *See* Agreement annexed to A/57/228B(2003)

serious offenders). The granting of amnesties over the listed offences is prohibited. The one pre-standing amnesty granted to Ieng Sary in 1996 is left to the determination of the Chambers.

Rejected proposals of the Secretary-General included reducing the number of judges to three at the trial and five at the appellate level; the securing of a majority of international judges, with decisions taken by a simple majority; the appointment of one prosecutor and one investigative judge, both international; and the removal of the Pre-Trial Chamber mechanism. This would have created a structure similar to other hybrid courts.[68] A savings clause in the final agreement provides that the UN may withdraw from the whole process, including its financial support (representing some two-thirds of the total budget), should the Cambodian Government make changes to the structure or organisation of the Chambers or otherwise cause them to function in a manner inconsistent with the terms of the Agreement. In turn, the Cambodian Law enables the Extraordinary Chambers to continue on their own if the UN withdraws, thereby transforming the enterprise into a purely domestic affair.[69]

A number of other features of the Agreement are problematic. The original report of the Group of Experts had noted widespread interference by the executive with the independence of the judiciary, including intimidation and threats; low levels of competence; and widespread corruption.[70] A notable deficiency of the supermajority regime is its failure to establish a procedure to deal with the possibility for a 'hung jury', which will likely result in confusion and gridlock.[71] The use of Pre-Trial Chamber for dispute resolution between key staff appears cumbersome and time consuming. It is unclear, moreover, if such a referral has suspensive effect, or if the Chambers is bound by a timeframe to render a decision. Rather than restricting the scope for possible inconsistent solutions by clearly establishing the applicable substantive and procedural law, the Agreement merely provides that any dispute between the Parties concerning the interpretation or application of the Agreement is to settled "by negotiation, or by any other mutually agreed upon mode of settlement", a solution that is likely to lead to further delays. These and other concerns were not

[68] *ibid*, ¶¶24-27
[69] Article 46, Cambodian Law
[70] A/53/850, S/1999/231
[71] Human Rights Watch, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* (Briefing Paper: April 2003), 5

missed on the UN negotiating team.[72] It is clear, however, that political rather than strictly legal considerations guided the process. In particular, Secretary-General candidly expressed in his report that he felt obliged to consent to the views expressed by States in support of Cambodia's position.[73] In his final assessment, the Secretary-General recalled that the UN Special Representative for human rights in Cambodia had "consistently found there to be little respect on the part of Cambodian courts for the most elementary features of the right to fair trial. I consequently remain concerned that ... established international standards of justice, fairness and due process might therefore not be ensured."[74]

In summary, although the substantive law of the Extraordinary Chambers is reasonably sound, concerns persist over the delays, obstruction and possibly show trial quality that may result from the compromises reached on organisation and procedure.[75] Perhaps most worrying, the slowly spun out nature of the process, a quarter century after the fall of the Khmer Rouge regime, may enable the persons most responsible to escape justice through natural death.[76] The overall result has been to greatly depart from the previously established standards for internationalised judicial proceedings, and to provide an unwelcome alternative model for hybrid courts.

(iii) BiH War Crimes Chamber

Unlike other courts reviewed in this section, the BiH War Crimes Chamber did not arise from a government request and was not imposed by an international administrator.[77] Instead, the establishment of the Chambers has been driven primarily by completion strategy of the ICTY.

---

[72] *Report of the Secretary-General on Khmer Rouge trials*, A/57/769 (2003), ¶21
[73] *ibid*
[74] *ibid*, ¶¶28-29; The UNGA approved the statute on 22 May 2003, and on 6 June 2003 the Cambodian Government and the UN signed the *Agreement Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*; A/57/228B
[75] Meijer (2004), 232
[76] Human Rights Watch ('HRW'), *Serious Flaws*; Lawyers Committee for Human Rights, *A Court for Cambodia?* (1 April 2003)
[77] The OHR and the international community, nonetheless, led the process and applied considerable pressure on the fractured BiH political institutions to ensure that the package of laws for the War Crimes Chamber was adopted.

Under the Dayton Peace Agreement, mixed courts and commissions have operated in BiH in a number of fields including property dispute settlement and elections, and at the level of the Human Rights Chamber and the Constitutional Court.[78] In 2001, the ICTY Prosecutor suggested to the Security Council that either a specialised BiH court or chamber assisted by international judges and prosecutors be established to prosecute lower and middle ranking accused persons, including cases referred by the Tribunal.[79] The proposal resulted in the establishment of a specialised chamber for war crimes within the State Court of BiH.

The War Crimes Chamber started operation in 2005 with a majority international judges and prosecutors, but will evolve over a projected five year transition period into a majority national and finally exclusively national staffed institution.[80] The State Prosecutor's Office includes a War Crimes Department headed by an international Deputy Prosecutor, while the Chamber is administered by an international Registrar. Subject-matter jurisdiction under the new BiH State Criminal Code is genocide, modelled on the Genocide Convention; crimes against humanity, modelled on article 7 of the Rome Statute; war crimes, modelled on the grave breach provisions of the Geneva Conventions; and violations of the laws and practices of warfare, modelled on the Hague Conventions.

The Chamber is intended to have jurisdiction over three categories of cases: those cases transferred by the ICTY in accordance with Rule *11bis* (approximately 15 accused); those cases transferred by the ICTY, for which indictments have not yet been issued (approximately 45 accused); and those *Rules of the Road* cases before domestic courts which, due to their sensitivity, should be tried at the State Court level.[81] Other less sensitive cases could be tried by entity level chambers for war crimes, which may be established in the light of the experience of the State level Chamber, or by ordinary national courts. Under domestic legislation, material provided by the ICTY on transfer of a case (such as pre-trial briefs, witness lists and

---

[78] See DPA Annexes 4 and 6

[79] *Address by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Carla Del Ponte, to the UN Security Council* (27 November 2001)

[80] *Joint conclusions of the Working Group of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Office of the High Representative regarding domestic prosecution of war crimes in Bosnia and Herzegovina* (The Hague, 21 February 2003)

[81] Where the ICTY has issued an indictment, referred cases are subject to OTP review; where no indictment has been issued, collected evidence is transmitted to the national authorities, but there is no ICTY control. Some lower ranking perpetrators have therefore been indicted in order to ensure that they are brought to trial in local courts. Interview with ICTY OTP Chief of Investigations, on file with author.

statements, deposition of witness who have given evidence in other trials or before presiding officers involving the same facts, exhibits and other physical evidence) will be admissible at trial before the Chamber.[82]

A feature which distinguishes both the Kosovo and BiH hybrid courts is their concurrent jurisdiction with a higher standing international body. Other hybrid courts were established as an alternative to an international tribunal rather than as a complement to it. Thus in both Kosovo and BiH, a rather advanced distribution of caseloads enables the concurrent exercise of jurisdiction by domestically based internationalised national courts, while the leadership trials are held in The Hague.

(iv) Special Chambers in Burundi

In 2002, the President of Burundi requested the Secretary-General to establish an international judicial commission of inquiry, as provided for in the Arusha Peace and Reconciliation Agreement of 28 August 2000. Following an assessment mission dispatched to Burundi in May 2004, the Secretary-General presented his recommendations to the Security Council, though not in the shape and form requested by the Burundi authorities. Instead, the report recommended the establishment of a twin track mechanism: a truth commission and a special chamber, both operating within the court system of Burundi, both internationalised.[83] Drawing on lessons learned from past models, the special chambers would be based on the 'court within a court' model of East Timor and BiH and, as with the mechanisms set up in Sierra Leone and Cambodia, would be established on the basis of an agreement concluded between the UN and the Government. Moreover, like the SCSL, the negotiations would be based on a mandate entrusted to the Secretary-General by the Security Council.

The assessment mission recalled, in particular, that three UN commissions of inquiry had been established in the last decade at the request of Burundi. While each

[82] See, inter alia, *Prosecutor v Stankovic, Decision on Referral of Case Under Rule 11*bis,(17 May 2005). The Referral Bench decided to grant the Prosecutor's motion for referral having considered compatibility of BiH laws with the Tribunal's Statute; reviewed the laws applicable to the events in 1992 in BiH; reviewed fair trial guarantees before the War Crimes Chamber; satisfied itself as to domestic witnesses protection measures, and that the death penalty would not be imposed.

[83] *Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi*, transmitted to the Security Council on 11 March 2005 (S/2005/158)

had had a limited mandate to investigate specific incidents, no legal or practical effect had been given to their recommendations and no action had been taken by any UN organs. As the report concluded, the "United Nations can no longer engage in establishing commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the Organization in promoting justice and the rule of law".[84]

By resolution 1606 (2005) the Security Council requested the Secretary-General to initiate negotiations with the Government, to consult with all Burundian parties concerned on how to implement his recommendations and to report on the details of implementation, including costs, structures and time frame.[85]

c. Other internationalised courts

(i) Iraqi Special Tribunal for Crimes Against Humanity

The Iraqi Special Tribunal for Crimes Against Humanity ('Special Tribunal') is included in the present discussion because its Statute shares a number of features common to hybrid courts. Nonetheless, the circumstances that led to its adoption under the aegis of the Provisional Coalition Authority are quite different, and its international component is composed of U.S. personnel who play an advisory role.[86]

The Statute of the Special Tribunal establishes a court with mixed jurisdiction and composition. Uniquely, however, the integration of international judges is required only "if it [the government] deems necessary". Similarly, the Chief Investigative Judge and the Chief Prosecutor are to appoint non-Iraqi nationals to act in an advisory capacity or as observers with respect to "general due process of law standards".

Temporal jurisdiction runs from 17th July 1968 to 1st May 2003; personal jurisdiction is limited to Iraqi nationals or residents of Iraq; while territorial jurisdiction covers listed crimes committed in Iraq or elsewhere, with specific

[84] *ibid*, ¶72
[85] S/RES/1606(20 June 2005); See *Fifth Report on Burundi*,S/2005/728 (21 November 2005), ¶45
[86] On the controversy over whether the Iraqi Governing Council appointed by the Coalition Provisional Authority had the authority to create a court or to amend the criminal law of territories under Occupying Powers *See* HRW, *Memorandum to the Iraqi Governing Council on 'The Statute of the Iraqi Special Tribunal'* (17 December 2003)

reference given to "crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait". Much of the subject-matter jurisdiction and procedural provisions of the Statute are modelled on the ICC and ICTY Statutes. Subject matter jurisdiction includes genocide, based on the Genocide Convention; crimes against humanity, modelled with minor amendment on article 7 of the ICC Statute;[87] war crimes, modelled with minor amendment on article 8 of the ICC Statute;[88] and certain violations of Iraqi laws. The latter includes manipulation of the judiciary; wastage of national resources and the squandering of public assets; and abuse of position and the pursuit of policies that may lead to the threat of war or the use of force against an Arab country. Individual criminal responsibility is based on article 25 and 28 of the Rome Statute and article 7 of the ICTY Statute. Provisions for investigations and indictment, review of indictment, the rights of the accused, the protection of victims or witness, and trial proceedings are modelled on articles 18 - 23 of the ICTY Statute. The Special Tribunal has concurrent jurisdiction with Iraqi national courts over offences under Iraqi law and enjoys primary jurisdiction over genocide, war crimes and crimes against humanity, and may seek a transfer of a case at any stage of the procedure (article 9, ICTY Statute). As with the ICC Statute, an exemption in the *ne bis in idem* rule allows for a retrial of a person for acts constituting one of the listed crimes where previous proceedings before a national Iraqi court "were not impartial or independent, were designed to shield the accused from international or Iraqi criminal responsibility, or the case was not diligently prosecuted."

In common with other post-conflict situations, the Special Tribunal will be governed by a complex web of laws. The Iraqi penal system is derived from French, Turkish and Islamic law. The Statute provides for the application of general principles of criminal law under the 1968 Iraqi criminal law for offences committed between 17th July 1968 and 14th December 1969; the 1969 Iraqi Criminal Code "as it was as of December 15, 1969, without regard to any amendments made thereafter" for offences committed between 15th December 1969 and 1st May 2003"; and the 1971 Iraqi Criminal Procedure Law. In relation to the international crimes, the judges may resort

[87] Omissions include enforced sterilization; apartheid; and the definition of gender in ICC art.7(3)
[88] Omissions include the widespread and systematic chapeaux for article 8 ICC Statute; art.8(2)(b)(xx); art.8(2)(d)&(f); art.8(3); reduced chapeaux in art.8(2)(c); and enforced sterilization. Transfer of populations by an "Occupying Power" (art.8(2)(b)(viii) ICC Statute) is replaced by "the Government of Iraq or any of its instrumentalities".

to the decisions of international courts or tribunals as persuasive authority. At the same time, the Coalition Provisional Authority has amended parts of the Iraqi criminal procedure code.[89] Such complex provisions will place onerous responsibilities on the judges to identify, interpret and apply relevant norms. This will be particularly problematic given that most judges, after four decades under the Ba'ath regime, have become accustomed to conducting summary proceedings and lack the necessary experience and expertise to conduct complex trials.[90] This concern, together with the absence of neutral and suitably qualified international judges and prosecutors, the inclusion of the death penalty, and the uncertain guarantee of adequate protection of both victims and witnesses and court personnel, does not bode well for ability of the Special Tribunal to uphold necessary standards.

Summary

Internationalised courts have the benefit of being able to draw on a pool of both international legal expertise and the local legal profession. They are located in close proximity to the events concerned, and have reasonable good access to potential evidence and witnesses. Sitting *in situ*, moreover, contributes to domestic ownership and acceptance by the population, compared to distant trials in foreign States. The resultant heightened sense of credibility and legitimacy may contribute more easily to national reconciliation initiatives. There may also be greater willingness on the part of the territorial State to proceed with internationalised trials, since they may appear as less intrusive than purely international processes. Hybrid courts have the potential also to contribute to capacity building, to the enhancement of domestic jurisprudence and, more generally, to the reconstruction and reform of the judicial sector. Importantly, and in contrast to the ICC, the jurisdiction of these courts can be applied retrospectively to events occurring before their establishment.[91] Finally, hybrid courts

[89] CPA/MEM/18 Jan 2003/03
[90] HRW *Memorandum* (2003)
[91] Benzing and Bergsmo, 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court', in Romano et al. (2004), 409-410; *see generally*

are typically far less expensive than fully international courts, making significant savings in areas such as travel, translation, staff and defence costs.[92]

Practice to date, however, has been less than satisfactory. The courts have often been unable to secure international judges and prosecutors with relevant experience. The discovery, application and interpretation of applicable laws have proved onerous. The specialised nature of these courts has meant that they have worked in vacuum from the rest of the domestic legal system, and have thus had limited impact on overall development of the justice sector. The courts have enjoyed lacklustre political support in the prosecution of high profile or sensitive cases. They also continue to suffer from the problems experienced by purely national courts in areas such staff security and witness protection. Moreover, the financial savings that internationalised courts have experienced has resulted, in part, from their severe under-funding.[93]

All of the above are practical considerations which could be overcome with sufficient political, administrative and financial assistance. The biggest weakness of hybrid courts as a model for enforcing international criminal law, however, is the failure of their constituent instruments to internationalise their cooperation regime. In particular, they enjoy a significantly weaker relationship with the national authorities of third States than do purely international courts. This is particularly important when addressing the issue of State immunity and the obligations on States to give effect to court rulings in matters of legal assistance. As the former Deputy Prosecutor for Serious Crimes in East Timor has noted, internationalised courts have proved particularly inadequate in response to conflicts where much of the relevant evidence, witnesses and accused persons are located abroad:

> .... In my view, a hybrid tribunal, which includes professionals from the national government, is appropriate for dealing with a conflict that is largely civil in nature, such as the case of Cambodia and Sierra Leone, but predictably ineffective in dealing with international conflicts where perpetrators came from outside of the country in which the hybrid court is located. The Special Panels for Serious Crimes has successfully litigated cases involving the "civil" nature of the conflict in East Timor, but have been powerless to bring to justice those members of the police and armed forces and highest-level militia

[92] *See* Ingadottir (2004), 285-289

[93] Ingadottir argues that in some cases, the lack of resources has been so extreme as to undermine the ability of these courts to meet established minimum standards of an independent judiciary and fair trial, *ibid*, 288. *See also* Cohen 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' Asia Pacific Issues, No.61(August 2002)

> commanders who organized the violence, because all of these accused are residing in Indonesia which refuses to cooperate.[94]

Thus, while hybrid courts are intended to achieve similar objectives as international courts, they cannot exercise the same powers. As argued earlier, if this was desired the Security Council could adopt a Chapter VII resolution modifying the obligations of States towards an internationalised court by, for example, obliging all States to cooperate and comply with decisions, or a particular decision, of a court. In the case of the Regulation 64 Panels in Kosovo, Sluiter argues that Security Council Resolution 1244 (1999) establishing UNMIK, which "[d]emands that all States in the region cooperate fully in the implementation of all aspects of this resolution", may be read to impose a legal obligation on such States to render cooperation on all aspects of the civilian administration of Kosovo, including the judicial system.[95] Applying this analogy to other situations, Security Council Resolution 1272 (1999) establishing UNTAET is less clear and instead "[s]tresses the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of this resolution". Similarly, Security Council Resolution 1470 (2003) on Sierra Leone merely "urges all States to cooperate fully with the Court" rather than 'deciding' they shall do so under Chapter VII.[96] The Extraordinary Chamber in Cambodia and the BiH War Crimes Chamber, moreover, have not been the subject of Council resolutions on matters of cooperation.[97] Thus while, particularly in the case of those courts created under the aegis of the UN, there appears to be a strong argument for the invocation of a duty to cooperation for all UN Member States in the interests of maintaining international peace and security,[98] none of the resolutions cited above establishes a clear duty for third States to render cooperation in a manner similar to Security Council Resolutions 827 (ICTY) and 955 (ICTR). Moreover, they do not address the relevance of immunities pertaining to incumbent officials under international law in relation to the exercise of jurisdiction by these courts.

---

[94] Koumjian (2004)

[95] Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals', in Romano et al. (2004), 390

[96] The preamble to S/RES/1478 (2003) repeats this appeal by merely "[c]alling on all States, in particular the Government of Liberia, to cooperate fully with the Special Court for Sierra Leone".

[97] *See* GA Res.58/191(2004) which appeals for financial and personnel support to the Extraordinary Chambers; and S/RES/1503 (2003) which calls for capacity building and donor support for the BiH WCC. In the case of BiH, it could conceivably be argued that the standing obligations under Dayton Peace Agreements require FRY and Croatia to assist in the ongoing civilian implementation of the GFAP.

[98] Sluiter (2004), 405

In spite of these limitations, as the BiH War Crimes Chamber demonstrates, the fact that any international judicial process could only ever prosecute the top strata of criminal activity, while leaving the bulk of the cases to domestic courts, means that internationalised courts will continue to have a role in complementing international courts and tribunals, rather than representing an alternative to them.

2. AMNESTIES AND ABSENCE OF TRIALS

Another possible response to the question of accountability for past crimes is the decision to forego the criminal process in favour of other societal goals. To what extent are amnesties compatible with duty to prosecute internationally crimes? What impact does this have on the enforcement of international criminal law and on duty to prosecute for the State proclaiming the amnesty, for a third State, and for an international tribunal? It may be useful for this purpose to distinguish between four broad categories: (a) amnesties for crimes under domestic law in one State; (b) amnesties for crimes under international law; (c) amnesty granted in State A to all its nationals who have committed crimes in State B; and (d) the role of truth and reconciliation commissions.

(a) Amnesties for crimes under domestic law in one State

Amnesties have often been promulgated in States after armed conflicts or states of emergency. Their purpose has been, variously, to promote the reintegration of former combatants and insurgents in peace processes and to placate former security forces in order to ward off coups; to exempt draft evaders and deserters from military penal sanction; and to provide amnesty for domestic offences committed by members of opposition armed forces or insurgents, such as crimes against the State, crimes against the armed force, or the illegal possession of weapons. Where the conduct in question amounts to an ordinary offence, it is the prerogative of the State to grant immunities from prosecution. This concurs with the concept of 'combatant immunity' in the law of international armed conflict or article 6(5) of Additional Protocol II with respect to non-international armed conflict which provides that "[a]t the end of hostilities, the

authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." However, where the conduct in question amounts to an international crime such as genocide, crimes against humanity or war crimes, failure to genuinely investigate and prosecute such crimes may incur a State's international responsibility under conventional and customary law. As the Secretary-General has summarised,

> While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.[99]

Amnesties for domestic crimes have been linked to both peace negotiations and to truth and reconciliation commissions.[100] The early release system under the *Good Friday Agreement'* (or *'Stormont Agreement'*) in Northern Ireland differs again from this model since the accused have already been prosecuted and convicted, but are being released early from imprisonment.[101] There is neither an amnesty bar on past or future prosecutions, nor are persons pardoned for crimes committed.

(b) Amnesties for crimes under international law

Blanket amnesties covering domestic and international offences have been used extensively in Argentina, Chile, Uruguay, El Salvador, Honduras, and Guatemala, often arising in response to the findings of truth and reconciliation commissions.[102] For States in transition from oppressive regimes, amnesties represent important tools to appease members of former regime who may be unrepentant for the atrocities that

---

[99] *Sierra Leone Report*,¶22; see also Secretary-General's *Rule of Law Report*, S/2004/616, p.21

[100] *See* Hayner, *Fifteen Truth Commissions -1974 to 1994: A Comparative Study* (1994) 16 HRQ 598

[101] *See* Annex B of the Agreement, 'Review of the Criminal Justice System' available at http://www.nio.gov.uk/agreement.pdf

[102] It should be noted that truth and reconciliation commissions have varied considerably in mandate, form and outcome. *See generally* Hayner, *ibid*

have been committed and retain variable amounts of power.[103] The experience of the UN sponsored El Salvador Truth and Reconciliation Commission, for example, demonstrated how fragile political realities may be unwilling or unable to bend to the task of prosecuting former officials.[104]

National amnesties for serious violations of humanitarian law are prohibited under the grave breaches provisions of the Geneva Conventions; the try or extradite regime of numerous multilateral treaties; as well as international and regional human rights instruments. Both the Genocide Convention and the Torture Convention explicitly require States to punish violators, while article 2(3) of the ICCPR obliges States to provide an "effective remedy". The Human Rights Committee has repeatedly interpreted the latter provision as incurring a positive obligation to investigate violations, hold persons responsible, and provide reparation to victims; although this arguably falls short of establishing an absolute duty to prosecute.[105] The ECHR requires States to ensure an "effective remedy" for violations and explicitly obliges Parties to undertake prosecutions at the domestic level. The Inter-American Commission on Human Rights has similarly interpreted the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights ('ACHR') as placing an affirmative obligation on States to investigate breaches of article 1 (life, liberty and personal security).[106] In its judgment in the *Velasquez Rodriguez* case, the Inter-American Court held 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, impose the appropriate punishment and ensure the victim adequate compensation...".[107] The same judgment characterised the practice of involuntary disappearance as a crime against humanity and, thus, a subject

---

[103] Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter American Human Rights System* (1994) BU Int'l LJ 12, 343-4

[104] *ibid*; Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime* (1991) Yale LJ, 2537; Americas Watch Reports, *Challenging Impunity: The Ley de Caducidad and the Referendum Campaign in Uruguay* (1989), 14-15, and *Chile: The Struggle for Truth and Justice for Past Human Rights Violations IV* (1992)

[105] HRC General Comment No.20 (1992), ¶¶14-15. *See also* HRC CCPR/C/51/D/322/1988 (Uruguay); CCPR/C/79/Add.67 (Peru), ¶20; CCPR/C/79/Add.80 (France), ¶13; CCPR/C/79/Add.19 (Uruguay), ¶7; CCPR/C/79/Add.46 (Argentina), ¶10;CCPR/C/79/Add.34 (El Salvador), ¶7, ¶12

[106] Kokott, *No Impunity for Human Rights Violations in the Americas*,(1993)HRLJ 14,157

[107] *Velasquez Rodriguez case, Judgment*, IACtHR (Ser.C) No.4 (1988), ¶174; see also *Barrios Altos case, Judgment*, IACtHR (Ser.C) No.75 (2001), ¶¶41-45, declaring "the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights" and hence nullifying the legal effect of two amnesty laws passed in 1995

of international law and not subject to statutes of limitations.[108] The Inter-American Commission also has held that amnesty laws in Argentina, Uruguay and El Salvador violated article 18 (fair trial) of the American Declaration as well as articles 1(1), 8 and 25 of the ACHR.[109] Moreover, the 1992 UN *Declaration on the Protection of All Persons from Enforced Disappearances* calls upon States to ensure that perpetrators "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanctions".[110]

(c) Amnesty granted in State A to all its nationals who have committed crimes in State B

A grant of immunity for actions committed in another State, be they domestic offence or international crimes, is clearly beyond the sole prerogative of that State. An amnesty for an offence committed in State A cannot act as a bar to prosecution for the same conduct in State B. The passage of amnesty legislation in one State, therefore, has no effect on the right of another State to initiate criminal proceedings. Similarly, an amnesty bar proclaimed in a State has no bearing on a prosecution brought before an international court.[111] This, moreover, reflects the absence of any national or international principles governing the application of *ne bis in idem* across different jurisdictions.[112]

(d) Truth and Reconciliation Commissions

While the passage of blanket amnesty legislation for the crimes of a former or current regime would be incompatible with the duty to prosecute persons accused of committing international crimes, amnesties may play a role for lower-level, domestic criminal offences. Truth and reconciliation processes have been considered in some

[108] *Velasquez Rodriguez case*, ¶153; Pasqualucci (1994), 346
[109] See *Argentina Report and Uruguay Report*,(1992) HRLJ 13,336-345; *Chile Report*, IACHR Rep.No.25/98, ¶76, IACHR Rep.No.36/96; Orentlicher (1991), 2540
[110] See also *Sierra Leone Report*, ¶22 above
[111] "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember"; *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, SCSL Appeals Chamber (13 March 2004), ¶17
[112] See below, Chapter 7

form in almost all States undergoing an internationalised judicial process, although to date the task of balancing criminal trials and truth-telling processes has arisen only in East Timor and Sierra Leone.[113]

UNTAET Regulation No.2001/10 entrusted the East Timorese Commission for Reception, Truth and Reconciliation (known by its Portuguese acronym 'CAVR') with the traditional tasks of inquiry, establishing the truth, reporting, identifying practice and policies, and promoting reconciliation and reintegration.[114] Significantly, however, the CAVR was also tasked with referring human rights violations to the Office of the General Prosecutor with recommendations for the prosecution of serious offences.[115] Persons fulfilling a Community Reconciliation Agreement were granted amnesty from any criminal and civil liability arising out of the acts disclosed.[116] Amnesties could not be extended to serious criminal offences.[117] Immunity was also stayed for any criminal acts which had not been the subject of a Community Reconciliation Agreement.[118] The approach to coordinating between the judicial and reconciliation processes was, thus, planned from the start. The Commission procedures, moreover, relied on the backdrop of a functioning judicial system, which provided a major incentive for participation so as to avoid criminal prosecution.[119] Immunities were targeted, specific and conditional, and applicable to minor offences only.

By contrast, the concurrent operation of prosecutions and reconciliation processes was unplanned and haphazard in Sierra Leone. Whereas the East Timorese Commission was built into the prosecution framework, the national Truth and Reconciliation Commission ('TRC') in Sierra Leone had already been established on paper several years before the creation of the SCSL.[120] No formal agreement was ever established between the TRC and the Special Court, and the SCSL Statute only made passing reference to alternative truth and reconciliation mechanisms with respect to juvenile offenders (Art.15(5)). Commentators noted early on that an uncoordinated

[113] *See* similar plans propose for Burundi, S/2005/158
[114] UNTAET/REG/2001/10(13 July 2001), Section 22(2)
[115] The CAVR should not be confused with the *Truth and Friendship Commission* established in 2005 by the governments of Indonesia and East Timor as an apparent pre-emptive response to the recommendation of the UN Commission of Experts on East Timor to establish an international tribunal
[116] UNTAET/REG/2001/10, Sections 27(7),27(8),30(2),32
[117] *ibid*, Section 32, Schedule 1
[118] *ibid*, Section 33
[119] JSMP, *Report on East Timor's Draft Law on Amnesty and Pardon* (November 2002)
[120] Established by the Lomé Peace Accord of 7 July 1999, the TRC only became operative on 5 July 2002. The SCSL was established on 16 January 2002.

approach in Sierra Leone would be counter productive and could undermine the efficiency and integrity of the two parallel processes in areas such as cooperation, confidentiality, information sharing, amnesties and witness protection. Other areas of potential conflict included the possibility for conflicting conclusions on similar facts, questions arising with respect to the admissibility of statements taken before one forum being used by another, and on the possibility for TRC access to SCSL detainees, bearing in mind their leadership role.[121] In practice, with the exception of the question of access to SCSL detainees,[122] significant problems have failed to materialise. However, this was not because of legal certainty or institutional linkage, but due to a policy decision taken by the SCSL Prosecutor not to use information from the TRC, including self-incriminating testimony.[123] The ability of defence council to subpoena confidential information from TRC archives, however, remains unresolved and may yet surface, emphasising the continuing need for coherence.[124]

Summary

While the continued use of blanket amnesties remains a bar to prosecution in a number of States,[125] there is emerging practice on the exclusion of serious human rights and international humanitarian law violations from the scope of national amnesties. At the same time, there is emerging acceptance for the operation of targeted and conditional immunity with respect to specific lower level offenders in tandem with judicial processes. In 2001, then ICTY President Jorda, however, referring to a possible BiH TRC, stated "amnesty would result in a two-tier justice system: one for the major criminals and one for those who carried out the orders. This

[121] *Compare* Fritz & Smith who suggest the uncoordinated approached has been both justified - underlining the independence nature of each institution - and successful in practice; *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone* (2001) Fordham Int'l LJ 25

[122] *Prosecutor v Sam Hinga Norman* (SCSL-2003-08-PT-122)(28 November 2003)

[123] *See generally* Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court* (2004) Colum.LRev 104, 730

[124] Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone* (2003) HRQ 25, 1035-1066

[125] *See* most recently, e.g., the Justice and Peace legislation approved by the Colombian Congress on 21 June 2005 and ratified by the government in July 2005; and the September 2005 Algerian referendum approving President Abdelaziz Bouteflika's Charter for Peace and National Reconciliation, proposing a general amnesty for all human rights abuses committed in the country's internal conflict.

would be difficult to justify vis-à-vis the universal principles of human rights."[126] In order to encourage the lower ranking offenders to participate in the process of national reconciliation, he suggested that a truth commission could be empowered to make recommendations to local or even international prosecutors to consider their disclosures as mitigating circumstances for the purpose of sentencing at trial. This would be similar in effect to a guilty plea in consideration of sentencing in court.[127]

Jorda's comments illustrate the degree of uncertainty surrounding the extent of State obligations to prosecute international crimes. Should a State prosecute all possible perpetrators, or should it focus on the persons most responsible and particularly grave violators?[128] Orentlicher suggests that the prosecution of those most responsible for designing and implementing abuses or who committed particularly notorious crimes would seemingly discharge a government's customary law obligation: it would not require the prosecution of every offender.[129] The political, financial and social costs of mounting trials will normally militate against an exhaustive approach. The Rwandan experience has shown that the incarceration of tens of thousands of alleged perpetrators may strain a national legal system beyond capacity, may result in massive violations of pre-trial detention rights, and may hamper broader reconciliation and rehabilitation initiatives. There may thus be a need to strike a balance between pursuing accountability for serious criminal offences, while allowing truth and reconciliation initiates to offer specific and targeted amnesties for more wide-spread low-level crimes.

A successful framework for the interaction between prosecutions and reconciliation processes will require clearly defined procedural and institutional mechanisms to resolve issues regarding sharing of information, witnesses protection and confidentiality.[130] Measures also will need to ensure that the sharing of information does not inadvertently compromise a person covered by witness protection. The manner in which the prosecution uses any confidential information

---

[126] *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, ICTY Press Release, J.L./P.I.S./591-e (17 May 2001)
[127] *ibid*
[128] Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) EJIL 14, 494
[129] Orentlicher (1991), 2599; *see also* Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 Law & Contemp. Probs., 136; Pasqualucci (1994), 334
[130] Wierda et al., *Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone* (24 June 2002), 8-11

gathered will also need to be determined, such as, for example, for the sole purpose of generating new evidence and subject to assurances on non-disclosure.[131] Solutions could include utilising *in camera* proceedings or resort to comparable rules governing privileged communication and information.[132]

Ultimately, national or collective responses to post-conflict environments must seek to address a variety of goals, including ending impunity, truth-seeking, reparations, institutional reform, vetting, dismissal and the transparent re-selection of qualified public servants.[133] The re-building of the justice sector reform must be matched by reform of law enforcement agencies, prison services, legal education, crime prevention, victim protection, and above all, must be supported by transparent and accountable government.[134] Finally, the need to devise strategies to preserve hard-won peace processes and to build democratic foundations may necessitate the careful exercise of discretion as to the sequencing and timing of accountability processes rather than the granting of blanket immunities.[135]

[131] *See* ICC art.54(3)(e)
[132] *See* ICC Rule 73
[133] *Rule of Law Report*, S/2004/616
[134] *ibid*
[135] See *ibid*

V

Lessons Learned

Chapter 1 has shown that while individuals may be held criminally responsible directly under international law, there are a number of gaps in the norms and institutional apparatus governing the enforcement of international criminal law.

At the normative level, while it is clear that not every prohibition under customary or conventional norms carries individual liability, the 'core crimes' of international criminal law are governed by specific criminal sanction. More problematic is the issue of the resultant duties incumbent on States. As the section demonstrates, there is a paucity of enforcement provisions with respect to international crimes. Customary international crimes not based on a treaty instrument, such as crimes against humanity, have suffered for want of normative clarity. Although all States may have an interest in the repression of these crimes, the legal duty to do so remains uncertain. In terms of conventional obligations, certain war crimes offences, such as the non-grave breach provisions of the Geneva Conventions lack an explicit enforcement regime. The Genocide Convention carries a loose set of obligations, requiring action principally from the State where the offences occurred. Treaties containing an *aut dedere aut judicare* rule that obligate specific courses of action represent greater normative coherence. The grave breaches regime of the Geneva Conventions creates the most demanding set of obligations in this category, by requiring Parties to actively search out perpetrators on their territory in order to bring them to trial. National practice in actively implementing these duties, however, has remained piecemeal and sporadic. Typically, States have taken the view that there is no requirement to try an offender in the absence of an extradition request, much less to search them out. Thus, despite the varying precision of these enforcement frameworks, the bases for the exercise of jurisdiction may be said to be governed by permissive, as opposed to mandatory, rules. The discretionary nature of norm enforcement results from the absence of a mechanism to ensure compliance where States decline to assert their criminal jurisdiction or to fulfil their treaty obligations.

The system operates outside of an institutional context that would convert a specific legal duty into a mandatory responsibility incurring sanction. The gaps identified, thus, relate both to normative and structural weaknesses.

The establishment of international courts and tribunals can help close these gaps by placing the obligations of States into a vertical, supra-national paradigm. Nonetheless, as Chapter 2 explains, a supra-national institutional framework without an international enforcement agent will not be able to ensure compliance. Lacking this, international courts and tribunals will have to rely on the horizontally structured inter-State system for the implementation of their decisions, including those that require coercion. Within this framework, States will comply with their international obligations either on a voluntary basis or will be induced or coerced to do so by a more powerful third State, whether bilaterally or through the forum of an international organisation.[1] Structural gaps will persist, therefore, even with the creation of international courts and tribunals with mandatory powers where they are not matched by adequate enforcement mechanisms.

Chapters 3 and 4 have examined how States have complied with their obligations under international criminal law. Of the different accountability models reviewed, the enforcement of international criminal law has proved most successful where the pursuit of justice has ridden rough-shod over State sovereignty, as in the unique example of post-WWII Allied controlled Germany and Japan, although this is unlikely to represent a model for future enforcement. As noted above, the immediate post-WWII trials can be considered an aberration from State practice. The convergence of a set of unique circumstances allowed for these trials to take place. The occupying Allied forces exercised complete control over the territory where the offences took place, were able to secure custody over all accused persons, and enjoyed an unprecedented unanimity of international political support. There was simply no question of the defeated nations withholding cooperation.[2] The ensuing trials both at the international and domestic level, were able to rely on direct enforcement by the Allied powers within their respective military zones. As a result, there was a total vertical ordering of jurisdiction over core crime offences at the

[1] On the lawfulness of belligerent reprisals *see* Greenwood, 'The Twilight of the Law of Belligerent Reprisals' (1989) Neth.Yrbk.IL 20, 54-55

[2] The U.S. led invasion of Iraq in 2003 and its subsequent occupation and control by the Coalition Provisional Authority may represent, despite sustained resistance, the nearest approximation to the control over territory and custody over accused persons exercised by the Allied powers after WWII.

legislative, adjudicative and enforcement level; although, by the same token, there was a complete absence of international scrutiny over Allied offences. This confluence of politics and law on the international stage at the time represented the nearest approximation to an international legal order backed by full coercive powers, and revived failed inter-war efforts to establish a global collective security system. The accord between the community of nations, however, soon fractured as the Cold War set in, and the jigsaw pieces that had been temporarily thrown into flux by the global upheaval fell back into place in their time-honoured configurations of State sovereignty and national interest.

The meeting of global political will with international accountability has never been repeated since and, indeed, is unlikely to recur without a fundamental re-ordering of humanity's collective life. Later high profile war crimes trials have taken place in the traditional arena of competing political and legal interests, guided by the promptings of national sovereignty. In the case of the former Yugoslavia and Rwanda, although the concept of an international justice was revived, the scope for direct enforcement at the international level was far more reserved. Instead, the *ad hoc* Tribunal have had to relied on national cooperation for all issues pertaining to the exercise of their jurisdiction. Thus, on the normative level, the ICTY and ICTR represent vertical extensions of the Security Council's Chapter VII authority. The scope for international executive powers, however, has been limited to post-conflict peace-enforcement presences in Bosnia and Kosovo (i.e. omitting the rest of the former Yugoslavia or Rwanda), while the appetite for robust military assistance to the Tribunals has suffered irregular political support from troop contributing capitals. In the place of direct enforcement, compliance has been coaxed or coerced primarily through the soft pull of external political, development and trading interests. Such linkage has sought to heighten the reputational risk attached to a notification of non-compliance by the Tribunals. The indirect nature of such leverage, nonetheless, has meant that both the ICTY and ICTR have been repeatedly frustrated in their efforts to seek the routine enforcement of their decisions by national authorities and have thereby been hampered in their efforts to ensure expeditious and efficient investigations and prosecutions. Despite their many notable achievements, the *ad hoc* Tribunals have been acknowledged by the UN as costly and time-consuming models and are unlikely to be replicated.

Hybrid or internationalised courts, where matched by adequate support, fill a niche between fully international and domestic trials. The different variations on the hybrid model have all sought to strengthen national capabilities by combining the benefits of international expertise with 'local' justice. The proximity of these courts to the events has meant better access to evidence and witnesses than remote international bodies, and has resulted in cheaper operational costs. Typically, the scope for outreach has been considerable, as has the ability of the courts to generate a greater sense of credibility and legitimacy, thereby contributing more easily to national reconciliation efforts. The courts have also brought a number of potential benefits, including long-term capacity building, development of national jurisprudence and strengthening of the administration of justice. Hybrid courts have retained, nonetheless, many of their weaknesses of their purely domestic counterparts. Their delivery of post-conflict transitional justice has been particularly hampered by failings in areas such as staff security and witness protection. The courts have succumbed, moreover, to the familiar pressures of domestic political life in their attempts to pursue leadership offenders. The most significant weakness of hybrid bodes as an alternative to fully international courts, however, lies in their inability to override inter-State rules on immunities, mutual legal assistance and extradition. Despite these limitations, it is likely that internationalised courts will continue to play an important role in complementing international courts and tribunals, rather than representing an alternative model.

The national authorities, moreover, will continue to shoulder the main burden for the investigation and prosecution of international crimes. It is axiomatic that the system of international criminal justice will always rely on domestic adjudication. Even with an international process focussing on the top strata of criminal activity, the vast majority of cases involving mid to low-level offenders will fall to the national level. Indeed, as the preamble to the Rome Statute affirms, the primary duty to exercise criminal jurisdiction over international crimes rests with States, not international institutions.

Equally, in historical perspective, it is clear that there has been little consistency in the exercise of jurisdiction over international criminal offences by national authorities, there being far too many instances in which prosecutions simply

did not occur.[3] The continued use of blanket amnesties remains a bar to prosecution in a number of States. The emerging practice on the exclusion of serious human rights and international humanitarian law violations from the scope of national amnesties is a welcome development. At the same time, there may be scope for the operation of targeted and conditional immunity for specific lower level offenders in tandem with judicial processes. Moreover, it is apparent that the peace and justice debate may require careful considerations exercise as to the sequencing of trials rather than the granting of amnesties.

Where trials are pursued, the State where the crime occurred will normally be best placed to exercise jurisdiction. Where that State is willing to proceed with trials, but is unable to do so due to resource constraints, international assistance may be possible. This may range from the provision of technical and financial assistance and training to strengthen domestic efforts, to the establishment of internationalised judicial processes as discussed above.

In addition to the State directly effected, there has been an increased tendency in recent years for other States to exercise their concurrent jurisdiction through a range of extra-territorial jurisdictional bases, including active personality and, more exceptionally, passive personality and universality. A third State may seek to assert jurisdiction, in particular, where the territorial State has failed in its duty to enforce treaty norms either because it lacks domestic willingness to enforce accountability or it is unable to mount resource-intensive trials. This echoes the well known dictum in the *Barcelona Traction* case where a distinction was drawn between obligations owed to particular States and those owed "towards the international community as a whole". In relation to the latter, the ICJ held "[i]n 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*".[4]

The *Pinochet* ruling of the House of Lords together with the several actions

---

[3] Joyner estimates at least 220 non-international armed conflicts leading to 86 million deaths since World War II, for which there has been "relatively few prosecutions and only scarce accountability", 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', (1998) Denver J. Int'l L. & Policy 26, 591

[4] *Barcelona Traction case*, ¶33. The statement has found expression in article 48(1)(b) of the ILC *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), which provides that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State ... if ... the obligation breached is owed to the international community as a whole"; A/56/10 (2001). This, nonetheless, is subject to draft articles 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility)

brought by the countries asserting jurisdiction in that case have displayed the emergence of an acceptance of exceptions to the immunity *ratio materiae* attaching to State officials for serious international crimes.[5] The Appeals Court decision in *Jones* together with established U.S. jurisprudence, moreover, appears to suggest an emerging State practice on the application of exceptions to functional immunity also for civil claims brought in respect of international criminal conduct offending *jus cogens*. This will have important implications for the ability of national courts to enforce international criminal law norms against State officials through the exercise of extra-territorial jurisdiction.

The upswing of activity by national authorities in recent years with respect to offences committed abroad comes as a welcome relief to the previous inaction.[6] In part, this has been based on a reinvigorated legislative framework for the prosecution of serious human rights and humanitarian law violations introduced, in many instances, under the rubric of national legislation implementing for the ICC Statute (see below, Chapter 9). States are also increasingly allocating dedicated resources for core crimes investigations. Following initiatives started during the 1980s to investigate WWII related offences, a number of national authorities have established specialised agencies to handle the investigation and prosecution of contemporary core crimes. Canada's Modern War Crimes Program, for example, was established in 1998 to bring together criminal investigations and immigration authorities. As of March 2005, more than 100 files were being examined involving allegations from Afghanistan, Angola, BiH, Burundi, Chile, China, Colombia, Croatia, El Salvador, Ethiopia, Guatemala, Honduras, Iraq, Lebanon, Nigeria, Peru, Philippines, Rwanda, Senegal, Serbia and Montenegro, Sierra Leone, South Africa, Sri Lanka and Sudan.[7]

---

[5] *See* cases cited above Chapter 2, n.72-73

[6] *See, inter alia, R. v Zardad*, Central Criminal Court (Old Bailey) (18 July 2005), unreported, concerning torture and hostage taking in Afghanistan; *09_751105-04_55006-05*, Rechtbank s'Gravenhage, Judgment (14 October 2005) (The Netherlands), unreported, concerning war crimes and torture in Afghanistan; *Van Anraat*, Rechtbank s'Gravenhage, Judgment (23 December 2005) (The Netherlands), unreported, concerning complicity in war crimes committed in Iraq; *SN*, Rechtbank Rotterdam, Judgment (7 April 2004) (The Netherlands), unreported, concerning torture in DRC; *X Ely*, Cour de Cassation (23 October 2002) (France), appeal no.02-85379, [2002] Bull.crim., no.195, 725, concerning torture in Mauritania. For cases involving military personnel oversees *see also*: *Evans et al.*, Judge Advocate General (UK), *Decision following submission of no case to answer* (3 November 2005) OJAG Case Ref:2005/59, unreported, concerning murder in Iraq (dismissed); *R. v Brocklebank*, Court Martial Appeal Court, Judgment (2 April 1996)(Canada),134 DLR(4th)377, concerning torture in Somalia (dismissed); *R. v Brown*, Court Martial Appeal Court, Judgment (6 January 1994)(Canada), unreported, concerning torture in Somalia (dismissed).

[7] Canada's Program on Crimes Against Humanity and War Crimes, *Eighth Annual Report 2004-2005*; http://www.cbsa.gc.ca/general/enforcement/annual/wc-cg2005-e.html

The Danish Special International Crimes Office was established in 2002 and has since received over 100 cases involving crimes committed in 30 countries, including cases from the former Yugoslavia, Iraq, Afghanistan, Uganda and Lebanon.[8] The Dutch Unit for International Crimes Investigations and the Swedish War Crimes Unit have also been dealing with cases arising from multiple situations. European efforts are now coordinated via a network of focal points for war crime related offences established in each EU Member State,[9] while Interpol has established a world-wide national focal points system to provide coordination and support for law enforcement agencies and international organisations responsible for the investigations of genocide, war crimes and crimes against humanity.[10] Such efforts bode well for the ability of national authorities to share a distribution of workloads with an ICC that is focussed on the prosecution of persons most responsible.

The expectation, however, that national authorities will be able routinely engage significant resources into costly trials for crimes committed abroad, and which may have little connection to the forum State, appears misplaced. At present, investigations leading to domestic prosecutions for crimes committed abroad remain exceptional. Rather, the majority of investigations lead to exclusion from refugee and immigration procedures and to deportations.[11] As the burden will normally fall on the State where the offence occurred, one option may be for countries with dedicated expertise to share investigative materials related to exclusion case files with the State of the accused' nationality for the purpose of prosecution at home. Other more recent initiatives suggest this could be buttressed by bilateral financial and technical assistance aimed at strengthening the domestic capacities of otherwise 'unable' States.[12] In other situations, meanwhile, the State of nationality will be unwilling to undertake prosecutions; although this may possibly be tempered in specific cases by external inducement or coercion.

Even where States assert jurisdiction, however, there will remain a number of inherent weaknesses in an enforcement model that relies on domestic adjudication. As the Pinochet extradition proceedings have illustrated, differences in the application of laws based on the same international norms by national courts may obscure the

---

[8] Source: http://www.sico.ankl.de/page34.aspx

[9] See below, Chapter 8

[10] Source: http://www.interpol.int/public/CrimesAgainstHumanity/default.asp

[11] *See* Art.1(f), *Convention Relating to the Status of Refugees* (1951)

[12] *See* Justice Rapid Response Initiative ('JRR'); updated information available at http://www.omm.com/webcode/navigate.asp?nodelHandle=486&idContent=5685

emergence of consistent jurisprudence. As Simpson points out in a comment that remains accurate almost a decade later, "[d]omestic laws have been applied in an irregular and often dubious manner to a very small number of suspected war criminals...," while "[m]unicipal tribunals have proved unsatisfactory, subjective and selective in their definitions of war crimes and crimes against humanity".[13] Domestic war crimes prosecutions, thus, remain highly selective and exceptional, subject to substantive and procedural variations, and ultimately unable to construct a general sense of a 'rule of law' for the crimes under consideration. Bhattacharyya has described this as a process of fragmentation in the application of international law:

> The drawback of an international criminal justice system that relies on domestic adjudication ... is that even when each national adjudicatory mechanism is in compliance with the rule of law on an individual basis, in the aggregate, the international rule of law may suffer. The vagaries of national adjudication, the varying sophistication of national adjudicatory mechanisms, and the substantial danger that like cases will not be treated alike are factors which may hinder the development of an aggregate international rule of law.[14]

The most consistent under-performers in this category have been States in, or recently emerging from, conflict. The record shows that local courts are particularly unwilling or unable to handle war crime cases in an effective and impartial manner. The organisation and functioning of judicial systems in such settings has routinely fallen short of internationally recognised human rights and fair trial standards. Endemic failings have included high levels of political influence over proceedings; lack of judicial independence and impartiality; ethnic bias in the conduct investigations and prosecutions; low competence levels of the police and judiciary; an absence of suitable infrastructure and financial support for trials; deficient witness protection or safety for personnel, premises and information; and a dearth of inter-State judicial assistance. Where they have occurred, prosecutions have focussed mainly on low to mid ranking officers, while ignoring senior members of the current and former military, police and political elite.

The reality is that these conditions represent the type of situation the ICC will most frequently confront. In most of the case studies examined above, the State

[13] Simpson, in McCormack and Simpson (1997), 29

[14] Bhattacharyya, 'Establishing a Rule-of-Law International Criminal Justice System' 31 Texas Int'l Law Jrnl (1996), 73-4. *See also* Marschik, 'European Approaches to War Crimes', in McCormack and Simpson (1997), 65-101; Warbrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia', (1996) ICLQ 45, 947-954

concerned would have likely fallen short of the unwilling or unable test established by the Rome Statute. Accordingly, jurisdiction would have reverted to the ICC. Given that the ICC Statute relies heavily on domestic modalities and cooperation by States for the implementation of its jurisdiction, this would have made the ICC dependent on the same institutional and procedural weaknesses that were deemed unwilling or unable to support domestic investigations and prosecutions. As Louise Arbour has commented,

> No one should expect that States emerging from armed conflict marked by the commission of massive human rights violations, will revert to well-functioning and co-operative democracies as soon as hostilities cease.... The Prosecutor's investigative powers should be seen against this sober background - and not through the spectrum of traditional judicial assistance and cooperation between like-minded democratic States in peace time.... The permanent Court should not be forced by the Statute into dependency on national authorities which find themselves in difficult transitions. Such dependency would probably harm the credibility of the Court, as it would unavoidably become either impotent, or else tainted by the lack of legitimacy of national authorities in question.[15]

The purpose of Part III of the study, therefore, will be to assess whether the ICC will be able to overcome the weaknesses that have hitherto plagued the enforcement of international criminal law. The proceeding sections will explore the concept of complementarity as a mechanism to bring disparate national and international efforts into a framework characterised by interaction, cross-fertilization and cooperation.

[15] Arbour, 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court' (1999) Windsor Yearbook of Access to Justice 17, 207-220

Part III: The International Criminal Court

VI

Jurisdiction

The Rome Statute represents an effort by the international community to overcome the structural flaws in the inter-State system related to the enforcement of international criminal law. The Statute creates a framework for outside intrusion into one of the most traditional aspects of State sovereignty – the exercise of criminal jurisdiction.[1] However, rather than imposing a vertical relationship from without, it invites States to voluntarily submit to the Court's jurisdiction on the condition that an effectively functioning national system will exclude external interference in their domestic affairs.

Part III will explore whether the new system established by the Rome Statute will succeed in promoting compliance where other mechanisms have failed. In particular, the present chapter and the one that immediately follows will examine the two stage process by which cases may come before the ICC: the determination that a case falls within the jurisdiction of the Court, and that it would be admissible.

1. COMPLEMENTARY JURISDICTION

The complementarity regime of the ICC is the centrepiece of the Rome Statute. While confirming the notion of concurrent jurisdiction, it departs from previous international models of criminal jurisdiction by emphasising a preference for the exercise of domestic jurisdiction over international crimes. In establishing the relationship between the ICC and national courts, the preamble to the original 1994 ILC Draft

[1] "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." *Island of Palmas Case (Netherlands v U.S.)*, Permanent Court of Arbitration (1928), 2 UN Rep. Int'l Arbitral Awards, 829

emphasised that while "the court is intended to exercise jurisdiction only over the most serious of crimes of concern to the international community as a whole", it is intended to be "complementary to national criminal justice systems in cases where such trial procedures may be not available or may be ineffective".[2] This premise was kept throughout the drafting process leading up to Rome and is preserved in the preamble to the Statute. Thus, in line with the exhaustion of local remedies principle, the jurisdiction of the ICC will become effective only where national authorities fail. The Court is guided by principles of partnership and dialogue, encouraging genuine national proceedings, while remaining vigilant should such efforts fail.[3] The ICC Prosecutor has already stated that he does not intend to 'compete' with States for jurisdiction and would welcome an absence of trials before the Court as a consequence of the regular functioning of national institutions.[4]

It is often suggested by commentators that the principle of primacy exemplified by the IMTs and the *ad hoc* Tribunals has been reversed in the Rome Statute. However, this confuses the issue of admissibility with that of primacy. Under the Rome Statute, while State Parties retain primary responsibility for the investigation and prosecution of core crimes, once a case has been found admissible before the Court it is the ICC that has primacy over concurrent domestic proceedings with respect to a particular case. Had the Statute created an inverted image of the *ad hoc* Tribunals, national courts would have been able to seek a deferral of a case from the ICC to the domestic level at any stage in the proceedings on the basis of a national decision to that effect. Instead, the Rome Statute establishes the competence of the ICC to review the *bone fides* of national proceedings and, moreover, empowers the Court to recall cases previously deferred where appropriate.

Others have suggested that the Rome Statute not only give States Parties the first right to prosecute violations, it creates an absolute duty for State Parties to do so. Schwartz, for example, pointing to article 17 of the Statute, observes that "provided that the alleged human rights violator is not surrendered to the ICC, a duty exists for states subject to the jurisdiction of the ICC to prosecute them in domestic courts".[5] This incorrectly imports an *aut dedere aut judicare* standard into the Rome Statute.

---

[2] A/49/10(1994), 44

[3] *Informal expert paper: The principle of complementarity in practice* (ICC-OTP 2003), 3-4

[4] Luis Moreno-Ocampo, *Statement* (16 June 2003); *Paper on some policy issues before the Office of the Prosecutor* (September 2003) ('OTP Policy Paper')

[5] Schwartz, 'Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the "Dirty War" in International Law' (2004) Emory International Law Review, 342-43

As recalled in the preamble, States have a pre-existent duty under customary and conventional law to repress international crimes. Article 17 of the Statute, however, relates only to the admissibility of a specific 'case'. As such, a State's legal obligation under the Statute to investigate or prosecute will be arise only in relation to a particular case that has been deferred to it by the Court. By the same token, a State's challenge under article 19 that it has launched or undertaken investigations or prosecutions with respect to a situation before the Court will only have suspensive effect on ICC proceedings if it relates to the particular case that is the subject of the Prosecutor's investigations. A general declaration by a State that it is initiating its own investigations will not be sufficient.[6]

Another feature of complementarity is its potentially beneficial effect for national authorities. In the case of the IMTs and the *ad hoc* Tribunals the distribution of case loads with domestic courts was guided by the primacy these institutions enjoyed, enabling cases to be transferred up or down at their discretion. Although the decisions flowing from these international bodies had some precedent setting value for national courts, because of their *sui generis* nature, these institutions have had limited impact on the enforcement of norms at the domestic level. In contrast, the ICC enjoys a much closer relationship with national proceedings since the triggering of its own jurisdiction is dependent on State action. The ability of the Court to make a finding as to genuineness of national efforts means that the ICC is likely to act as a catalyst for domestic action, and spur otherwise reluctant States to exercise their own jurisdiction so as to avert ICC intervention. National ICC implementing legislation, moreover, has come to set in motion a process of harmonisation of substantive definitions of crimes and general principles of international criminal law around the standards set by the Rome Statute (see below, Chapter 9). Thus, while the IMT at Nuremburg and Tokyo and *ad hoc* Tribunals were granted unchallengeable primacy over national courts, the ICC promises to exercise a far more profound influence on domestic investigations and prosecutions.

[6] See below, Chapter 7

2. PRECONDITIONS TO THE EXERCISE OF JURISDICTION

While States were quick to achieve consensus over the principle of complementarity during negotiations, differences persisted over how this should be exercised. These debates displayed the opposing views over the relationship between national and international law discussed in Chapter 2. Those of a more 'supranational' viewpoint started from the perspective that international courts are designed to address the failings of national courts by exercising jurisdiction in a non-selective, non-partisan and genuine manner free from political interference. The 'statist' thesis held that granting intrusive powers to international judges and prosecutors would represent an inappropriate infringement on State sovereignty. These opposing views played themselves out in the options laid out for the jurisdictional regime of the Court. The analysis below suggests that the Statute offers a balanced approach to resolving these opposing tensions States act in good faith, but invites considerable scope for abuse by non-genuine States.

Two questions bring these issues into focus. What should be the effect of accepting the Statute? Should becoming a State Party constitute automatic acceptance of the Court's jurisdiction *ratione materiae*, or should a State Party have to indicate its specific consent to the Court's jurisdiction over each of the listed crimes? Secondly, on what jurisdictional basis should the Court base its exercise of jurisdiction, namely which States must have accepted the jurisdiction of the Court in relation to the situation in question?

(a) Effect of acceptance of the Statute

In its 1993 Report, the Working Group of the ILC presented two options for State acceptance of the Court's jurisdiction: an 'opt-in' regime, similar to that of the ICJ, whereby the ICC only intervenes with the consent of States concerned; and an 'opt-out' approach, whereby the competence of the Court's jurisdiction would be presumed unless prospectively indicated otherwise by State Parties, subject to sixth month's advance notice.[7] The ILC favoured the former, with the proviso that the custodial

[7] A/49/10 (1994),82-3; A/51/22 (1996), ¶117-119

State had the obligation either to cede jurisdiction to the ICC, or to try or extradite the suspect to a requesting State in line with the *aut dedere aut judicare* rule of inter-State cooperation in criminal matters.[8]

In its final 1994 Draft, the ILC distinguished between two separate regimes for the exercise of the Court's jurisdiction. Draft article 21(1)(a) granted 'inherent' or 'automatic' jurisdiction over the crime of genocide, by virtue of article VI of the 1948 Genocide Convention, meaning that a contracting State Party to the Statute automatically accepted the jurisdiction of the Court over the crime.[9] By contrast, draft article 21(1)(b) established an opt-in regime for the remaining crimes requiring separate State consent for the exercise of jurisdiction over each of the listed crimes. Draft article 22(2) established a procedure similar to that of the optional clause under article 36(3) of the ICJ Statute, enabling a State to declare its acceptance either generally or with respect to a particular conduct or to conduct committed during a set period of time. Withdrawal of such acceptance would be subject to six month advance notification and would not effecting proceedings already commenced. Draft article 22(4) allowed a non-State-party to accept the jurisdiction of the Court by a declaration lodged with the Registrar.[10]

While inherent jurisdiction over genocide was recognised only by way of a standing treaty, for many States during subsequent negotiations it appeared unsatisfactory and undesirable to maintain a hierarchy of regimes given the proposed concentration of the Statute on the most egregious crimes. There was a fear also that failure to extend inherent jurisdiction to war crimes and crimes against humanity ran the risk of undermining the credibility and effectiveness of the Court, by creating an ICC 'á la carte'[11] that would burden the Court with subtle determinations of jurisdictional claims. As a result, the overwhelming majority of States during negotiations leading up to Rome accepted inherent jurisdiction, rendering the opt-in regime of draft article 22 redundant.[12] Accordingly, under the Rome Statute consent to the exercise of jurisdiction over the listed crimes is rendered automatically upon

---

[8] A/49/10(1994), 81

[9] The ILC commentary cited article VI of the Genocide Convention together with its *travaux préparatoire* (E/794(1948),11-12) as the basis for the operation of inherent jurisdiction for State Parties to both the Genocide Convention and the Statute; A/49/10,(1994), 67-68, 81-82.

[10] *See* options in Zutphen Draft article 6[21],article 7[21*bis*],article 8[21*ter*],article 9[22]; article 21-22, A/AC.249/1997/L.8/Rev1

[11] A/51/22(1996)

[12] The U.S., nonetheless, maintained its support for an opt-out regime for the crimes until the final day of the Conference; A/CONF/183/C.1/L.90(1998)

acceptance of the Statute. In the effort to bridge compromise proposals, however, a remnant of earlier debates remains by virtue of article 124, which enables a State to declare a temporary seven years opt-out with respect to war crimes alleged to have been committed by its nationals or on its territory. The article is framed as a transitional clause allowing a one-time non-renewal exception and will have thus limited impact on the overall principle of inherent jurisdiction. The provision, furthermore, is to be reviewed at a Review Conference seven years after the entry into force of the Statute. The other exception to the principle of inherent jurisdiction is the crime of aggression which is to operate on an opt-in basis. As article 121(5) of the Statute provides "[i]n respect of a State Party which has not accepted the amendment [e.g. establishing aggression], the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory". The provision also acts as an exception to the jurisdictional regime established for the core crimes, whereby the Court may exercise jurisdiction where either the State of nationality of the accused or the territorial State is a State Party, by converting the alternative formulation to a cumulative one. The same cumulative rule will hold also for any other crimes added to the Statute.

States that are not party to the Statute may declare their consent *ad hoc* to the exercise of jurisdiction by the Court *ad hoc*.[13] The possibility to include non-State Parties is consistent with the desire to include the broadest possible participation in the functioning of the Court. As foreseen by the ILC, the availability of the ICC enables, moreover, implementation of article VI of the Genocide Convention which provides that Parties may transfer jurisdiction to "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[14] Thus a State which is a party to the Genocide Convention could lodge a complaint with the Court without becoming a Party to the Rome Statute. Parties to the Genocide Convention, inversely, would not be bound by article VI thereof to adhere to the ICC Statute. A State declaring its acceptance of the Statute *ad hoc*, however, cannot thereafter avail itself of the opt-out provisions of article 124 with respect to war crimes. The conditions under which the Court will exercise its

[13] The uncertainty created by the poor wording of article 12(3) whereby a declaration is made "with respect to the crime in question" has been rectified by the RPE which clarify that a declaration under the article "has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation...".

[14] A similar provision appears in art.5, Apartheid Convention

jurisdiction in relation aggression and any other crimes added to the Statute by amendment will need to regulate also the effect of article 12(3) declarations.

Where the Security Council refers a situation to the Court under article 13(b), any UN Member States so directed by the Council, whether a party to the Statute or not, must accept the exercise of ICC jurisdiction and cooperate fully with the Court.[15] Where a State Party has lodged a declaration under article 124 opting-out of the war crimes provision the Council can, by virtue of its Chapter VII powers and article 103 of the Charter, modify the obligations of that State towards its treaty obligations by requiring it to accept the jurisdiction of the ICC also with respect to war crimes. As above, States not Parties to the Statute cannot avail themselves of the opt-out regime. Although the conditions for the exercise of jurisdiction in relation to aggression and any other crimes added by amendment will need to be defined separately, it is assumed that a Council referral would also activate the inherent jurisdiction of the Court in relation to these crimes.

There is no simple formulation for the manner in which the Court will exercise jurisdiction over each of the listed crimes. The situation may be summarised as follows:

(1) in relation to genocide, crimes against humanity and war crimes, jurisdiction is inherent for State Parties;
(2) in relation to war crimes, State Parties can *opt-out* of the Court's jurisdiction for a one-time 7 year period upon acceptance of the Statute;
(3) in relation to aggression and any other crimes added to the Statute by amendment, jurisdiction will operate on an *opt-in* basis for State Parties;
(4) Where a non-State Party declares its acceptance of the Court's jurisdiction *ad hoc*, jurisdiction will be inherent over genocide, crimes against humanity and war crimes. The effect of such a declaration in relation to aggression and any other crimes added to the Statute by amendment is yet to be defined.
(5) Where the Security Council refers a situation to the Court, jurisdiction will be inherent over genocide, crimes against humanity, war crimes. Inherent jurisdiction will likely extend also over aggression and any other crimes added to the Statute by amendment, although this remains to be defined.

[15] As the Darfur referral has demonstrated, the Council need not render the obligation to accept ICC jurisdiction and to render cooperation binding on all States, but only on those so directed; S/RES/1593

(b) State consent regime

Differences during negotiations persisted also over the setting of additional preconditions to the exercise of jurisdiction. At one end of the spectrum, some delegations argued for a strict State-centric regime whereby the Court would need to secure the consent of all interested States before it exercised any aspect of its jurisdiction. At the other extreme, others sought to exclude additional preconditions subsequent to acceptance of the Statute in order to enable the Court to exercise as broad a base of jurisdiction as possible. Germany, in particular, argued that the ICC should not enjoy a lesser right than domestic courts did. Although this proposal generated some sympathy during negotiations, it was ultimately dropped in favour of elaborating an explicit jurisdictional nexus. Significant differences persisted as to the jurisdictional bases upon which such a nexus should rely. Several States, most notably the U.S., insisted on a regime which would require the consent of both the State of nationality of the accused as well as the State of territory of the offence. This would have effectively excluded the jurisdiction of the Court over nationals of non-Parties States without the prior consent of that State. In a proposal that gained widespread support and that would have enabled the Court to exercise in a manner resembling the German proposal, the Republic of Korea proposed that the Court's jurisdiction be linked to fulfilment of one among a disjunctive list of four jurisdictional bases: the State of nationality of the accused, the State of nationality of the victim, the State on the territory of which the crime occurred, or the State with custody over the accused.

The final wording of article 12 as adopted reflects an attempt to bridge the majority preference for a broad approach and the narrow view adopted by a minority of powerful States. The article lists those States which must be Parties to the Statute or have given their *ad hoc* consent as either the State on the territory of which the crime occurred or the State of the nationality of the accused. Jurisdiction is therefore based on traditional principles of territoriality and active personality. Thus, subject to the application of article 16 and article 124, where ICC jurisdiction is asserted on the basis of the nationality of the accused, the Court will have jurisdiction regardless of the territory where the crime occurred. Where ICC jurisdiction is asserted on the basis of territoriality, the Court will have jurisdiction regardless of whether the State of the

nationality of the accused is a State Party or not.[16] These additional preconditions do not apply to Security Council referrals. In that instance, the source of the obligations of States to cooperate with the Court will be the Chapter VII resolution itself.[17]

As a number of State Parties and commentators have noted, the jurisdictional regime established under article 12 creates a serious lacuna by omitting the custodial State. This means that the Court will be unable to exercise its jurisdiction even though an offender may be in the custody of a State Party who is willing to surrender him or her to the Court unless the State in whose territory the crime occurred or the State of accused' nationality has also accepted the Court's jurisdiction or the Security Council has referred the situation.

From a negotiating perspective, the compromise wording for article 12 put forward by the Bureau of the Rome conference should be understood in the context of the make-or-break package that was presented to plenipotentiaries on the last day on the conference. Nonetheless, while it may be true that only a restrictive consent requirement could have secured the support of the overwhelming majority of States, the result represents a regrettable lapse in the jurisdictional reach of the Court. As such, the ICC will have less power to bring perpetrators to justice than do national courts.

3. TRIGGER MECHANISMS

Another critical factor affecting the assertion of jurisdiction is the Court's trigger mechanism scheme. As stipulated in article 13 of the ICC Statute, situations may be brought before the Court via three routes: a State Party, the Security Council or the Prosecutor.

(a) State Party

A number of issues were raised during the drafting of this provision: should States be able to refer individuals, crimes or situations to the Court; which States should have the right of referral; and what safeguards should be put in place to guard against

[16] For U.S. objections *see* Chapter 1; Scheffer (1999), 12
[17] See below, Chapter 8

frivolous complaints?

Draft article 25 of the ILC draft Statute envisaged complaints being lodged by State Parties with respect to both crimes and specific suspects. During early discussions in the Ad Hoc Committee concern was expressed that allowing States to forward individual cases could politicise the referral procedure. The provision also appeared inconsistent with draft article 23(1) whereby the Security Council could only refer a "matter" and not individual suspects. As pointed out by one PrepCom delegation, if the purpose was to prevent politicisation through the targeting of individuals, States were far more likely to lodge a complaint out of purely political considerations than the Security Council.[18] States could selectively target individuals or a particular side of a conflict, particularly in internal armed conflicts. The other principal features of the ILC Draft were the requirements that a complainant State in the case of genocide be a contracting party to the Genocide Convention (draft article 25(1)), and that for the remaining listed crimes, a State Party could only bring a complaint with respect to a crime for which it itself had accepted the jurisdiction of the Court (article 25(2)). To guard against possible abuse, further proposals in the Ad Hoc Committee and PrepCom process suggested restricting the right of referral to only those State Parties with an 'interest' in the matter. Interested States for this purpose included the State on the territory of which the crime occurred, the State of nationality of the accused or of nationality of the victim, and the State with custody over the accused.

Given the universal affront of the core crimes under consideration, the concept of interested States gave way during negotiations to the overarching principle that such crimes are of "concern to the international community as a whole", thereby underlining the responsibility of all State Parties in their repression. At the same time, the incorporation of provisions governing which crimes could be referred to Court became obsolete as consensus developed over the referral of situations and not crimes or suspects to the Court and agreement was reached on the concept of inherent jurisdiction. Thus, article 14 as adopted stipulates that upon referral by a State Party the Prosecutor will conduct a preliminary examination of the situation in order to determine whether one or more specific persons should be charged with crimes under the Statute. In arriving at his decision, the Prosecutor will consider whether: (a) there

[18] Statement by Russian Representative, PrepCom IV (August 1997); on file with author

is a reasonable basis to believe that a crime under the Statute has been committed; (b) the case would be admissible under the complementarity provisions of article 17; (c) the investigation would not serve the interests of justice.[19] The referral of situations instead of persons and the independent identification of individual liability by the Prosecutor act as important safeguards to guard against politically motivated referrals.

Article 14(2) of the Rome Statute requires States to accompany a referral with any supporting documentation available to the State and to "specify the relevant circumstances". The requirement is supplementary in nature and as suggested by the phase "as far as possible" is left to the discretion of States. Rule 104(2) clarifies that the Prosecutor, as in the case of communications under article 15, will be able to "seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court." Nonetheless, one of the listed grounds by which the Prosecutor may decide against initiating an investigation is the lack of information "made available to him or her" that could provide a reasonable basis to believe a crime under the Statute has been committed or that a sufficient legal of factual basis exists to seek a warrant or summons. Where a negative determination is made, the Prosecutor must inform the State making the referral of the reasons for his conclusion. One purpose for this provision is to enable the State to provide such additional information as it may possess. As article 14 stipulates, "[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information." A State Party also may pass information directly to the Prosecutor under article 15, although this would involve the more cumbersome procedure of obtaining Pre-Trial Chamber authorisation for an investigation to proceed. Nonetheless, States may favour passing information in this manner rather than through a formal referral.[20]

One of the early concerns expressed by commentators was the likely limited invocation of State referrals procedure. Traditionally, State-based complaint mechanisms have not fared well under international conventions. Not a single inter-

[19] Article 53 ICC Statute

[20] To avoid any undue publicity that may occur from an abuse of the triggering process, one proposal in the PrepCom process suggested confidentiality for proceedings at preliminary stages, giving all interested States the opportunity to participate before a public indictment is brought. This would have served as an additional procedural guarantee to protect the interests and secure the confidence of States; A/51/22 (1996) Vol. I, ¶147

State complaint has been filed under the ICCPR, the UN Convention Against Torture, UN Racial Discrimination Convention and the Inter-American Convention on Human Rights or the African Charter, while only 18 have been brought under the ECHR and two under the Genocide Convention. Although State complaints under the ICC deal with individual and not State liability, the anticipated political repercussions of such referrals were feared to induce an equal measure of reluctance. It is, therefore, of note that the first investigations before the ICC relating to the situations on the DRC and Northern Uganda have occurred in accordance with article 13(a). In addition, a State Party referral has been made by the Central African Republic, while an *ad hoc* declaration accepting the jurisdiction of the Court has been received from Côte d'Ivoire.[21] Significantly, in each of the above, the State lodged a self-referral with respect to a situation arising within its own territory. Such self-referrals, however, should not underestimate the usefulness of the Prosecutor's independent trigger mechanism. The threat of *proprio motu* powers can serve as a powerful incentive for States to make a self-referral in order to avoid the embarrassment of referral by an external agent. In the case of Northern Uganda and DRC, it is uncertain whether self-referrals would have been forthcoming without the possibility for an independent trigger mechanism.[22] The potential for self-referral was not foreseen by the drafters of the Statute. To date, it has come to represent a fruitful source of jurisdiction for the ICC. However, there will be a need to guard against countries ingeniously dumping cases on the Court so as to avoid their own responsibility, to garner international attention, or to pursue their own domestic political agendas against rival groups. Self-referrals, moreover, do not depart from the traditional rule that States are loath to lodge complaints against their peers.

[21] To date, no investigation has been initiated by the Prosecutor in relation to CAR or Côte d'Ivoire.

[22] Schabas, noting that after almost three years in office the ICC Prosecutor has yet to invoke his powers and shows little inclination to do so, suggests that, for all the battles fought in Rome, the exercise of *proprio muto* powers has become an "issue that has thus far proved to be of little importance"; 'The enigma of the International Criminal Court's success', OpenDemocracy.net (17 February 2006). This, however, fails to properly appreciate the ways in which the potential for *proprio muto* referral may prompt State action.

(b) Security Council

The ICC is a free-standing organisation with international legal personality outside of the United Nations system, but brought in to relation with it. One of the primary reasons for this was the perceived need of some States during negotiations to safeguard the independence of the Court and, in particular, in its relationship with the Security Council. Despite the fact that the final text clearly stipulates the parameters of this relationship, the Court remains, rather unnecessarily, outside of the UN system.[23]

The Statute provides for a significant role for the Security Council in the exercise of the Court's jurisdiction. The role of the Council with respect to aggression has already been referred to above. Examination below will focus on Security Council referral of situations to the Court and requests to defer an investigation or prosecution.

(i) Referrals

Since the establishment of the ICTY and ICTR, the legal authority of the Security Council to establish *ad hoc* criminal tribunals in exercise of its Chapter VII powers has been upheld by the ILC in its Commentary to the 1994 Draft Statute,[24] by the Appeals Chamber of the ICTY,[25] and by the overwhelming majority of States participating in the PrepCom sessions and the Rome diplomatic conference.[26] From the outset, one of the central purposes of establishing a permanent court was to avert resort to creating further *ad hoc* tribunals.[27]

As with State Parties, the Security Council can only refer a situation which the Prosecutor will then examine for the purpose of determining potential individual liability and the launching of an investigation. If the Prosecutor decides not to initiate an investigation the Security Council, as with a referring State in a State referral, can request the Pre-Trial Chamber to review the decision of the Prosecutor (article 53(3)(a)). Such a review can at most result in a request that the Prosecutor reconsiders

[23] This has created a raft of regulatory and operational issues for the Court in its early establishment and its ongoing relationship with the UN and third parties, since it must negotiate separate financial regulations, privileges and immunities, agreements and/or arrangements with States and UN funds, offices and programmes that would otherwise be subject to applicable UN System rules.
[24] A/49/10(1994), 85
[25] *Tadic Interlocutory Appeal*
[26] A/51/22(1996), ¶¶130-131. *See* art.29 UN Charter
[27] A/49/10(1994), 85

his initial decision, but the final determination remains with him. In contrast, where the Prosecutor bases his decision solely on the determination that the initiation of an investigation or prosecution in relation to a referred situation would not serve the 'interests of justice' (article 53(1)(c) and 53(1)(2)(c)) the Pre-Trial Chamber may, on its own initiative, rule against the Prosecutor's decision and require him to proceed with an investigation or prosecution.[28]

A number of provisions of the Statute distinguish situations referred by the Security Council. A referral must be made by the Council "acting under Chapter VII" of the UN Charter, i.e. in accordance with a determination of a threat or breach of the peace or an act of aggression.[29] This appear to indicate the application of a higher threshold compared to investigations triggered by State Parties or the Prosecutor *proprio motu*, for whereas the preamble to the Statute recognises that crimes within the jurisdiction of the Court "threaten the peace, security and well-being of the world", article 13(b) specifically requires that a Council referral be made in that context. As noted above, Security Council referrals are exempt from the jurisdictional nexus provisions of article 12. As such, the Security Council may refer a situation in relation to acts committed on the territory or by nationals of any State. This will be important where the situation relates to events occurring solely in a State not party to the Statute, or to a conflict that reaches across several national boundaries, including those of non-Party States.

Unlike the *ad hoc* Tribunals, however, the Security Council cannot define the scope and extent of the ICC's jurisdiction and is itself bound by the framework

---

[28] Article 53(3)(b), ICC Statute; Rule 110, ICC RPE. Note, review by the Pre-Trial Chamber is only possible with respect to the initial decision to initiate an investigation in relation to a referred situation, or the decision to proceed with a prosecution. It does not apply to sub-decisions taken within the context of a launched investigation or prosecutions as to the focus of investigative efforts (or lines of inquiry) or the selection of targets for prosecution.

[29] The term "acting under Chapter VII" has been contrasted by some commentators with the phrase "in a resolution adopted under Chapter VII" in article 16, suggesting that article 13(b) may not necessarily require a formal determination under article 39 of the Charter; Oosthuizen, 'Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council' (1999) NILR XLVI, 320. The better view in the light of the drafting history is that the phrase is merely a lexical anomaly. The possibility of extending the Council's referral authority to matters under its Chapter VI peaceful settlement mandate had also been proposed during PrepCom negotiations on the basis that articles 33 and 36 of the UN Charter encourage the Security Council in respect to any dispute, the continuance of which would likely endanger international peace and security, to seek a peaceful solution by resort to, *inter alia*, "judicial settlement"; (A/51/22 (1996) Vol.I, ¶134; Vol.II, 76; Zutphen Draft art.10[23](1); art.23(1), A/AC.249/1997/L.8/Rev1). Other proposals that sought to grant a referral power to the UNGA were rejected by both the ILC and the PrepCom, (A/49/10,86; A/51/22(1996), ¶132). There is nothing of course withholding the UNGA from calling on the Security Council or concerned States to refer a situation to the Court.

established by the Rome Statute. Contrary to the view expressed elsewhere,[30] the Security Council is unable to amend the definition of crimes within the Statute; to alter or add to the list of crimes; or change the temporal jurisdiction of the Court by referring situations that occurred prior to the entry into force of the Statute (see below, Chapter 8). Security Council referrals, moreover, lack the primacy accorded the ICTY and ICTR in relation to cases before national jurisdictions. As such, the referral of a situation by the Security Council does not alter the basic framework of the complementarity regime.[31] The Security Council cannot circumvent the complementarity thresholds of article 17, for example, by declaring that a State is unwilling or unable to genuinely investigate or prosecute. Such a finding would be merely indicative and could not bind the ICC. Article 19 provides that challenges may be brought by the Chamber dealing with the matter, the Prosecutor, the accused, a State with jurisdiction, or a State from which acceptance is required under Article 12. Since no exception is made to the general rule, such challenges are permissible also in the event of a case arising from a Security Council referral.[32] A challenge, for example, may be brought as to whether the referral respected the procedural requirements of article 13(b) that it be made in accordance with the requirements of Chapter VII. Moreover, a State could challenge a determination by the Council, either implied or explicit, that it is unwilling or unable to genuinely investigate and prosecute cases arising out of a given situation (article 17). Where a challenge is upheld, the Prosecutor would have to refer the case to the relevant national authority, even in the instance of a Security Council referral. The lodging of a complaint under article 19 will also have suspensive effect on any investigations by the Prosecutor unless the Court rules otherwise.[33]

There is nothing of course preventing the Security Council from creating further *ad hoc* tribunals. Indeed, the Council may decide that the design of the ICC is structurally too weak to carry out its desired functions. The Council, also, may prefer to mandate the Secretary-General to negotiate agreements on the establishment of hybrid courts on the model of the SCSL and could pass an ancillary Chapter VII

[30] Bergsmo (2000), 110

[31] The only exemption from the complementarity regime under a Security Council referral is the non-applicability of article 18.

[32] Note, however, since a Security Council referral is exempted from the normal State consent for the exercise of the Court's jurisdiction, there is no requirement under article 12 to secure the approval of jurisdiction from the listed States.

[33] But *see* art.19(8), on the authority to pursue certain investigative steps

resolution to bolster the cooperation with such courts.[34] Financial, political and strategic considerations, nonetheless, may caution against such an alternative where a situation would clearly fall within the temporal jurisdiction of the ICC, as debates surrounding the Darfur referral indicate.[35]

A more controversial option would be for the Council to invoke article 103 of the UN Charter in order to override the competing obligations of State Parties under the ICC Statute. The Council could, for example, establish a Chapter VII obligation binding States not to exercise their jurisdiction over a situation and not to bring a challenge against the admissibility of a case, with the intention of activating thereby the Court's jurisdiction. Such a resolution could, in the interests of international peace and security, determine that trials before the ICC would be the most appropriate response. The purpose of ordering non-action by States would not be to grant impunity, but to enable the ICC to investigate and prosecute the most serious crimes of concern to the international community, which itself would correspond with the objects and purposes of the Rome Statute.[36] The resolution possibly could require national authorities to yield jurisdiction in leadership cases only, to be determined by the Court, and call for consultations in order to establish an appropriate division of labour with regard to lower level offenders. Theoretically, this would place the ICC in a comparable position to the *ad hoc* Tribunals, by establishing jurisdictional primacy. Equally, however, it may be argued that the Council cannot legitimately order States not to investigate or prosecute crimes which violate *jus cogens* prohibitions and which States are under *erga omnes* obligations to repress. Furthermore, the exercise of such powers would alter the treaty making process and the careful balance struck between the Security Council, States and the Court.

(ii) Deferrals

One article attracting some of the most heated controversy is the provision that the Security Council can not only trigger a situation, it can also halt ICC proceedings. Discussion on the issue arose out of the need perceived by the ILC and numerous

[34] See above, Chapter 4; Reuters, *Sierra Leone court seeks more authority* (June 11)

[35] *See*, e.g., U.S. proposals to create further a *ad hoc* court, hybrid court or AU regional court for the Darfur situation as an alternative to ICC intervention; *see* Security Council debates on adoption of S/RES/1593, S/PV5158(31 March 2005)

[36] *Informal expert paper: The principle of complementarity in practice* (ICC-OTP 2003), 21-22. See below Chapter 7 'uncontested complementarity'

States, including the Permanent Members of the Security Council, to ensure the consistency of the ICC Statute with UN's collective security system and the primary responsibility conferred therein on the Council for the maintenance and restoration of international peace and security. The aim was to coordinate the separate functions of the two bodies, and the complex roles of good offices, diplomacy, peace keeping, peace building, reconciliation and prosecution. In particular, the negotiating delegations proposed that the Security Council should be able to halt judicial proceedings where this was deemed appropriate for the Council's broader functions, such as during the conduct of delicate peace negotiations.[37] Moreover, in the light of the likely reliance of the ICC on Council assistance, it would have been highly undesirable for two bodies to compete or conflict with each other.

Under the 1994 ILC Draft, article 23(3) specified "[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides." The Security Council could also veto a trial or an investigation that had already commenced when it seized itself of a matter at subsequent stage. In the view of many States, the draft gave an unacceptable bias to the political rulings of the Council without guaranteeing a necessary degree of judicial independence. The provision could have, moreover, undermined the principle of the equality of State Parties by introducing a three tiered hierarchy between ordinary State Parties, those who were additionally members of the Security Council, and those with a right of veto within that body.[38] The text also failed to define what was meant by a situation "being dealt with" under the Security Council's Chapter VII mandate: whether this would include any matter on its agenda, under active discussion; the subject of a resolution; or the subject to enforcement measures. Given that some situations before the Security Council went back as far as 1947,[39] and the high probability that any matter before the Prosecutor would simultaneously be under the consideration of the Security Council, the provision could have effectively prevented any serious crime of international

[37] Examples include the ICTY indictment of Radovan Karadic during the negotiations leading to the GFAP for BiH; the ICTY indictment of Slobodan Milosevic before the Ramboulie settlement talks over Kosovo; and the SCSL indictment of Charles Taylor during peace talks in Ghana.

[38] A/49/10(1994), 87-88

[39] See *Summary Statement by the Secretary-General on Matters of which the Security Council is Seized and on the Stage Reached in their Consideration*, S/2006/10(2006). As of the last annual statement on 1 March 2006, 148 matters were under the Council's consideration.

concern from reaching the ICC without the Council's assent. Moreover, the provision would have established a new precedent for international adjudication. The ICJ Statute does not contain a provision for Security Council deferrals, and it has ruled that a case is admissible even if the matter is simultaneously being dealt with by the Security Council under Chapter VII of the Charter.[40] Similarly, the ICTY and ICTR remain autonomous in the elaboration of a prosecutorial strategy, although it is the Security Council that ultimately dictates the continuation of both mandates. Moreover, PrepCom discussions pointed out that if national courts can prosecute a case that overlaps with a situation under the consideration of the Security Council, an international court should enjoy at least the same right.[41]

The final text as adopted reverses the burden of the provision. Article 16 of the Statute provides that the Security Council is required to pass a resolution under Chapter VII in order to prevent the Court from commencing or proceeding with an investigation or prosecution for a renewal twelve month period. The most obvious consequence of this is that it prevents the exercise of a single veto from blocking ICC activity. A veto by any Permanent Member under this arrangement could only be wielded to prevent a deferral rather than to trigger it. A deferral resolution must be voted on under Chapter VII of the Charter, meaning that a determination must first be made, in accordance with the UN Charter, that there is threat or breach of the peace or an act of aggression. This indicates the intended exceptional use of deferrals power to address specific scenarios. Moreover, the resolution is time bound to a renewable twelve-month period, meaning that the Court is not to be indefinitely prevented from discharging its functions. This emphasises the point that while an article 16 deferral request from the Security Council would act as a procedural bar to suspend further ICC action, it cannot displace jurisdiction. Finally, deferrals can be made with respect to both investigations and prosecutions. Preliminary examinations by the Prosecutor prior to the initiation of an investigation, thus, are not effected by an article 16 deferral. This includes the power to "seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources"; and to "receive written or oral testimony at the seat of the Court".

Article 16 represents the only exception in the Statute to the over-riding

[40] *Libya v US; Libya v UK*, ICJ Rep.1992; also Judgment on Preliminary objections, 27 February 1998. *Revised Report of the Working Group on the Draft Statute of an International Criminal Court*, (A/CN.4/L.490) A/CN.4/L.490/Add.1(1993); ILC Commentary on article 41, A/49/10(1994)
[41] *See* A/51/22(1996), ¶143

principle of complementarity. For, in contrast to the conditions of article 18 governing the deferral of State Parties or Prosecutor triggered investigations to national authorities, there is no requirement on the authority to which the deferral is made, the Security Council, to take any action with respect to the situation in question. The Prosecutor is also excluded from reviewing the conditions predicating the request for deferral. Essentially, once an investigation or prosecution has been interrupted by the Security Council, it is out of the purview of the Court for as long as the Council so determines. The Court could, however, assert its competence to review the compatibility of a Security Council resolution with the procedural requirements of article 16 as to whether the resolution was passed under Chapter VII, respects the permissible duration, and relates to a specific investigation or prosecution. The Court would be excluded, however, from reviewing the substantive basis for the determination by the Council to invoke Chapter VII so as to ascertain the legality of the Security Council actions with the powers attributed it under UN Charter.[42]

Another feature that distinguishes article 16 from the general scheme of the Statute is the absence of any modalities either in the Statute or in the Rules of Procedure and Evidence clarifying how a deferral request is to be implemented. A host of issues not foreseen in the article, but noted during the preparatory process, will need to be addressed. This includes questions related to the preservation of evidence, the protection of witnesses and the continued apprehension of persons once proceedings have been initiated.[43] Absent specific guidance, protective measures may be regulated by the Security Council as a corollary to its deferral request, or could be ordered by the Pre-Trial Chamber.[44] Moreover, the Security Council could decide under Chapter VII that all necessary protective measures be taken by States, and could invite the Prosecutor to ascertain, review and report on the effectiveness of such measures.

It is notable that the first provisions of the Statute that were called into effect

---

[42] *Compare* Sharf (1999), 523, who argues, following the ICTY decision in the Tadic Interlocutory Appeal, ¶18 (*compétence de la compétence*) that the ICC could assert an incidental power to determine whether the deferral request was consistent with the purposes and principles of the UN Charter. Given the strictly defined corpus of law in the Rome Statute and its unique drafting history, however, it is highly doubtful that such an expansive interpretation would be permissible. Moreover, article 16 is merely a procedural mechanism: the basis of the Council's power to request a deferral derives from the UN Charter itself, not from the Rome Statute.

[43] Bergsmo and Pejić, 'Article 16, Deferral of an investigation or prosecution', in Triffterer (1999), 380-1

[44] *See* art.54(3)(f) and 56; *ibid*

were article 16 on deferrals by the Security Council and article 98 on exceptions to the exercise of jurisdiction: both in relation to U.S. concerns. The conditions under which Security Council Resolution 1422 was adopted, on the eve of the entry into force of the Statute, is well known and does not require detailed elaboration. Suffice to recall that the U.S. had threatened to exercise its veto to block the otherwise routine extensions for all upcoming to UN peacekeeping operations, beginning with the United Nations Mission in Bosnia and Herzegovina. In the absence of an operational ICC at the time of Council resolutions 1422 (2002) and 1487 (2003), and the failure to secure renewal in 2004, the ICC did not have the opportunity to review the procedural *bone fides* of these resolutions. Nonetheless, a number of States in open discussion before the vote on both resolutions and during parallel proceedings at the ICC Preparatory Commission suggested that the Council may have violated the express terms of article 16:[45]

1. Although resolutions 1422 and 1487 were adopted under Chapter VII, there was no determination of a threat or breach of the peace or an act of aggression, thereby violating the procedural conditions for the adoption of Chapter VII measures under the UN Charter.[46] Instead, the Council determined "that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council". This echoed the position of the U.S. Ambassador to the UN that failure to pass the resolution, and the resultant termination of all UN peacekeeping operations by the wielding of a U.S. veto, would itself constitute a threat to international peace and security.[47] It is highly doubtful, however, that the aversion of this type of self-induced crisis was the intention of the drafters of the ICC Statute. In the absence of a specific determination under article 39 of the UN Charter, the resolutions appear to have contravened the procedural requirements

[45] S/PV4568(Resumption 1) + Corr.1(10 July 2002); S/PV4772,(12 June 2003); PCNICC/2002/L.3 (18 July 2002). *See also* Amnesty International, *The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice* (2003)

[46] Note, although the Council must determine that either a "threat to the peace, breach of the peace, or act of aggression" exists, it does not need to necessarily expressly mention this in its decision; *see* Frowein and Krisch, in Simma et.al., eds., *The Charter of the United Nations, A Commentary* (2002), 717, 727

[47] *See* Statement by U.S. Representative; S/PV4563(30 June 2002)

for Chapter VII action and, therefore, by implication violate article 16.[48]

Two further aspects appear to affect the spirit, if not the letter of the article:

2. The drafting history of article 16 shows that the provision was viewed as an exceptional measure to be employed by the Council in rare situations, such as the repeated example of halting ICC proceedings that would disrupt peace talks. Its preventive and generalized usage to situations yet to arise appears to contradict the intention of the Statute.[49]

3. The drafting history indicates that the provision was to be applied on a 'case by case basis' to specific investigations and prosecutions.[50] The broad coverage of resolution 1422 to exempt investigation and prosecutions yet to be initiated, against persons yet to be identified, before, indeed, any crime has occurred, contravenes this premise.[51]

As stipulated in the Vienna Convention of the Law of Treaties, "[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". If interpretation nonetheless leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable", recourse may be had to supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[52] Contrary to the view expressed elsewhere,[53] the drafting history, together with the views expressed by the majority of State Parties presenting statements in Council sessions, indicate that Security Council resolutions

[48] Statements were heard on behalf of seventy-two countries at an open session of the Security Council. *See*, e.g., Statement by Representative of Samoa;S/PV4568(Resumption 1) + Corr.1(10 July 2002)
[49] Statement by Representative of Switzerland, *ibid*
[50] Statement by Ambassador of Canada, *ibid*: "The negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation - for example the dynamic of a peace negotiation - would warrant a twelve-month deferral"
[51] Several States argued the resolutions effectively altered obligations arising for State Parties under the Rome Statute. Canada, e.g., stated "[t]he proposed resolutions currently circulating would set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished, e.g. the nuclear Non-Proliferation Treaty, through a Security Council resolution. The proposed resolution would thereby undermine the treaty-making process", *ibid*
[52] Art.31-32,*VCLT*
[53] MacPherson 'Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings', *ASIL Insights* (July 2002)

1422 and 1487 do not respect the objects and purposes of the Statute, and arguably lead to results that are unreasonable. To that extent, the exceptionalism that frames U.S. policy towards the ICC may have already weakened the normative strength of the Rome Statute, by providing for limitations to the exercise of the Court's jurisdiction in ways not foreseen by the Statute. It also strengthens 'realist' assertions that, at least for the U.S., the institution of the ICC has become a focal point for the assertion of relative power in the world system, rather than a forum for the impartial prosecution of international crimes.[54]

(c) Prosecutor

The ability for the Prosecutor independently to trigger cases before Court was widely perceived as a critical test to prevent the ICC being constrained by State or Security Council inaction. In particular, it was argued that the powers of the ICC Prosecutor should analogous to those of the ICTY and ICTR Prosecutor in being able to receive information from any source.[55] An independent trigger mechanism was also seen as vital to the truth-seeking dimension of the Court by guaranteeing that the Prosecutor would not be restricted in his ability to gather, receive and act on information. Opposing this power were the views of a shrinking minority of States who expressed fears over impartiality, manipulation and politicisation by an independent and

[54] See above, Chapter 2

[55] The U.S. delegation during PrepCom IV challenged the assumption that the *ad hoc* Tribunals serve as a precedent for *ex officio* powers, by arguing that the Prosecutor in those instances does not enjoy the power to independently initiate cases against any country, but only those arising out of the geographic limitation of a referred situation; intervention by U.S. delegation (11 August 1997). *See also* Kirsch and Robinson, who similarly suggest that the ICTY/R Prosecutor acts on the basis of a situation referred to him/her by the Security Council, which is more akin to an article 13(b) referral; 'Initiation of Proceedings by the Prosecutor', in Cassese et al. (2002), 657-8. However, it is inaccurate to compare the establishment of the ICTY with 13(b) referrals, since the ICTY was established in reference to a sphere of territorial jurisdiction and not a situation *stricto sensu*. The ICTY has jurisdiction over the territory of six States that make up the former SFRY for serious violations of international humanitarian law committed therein since 1991. Within those six States, the ICTY Prosecutor is independent is bringing forward cases based on any situation that has or may arise. Thus, although the situation in Kosovo arose six years after the creation of the ICTY and was not originally foreseen by the Security Council, the Prosecutor was able to initiate investigations *proprio muto* in relation to this new situation without need of a new referral. Moreover, the ICTY Prosecutor stated that the actions of NATO countries that participated in the bombing campaign over Serbia fell within the purview of the Tribunal's jurisdiction. The jurisdictional ambit of ICTY in relation to the former Yugoslavia, in this sense, is comparable to the jurisdictional reach of ICC under the Rome Statute. Within this jurisdictional sphere of competence, the ICC Prosecutor is, similarly, independent in bringing forward investigations *proprio muto* in relation to any situation that may arise, without need for a specific referral.

possibly rogue Prosecutor. These views were also influenced by the concurrent processes at play in the U.S. and aptly expressed informally during one PrepCom session as the fear of creating a 'global Kenneth Starr'.[56] Concern was also raised that the provision for the receipt of information from any source could overwhelm the Prosecutor with frivolous complaints.

While these two positions appeared irreconcilable, the attention of the group of Like Minded States favouring a strong ICC turned to addressing these fears by strengthening procedures, reducing the discretionary powers available to the Prosecutor, and setting high admissibility thresholds, rather than denying the Prosecutor an independent triggering capacity. The most critical of these efforts was the proposal for judicial review and approval prior to the initiation of *proprio motu* investigations. As elaborated in article 15 of the Statute, a Pre-Trial Chamber of three judges will examine a request by the Prosecutor to proceed with an investigation, together with all supporting documentation, in order to determine a reasonable basis to proceed. Victims also may make representations, while States may appeal any authorisation by the Pre-Trial Chamber. Additional procedures that limit, and allow significant oversight over, the Prosecutor's discretionary powers include provisions over the qualifications of the Prosecutor and his/her election by the Assembly of State Parties (article 42); removal from office (article 46); disciplinary measures (article 47); admissibility and challenges (articles 17-19); deferral by the Security Council (article 16); and confirmation of the charges before trial (article 61). Moreover, in order to grant States the earliest opportunity to exercise their own complementary jurisdiction, article 18 requires the Prosecutor to notify all State Parties and other States that would normally exercise jurisdiction over the crimes concerned of his intention to initiate an investigation, and to defer to investigations undertaken by at the national level (see below, Chapter VII).

In order to guard against frivolous litigation, an additional admissibility threshold was introduced in relation to all three trigger mechanisms. This is the requirement under article 17(1)(d) that a case not only fall within the subject matter

[56] Informal interventions at PrepCom IV (August 1997), on file with author. In response see *Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court*(8 December 1997): "there is more to fear from an impotent than from an overreaching Prosecutor. It is trite to recognise that an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith for improper purposes.... [I]f persons guilty of crimes within the statute are out of reach of the Prosecutor, the very purpose of the statute will be defeated."

jurisdiction of the ICC, but that, in addition, it is of sufficient gravity to justify further action by the Court. As such, the provision serves as a filtering mechanism to prevent the Court from being burdened with minor cases. How the gravity threshold will be applied in practice will be determined by the judges (see below, Chapter 7).

As to fear of the a *proprio motu* empowered Prosecutor being flooded with complaints, this has not been an overbearing issue in the practice of various human rights treaty monitoring bodies, and the ICC OTP has already established a filtering mechanism.[57] These factors, together with the detailed articulation and threshold for the applicability of crimes under the Statute, act as significant safeguards against abuse. As Kirsch and Robinson note:

> [a]lthough the concern was raised that this independent power could generate politically motivated or frivolous investigations, it would seem, given the numerous safeguards and requisite professionalism of the Prosecutor, that this is in fact likely to be the *least* politicized trigger mechanism. The Prosecutor is far more likely to exercise his or her power to dismiss ill-conceived referrals from State Parties with a political axe to grind than to be the originator of any frivolous investigations, wasting the valuable time and resources of the ICC.[58]

Conclusion

The jurisdictional regime of the Rome Statute provides for a system of inherent jurisdiction and a range of trigger mechanisms to enable the Court to act independently within the theatre of jurisdictional bases established by the Statute. As a safeguard against inaction on the part of State Parties or the Security Council, the inclusion of independent triggering powers for the Prosecutor ensures that cases will reach the ICC, either *proprio motu* or by prompting self-referrals. Such powers pose a serious challenge to the notion of a 'statist' Court. Where the Council does refers a situation, the jurisdictional ambit of the ICC can be extended to universal coverage. The Court's consideration, nonetheless, is limited to crimes committed after 1 July

[57] *See* Annex to OTP Policy Paper. See *Update on Communications Received by the Office of the Prosecutor*,(10 February 2006); available at www.icc-cpi.int
[58] *ibid*, 663

2002, and is thus unavailable to deal with earlier situations, where other mechanisms will remain more appropriate.[59]

The Korean draft formulation for the State consent regime would have relied on the State jurisdictional basis of territoriality, active personality or passive personality or simple custody over the accused (universality). In a severely restricting compromise, the final provision was watered down to limiting the exercise of jurisdiction only to situations where acceptance has been secured from the territorial State or the State of nationality of the accused. This means that the ICC will be unable to act where future Pol Pots, Idi Amins, or Saddam Husseins massacres their own people on their own territory, and have not accepted the Statute. Similarly, it will not be possible to transfer a future Pinochet held by a custodial State to the ICC without his State of nationality's acceptance of the Statute. Moreover, a State Party will be unable to trigger a case involving crimes committed against its nationals in a non-signatory State. In this manner, unless the Security Council refers a situation, the ICC will have less power to bring perpetrators of mass violence to trial than do national jurisdictions. There will be much, therefore, for State Parties to do in extending their own domestic jurisdiction in order to fill the gaps left by the jurisdictional reach of the Court (see below, Part 9).

[59] *See*, by contrast, the proposals cited in the Commission of Experts on East Timor Report that ICC jurisdiction could be applied retroactively via Security Council intervention to enable the Court to address the East Timor situation; S/2005/458. For the reasons noted in Chapter 8 ('Enhanced Cooperation'), the suggestions have little legal merit or practical value. To be effective, the proposal would require amendment of the ICC Statute by the Assembly of State Parties according to the procedure foreseen in Part 13 of the Statute.

VII

Admissibility

In order to understand compliance, it is necessary to examine avoidance techniques that States may employ in order to frustrate the Court's jurisdiction. In particular, the present chapter will examine the manner in which competing claims to jurisdiction will be resolved by examining how complementarity will operate in practice. Attention will centre on the admissible regime established by article 17, as well as the procedure for challenges to admissibility and jurisdiction under articles 18 and 19. A final section will consider issues related to forum determination where the ICC defers or declines jurisdiction.

1. COMPETING JURISDICTIONAL CLAIMS

Complementarity presupposes a group of interested States with competing claims to jurisdiction amongst themselves and with the Court over an individual in any concrete case.[1] Under complementarity, the general principle governing how these claims will be settled is that the Court should defer to domestic proceedings in all but a limited number of cases. This is reflected in the structure of article 17 which provides that national jurisdiction shall prevail unless one among a series of listed exceptions is satisfied. Namely, the Court is to reject any case brought by the Prosecutor where (a) a national investigation or prosecution is ongoing; (b) an investigation has been completed, but a decision has been taken not to prosecute; (c) the individual has already been prosecuted; or (d) the case is of insufficient gravity to warrant further action by the Court. As complementarity already leans heavily in deference to domestic proceedings, it soon became clear during negotiations that it must be left to the ICC, and not national authorities, to assess these four conditions and to determine

[1] Bleich, 'Complementarity', 13 Nouvelles Études Pénales (1997), 231

its own jurisdiction against the competing claims of national forums.[2] Defining the parameters by which the ICC would assess national action, thus, became a central task for the preparatory process.

The complementarity test established in article 17 draws on the experience of the former Yugoslavia and Rwanda in distinguishing between situations where national authorities are unwilling or otherwise unable to take action. In order to determine unwillingness or inability in a particular case, the Court must determine whether investigations or prosecutions have been carried out 'genuinely', a term considered the least subjective from a series of options including 'diligently', 'good faith', 'effectively' and 'sufficient grounds'.[3] Nonetheless, the test will require the Court to satisfy itself as to the intent of State in the circumstances. While this may not be problematic in clear cut cases, unwilling States may quickly learn to employ elaborate foils to disguise their true intents.[4] As with other parts of the Statute, the law will have to be tested in court to lend the provisions both clarity and form.

In order to determine unwillingness in a particular case, the Court is to consider, having regard to the principles of due process recognised by international law, whether one or more of the following exists, as applicable:

(a) The proceedings or a national decision seek to shield the person from criminal responsibility;
(b) There has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person to justice;
(c) The proceedings were/are not being conducted independently or impartially, or in a manner which is consistent with an intent to bring the person to justice.[5]

---

[2] Art.19, "[t]he Court shall satisfy itself that it has jurisdiction in any case before it". *See also* principle of *compétence de la compétence* as elaborated in *Tadic Interlocutory Appeal*, ¶¶18-19; *Namibia case*, 16; *Nottebohm case* (Liechtenstein v Guatemala) ICJ Rep. 1953, p.119; Fisheries jurisdiction case (UK and Northern Ireland v Iceland) ICJ Rep. 1973, p.3; *Nicaragua case* (Nicaragua v U.S.), ICJ Rep. 1984, p.392; *see generally*, Schermers and Blocker, *International Institutional Law: Unity within Diversity* (1995), 463; Brownlie, 6th ed (2003), 715

[3] Holmes, 'The Principle of Complementarity', in Lee, ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 49

[4] Holmes (1999), 75. Similar concerns arise, to a lesser extent, in the assessment the Court will have to give in determining what constitutes 'significant' collapse.

[5] Contrary to the view by Holmes, the list is not exhaustive. An ordinary reading of the text indicates that the three grounds are factors to be taken into consideration by the Court when arriving at its determination, but there is nothing excluding admissibility should these factors not be established. The Court therefore is granted discretion to consider additional indicators of unwillingness; Holmes,

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5

Evidence of sham proceedings may be brought in a number of ways. The treatment by domestic authorities of similar cases, or cases arising out of the same situation, for example, may be indicative. A failure to conduct a genuine investigation or prosecution in such circumstances will lend a strong presumption against willingness in relation to the proceedings before the Court. Other factors could include obvious departures from normal legal procedures, whether civil or military, such as by the appointment of special prosecutors or judges with political affiliations or the transfer of cases to secret tribunals, thereby bringing into doubt the observance of "the principles of due process recognised by international law".[6] In particular, this last provision serves to emphasise that the Court may have recourse to international standards and guidelines for the conduct of effective investigations and trials.[7]

National decisions aimed at shielding accused persons could include the intentional omission in national implementing legislation of certain categorisations of crimes or certain levels of responsibility. Examples include the absence of command responsibility or the failure fully to incorporate the crime of genocide in Serbia and Montenegro's war crimes legislation. As noted above, such legislative lacuna could indicate an intent to shield the military and political leadership from prosecution. The Prosecutor would need to show, however, that such legislative deficiency would result

---

'Complementarity: National Courts *versus* the ICC', in Cassese et al. (2002), 675

[6] Holmes (2002), 675

[7] *See* e.g. *UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, A/9030/Add.1(1973); *UN Basic Principles on the Independence of the Judiciary*, A/CONF.121/22/Rev1(1985); *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/40/53(1985). *UN Guidelines on the Role of Prosecutors*, A/CONF.144/28/Rev1(1990); *UN Basic Principles on the Role of Lawyers*, A/CONF.144/28/Rev1(1990); *UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/55/89 Annex 4 (2000); *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/43/49(1988); *UN Standard Minimum Rules for the Treatment of Prisoners*; E/3048 (1957), amended E/5988(1977); *Question of the impunity of perpetrators of human rights violations (civil and political)* E/CN.4/Sub.2/1997/20/Rev1(1997); Art.2, HRC General Comment 3(1981); Art.9, HRC General Comment 8,(1982); Art.14, HRC General Comment 13,(1984); Art.7, HRC General Comment 20,(1992)

in a genuine inability to hold persons accountable. The lacunae in and of itself without establishing the practice that will flow as a result may not satisfy the Court.[8]

More obvious national decisions aimed at shielding accused persons include the passing of amnesties and post-conviction pardons. In negotiations, the question of amnesties and pardons was raised as part of discussion on *ne bis in idem*. The U.S. circulated a non-paper summarising State practice in the implementation of amnesties and pardons.[9] Examples included situations of transitions to democratic governments seeking to protect members of the outgoing regime; attempts at national reconciliation aiming to close a door on the conflict of a past era; and measures to encourage the surrender or reintegration of armed dissident groups. The issue was not discussed in detail either at PrepCom sessions or in Rome. There was a fear that opening the door to discussions could lead to the inclusion of specific exemptions from ICC jurisdiction that would run contrary to the emerging international custom on the core crimes.[10]

There were also a series of proposals that broadly sought to prevent an omission in the complementarity regime at the stage of sentencing. This would have empowered the ICC to take up a case tried domestically following a "manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty."[11] The proposal was ultimately deemed to represent too high a level of intrusion into domestic administrative and executive decision making processes. The failure to secure the language in the text, however, does not mean that the Court is excluded from ruling on the issue. The *bone fides* of decisions could be challenged under the Court's admissibility rules in order to show that "the national decision was made for the purpose of shielding the person concerned" or was otherwise "inconsistent with an intent to bring the person concerned to justice". Although challenges would normally take place before or during the domestic trial,[12] there is nothing in the Statute excluding post-trial examination. The Court could

---

[8] *See*, e.g., *Amicus curiae* brief of Croatia in *Prosecutor v Mejakic et al.* Rule 11*bis* hearing, observing that the absence of command responsibility in its domestic legislation during relevant period could be overcome by application of other related provisions of national law; on file with author

[9] *U.S. Delegation Draft - State Practice Regarding Amnesties and Pardons*, circulated 15 August 1997 (PrepCom IV); on file with author

[10] See above, Chapter 4

[11] See Draft article 19, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act* (A/Conf.183/2/Add.1, 1998). Earlier formulations were also included in the 1995 Siracusa Draft Statute and 1996 and 1998 PrepCom proposals

[12] Van den Wyngaert and Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty', in Cassese et al. (2002), 726

thereby determine whether the suspension of sentence enforcement or a pardon, amnesty, parole or commutation serves the interests of the Statute to "put an end to impunity for the perpetrators of these crimes".

Alternatively, there may be conditions under which a national decision not to enforce a sentence or to grant amnesty may be observed by the Court. A Security Council deferral under article 16, for example, may have the effect, either explicitly or otherwise, of protecting a national amnesty decision. The Prosecutor also may exercise his discretion in order to honour a domestic decision not to prosecute by determining that a trial would not serve the 'interests of justice' (article 53). This may arise in relation to a truth and reconciliation or post-conflict transition process, or an undertaking of traditional-based forms of justice, especially where official inquiry, public disclosure and debate has taken place.[13] The Prosecutor's decision would have to take into account "all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime". It would be subject, moreover, to review by the Pre-Trial Chamber which could result in the decision being overturned.[14] Finally, as the example of ICC intervention in Northern Uganda has shown, prosecutorial discretion will often go to the issue of sequencing peace-building process and international prosecutions, rather than the granting of blanket immunities.[15] To the extent that the ICC will be able to review the *bone fides* of amnesties, the articulation and application of the guiding principles by the Chambers will establish important parameters for the international supervision of national amnesties.[16]

---

[13] *Compare* Human Rights Watch, which argues that the Prosecutor should construct the 'interests of justice' narrowly so as to exclude all political considerations or calculations such as the impact of an investigation on ongoing peace processes or truth and reconciliation initiatives, which rather is a task for the Security Council via article 16; *HRW Policy Paper: The Meaning of "the interests of justice" in Article 53 of the Rome Statute*,(June 2005)

[14] Sharf (1999), 524 argues that the Pre-Trial Chamber would have to consider also whether there is an international legal obligation to prosecute the offence. This criteria, however, does not appear in article 53 and, as noted earlier, although the ICC Statute mirrors various substantive provisions of other conventions, it does not incorporate the procedural obligations relating thereto.

[15] On the question of phasing and timing of possible ICC arrest warrants for the LRA leadership and concerns over its impact on the peace process, *see* ...

[16] Broomhall (2003), 100

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice

For a delay to be inconsistent with an intent to bring a person to justice, it must be unjustified. The original term "undue delay" was changed during the drafting process to the higher standard of "unjustified delay" in order to require the Court to seek the views of the State concerned.[17] Evidence of such delay could include the adoption of timeframes that deviate from normal practice for similar cases, leading to prolonged and ineffective investigations. This will be less persuasive as an indicator if domestic proceedings routinely suffer from lengthy delays. Another possibility is the use of commissions of inquiry outside of the criminal justice system to stall actual investigations and prosecutions. The wording of the provision suggests that the burden will be on the State to justify delays that depart from the established patterns of national proceedings. Similarly, Rule 51 invites States to bring to the attention of the Court any information showing that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct with respect to an admissibility determination under article 17. The failure of a State to provide such information may weigh against it in the Court's assessment.

Establishing an international standard for the length of proceedings will prove difficult. National practice varies considerably and the *ad hoc* Tribunals and the European Court on Human Rights ('ECtHR') have been notably tolerant of lengthy criminal proceedings and pre-trial detention.[18] In *Mutimura v. France*, ECtHR held that the applicant had not received an effective remedy in respect of domestic judicial investigations into genocide and torture offences which had lasted over eight years and eight months.[19] ICTY and ICTR decisions on the length of pre-trial detention have dealt primarily with delays by the Tribunals themselves. In the case of the ICC,

---

[17] Holmes (1999), 34

[18] *See Prosecutor v Drljaca and Kovacevic, Decision on Defence Motion for Provisional Release*,(20 January 1998); *Prosecutor v Kanyabashi, Decision on the Defence Motion for the Provisional Release of the Accused* (21 February 2001). ECHR cases: *Stögmüller v Austria, Judgment*,(10 November 1969) (reasonable time cannot be assessed *in abstracto*),¶4; *Wemhoff v Germany, Judgment*,(27 June 1968) (the reasonableness of an accused person's continued detention must be assessed in each case according to its special features),¶10; *Zimmerman and Steiner v Switzerland, Judgment*,(13 July 1983),¶24 (reasonableness depends, *inter alia*, on complexities of case-specific factual and legal issues, and the conduct of the applicant and the competent authorities); *W v Switzerland, Judgment*,(26 November 1992)(finding no violation for pre-trial detention of four years)

[19] *Mutimura v France, Judgment* (8 June 2004) (finding violation of right to a hearing within a reasonable time and right to an effective remedy)

tolerance of lengthy delays by national authorities could allow substantial scope for non-genuine States to abuse the principle of complementarity. The ICC will therefore need to establish timeframes and possibly develop standards applicable under the Rome Statute if it is to effectively administer the deferral of cases.

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The test in the last subparagraph of 17(2) appears at first glance to repeat the main features of subparagraphs (a) and (b). During preparatory discussions, however, it emerged that there may be scenarios where a State endeavours to institute genuine proceedings, but may be individuals who manipulate the process to ensure that accused persons are not found guilty by, for example, engineering a mistrial or by deliberately violating a defendant's right in order to taint evidence or testimony.[20] In this type of instance, although the tests of shielding or delays may not be met, there may be still doubts as to the independence and impartiality of the proceedings sufficient to call into question the intent of the State to bring the person to justice. Factors which may indicate a lack of independence and impartiality include evidence of improper influences, inducements, pressures, threats or interferences, either direct or indirect, on judicial officials; exposing officials to unwarranted and irregular discipline, suspension or removal proceedings; as well as inappropriate or unwarranted interference with the judicial process, or subjecting judicial decisions to revision outside of legal procedures.

(d) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse 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

[20] Holmes (1999), 50-51

As the chair of the PrepCom working group on complementarity has stated, the negotiation of article 17(3) was less contentious than defining 'unwillingness', largely because 'inability' is a more objective, fact-driven notion: "[t]he absence of a functioning prosecutor's office or a court system are facts which either exist or do not and therefore lend themselves to less subjective interpretation."[21] The Court is to consider whether "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." The article, thus, provides three fact-based criteria to test the health of the national judicial system: the ability to obtain the accused, the ability to obtain the necessary evidence and testimony, and the ability to otherwise carry out proceedings.

'Total or substantial collapse' covers situations such as those faced by post-genocide Rwanda or East Timor, where the criminal justice system is no longer functional. The original term 'partial collapse' was changed to 'substantial' during the Rome conference to rule out situations where the national judicial system is intact, but because of an armed conflict or loss of territory in a particular area, it is partially affected. The provision, thus, requires there to have been a substantial impact on the national judicial system as a whole.[22] The 'unavailability' of a national judicial system, again either total or substantial, is the second criteria of inability. Unavailability may characterise situations where the judicial system is intact, but may not be functioning due to systemic failures: for example, the non-execution of warrants and judicial order because of a lack of cooperation between the judiciary and the police, or between different law enforcement agencies within a State. In BiH, for example, judicial orders issued by Cantonal Courts in the Federation BiH, particularly in war crime related cases, have seldom been implemented by the authorities in *Republika Srpska*, and *vice versa*.[23] The difference between unavailability under 17(3) and national decisions taken under article 17(2)(a) is the absence of a requirement to prove intent on the part of the State to shield the accused. A system that is not functioning correctly is different from a system that is intended to fail.

For a finding of inadmissibility, these factors must be applicable to a particular

[21] Holmes (2002), 677
[22] *ibid*, 678
[23] Because of the constitutional arrangement under the DPA and the fragmentary political culture, BiH has separate police structures for the 10 Cantons, the FBiH, RS, Brcko District, and specialised agencies at the State level (SIPA, SBS). In addition there are Court Police services at the entity and State levels, and a FBiH Finance Police.

case before the Court. As referenced earlier, one indicator may be to compare the conduct of national authorities in relation to similar serious domestic cases. Thus, while reference to international standards or the comparison of one State with another may provide useful benchmarks, the record of enforcement for similar conduct in the State concerned may best help reveal whether the national authorities have acted in a manner that is not consistent, independent or impartial.[24]

An ordinary reading of article 17(3) suggests that the enumerated factors are non-exhaustive. There is no indication that the absence of the said factors will invalidate a finding of inability, and there is nothing restricting the discretion of the Court to consider factors additional to those identified. This may include legislative bars to investigation or prosecution, such as amnesties and pardons, or deficiencies in national implementing legislation defining the crimes, or in failing to incorporate principle of criminal law such as command responsibility.

(e) Uncontested complementarity

One further scenario, not foreseen during negotiations, is where no competing jurisdictional claim is brought by States, thereby effectively enabling a waiver of admissibility requirements for the purpose of complementarity. The test of unwilling or inability becomes operative where a State has initiated domestic proceedings or has otherwise challenged the jurisdiction of the Court. Absent this, the limitations to admissibility under article 17(1)(a)–(c) become redundant and a case can proceed.[25] The position has been articulated in a policy paper issued by the Prosecutor:

> There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and

[24] Holmes (2002), 676-7

[25] *Informal expert paper* (complementarity), 7. Challenges, nonetheless, may be forthcoming at later stages from other parties (see below, article 19)

> expertise relating to that situation, making the Court the more effective forum. In such cases there will be no question of "unwillingness" or "inability" under article 17.[26]

This is the simplest way for a case to proceed: what Moreno Ocampo has termed "positive complementarity".[27] Where complementarity is uncontested the Prosecutor may be able to enter into agreements with the State concerned, in accordance with article 54(3)(d), to facilitate its cooperate and to discuss the possible distribution of caseloads through a consensual "division of labour".[28] Accordingly, the ICC could focus on senior level offender while the State builds the necessary capacity and generates the required political will to pursue mid to low level offenders. The best outcome of such engaged dialogue would be a 'self-referral'. Where the State in question does not object to ICC jurisdiction, but nonetheless fails to refer the situation, the Prosecutors could proceed *proprio motu* on an expedited basis given the likely unforthcoming challenges to admissibility.

Uncontested complementarity may come to represent one of the more fruitful mechanisms for enabling jurisdiction and for establishing a cooperative relationship between international and national jurisdictions. Indeed, the Prosecutor has indicated that, as a matter of policy, whenever he intends to initiate a situation *proprio motu*, he will in general seek where possible to make the support and cooperation of the State concerned explicit through referral.[29] Self-referral will have several practical benefits in comparison to *proprio motu*, Security Council or third State triggered jurisdiction. The State concerned is likely to engage cooperatively with the Court to assist the investigation, to accord any necessary privileges and immunities, and to provide for staff security and the protection for victims and witnesses.[30] In delicate post-conflict transitions, international involvement may help also to externalise the political costs of prosecutions by shifting spoiler effects away from weak national governments onto the ICC.[31]

---

[26] OTP Policy Paper, 5

[27] *Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps* (The Hague, 12 February 2004)

[28] *ibid*

[29] *Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications* (ICC-OTP), 5

[30] *ibid*

[31] *ibid*; Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) Leiden JIL, 567

Self-referrals, nonetheless, may not always have genuine considerations of accountability in mind. Particularly in an ongoing conflict, referrals may be motivated by a desire to internationalise a conflict, to bolster the legitimacy of the government, or to de-legitimise and isolate opponents.[32] Equally, it is possible that States may exploit uncontested complementarity by flooding the Court with cases so as to avoid their own responsibility or to otherwise play to external constituencies. Case-dumping would undermine complementarity, which relies on the notion of primary and concurrent duty of States, and could, moreover, entrench patterns of impunity. Burke-White suggests that the dangers for politicisation and manipulation should caution the Prosecutor against acting upon such referrals:

> ... where the ICC becomes an implement of a potentially despotic national government whose own hands may not be clean, the Prosecutor might be well advised to encourage national prosecutions that fully account for the political costs of justice or to delay international investigation until his actions are less likely to alter domestic political outcomes.[33]

This appears to simplify the nuances of prosecutorial discretion, as the risks accompanying each situation will need to be weighed against numerous variables. What is clear is that the Prosecutor will need to carefully consider the policy implications of his stated preference for uncontested complementarity by encouraging and assisting State Parties to develop, possibly in cooperation with neighbouring States and other international organisations, comprehensive long-term anti-impunity strategies to address the responsibilities of domestic authorities to burden their primary share of prosecutorial initiatives.[34]

2. CHALLENGES

Where the Court deems a case admissible, challenges may be brought in two ways: (i) a request for a deferral, and (ii) a challenge as to jurisdiction or admissibility.

---

[32] *See* the selective referral by the Government of Uganda of the "situation concerning the Lord's Resistance Army", Referral letter to the ICC Prosecutor of 6 December 2003, on file with author. The Prosecutor interpreted the referral as covering crimes committed by all parties to the conflict; Letter from the Prosecutor to the President of the ICC (17 June 2004), on file with author

[33] Burke-White (2005), 568

[34] *Informal expert paper* (complementarity), 18-21; see below, Chapter 9

(a) Request for deferral by States (article 18)

Article 18 allows States to request the deferral at the earliest possible stage even before a case has been brought, by putting States on one month's advance notice of the Prosecutor's intention to initiate an investigation.[35] The article aims to address the need to prevent overlap of parallel investigations by the ICC and national authorities, and the desire to expedite the clarification of intentions with respect to the exercise of jurisdiction. It also affirms the principle enunciated in the preamble that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Together with article 17, the provision serves as a further prompt for State action. It reinforces, moreover, the notion of partnership and dialogue between national authorities and the ICC. To guard against non-genuine manoeuvres, the Prosecutor can challenge deferral requests before the Pre-Trial Chamber and apply for authorisation to proceed with his investigation. Article 18 does not apply to situations referred by the Security Council, since such referrals are not triggered on the basis of State consent.

The approach that the ICC judges adopt towards article 18 and the related provisions on challenges will be critical for the integrity of the Court. It is likely that the Chambers will develop a margin of discretion doctrine for the assessment of national efforts undertaken in good faith. Too great a degree of deference to States requiring high thresholds of proof, however, could undermine incentives to encourage compliance with the Rome Statute.[36] Over reliance on assertions of State misconduct without adequate factual assessment, on the other hand, could paralyse domestic efforts and undermine the complementarity goals of the Statute.

When deciding to launch an investigation, either *proprio motu* or via State referral, the Prosecutor will have made a determination as to the genuineness of national proceedings in accordance with the article 17 test.[37] Accordingly, the Pre-Trial Chamber may determine a presumption against the *bone fides* of a State subsequently declaring jurisdiction under article 18(2) on the grounds that it will now

---

[35] *See*, conversely, a rejected Italian proposal (PrepCom V, December 1997) to require State Parties to inform the Prosecutor of any national investigations or proceedings relating to crimes under the Statute, in part in reaction to article 18; Holmes (1999), 64, 72

[36] Broomhall (2003), 92

[37] *See* article 53, ICC Statute

undertake genuine investigations and prosecutions. In making its determination that a State's notification is without merit, Pre-Trial Chamber will rely on the article 17 factors and any supporting information presented by the Prosecutor and the State concerned (Rules 51, 53, 55). Where the case is deferred, the judges may apply the six month review period strictly, by placing a strong burden on the State to demonstrate the genuineness of its proceedings and any concrete progress made.

It is equally possible, however, that the Pre-Trial Chamber will hold that the Statute is designed to foster a presumption in favour of State jurisdiction, except in very obvious cases. Such an approach could be fraught with dangers. Given the context in which the crimes have been or are being committed, States acting in bad faith could exploit the one month advance notice to launch their own domestic proceedings, while quietly moving to intimidate witnesses, tamper evidence, or shield offenders. Although article 18 enables the Prosecutor to notify States on a confidential basis or to limit the scope of information provided, Rule 52 obliges him to provide sufficient information to assist the State in its application of the deferral request, and stipulates that the State can request additional information.

Where the investigation is deferred to national authorities, there may be several ways a non-genuine State could postpone further ICC intervention. The construction of an investigation and case file will take time. It is not uncommon for domestic investigative, preparatory and trial proceedings in serious, complex criminal cases to take up to two or three years. The ICC's own activities in Northern Uganda lasted approximately a year from the date of referral before the issuance of arrest warrants, and have taken even in the Democratic Republic of the Congo ('DRC').[38]

In the interim, the Prosecutor may seek an exceptional ruling from the Pre-Trial Chamber to "pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available." The Statute is silent on the degree of leniency to be granted national authorities and the extent of information to be provided on domestic progress. Where the Court has determined a deferral was appropriate, it may apply its discretion in favour of continuing domestic

[38] The ICC OTP investigations into the DRC and Northern Uganda were launched on the 22 June 2004 and the 28 July 2004 respectively. The first arrest warrants in relation to Northern Uganda were issued under seal on 8 July 2005; *Situation in Uganda, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58* (ICC-02/04-01/05-1-US-Exp)(unsealed 20 October 2005). The issuance of arrest warrants in the DRC situation is pending.

action. In such circumstances the Prosecutor will be allowed merely to request periodic updates from the State concerned on "the progress of its investigation and any subsequent prosecutions". The deferral to national investigations will be open to review by the Prosecutor six months after the deferral or at any time when a significant change in domestic unwillingness or inability can be demonstrated. However, since much of the case file on offenders will be of a confidential nature, it is unclear the extent to which the Prosecutor can demand access to the details of an investigation. While lack of requisite cooperation could be presented as evidence of domestic unwillingness to enable independent assessment, this may not be deemed sufficient to warrant the case being recalled. A recalcitrant State, therefore, may soon learn that in order to block cases before the ICC it need not engage in the kind of overt opposition that would immediately signal unwillingness. Instead, it may come to employ more subtle, procedural stalling mechanisms that are consistent with the letter of the Statute and short of bringing its actions in violation of its terms.

Moreover, it may not be during the investigative phase, but at later trial, conviction or post-conviction stages that a State may seek to undermine or postpone genuine progress. National proceedings could continue for a considerable period of time, including investigation and prosecution, before the case is finally deemed, possibly in relation to the final judgement or sentencing, to have been insufficiently genuine. Alternatively, a complex trial lasting several years which is conducted genuinely may conclude with the conviction being set aside under the terms of a parole, pardon or amnesty. As most important pieces of material and testimonial evidence are lost in the earliest stages after a crime, referral of the situation at this late stage may have serious repercussions on the Court's ability to collect evidence and to take uncontaminated witness statements. In the worst scenario, the Prosecutor may be trapped in a recurring cycle whereby preliminary examinations leading to an investigation are undertaken only to result in cases being deferred. He may repeatedly be left to observe cases being carefully strung out in domestic proceedings through multiple stage delays that only after several years are formally deemed not genuine, by which time international support for trials for that situation may have waned. Thus, the application of a strong presumption in favour of domestic action may enable a non-genuine State to exploit the procedural mechanisms made available by the Statute.

The trials held in Indonesia relating to the crimes committed in East Timor

offer a telling example of avoidance techniques employed prior to, during and at the conclusion of domestic trials. As reviewed above, after the numerous postponements and sustained international pressure, domestic legislation establishing the special Human Rights Courts was finally passed, but with a selectively circumscribed scope and timeframe. This was followed by delays and allegations of political influence over the appointment of judges and prosecutors, and controversy over the list of accused persons which glaringly omitted the most senior military officers alleged to be most responsible. The resultant trial and appeals process, concluding four years after the atrocities, has been widely condemned as inconsistent with an intent to bring the perpetrators to justice.[39]

It is hoped that the Court will take a more robust approach towards assessing unwillingness or inability and will exercise greater scrutiny in applying any margin of appreciation. In the Darfur situation, shortly after the adoption of the Security Council Resolution 1593, the Government of Sudan announced the establishment of an *ad hoc* Sudanese Court to investigate and prosecute crimes committed in its eastern region. The initiation of national judicial proceedings would potentially enable Sudan to challenge, by way of Article 19, the jurisdiction of the Court in accordance with the test set in Article 17. However, Sudan will need to show that a particular case brought by the Prosecutor is the subject of genuine national proceedings, not just that it has initiated domestic processes generally. As indicated in the first two reports of the Prosecutor to the Security Council, while the ICC is following closely the progress of these trials, the information available to date indicates that they are not focussing on the type of cases that are the focus of his current investigations: that is, cases relating to persons who bear the greatest responsibility for crimes within the jurisdiction of the Court.[40] Thus, for the purpose of admissibility, national proceedings will need to encompass both the person and the conduct which is the subject of a case before the ICC. The manner in which the ICC Chambers apply this standard will be critical for the success of the enforcement system created by the Rome Statute.

---

[39] Commission of Experts on East Timor Report; see above, Chapter 4. A similar verdict followed the parallel trial in relation to the 1984 Tanjung Priok massacre. *See also* trials of TNI officers for abuse of authority during military assaults on Aceh Province, which appear to have been held to deflect attention from more serous allegations of arbitrary killings and targeting of civilians; *U.S. questions RI's will to prosecute rights cases*, Jakarta Post (18 June 2003); *Aceh trial for Indonesian troops*, BBC News (25 September 2003). This suggests, in the light of the complementarity regime, that States will learn to adjust their methodology to provide a veneer of compliance with international norms.

[40] *Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSR 1593 (2005)*, (1st Rep: 29 June 2005) (2nd Rep: 13 December 2005)

(b) Challenges to jurisdiction or admissibility (article 19)

The second opportunity for States to lodge challenges begins once the Prosecutor has brought a case. Article 19(1) stipulates that the Court shall satisfy itself that is has jurisdiction "in any case brought before it", and may determine "the admissibility of a case" on the grounds referred to article 17. This means that a challenge may only be brought once a warrant of arrest or a summons to appear has been issued, since prior to that moment there is no case before the Court.[41] Jurisdiction and admissibility challenges, therefore, cannot be brought with respect to a situation in general. Challenges may be brought by the Prosecutor, the accused, a State with jurisdiction, or a State from which acceptance is required under article 12. The Court may also act on its own motion. Such proceedings are permissible even in the event of a Security Council referral, since the Statute makes no exceptions to the general rule.[42]

Although article 19 and the accompanying rules seek to ensure an expedited process for challenges, there is wide scope for procedural delays. Challenges can only be brought once and must be lodged prior to or at the commencement of a trial, although "in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial." Moreover, while States are required to make their challenge at the earliest possible stage, there is no sanction if they fail to do so. The Pre-Trial Chamber is to decide on the procedure to be followed in challenge proceedings. It may hold a hearing, although this is not obligatory, or it may join the question to a confirmation or trial proceeding. It is possible, however, that several States may have jurisdiction and they may each bring challenges at different times. The accused may bring a challenge also at the latest stage possible as s/he is under no obligation to challenge at an early stage. Victims also may seek representation. Since the Statute does not strictly define who may be a victim, there may be several victims or victims groups, possibly rivals, who may argue that the other group cannot represent them and each of whom may wish to submit observations. The Court may, thus, hear several challenges from different

[41] See *Situation in DRC, Decision following the consultation held on 11 October 2005 and the Prosecution' s submission on Jurisdiction and admissibility filed on 31 October 2005* (ICC-01/04-93) (9 November 2005), 4

[42] As noted above, the only difference is that since a Security Council referral is exempted from the normal State consent regime, there is no precondition under article 12 to secure the acceptance of the Court's jurisdiction from these States (see above, Chapter 6)

parties, at different stages of the proceedings. Attempts made during the PrepComm to introduce a Rule that would require challenges to be heard together to avoid such delays were considered contrary to the Statute.[43]

Another factor that the Court must take into consideration at the admissibility stage is the gravity of the case. There are several provisions in the Statute dealing with the subject of gravity. Recital 10 of the preamble to the Statute stipulates that the Court has jurisdiction over 'the most serious crimes of international concern'. Article 5(1) strengthens this notion by stating that the jurisdiction of the Court is limited to 'the most serious crimes of concern of to the international community as a whole'. Specific indicators of gravity are contained also in the contextual elements of the crimes as stipulated in the Statute and the Elements of Crimes, such as: 'manifest pattern of similar conduct', 'widespread', 'systematic', 'multiple commission of acts', 'State or organisational policy', and 'as part of a plan or policy or as part of a large scale commission of such crimes'. The most explicit reference to gravity as a determinative factor on the selection of cases, however, is contained in article 17(1)(d), which stipulates that a case will be inadmissible where it is not of sufficient gravity to justify further action by the Court. The provision, thereby, establishes a filter mechanism to prevent the Court taking up relatively minor cases. This means that any case presented to the ICC will therefore need to pass a two fold test: (i) it must fall within the jurisdiction of the Court, and (ii) it must be sufficiently grave to be admissible.

Again, the manner in which the Court determines the scope of gravity will shape the pattern for future case selection. As noted in Chapter 4, much of the discussion on gravity determination has focussed primarily on issues related to the seniority of offenders and/or the degree of their participation in particularly serious crimes. The ICC judges may decide to interpret article 17(1)(d) in a narrow manner by elaborating a specific threshold that must be met before any cases can proceed. One such standard, drawing on the criteria applied by the SCSL Prosecutor and the *ad hoc* Tribunals as part of their completion strategies, could be to require that cases focus on leadership suspects only.[44] This would aim at strictly defining the scope of

[43] Holmes (2002), 684

[44] *See* ICTY Rule 28, as amended on 6 April 2004 as part of the completion strategy, which requires Tribunal's Bureau to determine "whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal"; *see also* ICTY Annual Report A/50/365 (1995); see above, Chapter 4

ICC investigations at the criminal policy level where the principal decisions are orchestrated. The Chamber may, however, determine it inappropriate for a permanent institution that is not time-bound in its longevity to so circumscribe its scope, particularly given that the legislators of the Statute refrained from doing so. A narrow focus on rank could limit also the overall deterrent impact of the Court if it paradoxically serves to bolster impunity for the actual perpetrators of major crimes. Establishing hierarchy as a legal test, moreover, would expose the ICC to admissibility litigation by defendants, who could challenge the jurisdiction of the Court based on their comparative seniority. It would also ignore the fact that command structures and policy/decision-making levels can be fluid and not readily susceptible to easy distinction. Thus, while hierarchical consideration no doubt will be an important policy determination in the selection of cases by the Prosecutor,[45] it would appear counter-productive to set it as a legal precondition.

Other authorities indicate that a wider approach should be taken to gravity so as to encompass also other factors, such as the commission of offences by particularly serious or notorious perpetrators, as well as the overall impact of a criminal episode on the situation as a whole or its temporal and geographic scope.[46] Particularly, in terms of hierarchy, it may be necessary in certain situations, due to the unavailability of evidence or senior suspects, to build a pyramid of cases starting with mid-level commanders, as the early prosecutorial strategy of the ICTY demonstrates. Maintaining a level of uncertainty as to the potential focus of ICC investigations and the exercise of prosecutorial discretion, moreover, may heighten the deterrent effect of the ICC. A broad and flexible rendering of gravity, thus, would militate against the definition of explicit thresholds. Instead, it would represent a relatively straight forward assessment of gravity aimed at excluding the prosecution of cases that, while falling within the jurisdiction of the Court, would be essentially minor in scope.

Where a case falls within the Court's jurisdiction and would be admissible, a

---

[45] The ICC Prosecutor has taken a policy decision to focus on "those who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible for those crimes". At the same time, his policy paper states that "[t]he concept of gravity should not be exclusively attached to the act that constituted the crime, but also to the degree of participation in its commission"; OTP Policy Paper, 7

[46] *See, inter alia*, Carla Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility' (2004) 2 Jrnl Int'l Crim. Justice, 517. *See also* above Chapters 3-4 regarding jurisdiction over leaders (seniority) and those who committed the worst atrocities (scale/severity): definition of category 1 offenders in Rwanda's Organic Law No.8/96; discussion accompanying the adoption of article 1 SCSL Statute, S/2000/915, ¶¶29-30; article 1, Agreement on the Extraordinary Chambers in Cambodia

third, challengeable threshold applies at the level of the Prosecutor's discretion to initiate an investigation in relation to a referred situation or to proceed with a prosecution. The decision on cases for which there is sufficient factual and legal basis and which would be admissible, but which would not be desirable on other case selection grounds is resolved by way of Article 53(1)(c) and 53(2)(c).[47] The Prosecutor, for example, may determine that a particular line of inquiry may detract from the ability of the Court to pursue more grievous cases, or he may compare the overall gravity of one situation with another in deciding which investigations to initiate.[48] The preamble citations and references in Article 5 to limiting the focus of the Court to the most serious crimes of international concern support this position.

3. NON BIS IN IDEM

(a) The ICC with respect to its own trials

Article 20(1) provides that the conviction or acquittal of a person by the ICC will preclude subsequent prosecution for the same conduct by the Court. The '*idem*' relates to the same conduct being re-tried under a different categorisation, i.e. murder of civilians as a war crime being subsequently re-tried as a crime against humanity or genocide.[49] The only exception provided is for revision of a conviction or a sentence based upon newly discovered evidence, the discovery of the fraudulent nature of evidence entertained during the trial that would be sufficient to alter the final verdict, or proof of serious misconduct by one of the participating judges (article 84). In these situations, the Appeals Chamber may reconvene the original trial chamber or constitute a new one.

---

[47] On the scope of Pre-Trial Chamber review over the Prosecutor's discretionary decisions see above, Chapter 6, n.28

[48] Because of infinite jurisdictional scope of the Court and its strictly defined resources, the OTP will need to adopt a resource-driven, rather than case-driven prosecutorial strategy (see below, Chapter 10)

[49] The provision is without prejudice to the possibility of the Prosecutor to bring cumulative charges in the indictment. As has been established in the practice of the ICTY, cumulative charges have been permitted where the crimes charged protect different values or contain different elements; *Prosecutor v Kupreskic et al., Decision on Defence Challenges to Form of the Indictment rendered in Kupreskic et al.* (15 May 1998). In relation to consideration of cumulative charges at the penalty stages, see *Prosecutor v Tadic, Decision on Defence Motion on Form of the Indictment* (14 Nov, 1995), 10

(b) Domestic courts with respect to an ICC trial

Article 20(2) prevents the prosecution of an individual by another court for a crime that has been already tried by the ICC. The term 'another court' is not defined, but from the drafting history indicates that it refers to national courts of State Parties, as they are the only relevant authorities that are bound under the Statutes provisions.[50] Nonetheless, the ICC judges may interpret the phrase to include other international criminal tribunals, particularly those established through UN participation, as well as other quasi judicial forums. The adherence of non-State Parties to the rule would depend on general and voluntary respect for the ICC.

In contrast to paragraph 1, the '*idem*' relates to the crime and not the conduct. Thus a person who has been tried by the ICC for rape as a war crime could be later re-tried for rape as a crime against humanity[51] or rape as an ordinary crime by another court. This corresponds to the right recognised in many national legal systems to prosecute an individual who has been tried abroad, and which is accompanied in most States with a deduction of sentence for previous time served abroad. The provision also reflects the fact that neither national nor international principles exist for the application of *ne bis in idem* across different jurisdictions. This has resulted in the complete non-recognition of foreign judgements by some States and limited recognition (deduction of sentence principle) by others.[52]

(c) The ICC with respect to a national trial

One of the central themes of negotiating States favouring a strong ICC was the principle that Court must be the final arbiter of its own jurisdiction and in ruling on the *bone fides* of national action. Without this, complementarity would render the ICC powerless if it enabled national authorities to avert the Court's jurisdiction simply by instituting domestic proceedings. The *ne bis in idem* rule under article 20(3) acts as one of the guarantors of this principle by providing that the ICC is to determine its

[50] Tallgren, 'Article 20 Ne bis in idem', in Triffterer (1999), 427

[51] Compare Wyngaert and Ongena (2002), who suggest that the article 20(2) prevents another court from retrying any crime under article 5; 723. Article 20(2) does not bar subsequent prosecution by another court for a crime listed under article 5 which was not charged in the case before the ICC.

[52] Wyngaert and Ongena (2002), 708

jurisdiction against a competing claim by a national authority.[53] Accordingly, article 20(3) enables the ICC to prosecute a person who has been tried in another court where the proceedings "(a) [w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) [o]therwise 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." There are several important components to this provision. The '*idem*' that is protected is "for conduct also proscribed under articles 6, 7 or 8".[54] Thus the categorisation of offence in the domestic forum is not relevant for this purpose. What matters is that the conduct alleged is proportionately penalised. For the same reason, the exception found in the Statute of the *ad hoc* Tribunals over acts characterised as an ordinary crime was not included in the Rome Statute. Hence, complementarity does not rely on the identical categorisation of crimes, or on ensuring identical outcomes in alternate proceedings, but rather in securing adequate coverage for the repression of each specific criminal conduct.[55]

Finally, as noted above, the ICC Statute does not require any application of the deduction of sentence principle. Articles 9 and 10 of the Statutes of the ICTR and ICTY respectively provide that "[i]n considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served". In contrast, article 20 is silent on the question and the matter is only taken up as part of sentencing under article 79(2), which provides that the Court may, but is not required to, deduct any time spent in detention in connection with the conduct underlying the crime. The negotiating history indicates that the absence of a deduction of sentence rule may have been an unintended omission of the final drafting process.[56] Nonetheless, it is

[53] *ibid*, 429; *see also* article 19(1)

[54] The crime of aggression is not listed in the provision. Wyngaert and Ongena (2002) suggest this may based on the premise that the conduct proscribed by aggression that can only be prosecuted pursuant to a determination by the Security Council, rather than by individual States; 725

[55] The categorisation of an ICC offence as an ordinary crime, however, may result in other limitations that may effect admissibility claims by the State; see below, Chapter 9

[56] The deduction of sentence principle appears in earlier ILC (Art. 42(3)) and PrepCom (Art 12(3)) drafts, and was omitted during the final drafting stages on the view that its placement in the provision on *ne bis in idem* was superfluous, and could better be addressed under sentencing. *See* Tallgren (1999), 433

expected that the Court will make reference to the practice of other domestic courts and international tribunals in the development of its sentencing policies and will be guided by the principle of reasonableness.

4. DETERMINING WHERE JURISDICTION RESIDES

(a) Burden of proof

The Statute does not indicate which party bears the burden of proof at the admissibility stage. The general principle guiding the allocation of the burden of proof under international law and both common and civil law traditions is that the party asserting a claim bears the burden of proving the facts disputed: *onus probandi actori incumbit.*[57] Accordingly, depending on the source of the challenge, the burden may fall on the accused, a State with jurisdiction, a State from which acceptance of jurisdiction is required under article 12, or the Prosecutor. All the above may challenge the determination with respect to the jurisdiction of the Court or the admissibility of a case. In addition, a State with jurisdiction may lodge an appeal against a ruling of the Pre-Trial Chamber on its deferral request (article 18(4)). The Prosecutor, in turn, may challenge the deferral procedure before the Pre-Trial Chamber (article 18(2)) and the Appeals Chamber (article 18(4)), and may request a review on a determination of inadmissibility under article 17 on the basis of new facts (article 19(10)). The Prosecutor will also bear the burden of proving the absence of genuine domestic investigations or prosecutions before the PTC where he seeks to initiate an investigation *proprio motu* (article 15(4)). Cases initiated in accordance to a State or Security Council referral carry a presumption in favour of the Prosecutor's determination on admissibility until challenged.

Where a State brings a jurisdiction or admissibility challenge, the burden of proof in determining the effectiveness of its national procedures will lie with that State. In particular, it will have to show that it is acting in good faith and not merely attempting to delay or deflect ICC proceedings. This makes formidable sense since it is national authorities that, by virtue of their own resources and familiarity with their

[57] Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals* (1995), 369; Lillich, ed., *Fact-Finding Before International Tribunals* (1990), 34

system, are best positioned to give evidence as to the effectiveness of their procedures.

The Court may, however, adopt other commonly accepted principles for allocating the burden of proof. It may, for example, place the burden on the party making the disfavoured contention, which will almost always be the Prosecutor.[58] In particular, the judges may opine that the structure of article 17 provides a presumption in favour of domestic action. Since a case will be inadmissible unless lack of domestic genuineness can be proven, the Court may decide that the burden of demonstrating bad faith or inability rests with the Prosecutor. Equally, the Prosecutor may try to balance or shift the burden towards the State by relying on the principle that the party that has exclusive or superior knowledge of the facts is in the best position to provide the required evidence.[59] Proof of obstruction by State authorities, such as by unreasonable restrictions being placed on access to information on national proceedings, may enable adverse inferences to be drawn by the Court.[60]

(b) Standard of proof

The standard of proof at the admissibility stage should be the 'balance of probabilities' and not a higher standard such as 'proof beyond reasonable doubt', since what is at issue is the forum in which the alleged conduct is to be tried, not the determination of the actual conduct itself. The drafting history demonstrates, nonetheless, that appropriate deference should be granted to domestic jurisdictions when assessing the 'genuineness' of national proceedings, including decisions not to prosecute, as a precaution against the ICC sitting in judgement as an appellate body over the efficacy of national proceedings.

---

[58] OTP Policy Paper, 55

[59] *Eduardo Bleier v Uruguay*, HRC Comm.No.R.7/30 (23 May 1978),¶13.3; *Avsar v Turkey* (25657/94) ECHR 435 (10 July 2001),¶392; *Salman v Turkey*,(21986/93) ECHR 356 (27 June 2000),¶100; *Cakıcı v Turkey*,(23657/94)[1999] ECHR 41 (8 July 1999),¶87; *Ertak v Turkey*,(20764/92) ECHR 192 (9 May 2000),¶131; *Timurtaş v Turkey*,(23531/94) ECHR 221 (13 June 2000),¶82; *Selmouni v France*, (25803/94) ECHR 66 (28 July 1999),¶87; *Ribitsch v Austria*,(18896/91) ECHR 55 (4 December 1995),¶34; *Tomasi v France*,(12850/87) ECHR 53 (27 August 1992),¶108-111

[60] *Informal expert paper* (complementarity), ¶56

(c) Forum determination

Another set of issues governing the interaction between national courts and the ICC is the question of how the trial venue will be determined where the ICC either declines or defers jurisdiction. On the inter-State level, there is no general rule of international law establishing a hierarchy between the various bases of jurisdiction where different national authorities want to prosecute the same conduct. Multilateral extradition instruments normally leave the requested State with discretion to decide which State is given priority. In the absence of guiding rules, forum determination is normally made on practical grounds such as the availability of witnesses and evidence, the location of the accused, and the decisions on extradition made by the custodial State. It may also be influenced by the manner in which a particular State has prescribed the jurisdiction of its domestic courts.

Territorial jurisdiction is widely held to be the strongest and primary basis for jurisdiction.[61] Literature on the topic, thus, normally grants preference to the place where the offence took place, subject to there being a genuine ability and willingness to effectively prosecute the conduct in question. Prosecution in the territorial State will normally have several advantages, including the convenience to the parties, cost-effectiveness and procedural efficiency.[62] It also corresponds to the principle that a criminal defendant should be tried by his 'natural judge'.[63] The proximity of the courts to the events, moreover, will enable a better appreciation of the socio-political, historical, cultural context of the case, and is more likely to contribute to restorative justice for the victims and affected communities. Domestic legitimacy and acceptance, furthermore, may better contribute to public debate and deliberation, and heighten pedagogical initiatives to deter the future recurrence of violence and to inculcate a culture of accountability.

Other valid reasons, however, may militate against assigning priority to the State where the crime occurred. The State of nationality of the accused or the State of nationality of the victim may have equally compelling arguments for prosecuting the case. Granting primacy to the territorial State may risk creating priority claims to ownership which could be linked to concepts of sovereignty and non-intervention in

[61] Jennings and Watts (1996), 458
[62] Cottier, in Fischer, Kress and Lüder, eds., *International and National Prosecution of Crimes under International Law: Current Developments 2* (2004), 851
[63] *Commentary* to Princeton Principles, 53

order to limit action by other States.[64] Moreover, aside from the inability or unwillingness of the territorial State to entertain genuine prosecutions, there may be practical factors, such as the presence of the victim and the accused, perhaps by way of asylum, in another country. Finally, States with no direct nexus to the crime enable the exercise of jurisdiction on the basis of universality, although this represents the weakest basis of jurisdiction. Some national courts require a legitimising link between the crime and the forum State,[65] or evidence that the territorial State is unwilling or unable to genuinely prosecute,[66] before allowing the cases to proceed.

As at the inter-State level, there are no guiding rules in the ICC Statute or Rules on how the Court should select the venue for prosecution where it decides to defer a case and there are several competing claims to jurisdiction.[67] Article 90, on competing extradition requests, provides a list of criteria which the judges may decide to apply by analogy. This include such factors as the respective dates of the request, the interests of the requesting State including, where relevant, whether the crime was committed in its territory, and the nationality of the victims and of the person sought. ICTY Rule 11*bis* on the referral of cases to domestic courts provides for the transfer of cases to the State in whose territory the crime was committed, or in which the accused was arrested, or to a State having jurisdiction and being willing and adequately prepared to accept such a case, without indicating a priority of ranking.[68] As the ICTY Referral Bench has stated, "it has not been shown that there is an established priority in international law in favour of the State in whose territory a crime was committed. International extradition treaties, whether multilateral or bilateral, offer some analogy, but these do not typically provide for primacy of any one ground of jurisdiction. In domestic jurisdictions, the question is often regulated by

---

[64] Ferdinandusse, 'The Interaction of National and International Approaches in the Repression of International Crimes' (2004) EJIL15, 1050

[65] *See* discussion on German practice, Chapter 3, n.118-122 and accompanying text. *See also*, more generally, adoption of 'genuine link' principle in the *Nottebohm case*, ICJ Rep (1955) and rulings in Spanish courts

[66] *See* Decision of the National Court (Spain), Criminal Chamber, Plenary Session, Appeal Record No. 115/2000, Preliminary Proceedings 331/99, Central Court of Instruction No. 1, Madrid, 13 December 2000, concerning action brought against former Guatemalan military and government officials

[67] *See* Morris, 'Complementarity and Its Discontents: States, Victims, and the International Criminal Court', in Shelton, ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000) who points out that "the ICC Treaty articulates no principles or policies to govern ... decision making on fundamental issues"

[68] See *Prosecutor v Mejakic et al., Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis (20 July 2005), ¶40: "As a matter of construction, the Rule appears, relevantly, to be concerned only to identify the alternatives and gives no indication of a hierarchy of, or priority between, states."

statute and there is no universal provision or practice." The Princeton Principles on Universal Jurisdiction provide a non-exhaustive set of criteria for States to take into consideration when deciding whether to try or extradite a person over which it has custody solely on the basis of universal jurisdiction based on an aggregate balance of multilateral or bilateral treaty obligations; the place of commission of the crime; the nationality connection of the alleged perpetrator to the requesting State; the nationality connection of the victim to the requesting State; any other connection between the requesting State and the alleged perpetrator, the crime, or the victim; the likelihood, good faith, and effectiveness of prosecution in the requesting State; the fairness and impartiality of the proceedings in the requesting State; convenience to the parties and witnesses, and the availability of evidence in the requesting State; and the interests of justice.[69] Burke-White suggests the guiding rules for the selection of the *forum conveniens* can be found by application of the principle of subsidiarity. As employed in the Treaties of the European Union, the principle seeks to by defer matters to the lowest practicable level for execution.[70] Applied to the field of international criminal law, he suggests that enforcement should occur "as close to the affected populations as considerations of justice and fairness will allow".[71] The implications of subsidiarity, however, arguably go beyond the level of horizontal inter-State relations. For subsidiarity, like complementarity, deals primarily with the distribution of competencies between the State and supra-State levels along an axis of vertical powers, which seeks to avoid excessive centralism by ceding sovereignty upwards only where essential and appropriate. Moreover, once delegated, States can neither block nor withdraw competence and must refrain from taking concurrent action on the same issue.

In the hypothetical situation where all factors as to willingness and ability are equal, the Court may have to decide between competing bases of jurisdiction claimed by different States. In practice, the various principles of jurisdiction may often interweave, and a State claiming jurisdiction may do so on several related bases.[72] Given that the ICC explicitly recognises the bases of jurisdiction founded on territoriality and active personality, the most difficult choice will be between States

[69] Principle 8, Princeton Principles
[70] *See* 1992 Treaty on European Union
[71] Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 Michigan Journal of International Law 1, 87
[72] Brownlie,306

asserting jurisdiction on these bases. As noted above, practical factors, including the interests of victims, the interests of justice, the impact on reconciliation and external considerations may influence the ultimate outcome of the decision.

The practice of the ICTY Referral Bench is illustrative of the dilemmas the ICC will face. In the case of the *Vukovar Three*, relating to one of the most notorious episodes of the Croatian war, the Prosecutor's Rule 11*bis* motion provoked competing claims for transfer from Croatia (the territorial State) and Serbia and Montenegro (the State of nationality of the accused). The Referral Bench had to choose between approximately equivalent degrees of political willingness and domestic capacity to prosecute the accused. In addition, several practical factors were considered including the impact on the effected population and local reconciliation in Croatia, and the judicial efficiency of joining the case with ongoing related domestic proceedings against several co-perpetrators being put on trial in the *Ovcari* case in Belgrade. Faced with the unenviable task before the judges and controversy caused in the region, in the end the Prosecutor decided to withdraw the motion after concluding that "any decision by the Chambers to transfer it would provoke deep resentment in one or the other country considered for the transfer" and "would not be in the interest of justice".[73] The case was therefore retained by the Tribunal, an option that will likely not be open to the ICC Prosecutor in an admissibility determination before the Court.

In the case of *Mejakić et al.*, the choice before the ICTY Referral Bench was less evenly balanced between BiH, which claimed jurisdiction on the bases of territoriality, active nationality and passive nationality, and Serbia and Montenegro, which claimed jurisdiction also on the basis of active nationality as well as on the basis that the transfer of the accused had been executed by that State.[74] The authorities of BiH argued that it had a significantly greater nexus with the trial of each of the accused for the offences alleged against them. In addition, the BiH authorities in conjunction with the international community had recently set up a special War Crimes Chamber - a forum that had been central to the development of the International Tribunal's own completion strategy.[75] There was a clear preference, thus, for the ICTY to transfer cases to an institution it had helped engender and which

[73] *Address by ICTY Prosecutor to the Security Council* (13 June 2005) CDP/MOW/977-e. The choice of wording recalling the Statutory grounds under article 53 by which the ICC Prosecutor may decide against a particular prosecution is interesting.
[74] *Prosecutor v Mejakić et al., Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis (20 July 2005)
[75] See above, Chapter 4

retained an international component. By contrast, SCG argued, *inter alia*, that the Tribunal could not transfer the case to another forum without its consent based by analogy on the inter-State rule prohibiting re-extradition whereby an individual is to be returned to the Sending State upon completion of the legal process in the requesting State. In rejecting the argument the Referral Bench considered, *inter alia*, the fact the three accused had voluntarily surrendered, albeit under some pressure, and thus, even under extradition law, could not be considered as having been transferred by SCG. More importantly, the Bench noted the established distinction between extradition and surrender and, in particular, the difference between a bilateral agreement between States and the obligation to render cooperation pursuant to Chapter VII of the UN Charter.[76]

As with the ICTY, determinations on competing jurisdictional claims by the ICC will most likely be determined by reference to factors such as the genuineness of the link between the crime and the State (base of jurisdiction claimed) and practical factors affecting the availability of potential evidence. Experience demonstrates, however, that such decisions may prove controversial, particularly in volatile conflict or post-conflict political settings.

Conclusion

The admissibility regime of the ICC establishes a pragmatic system for enabling cases to be heard by the Court. While States can lodge challenges at different stages, once a situation has been referred it falls to the Court to determine where jurisdiction resides. Much will depend, therefore, on the manner by which the Court applies any margin of appreciation in favour of State challenges. As the scenarios cited above indicate, without robust application, the Statute may prove a weak instrument to counter the tactics of recalcitrant State bent on exploiting its numerous procedural devices. The Court will have to determine carefully, therefore, at each stage whether national efforts are undertaken in a genuine manner or otherwise designed to shield offenders from justice. These supervisory functions represent the cornerstone of complementarity, in granting the Court exclusive competence to rule on all matters

[76] *ibid*, ¶¶29-31

related to its jurisdiction and the admissibility of cases against the competing claims of national forums.

VIII

International Cooperation and Judicial Assistance

Having determined its jurisdiction with respect to a situation, the ICC will depend on the cooperation of States to give effect, *inter alia*, to its ability to conduct investigations, identify and locate persons, take testimony and produce evidence, access documents and to effect arrest and surrender. Of all the provisions on the Rome Statute, Part 9 dealing with international cooperation and judicial assistance most clearly encapsulates the tensions between vertical and horizontal regimes. In some respects, the system established echoes the *ad hoc* Tribunals, while in others it models itself on traditional and consensual mutual assistance provisions. The chapter will show that without good faith cooperation or robust Security Council intervention, the ICC may lack the adequate tools to conduct its investigative activities.

The use of term 'cooperation' under the Statute encapsulates a range of functions. A first cluster of activities include requests from the Prosecutor at the preliminary examination stage for the provision of additional information from any reliable source pursuant to article 15 and Rule 104; requests for cooperation from States and intergovernmental organisations under article 54(3)(c) -(d); and requests for cooperation under Part 9. It is in this sense that the term cooperation is used in this study. Other references to cooperation in the Statute include the authority of the Pre-Trial Chamber, acting either on the motion of the Prosecutor, the defence, or its own initiative, to request cooperation pursuant to an order issued under articles 56 and 57. The Trial Chamber may exercise the same powers in accordance with article 61(11) and 64(6). The Court may seek also cooperation for the enforcement of sentences in relation to a core crimes conviction or for an offence against the administration of the Court.

1. HORIZONTAL V. VERTICAL POWERS

(a) A mixture of powers

As a number of commentators have suggested, the Rome Statute creates a unique mixture of horizontal and vertical regimes.[1] In some respects, the ICC follows the supra-State model of the *ad hoc* Tribunals.[2] Thus, surrender to the Court is distinguished from extradition in order to exclude traditional objections under extradition law, as well as constitutional bars in those States that prevent the extradition of nationals.[3] Similarly, the term 'other forms of cooperation' is employed in place of mutual legal assistance. The general duty to cooperate specifies that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" (article 86). This duty to cooperate is applicable to the whole Statute and not, as some delegations had proposed during negotiations, only to Part 9.[4] Article 88 requires that States Parties "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part." State Parties are required, therefore, to adopt requisite implementing legislation and cannot plead deficiencies in their domestic law against a failure to perform their treaty obligations.[5] As with the *ad hoc* Tribunals, the Court is under no obligation of reciprocity towards States, although it may respond to incoming requests for assistance.[6] The Court is also the final arbiter of disputes over the extent of cooperation owed by States under the Statute, and may make a finding of non-compliance and report the matter either to the Assembly of States Parties or to the

---

[1] *See*, e.g., A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL, 144

[2] *ibid*

[3] Some states had urged for a flexible system in the ICC Statute that would allow for their special constitutional requirements; A/51/22 (1996), Vol.I, ¶311; Zutphen Draft Article 79[53], 2(b) permitted a ground for refusal where the person sought was a national of the requested State; A/CN.4/L.490 & A/CN.4/L.490/Add.1(1993); ILC Commentary on Article 41, A/49/10,(1994)

[4] Article 77[51] of Zutphen draft consolidated text read "States Parties shall, in accordance with the provisions of this [Part] [Statute], fully co-operate with the Court in its investigation and prosecution of crimes under this Statute. State Parties shall so co-operate without [undue] delay"; A/AC.249/1997/L.9/ Rev1,p.41

[5] Art.27 VCLT

[6] Article 93(10)

Security Council where the Council has triggered the situation (article 87(7)).[7] The role of national bodies in relation to Court requests is strictly confined. In arrest proceedings, for example, while the competent judicial authority of the custodial State is to determine whether proper process has been served and the arrested person's rights have been respected, it may not examine the legality of the warrant itself (article 59(4)).

Other provisions of Part 9 reflect traditional mutual legal assistance between States. Thus, in contrast to the ICTY and ICTR, only States that have accepted the jurisdiction of the Court are obliged to cooperate, barring Security Council intervention.[8] Article 87, moreover, speaks of 'requests for cooperation' rather than the language of 'obligation' and compliance with 'orders'. In contrast to the ICTY and ICTR, the Rome Statute grants States numerous grounds for refusal, any one of which could potentially delay cooperation or could be exploited to avoid obligations arising from the Statute. The requested State may seek consultation, modification, or postponement of the particular measure of cooperation based on national security considerations (article 72); third party interests (articles 73 and 93(9)(b)); competing requests for extradition from a non-Parties State (article 90), or a competing request for cooperation (article 93(9)); a prohibition in domestic law (article 91 & 99); other requirements of its domestic law (article 91 & 96); interference with an ongoing case different from that to which the request relates (article 94); lack of information provided, pre-existing treaty obligations with non-Parties States, or an inability to affect an arrest (article 97); or the immunity of persons or property of a third State under international law or of a national of a sending State under an international agreement (article 98). Moreover, the requested State may raise issues for consultations with respect to any problems it identifies which may "impede or prevent" the execution of a request, although the object of such consultations must be to resolve the matter without delay (article 97). An admissibility challenge under articles 18 and 19, moreover, may postpone execution, absent instructions from the Court to the contrary (article 95). Such postponement, however, does not effect the ability of the Prosecutor to exceptionally seek measures from the Pre-Trial Chamber

[7] Where the Security Council did not refer the matter there is nothing preventing the Court from asking for the cooperation and assistance of the Council pursuant to article 87(6) ICC Statue and article 15 of the UN-ICC Relationship Agreement; ICC-ASP/3/Res.1

[8] Non-Party States may cooperate either by accepting ICC jurisdiction *ad hoc* (article 12(3)), or otherwise by providing assistance on the basis of an arrangement, an agreement or any other appropriate basis (article 87(5))

"to take testimony or a statement from a witness of to examine, collect or test evidence, which may not be available subsequently for the purposes of the trial" pursuant to article 56. As to compulsory measures, the Trial Chamber can only compel a person a witness or require the production of evidence if the domestic legislation of the State where the witness or evidence is located enables national authorities to assist the Court in this manner.[9]

(b) Domestic modalities

The mixture of the vertical and horizontal regimes is displayed best perhaps in the proviso that requests for arrest and surrender and requests for assistance are to be executed in accordance with both Part 9 and the procedures under domestic law (articles 89 and 93). This presupposes that Part 9 of the Statute and a State's national laws are mutual compatible.[10] A State Party, therefore, cannot be restrained by national law from rendering cooperation to the Court pursuant to its obligations under Part 9 in ways not anticipated by the Statute. A State Party would violate its obligations, for example, where its legislation permits the application of a political offence exemption to surrender, or otherwise enabled national authorities to consider whether an arrest warrant is properly issued, to entertain a *ne bis in idem* claim contrary to article 89(2), or to hear challenges related to admissibility.

Other provisions leave open the question of the balance to be achieved between the investigative requirements of the Court and observance of domestic procedures. The Statute does not determine, for example, whether the taking of evidence and the carrying out of requests should be led by the Prosecutor and assisted, where necessary, by national authorities or if, instead, States should be in charge of request execution.[11] This ambiguity reflects the varying practice of States. It also corresponds to the possibility provided in some jurisdictions for the involvement of the requesting authority in request execution. Modern mutual legal assistance regimes, moreover, depart from the traditional rule that requests should be execution according

[9] Article 64(6), art.58(7)
[10] Broomhall (1999),131
[11] Cassese (1999),165

to the law of the requested State.[12] This movement has occurred because of problems where, as a result of differences between national procedures, information gathered by one State may be inadmissible before the courts of another State because it does not meet its domestic procedural requirements. Article 99(1) of the Statute, thus, provides that requests for assistance are to be executed "in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request". Accordingly, a State Party will not be able to argue that the manner specified in the request cannot be observed because of an absence of domestic provisions, because it departs from normal domestic practice, or it is otherwise cumbersome: it must show a specific prohibition in law. Moreover, the provision does not rule out the possibility for the Prosecutor to control elements of request execution. For example, while the OTP may request the assistance of the State authorities in the identification and location persons, or to facilitate the voluntary appearance of a witness, it may request that the questioning of the individuals be undertaken by its own officials without the presence of State authorities. A witness, for example, may feel intimidated by the presence of domestic officials during questioning.[13] Moreover, enabling States to control the manner in which ICC requests are executed could undermine the effectiveness of the results achieved. As Arbour and Bergsmo have noted, "[b]ased on the experience of the two *ad hoc* Tribunals, merely allowing Tribunal investigators to be present at and assist in the execution process would fall far short of the requirements of effective international investigation and prosecution. How can cases be prepared effectively if the Prosecutor cannot control the gathering of evidence?"[14] Failure to secure such control could render the obligation to cooperate only as effective as the national laws and procedures of each State.[15] This will be all the more important given that investigative measures will be undertaken predominantly on the territory of conflict or post-conflict States.

---

[12] *See* art.6 Model Treaty on Mutual Assistance in Criminal Matters, A/45/117(1990), A/53/112(1998); art.18(17) Convention against Transnational Organised Crime, A/55/383(2000); and art.4(1) EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000)

[13] The presence of the territorial State's law enforcement personnel is normally required in most civil law jurisdictions, but is typically less strict for inter-State requests between common law jurisdictions; interview with Kimberly Prost, Head of the Criminal Law Section, Commonwealth Secretariat (2004); on file with author

[14] Arbour and Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in von. Hebel, Lammers, and Schukking, eds., *Reflections on the International Criminal Court* (1999), 137

[15] Bassiouni, 'Observations Concerning The 1997-98 Preparatory Committee's Work', 13 Nouvelles Études Pénales (1997), 20

Articles 91 and 96 provide that the requested State can require that a request is accompanied by such information as may be required under its domestic law. These provisions should be interpreted narrowly to avoid them operating as an obstacle to speedy cooperation. In relation to requests for arrest and surrender, article 91(2)(c) points out that such 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, taking into account the distinct nature of the Court". This relates, in particular, to the requirement in some jurisdictions that evidence, such as witness statements, is produced before its courts to support an extradition request. A number of common law countries have already eliminated this requirement for extradition proceedings with certain States. The UK, for example, has lifted the requirement with respect to EU Member States under the 1957 *European Convention on Extradition.*[16] In a similar manner, the common law States that have, to date, adopted implementing legislation for the Rome Statute have deleted the requirement for the production of evidence in ICC surrender proceedings.[17] Despite the absence of a similar caveat with respect to other forms of cooperation, article 96(2)(e) should arguably be interpreted in the same spirit as article 91(2)(c) in order to prevent inconsistencies and the raising, similarly, of undue obstacles.[18]

(c) Competing requests

Although the Rome Statute distinguishes requests for arrest and surrender from extradition proceedings, a number of the procedural aspects of the ICC surrender process are borrowed from domestic practice. Article 90 deals with the complex situation where a State Party receives a request for arrest and surrender from the Court and a request for extradition from another State for the same person and for the same conduct. If the competing request originates from another State Party, the requested State is to give priority to the ICC, but does not have to affect the surrender unless the Court has ruled on admissibility of the case. Priority is to be accorded to the Court

[16] 1990 SI 1507, reg.3
[17] *See* UK, Canada, Australia, New Zealand, South Africa
[18] *Informal expert paper: Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation* (ICC-OTP 2003) ('*Informal expert paper* (cooperation)'), ¶60

where the competing request comes from a non-Party State with which the requested State does not have any extradition treaty obligations, and where the case has been found admissible by the Court. If the case has not been found admissible, the request of the ICC and that of the non-Party State are to be placed on an equal footing, leaving the requested State free to proceed with extradition if it so chooses. Similarly, where the competing request comes from a non-Party State with whom the requested State does have extradition treaty obligations, and the case has been found admissible by the Court, the requested State is again granted discretion to determine which request shall be given priority.[19] The requested State, however, must take a number of factors into consideration in arriving at its decision, including the respective dates of the requests; the interests of the requesting State, in particular as to whether it is the territorial State or the State of the nationality of the victim or of the accused; and the possibility of subsequent surrender between the ICC and the other State. These last criteria have been taken over from extradition instruments.[20] Finally, where a competing extradition claim is presented by any State for the same person, but for different conduct, the requested State is to give priority to the Court where it does not have extradition treaty obligations with the requesting State, and where it does, to apply the above factors as to the interests of the requesting State, but while giving special consideration to the relative nature and gravity of the conduct in question. The same set of principles are to be applied in relation to competing requests for assistance (other form of cooperation) where the matter cannot be resolved by consultation between requested State, the Court and the third State (article 93(9)(a)). The Rome Statute, thus, attempts to strike a balance between the cooperation regime binding on States Parties and their existing reciprocal obligations towards other States under extradition law. As is apparent, the procedure is both complicated and cumbersome, and distinguished from the absolute obligatory regime under the Statute and Rules of the *ad hoc* Tribunals.[21]

In reviewing this system, Prost argues that it would be incorrect to suggest that the regime established by the ICC Statute imports a horizontal, State-centric approach to cooperation since the issue of competing requests relates to the obligation of State Parties to other States, not of State Parties towards the ICC:

[19] *Compare* the ability of the ICTY to issue binding orders for surrender to all States, irrespective of competing treaty obligations
[20] *See*, e.g., art.17, European Convention on Extradition (1957)
[21] *See* Rule 58, ICTY & ICTR RPE

> If the requested State were obliged to give the Court priority over a non-State Party, this would amount to affecting the rights of States not Parties to the Statute. This would be in conflict with the principles reflected in the Vienna Convention on the Law of Treaties. Instead, the obligations owed to the non-State Party are placed on equal footing with those owed to the Court and thereby, while the decision of the requesting State may be in favour of the Court as opposed to the State, nothing in the Statute itself affects the rights of non-States Parties.[22]

Although Prost identifies the correct legal issues involved, the results flowing from the negotiated text of the Statute may be less than satisfactory, particularly where they may lead to postpone, delay and possibly to non-surrender. Moreover, where a requested State is bound under treaty obligations to a non-Parties State to try or extradite an accused, the requesting non-Party State may refuse to recognise transfer to the ICC as satisfaction of treaty obligations.

Indicative of the compromise text which the Statute represents, Part 9 oddly it incorporates the extradition rule of speciality. This means that an indictment against an accused cannot be amended after surrender even where, for example, through new witnesses only coming forward after the arrest, new evidence overwhelmingly supports the addition of crimes or a withdrawal of counts, without the consent of the surrendering State. The amendment of indictments has proven to be essential for the ICTY and ICTR Prosecutors, and the imposition of a speciality requirement seems to be an unnecessary restriction. Sensitivity to this concern during negotiations led to the inclusion of the second subparagraph to the article, as a counter compromise, enabling the Court to request a waiver of speciality from the surrendering State and encouraging the requested State to grant such waiver.

(d) Additional forms of cooperation

The forms of cooperation listed in Part 9 are not exhaustive. Pursuant to article 93(1)(l), the Court may request States to provide "any other type of assistance which is not prohibited by the law of the requested State". Article 93(3) provides that any

[22] Prost, 'Article 90',in Trifterer (1999), 1088. *Compare* Cassese (1999), at 166, who argues somewhat unconvincingly and without tackling the issues raised by the law of treaties, that the obligations stemming from the Rome Statute should have taken precedence over those flowing from other treaties.

applicable domestic bar must be "on the basis of an existing fundamental legal principle of general application". Thus, the prohibition must be pre-existing and not adopted after the ratification of the Rome Statute; it must offend a fundamental principle, which may be evidenced by other domestic statutory or constitutional provisions; and it must apply generally to other situations under domestic law and not just to ICC proceedings. The burden of proof in this respect should be placed on the State (*onus probandi actori incumbit*).

The Court could utilise article 93(1)(l) to seek forms of cooperation not prohibited in domestic law, such as the intercept of communications, DNA testing, or the provision of forensic and other expertise and assistance. As with article 99(1), the provision could also be used for the rendering of passive assistance by States, by permitting the OTP to undertake specific investigations steps in its territory without the participation or presence its domestic authorities. Where the requested measure of assistance is prohibited under domestic law, the State concerned must "promptly consult with the Court to try to resolve the matter". In particular, the requested State may propose to provide the assistance sought "in another manner or subject to conditions". If, after consultations, the matter cannot be resolved, it is for the Court to modify the request as necessary: a result that is considerably at odds with the absolute normative obligations imposed by the *ad hoc* Tribunals.

(e) National security and request denial

The Statute provides that a State may deny a request relating to national security outright, either in whole or in part, although it may consider whether the assistance can be provided under "specified conditions, or whether the assistance can be provided at a later date or in an alternative manner".[23] If the requested material is in the possession of the OTP, for example pursuant to an article 54(3)(e) confidentiality agreement, the Court may order disclosure. If the material is in the sole possession of the State, the Court may merely make such inference in the trial as to the existence or non-existence of a fact related to the evidence withheld (article 72(7)). In addition, if the Court concludes that by invoking such grounds for refusal the State is not acting

[23] Article 93(4)-(5)

in accordance with it obligations under the Statute, it may make a finding also of non-compliance and refer the matter to the Assembly of States Parties or the Security Council, as appropriate.

Other possibilities for request denial are strictly limited to where the request relates to a type of assistance not listed in Part 9 and which is prohibit by national law (article 93(3)); where the request relates to documents or information received in confidence from a third party (article 73); where the State Party receives a competing request from a non-Party State pursuant to an existing international obligation (article 90); or in connection with the immunity of a third party (article 98). Denials made in addition to those foreseen in the Statute would place a State in breach its treaty obligations and would expose it to a possible finding of non-compliance. Other factors which may prevent a State Party from executing a request without further consultation, but which cannot form the basis of a denial, include: insufficient information received; inability, despite best efforts, to locate the person sought for surrender; or the fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State (article 97).

(f) Immunities pertaining to third States or Organisations

Whereas article 27 of the Statute provides that immunities under national or international law shall not bar the jurisdiction of the Court, article 98 deals with the immunities owed by a requested State Party to a third State or organisation. Thus, while a State Party may not invoke immunities to deny a request for the arrest and surrender of its own nationals, article 98 provides that it will not be asked to proceed with the arrest and surrender of a national of a third State who enjoys State or diplomatic immunity under international law absent the consent of that State (article 98(1)). The provision serves to maintain the well-established system of inter-State immunities discussed in Chapter 2. Equally, paragraph 2 of article 98 provides that the Court may not proceed with a request that requires a State Party to act inconsistently with an international agreement pursuant to which the consent of a sending State is required for the surrender of one of its nationals to the Court. This helps clarify that the prohibition on re-extradition common to bilateral extradition

agreements also applies to request for surrender to the Court. Moreover, the provision is meant to cover persons who enjoy privileges and immunities under military arrangements providing for the stationing of forces abroad. Status of Force Agreements ('SOFA') or Status of Mission Agreements ('SOMA'), such as those governing the deployment of national armed forces or UN peacekeepers around the world, typically provide for the retention of exclusive criminal jurisdiction by the sending State over their personnel for offences committed on the territory of the receiving State.[24]

The result of these provisions means that, as with competing extradition requests, where a surrender request affects the interests of a third State, the ICC will be bound by the regulations of inter-State practice. This may have significant impact on the ability of the Court to secure accused persons, particularly since the focus of the Prosecutor on the persons most responsible may well result in the targeting of individual in senior military or political office. If the Court is unable to secure the cooperation of the State of nationality of the accused, a suspect may be able to take shield behind the cover of State or diplomatic immunity in a third State.

The scope of article 98 will be subject to the interpretation of the Court.[25] The ICC judges may hold, for example, following the *Pinochet* ruling, that immunity *ratione materiae* under article 98 is not available for official acts that are contrary to ICC core crimes. A strict observance of the House of Lords decision, however, would require a link to an express waiver of immunity, such as by way of a treaty requirement that has been domestically incorporated by the requested State and the third State, and which criminalises the act in question. Immunity *ratione personae*, moreover, would remain in force. A narrow construction of the ICJ decision in *Congo v. Belgium*, by contrast, could lead the judges to deny any exceptions to functional immunity for acts that were not conducted in a purely private capacity.[26] Alternatively, the judges may rule that article 27 of the Rome Statute establishes a waiver of immunity between State Parties for the purpose of the arrest and surrender of their own officials to the Court. Because Parties would be acting pursuant to an ICC request and in the delegated fulfilment of Court powers accepted by them, immunity would not attach either to the person or the functions of any State Party

[24] See above, Chapter 6
[25] *See generally* this section Broomhall (2003), 141-6
[26] *See* discussion above, Chapter 2

official sought by the Court. Immunities would continue to exist, meanwhile, subject to article 98, for the officials of non-Party States.[27]

Kleffner goes further and argues that by consenting to article 27(2) State Parties "implicitly waive the international immunities of their incumbent senior officials vis-à-vis other State parties in their national proceedings."[28] The Rome Statute, however, only creates obligations between State Parties and the Court. It does not regulate nor alter the regime of inter-State horizontal relations between Parties except in explicit circumstances.[29] As noted in Chapter 2, the observance of personal immunities of incumbent senior officials forms one of the most traditional tenants of inter-State relations. Absent explicit consent, the acceptance by a State Party of article 27(2) cannot be read so as waive such immunities for its officials before foreign courts. Moreover, in the light of the legislative and constitutional considerations highlighted above, it is highly doubtful that State Parties intended such an outcome.

Another controversial postulate would be for the Court to hold that both immunity *ratione personae* and immunity *ratione materiae* under international law are no longer applicable between States with regard to perpetrators of core crimes, irrespective of whether they are Parties to the Statute or not.[30] This would render the formulation in article 98(1) of immunities "under international law" sufficiently flexible so as to take into account emerging developments in State practice and *opinion juris*: thereby reducing the applicability of article 98 essentially to non core crime offences.[31]

Finally, as noted below, it is possible for the Security Council to adopt a resolution under Chapter VII requiring States to lift or disregard immunities for persons named in a particular ICC arrest warrant, thereby overriding any pre-existing obligations of UN Member States under international law (article 103, UN Charter).[32]

---

[27] *See* Broomhall (2003), 144-5; Swart and Sluiter, 'The International Criminal Court and International Criminal Cooperation', in von Hebel, Lammers and Schukking (1999), 120-1

[28] *See* Kleffer (2003), 103-6, although he argues that personal immunities would continue to apply in respect of non-Party States

[29] Articles 90 and 93(9) on competing requests for judicial assistance and extradition; see above, Chapter 8

[30] Broomhall (2003),146

[31] Namely, offences against the administration of justice, art.70

[32] *See* 'Enhanced Cooperation' below

(g) Direct execution of investigative measures

Two further features of the Rome Statute demonstrate how the ICC cooperation regime departs from traditional mutual legal assistance regimes. Firstly, article 99(4) authorises the Prosecutor to execute a request directly in the territory of a State Party without having secured its consent and, if necessary, without the presence of the authorities of the requested State. The provision is strictly limited to measures that can be conducted on a non-compulsory basis. This includes the interviews of witnesses on a voluntary basis, or the examination of a public site or place, such as a mass grave, but without 'modification'. Such measures can be executed directly in two situations: (1) in the territorial State, where there has been a determination of admissibility, and following "all possible consultations with the requested State Party"; and (2) in other cases, "following consultations with the requested State Party and subject to any reasonable conditions or concerns raised". With respect to both situations, Prost and Schlunck point out that the language of consultation "was chosen to reflect that the Prosecutor should pursue consultations whenever possible, but at the same time recognising that consultations may not be *possible*, in which case there will be no discussion with the State Party, prior to execution."[33] By distinguishing between the State where the crime is alleged to have been committed and others State Parties, the provision creates creative ambiguity in relation to the latter by imposing conditions that fall short of a strict consent requirement, but go further than mere consultation.[34] Nonetheless, in both situations the requested State cannot raise concerns and propose conditions that are unreasonable and contrary to the express terms of Article 99(4), such as by requiring the presence of domestic authorities during the execution of the measure.[35] Finally, since notice of an intention to undertake non-compulsory measures is distinguished from routine article 93 requests, the Prosecutor does not need to provide the supporting information normally required for a request for assistance (article 96) and may withhold, as appropriate, the identity of witnesses or

[33] Prost and Schlunck 'Article 99', in Trifterer (1999),1141. The *Informal expert paper* (cooperation) suggests "[i]t would be advisable for the Prosecutor to set a deadline for the consultations and indicate that in the absence of a response by that time the Prosecutor will presume that the State has no concerns to raise and that the consultations are thus concluded"; ¶68

[34] Kaul and Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) Yrbk IHL Vol.2, 169

[35] *Informal expert paper* (cooperation), ¶70

the location of sites to be visited.[36]

Secondly, the Pre-Trial Chamber may authorise the Prosecutor to take specific compulsory measures within the territory of a State Party without having secured its consent under Part 9. This it may do where it has determined that the requested State is "clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation". Article 57(3)(d) represents the only exception to the principle that the execution of a compulsory measure is subject to State consent and is to be undertaken in accordance with the procedure of the requested State. The provision aims to remedy the void created where there is no domestic judicial authority competent to authorise the measure: failed State scenario. Accordingly, the Pre-Trial Chamber may, "whenever possible" having regard to the views of the State concerned, authorise the Prosecutor to take specific investigative steps. This may include, *inter alia*, the compulsory interview of persons, the conduct of searches and seizures, and exhumation of sites. Authorisation under the provision takes the form of an order, and may include specific procedures to be followed (rule 115). Conversely, the provision does not apply where the State is able, but unwilling to cooperate.

(h) Resource constraints

A final practical consideration bearing on the functioning of the Court's power is its financial health. As a product of a treaty that is places the Court outside of the UN System, the ICC depends on assessed contributions made by its own State Parties or through voluntary contributions. The Statute also provides that funds may also be provided by the UN, particularly in relation to the expenses arising from a Security Council referral. However, at U.S. insistence, all activity undertaken to date by the UN for the Court, such as the execution of requests by UN operations in the field, has been done at a strictly reimbursable basis. The Security Council Darfur referral, similarly, specifies that none of the expenses incurred in connection with the referral are to be borne by the UN.[37] The annual resource allocation recommended by the Committee on Budget and Finance to the Assembly of State Parties, therefore, will

[36] *ibid*, ¶69
[37] S/RES/1593(2005), ¶7

have a crucial impact on the ability of the Court to fulfil its functions.

Former ICTY/R Prosecutor Goldstone noted early on that budgetary delays and uninformed decision-making repeatedly frustrated the work of *ad hoc* tribunals and undermined prosecutorial independence.[38] The initial years of the ICC have been no different. Although the Court's financial plan is based on projections provided by the organs, the 2004 and 2005 budgets suffered significant cuts in a number of critical areas including the recruitment of investigative personnel for new referrals; the establishment of field offices to support operational activities; and the funding of victim and witness protection programmes.[39] Moreover, the Committee on Budget and Finance questioned issues that did not have a budgetary impact, such as the organisational management and administration of the Prosecutor's Office, bringing into doubt the Prosecutor's authority in these matters under the Statute.[40] The resolution of the tension between the need for efficient budgetary planning and the flexibility necessary to respond to new situations or conditions as they arise will be critical for the successful functioning of the ICC.

Questions of funding also go to the heart of legal, financial and strategic choices regarding the type Court envisaged by stakeholders.[41] As of end 2005, the Court was investigating three situations, had received a State referral from the Central African Republic and a declaration of acceptance of jurisdiction from the Cote d'Ivoire and, in addition to these two, was analyzing a further five situations of concern.[42] A case driven approach would require the ICC to act in all situations where crimes appear to fall within its jurisdiction and are grave enough to be admissible. This would result in a Court dealing with multiple situations. Such routine intervention, however, could encroach on the responsibility of national authorities and

---

[38] "Without the cooperation of States, and without the necessary funding and support the accomplishment of our essential task is seriously jeopardized"; 'Symposium International Criminal Law: Living History Interview with Judge Richard Goldstone'(1995) 5 Transnat'l L. & Contemp. Probs., 373 cited in O'Donohue, 'Towards a Fully Functional International Criminal Court: The Adoption of the 2004 Budget' (2004) LJIL 17, 586

[39] *Report of the Committee on Budget and Finance*, ICC-ASP/3/18 (13 August 2004). *See* O'Donohue, 'The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor' (2005) LJIL 18, 591–603. *See* e.g. the CBF recommendation for 2005, later rejected by the ASP, to cut the Prosecutor's proposed budget for a third investigative team – the budget that later went into establishing the Darfur investigative team; ICC-ASP/3/18, ¶67

[40] *See*, in particular, objections raised in relation to the establishment of the OTP Jurisdiction, Complementarity and Cooperation Division; ICC-ASP/3/18, ¶61-62

[41] *Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs* (24 October 2005)

[42] *ibid*

represent too high a level of intrusiveness. Moreover, increasing the demands for intervention in comparatively less grave, although admissible, situations might fail to accurately reflect the concern of the international community and could lead to a diminishing of support.[43] A resource driven approach, by contrast, would require the Prosecutor to adopt a highly focussed strategy that would limit the overall impact of the ICC, meaning that many situations involving massive crimes would not be investigated. A narrow focus, however, may increase international consensus towards ICC prosecutions.[44] The budgetary priorities set by States and their financial commitment to the process, therefore, will dictate the much of the shape and form the institution will take.

2. ENHANCED COOPERATION

While Part 9 of the Statute stipulates the obligations on State Parties to render provide cooperation, there are a number of ways in which cooperation could be enhanced. One mechanism, that of bolstering the powers of the Prosecutor through Pre-Trial Chamber authorisation under article 57(3)(b), has already been noted. Other possibilities are discussed below.

(a) Domestic legislation

States may provide for additional types of assistance or facilitated modes of execution in their domestic legislation. Parties may include provisions in their ICC implementing legislation that voluntarily grant cooperation for one or more categories of investigative measures. Domestic modalities for cooperation may be strengthened also through regional decision making. In the context of EU, Members States, building upon the EU Council Common Position on the ICC,[45] adopted a Council Decision in June 2002 establishing a *European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war*

[43] *ibid*
[44] *ibid*
[45] EU Council Common Position 2001/443/CFSP(11 June 2001)

crimes.[46] The Decision, in particular, recalls the affirmation in Rome Statute preamble citation four that the effective prosecution of the core crimes "must be ensured by taking measures at national level and by enhancing international cooperation". It calls on EU Member States to enable direct communication between centralised, specialised contact points, and the provision of facilitated exchange of information, where possible without the requirement of a formal request. In a second Decision, the Council calls for the exchange of core crimes information between relevant national law enforcement and immigration authorities within and between EU Member States in connection with either suspicious applications for residence permits or in relation to domestic core crime investigations and prosecutions. The Decision also calls on EU Member States to consider establishing dedicated war crimes units within competent law enforcement authorities, and calls on the EU Council Presidency to promote interaction between national contact points and to invite representatives of the *ad hoc* Tribunals and the ICC to coordination meetings as appropriate.[47] Such heightened interaction between and within competent national authorities promise to augment the scope for complementary support for the ICC's own investigative efforts.

(b) Agreements or arrangements

Article 54(3)(d) empowers the Prosecutor to enter into such arrangements or agreements, not inconsistent with the Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organisation or person. The provision has become a fruitful source for enhancing cooperation and a number of arrangement and agreements have already been concluded with State Parties, non-Party States and international organisations. For non-Party States and international organisations such agreements may form the sole legal basis for rendering cooperation.[48] The arrangement or agreement may grant assistance for the purpose of a concrete investigation or may enhance cooperation more generally. For example, a State Party may be willing to allow the Prosecutor to take voluntary witness testimony without

[46] EU Council Decision 2002/494/JHA(13 June 2002)
[47] EU Council Decision 2003/335/JHA(8 May 2003)
[48] In addition, a non-Party State may be bound to render cooperation by a Security Council Chapter VII resolution

following the consultation and notice procedures of article 99(4), or it may specify an advance notice period (e.g. 48 hours) that the Prosecutor must give to its central authority before entering its territory to conduct non-compulsory activities. An agreement may substitute also for domestic implementing legislation on an interim basis where there has been a delay in its adoption, or it may regulate in more detail practical arrangements which would normally not be covered by primary legislation. It may set out rules, for example, for the exchange of information in accordance with domestic law, or the types of information required under domestic law for the provision of assistance under articles 91(2)(c) or 96(2)(e). The Prosecutor may also enter into arrangements for the protection of classified information by agreeing not to disclose, at any stage of the proceedings, documents or information that he obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the information provider consents.[49] For territorial States where the Prosecutor will conduct investigative activities, an agreement may clarify other legal and practical issues such as the provision of security, modalities for witness and victim protection, and the provision of administrative services and logistical assistance.

A dualist State will typically insist that an international agreement, such as one entered into with the OTP or the Court as a whole, is implemented by domestic law, as the agreement itself will function only at the international law plane and will not be effective within national law without some form of domestic incorporation. This may undercut the utility of such *ad hoc* agreements as stop gap measures to remedy a lack of adequate implementing legislation. At the same time, poorly constructed agreements may result in the downgrading of assistance by enshrining into text restrictive modalities and interpretations on the scope of cooperation owed. The experience of the ICTY, which relied upon such agreements in its early phases in the absence of national implementing legislation, has indicated that the elaboration of modalities sometimes only served to highlight the differences in views between the Prosecutor and States about who should be in control.[50]

[49] Article 54(3)(e); *see also* ICTY/ICTR Rule 70
[50] Letter from ICTY OTP to ICC Director of Common Services (6th March 2003); on file with author

(c) Security Council

The referral of a situation by the Security Council, acting under Chapter VII of the UN Charter, will render the duty to cooperate binding on all States so directed by the Council, including States not Parties to the Statute. As noted earlier in Chapter 6, the basis for the cooperation to be rendered here will be the Security Council resolution itself, not the Rome Statute. But can the Security Council substantively alter and enhance the Statutory cooperate regime to enable the Prosecutor to circumvent the cooperation provisions laid down in Part 9?

The Security Council cannot authorise the ICC to act beyond the powers conferred upon it under the Statute. Unlike the *ad hoc* Tribunals, the ICC is not a subsidiary organ of the Council in the sense that the principal organ possesses the competence to determine the membership, structure, mandate and duration of existence of its subsidiary organ.[51] The ICC, as an international organisation with distinct legal personality, cannot be bound by Security Council obligations. Furthermore, the principle of attribution holds that an international organisation cannot act beyond the powers attributed to it by its constituent treaty.[52] As Sarooshi points out, the Security Council cannot expand the subject-matter jurisdiction or temporal scope of the Court beyond the provisions of the Statute, since the ICC would then be acting *ultra vires* its own Statute.[53] Similarly, the Council cannot enable the Court to circumvent the complementarity provisions of the Statute, such as the admissibility and challenge regime of article 17 and 19, or to bypass the State cooperation regime of Part 9.

The Security Council can, however, place a binding obligation on ICC State Parties that modifies their corresponding treaty obligations under the Rome Statute, by virtue of article 103 of the UN Charter. For example, the Council could require State Parties to enact legislation enabling them to render specific additional forms of cooperation either by way of article 93(1)(l) or by entering into article 54(3)(d) agreements. Moreover, it could direct ICC State Parties to amend the Rome Statute via the procedure foreseen in Part 13 of the Statute to enable the Court to fulfil the

---

[51] Sarooshi, *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (1999),130

[52] Schermers and Blokker (1995), 141

[53] Sarooshi, 'The Peace and Justice Paradox', in McGoldrick, Rowe and Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 106-7

objective desired by the Security Council; although the Council would be limited in its ability to enforce actual compliance with its decision by the Assembly of States Parties.[54] More controversially, the Council could trump the obligations of ICC State Parties to require them to act in a manner that would be inconsistent with the Rome Statute. It could, for example, require State Parties to desist from entering a challenge to the jurisdiction or admissibility of a case under article 19; to require States (or certain States) to share information and documents sensitive to national security under *in camera* proceedings; or to require States to prioritise ICC requests for surrender over competing requests for extradition. By the same token, the Council could obligate States in a manner that would diminish support to the Court by, for example, demanding the non-surrender of nationals of States not Party to the Rome Statute without that State's consent.[55]

As noted earlier, in case of non-compliance by States with a Security Council referred situation, the Court may make a finding to that effect and refer the matter to the Council. Security Council practice in the area of non-compliance with Chapter VII resolutions, however, is not encouraging. Repeated ICTY notifications of non-compliance by States of the former Yugoslavia has led to little more than verbal admonition.[56] Notification to the Council or the Assembly of State Parties, nonetheless, could trigger customary and emerging international norms on State responsibility.[57] This could lead to the imposition of bilateral or collective enforcement action, or the adoption of regional and bilateral sanctions such as the imposition of trade and aid conditionality measures, travel bans and the freezing of assets.

The Court's resort to the Security Council need not be limited to infractions based on Council referrals. The Security Council could enhance cooperation at any time at the Court's request.[58] The ICC, thus, could call for the Council's assistance to obligate non-Party States (or particular non-Party States) to render cooperation in

---

[54] *See* Article 48, UN Charter "[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

[55] *See*, e.g., Darfur referral, S/RES/1593(2005),¶6 in relation to personnel attached to UN or AU operations

[56] Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000), 223

[57] *See* ILC Commentary on *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, A/56/10 (2001)

[58] Article 87(6): "The Court may ask any intergovernmental organisation to provide ... forms of cooperation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate".

relation to a situation not referred by the Council, or to mandate a peacekeeping operation to provide cooperation in the gathering of evidence, the protection of victims and witnesses and the arrest and surrender of suspects.[59]

(d) Rule amendment and the Review Conference

One area in which the ICC Prosecutor will have less flexibility than the Prosecutors of the *ad hoc* Tribunals is in the use of implied powers: i.e., the invocation of those powers which, although not expressly provided for in the Statute, are deemed essential for the performance of the Court's functions.[60] Given the rudimentary form of the ICTY and ICTR Statutes, the formalisation of such powers through rule amendment has been an important feature of the Tribunals' development and the enhancement of their cooperation regimes.[61] The ICC Prosecutor will need to be far more cautious in the invocation of implied powers given the express intention of the drafter to create a detailed framework in the Statute and the Rules,[62] if he is to avoid accusations of acting *ultra vires*. Moreover, although rule amendment may be proposed by any State Party, the judges acting by majority or the Prosecutor, the procedure is far more burdensome than the judge-created Rules of the *ad hoc* Tribunals. Adoption of amendments will require a two-thirds majority of the Assembly of States Parties before it enters into force (article 51).

In the case of the ICTY and ICTR, changes of a more fundamental nature to their Statutes have required the proposal of amendment by the Tribunal Presidents to the parent organ.[63] The Rome Statute is open to amendment on the proposal of any State Party, either at a meeting of the Assembly of States Parties or by way of a Review Conference seven years after the Statute's entry into force. The amendment process is subject to a series of conditions and requirements that will render it a

---

[59] *See Informal expert paper* (cooperation), ¶95. Of course, the Council could act also at its own initiative in the absence of a request; Sarooshi, 'Aspects of the Relationship between the International Criminal Court and the United Nations', 32 Netherlands Yearbook of International Law (2001),36

[60] *Reparations case*, ICJ Rep. 1949, p.182

[61] See, *inter alia*, ICTY Rule 39 (prosecutorial summons), Rule 40 (provisional measures), Rule 54*bis* (orders directed to States for the production of documents), Rule 58 (non applicability of national extradition provisions), Rule 70 (matters not subject to disclosure)

[62] See early discussion in *Report of the Preparatory Committee on the Establishment of an International Criminal Court* A/51/22 (1996), ¶55, ¶¶184-8

[63] Amendments have included increases to the number of Trial Chambers, the number of permanent judges, and on the appointment and status of *ad litem* judges

highly cumbersome mechanism (*see* articles 121-123). It is unlikely, thus, that the Court, at least in the foreseeable future, will be able to rely upon treaty amendment to enhance its Part 9 powers.

(e) External Coercion

As noted earlier, the ability of the ICC to independently coerce compliance from unwilling States is extremely limited. While it may issue requests and make orders for the compulsory attendance of witnesses, for the surrender of accused persons, or for the freezing of assets, it has no direct sanctioning capacity beyond the threat of reporting non-compliance. The effectiveness of coercive measures against recalcitrant States, therefore, will rely in large part on the linkage of ICC cooperation to the threat of exclusion from other areas of international life. As shown above, the policy of linking trade benefits to EU association and eventual membership as well as other bilateral conditionality efforts have had a considerable impact on the cooperation of the States of the former Yugoslavia. By comparison, in the case of Sudan, the Security Council has taken a multidisciplinary approach by passing a package of Chapter VII measures comprising UN peacekeeping troops with a limited use of force mandate (S/RES/1590), the establishment of a Sanctions Committee (S/RES/1591), and referral of the Darfur situations to the ICC (S/RES/1593). Although consideration of economic sanctions on Sudan's critical oil industry has been blocked by China, the Sanctions Committee has been mandated to consider the imposition of travel restrictions and freezing of assets on persons who, *inter alia*, "commit violations of international humanitarian or human rights law or other atrocities".[64] Such measures may, moreover, lead to political marginalisation and diplomatic isolation, which may have a causal effect on other areas, including trade and commerce. The commitment of the international community to robustly apply coercive linkages in this manner may prove critical in guaranteeing the cooperation of the Sudanese authorities with the Court.

[64] *See* Report of the Panel of Experts established pursuant to Resolution 1591, S/2006/65

3. EXECUTION OF REQUESTS

Irrespective of the type of obligation owed under Part 9, a request will only be effective if it is complied with in the manner requested by the Court. In domestic settings, the judiciary can supervise the observance of criminal procedure to guarantee the integrity of the process and the admissibility of evidence. The section below will explore the extent to which the ICC Chambers will be able to examine, regulate or supervise the execution of Court requests by domestic authorities. In particular, the ICC judges will be guided by Part 9 and by article 69 which holds that "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." Moreover, the admissibility criteria of unwillingness and inability will enable the Court to exercise its supervisory functions over the adequacy of national criminal jurisdictions.[65] In the absence of related ICC jurisprudence, an examination of Tribunal practice is provided below with some observations on its relevance by analogy for the ICC.

(a) Admissibility of evidence

In the case of *Mucić et al*, the ICTY Trial Chamber considered a defence motion to exclude statements made by the accused before the Austrian police without the presence of counsel, prior to his transfer.[66] The motion was brought under ICTY Rule 95, which provides for the exclusion of evidence obtained by means contrary to internationally protected human rights. The Chamber noted that although the Austrian procedural rules preclude the right of a suspect to counsel until after questioning, s/he is able to consult a lawyer before deciding whether to give an interview, and that this was not necessarily at odds with the scope of "legal assistance" under article 6(3) of the ECHR, as interpreted by the Strasbourg Court. Nonetheless, the Trial Chamber argued that the correct standard to be applied was not only ICTY Rule 95, but also the

[65] Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) JICJ 1, 87

[66] *Prosecutor v Delalic et al., Decision on Zdravko Mucic's Motion for the Exclusion of Evidence* (2 September 1997)

law of the Tribunal governing the admissibility of evidence. As such, the conditional right to counsel under Austrian procedure was held to be inconsistent with the unfettered right to counsel under Article 18(3) of the ICTY Statute and sub-Rule 42(A)(i). As the Chamber held, "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 made under it inadmissible". Accordingly, the Chamber determined that implementation of a request for assistance by non-Tribunal organs must be compatible not only with international human rights standards, but with the Tribunals' own Rules even where they may not strictly offend such standards. The law on the Tribunal applied thus to the entire criminal procedure.[67]

In a later decision in the same case, the Trial Chamber determined that procedural irregularities by the requested State in the implementation of an OTP request did not foreclose admissibility. The decision relied in part on the absence of applicable procedural rules in the ICTY Statute and Rules, and partly on the assumption of competence by the Chamber to review the consistency of the requested State's conduct with its domestic law. Relying on Rule 89, the Chamber determined that the deviations by the Austrian police from their own criminal procedure during a search was outweighed by the relevance and probative value of the evidence tendered. It held that since the breach of rules was minor in nature, the means by which the evidence had been obtained did not cast substantial doubt on its reliability, and the admissibility of the evidence collected would not be antithetical to, or seriously damage, the integrity of the proceedings.[68]

[67] Notwithstanding the above, the Trial Chamber appears to have based part of its reasoning on a faulty analysis of the required standard of proof. As the Chamber held: "[t]he Tribunal is established for the trial of criminal offences of the most serious kind. Hence nothing less than the most exacting standard of proof is required. It is universally accepted that the burden of proof lies on the Prosecution. The standard of proof on the Prosecution is proof beyond reasonable doubt"; *ibid*, ¶48. It is highly doubtful, however, that the standard of proof for admissibility of evidence as opposed to conviction is 'proof beyond reasonable doubt' and not the 'balance of probabilities'; even more so in the case of a non-jury trial before professional judges who can assign appropriate weight to admitted evidence. The decision was not appealed by the prosecution, possibly because of the limited utility of the material sought.

[68] ICTY Rules 89(D) & 95. *Prosecutor v Delalic et al., Decision on the Tendering of Prosecution Exhibits 104 – 108* (9 February 1998), ¶¶18-20

(b) Pre-trial detention by national authorities

The *Barayagwiza* case was subject to two ICTR Appeal decisions on the pre-trial detention on the accused. In its first decision, the Appeals Chamber held that there had been a violation of the length of detention in Cameroon prior to transfer; the accused right to be promptly informed of the charges against him; the right to challenge the legality of his detention before a court of law; and the duty of prosecutorial due diligence.[69] In the face of egregious and repeated violations of the accused rights by the OTP, the Appeals Chamber instituted the remedy of the termination of proceedings. On review by the Appeals Chamber, the findings as to the violations were upheld, but the remedy was altered in the light of new facts tendered by the OTP. Determining that responsibility for the violations fell principally on the authorities of Cameroon, the Chamber held that the extraordinary remedy of release would be disproportionate and instead ordered that the accused receive a reduction of sentence in case of conviction, or financial compensation in case of acquittal.

It is worth examining the original basis for which OTP was found responsible. The Appeals Chamber relied on the argument that although the accused was not in the physical custody on the Tribunal, he was in its constructive custody. It held that the situation was analogous to the 'detainer' process in U.S. jurisdictions, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person already in custody to ensure that he will be available to the demanding authority upon completion of the present term of confinement. Citing the U.S. Supreme Court, the Appeals Chamber held "[i]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...".[70] Given facts indicating that Cameroon was willing to transfer the accused (disputed on review), the Appeals Chamber accordingly attributed the length of detention and the related violations to the OTP.[71]

The Appeal Chamber in its decision also emphasised the competence of the Tribunal to exercise supervisory powers to review assistance rendered by requested authorities pursuant to a request for assistance:

---

[69] In particular, the Chamber noted the improper initial provisional detention of 29 days in Cameroon pursuant to an OTP request issued under Rule 40 (9 days more than the maximum 20 permissible); and a second period of provisional detention pending transfer of over 7 months subsequent to a Rule 40*bis* request (against a maximum of 90 days permissible)

[70] *Prosecutor v Barayagwiza, Decision* (3 November 1999), ¶56, ¶61

[71] *ibid*, ¶59

> The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.[72]

As the Chamber went on to state, "it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims."[73] The Chamber thus determined that the ICTR has competence to exercise supervisory powers over action attributable to non-Tribunal organs with regard to all pre-trial actions that occur in the context of its proceedings.

(c) Irregular arrest and rendition

The issue of unlawful arrest and rendition has been addressed in a number of cases before the ICTY and ICTR and has been extensively researched elsewhere.[74] These cases mainly relate to the lawfulness of cross-border abductions and their impact on the exercise of jurisdiction (*male captus bene detentus* principle).

In the *Dokmanović* release decision, the first case before either Tribunal where the legality of arrest was challenged, the Trial Chamber found that although the accused was 'lured' from the territory of FRY into territory administered by the United Nations Transitional Administration for Eastern Slavonia, the arrest was not unlawful as it did not amount to forcible abduction of kidnapping, and did not violate the sovereignty of the FRY.[75] The decision also established the lawfulness of the execution of arrest warrants by entities other than States.[76]

---

[72] *ibid*, ¶76

[73] *ibid*, ¶85. The passage refers to the period in which the accused' right to be promptly informed of the charges against him was violated, 35 days out of a total of 11 months of which were clearly attributable to the Tribunal.

[74] *See, inter alia*, Bank, 'Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence' (2000) Max Planck Yrbk UN Law 4, 233-269; Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia' (1999) BYIL 70, 165-244; Sloan, 'Prosecutor v Todorovic: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction' (2003) Leiden JIL 16/1, 85-113

[75] *Prosecutor v Mrksić el al., Decision on the Motion for Release by the Accused Slavko Dokmanović* (22 October 1997), ¶57

[76] Sluiter, in Klip and Sluiter, eds., 'Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993- 1998' (1999), 155

In the case of Stevan Todorović, the accused alleged that he was kidnapped from his home in FRY by bounty hunters hired by SFOR (and the OTP) and abducted to the territory of BiH, where he was arrested by SFOR. The Chamber initially refused an evidentiary hearing on the matter given the lack of sufficient factual and legal materials in the Defence motion.[77] The Trial Chamber subsequently issued at the request of the defence an order for judicial assistance from the OTP, and thereafter from SFOR, in order to obtain evidence pertinent to the motion for release.[78] The matter was later dropped after Todorović entered into a plea bargain agreement with the prosecution.

In the *Nikolić* case, the ICTY Appeal Chamber rejected the accused motion to set aside jurisdiction on the basis of his alleged illegal abduction and transfer from FRY by unknown individuals to BiH and into the hands of SFOR and the OTP.[79] After reviewing national case law on irregular arrest and rendition,[80] the Appeals Chamber identified a number of factors in favour of asserting jurisdiction notwithstanding irregularities in arrest, where: (i) the case involves a crimes such as genocide, crimes against humanity or war crimes; (ii) the State whose sovereignty has been breached has not lodged a complaint; and (iii) the treatment of the accused during the course of the arrest is not of an egregious nature.[81] These factors were held to be all the more relevant where cooperative from the State concerned had been ineffective. In its opinion, which is worth quoting at length, the Appeals Chamber held:

> This fundamental expectation [that those accused of universally condemned offences will be brought to justice] needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused .... In the opinion of the Appeal Chamber, the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by limited intrusion in its territory, particularly when the

[77] *Prosecutor v Simić, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović* (25 March 1999)

[78] *Prosecutor v Simić, Order on Defence Requests for Judicial Assistance for the Production of Information*,(7 March 2000); *Decision on Application for Leave to Appeal Against Trial Chamber Decision of 7 March 2000* (3 May 2000); *Decision on Motion for Judicial Assistance to be provided by SFOR and Others* (18 October 2000)

[79] *Prosecutor v Nikolić, Decision on Interlocutory Appeal Concerning Legality of Arrest*,(5 June 2003)

[80] See *ibid*, ¶¶21-23

[81] *ibid*, ¶28; *Prosecutor v Nikolić, Decision on Defence Motion challenging the Exercise of Jurisdiction by the Tribunal*,(9 October 2002), ¶114. No remedy was rendered by the Chamber, despite a finding of irregularity in the pre-trial proceedings.

> intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the grounds that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State of organisation involved. This is all the more so in cases such as this one, in which the State whose sovereignty has allegedly been breached has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction.[82]

Interestingly, despite of the supervisory powers doctrine adopted by the Appeals Chamber, ICTR Trial Chamber II has repeatedly declined to exercise any review competence over the legality of searches, seizures and arrests by domestic authorities.[83] Relevant cases include the *Ngirumpatse* case, which held, "the Tribunal is not competent to supervise the legality of arrest, custody, search and seizure executed by the requested State."[84] The *Kajelijeli* case held, "the manner and execution of arrest is an area within the States' responsibility. When the Prosecutor makes a request for the arrest of the Accused, the matter falls within the domain of the requested State and it is that State which organizes, controls and carries out the arrest in accordance with their domestic law."[85] In the *Karemera* case, the Chamber opined that a request made by the Prosecutor is executed and controlled by the State authorities using their law enforcement organs and that "the Trial Chamber therefore, considers that it cannot provide any remedy concerning such arrest and custody as these are still matters within the jurisdiction of the requested State."[86] Finally, in the *Nzirorera* case, "the Chamber held that it lacked jurisdiction to review the legal circumstances attending the arrest of a suspect, under Rule 40 of the Rules, in so far as the arrest has been made pursuant to the laws of the arresting state."[87]

---

[82] *Nikolić* Decision on Interlocutory Appeal, ¶26

[83] Sluiter (2002), 3

[84] *Prosecutor v Ngirumpatse, Decision on the Defence Motion challenging the Lawfulness of the Arrest and Detention and seeking Return or Inspection of Seized Items* (10 December 1999), ¶56

[85] *Prosecutor v Kajelijeli, Decision on the Defence Motion concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing* (8 May 2000) ¶34

[86] *Prosecutor v Karemera, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be used by the Prosecutor in preparing an Indictment against the Applicant* (10 December 1999), ¶4.3.1

[87] *Prosecutor v Nzirorera, Decision on the Defence Motion challenging the Legality of the Arrest and Detention of the Accused and requesting the Return of Personal Items Seized,*(7 September 2000)¶27. See also *Prosecutor v Nyiramasuhuko, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized* (12 October 2000), ¶26

(d) Request criteria for production of documents

In the practice of both Tribunals, it has not been uncommon for States to criticise the form of a request, whether in the form of a binding order from Chambers or request for assistance from the Prosecutor, on the grounds that it lacks sufficient clarity. In genuine cases, the Prosecutor has been able to engage in a dialogue with the requested authorities to define with greater precision the parameters of the request. In other instances, national authorities have set unreasonable standards by requiring the Prosecutor to identify a document with exact precision by name, reference number, location and date. Clearly, in many situations, the Prosecutor may lack a detailed description, but will know of the purported existence of a particular piece of evidence and will be able to establish reasonable parameters to facilitate its recovery.[88]

Uncooperative States, moreover, have often resorted to sophisticated methods to limit assistance in place of overt refusal. This has ranged from counter-requests for more information; explanations that the documents were stored during the conflict period when good record keeping was poor, or that archives have been destroyed or damaged; pleas for understanding that it does not have modern record keeping facilities. Complaints have also not been infrequent with respect to the volume of the request, with exaggerated protests that the entire government administration would have to stop working for a year in order to fulfil the request. The Tribunals themselves, however, have also been at fault. Besides general problems with poorly drafted requests for assistance, early on the OTP would at times intentionally shroud requests in broad parameters for fear of exposing its prosecutorial strategy or risking the destruction or disappearance of the documents sought.[89]

In the *Blaskić Subpoena Judgment*, the Appeals Chamber set out four "mandatory and cumulative"[90] criteria with which any request for a binding order under article 29(2) for the production of documents must comply in order to avoid a "fishing expedition". The Appeals Chamber held that a request for a binding order must identify specific documents and not broad categories; set out the relevance of

[88] Interviews with senior ICTY OTP officials, on file with author

[89] *ibid*

[90] The use of the term "mandatory and cumulative" in connection with four criteria was employed by the later Kordić Trial Chamber and subsequently adopted by the Appeals Chamber in the same case; *Prosecutor v Kordić et al., Decision on the Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999)

such documents to the trial; not be unduly onerous; and give the State sufficient time for compliance. The Chamber also made a distinction between cooperative and mandatory compliance: endorsing the Prosecutor's contention that, as a matter of policy, the OTP should first seek "through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or Trial Chamber to have recourse to the mandatory action provided for in Article 29".[91] These various criteria were subsequently incorporated into ICTY Rule 54*bis*.

In the *Krstić* case, the Trial Chamber tested the request of the Prosecutor against these criteria and dismissed three of the requested documents because their relevancy had not been demonstrated, and a further ten documents because the Prosecutor had not previously sought, through cooperative means, the assistance of the *Republika Srpska*.[92]

In the *Kordić* case, the Republic of Croatia filed before the Appeals Chamber a request for the review of a binding order issued to it on the grounds, *inter alia*, that it was inconsistent with the criteria stipulated by the Appeals Chamber in its earlier Judgment.[93] In particular, Croatia criticised (i) the lack of specificity of some of the documents sought, which referred to entire categories; (ii) the inability to determine relevance of documents unsatisfactorily identified; (iii) the onerous nature of request; and (iv) the deadlines set by the Chamber, which it had decided after *ex parte* proceedings with the Prosecutor. The Appeals Chamber interpreted its earlier criteria and concurred with the prosecution claim that the *Blaskić Subpoena Judgment* did not prohibit the use of categories, but only the use of broad categories which lack "'sufficient clarity to enable ready identification' of the documents falling within that category." Having determined the test of specificity had been met, the Chamber also rejected the challenge with respect to relevance. Moreover, Croatia lacked *locus standi* to challenge the matter since such determinations fell exclusively within the discretion of the Tribunal. As to the third criterion with respect to volume, the Chamber held that the criterion was relative and entailed striking a balance between the difficulty of producing the evidence and the extent to which it was "strictly justified by the exigencies of the trial". While an obligation to render the Tribunal

[91] *Blaskic Subpoena Appeals Judgment*, ¶31

[92] *Prosecutor v Krstić, Binding Order to the Republika Srpska for the Production of Documents*,(12 March 1999). *See* also *Prosecutor v Kordić et al.*, Binding Order (4 February 1999) wherein the Trial Chamber dismissed the prosecution request for two documents on the grounds of lack of relevance.

[93] *Prosecutor v Kordić et al., Decision on the Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999)

assistance may be onerous for a State, the correct test was whether it was *unduly* so. With respect to timelines, the Appeals Chamber held that it was within the right of the Requested State to consult with the Trial Chamber in order to establish "workable and reasonable deadlines" pursuant to Rule 108*bis*. The Chamber held that a State is not entitled, however, to a right to be heard before a binding order is issued.[94]

(e) Observations on the Rome Statute

With the benefit of their experiences, the Rome Statute is clearer than the Statutes and RPE of the *ad hoc* Tribunals in a number of areas. Article 69(7) of the ICC Statute, partly based on ICTY Rule 95, explicitly provides for the exclusion of evidence obtained by means of a violation internationally recognised human rights or the Statute. Thus, the requested State cannot obtain evidence in a manner that, while it may accord with domestic law and internationally recognised human rights, offends the Rome Statute. The exclusion, however, is conditional. As in ICTY Rule 95, the violation must be of sufficient gravity before it triggers inadmissibility as set out in the provision. Evidence obtained by means that violates the Rome Statute or international human rights, but which does not raise 'substantial doubt' as to its reliability or would not be 'antithetical to' or 'seriously damage' the integrity of the proceedings, would be admissible.

The interpretation of the criteria for the production of documents by the ICTY Appeals Chamber will be of assistance to the ICC in the application of article 96 of the Rome Statute, which is based substantially on the *Blaskić Subpoena Judgment* and the relevant provisions of ICTY Rule 54*bis*.

Article 67(8) of the Rome Statute clarifies that the Court "shall not rule on the application of the State's national law" when deciding on the relevance or admissibility of evidence. This will prevent the kind of review undertaken by the ICTY Trial Chambers on the observance of domestic procedures by the national law enforcement agencies. Nonetheless, while the Court may not rule on the application of national law, it may take domestic legislation into consideration as a factor bearing on

[94] Despite this finding, a new sub-Rule (D) was later added to Rule 54*bis* providing for a notification and hearing procedure before the issuance of a binding order. The provision, however, is subject to sub-Rule (E), whereby a Judge or Trial Chamber may issue an order with giving the State notice, if, having regard to all the circumstances, there are good reasons to do so.

the admissibility or the probative weight of evidence.[95] Article 67(8) of the Statute acts as a corollary to the requirement that in order to be admissible, evidence should be obtained in accordance with the Statute. The case law of the Tribunals, nonetheless, indicates the need for the ICC Prosecutor to promote compliance with the Rome Statute and ICC RPE, and supervise to the extent possible national execution of requests.

Less clear is the extent to which the Court will deem it necessary to review the application of domestic law in relation to national surrender proceedings. In contrast to the ICTY and ICTR Statutes, the ICC Statute requires the custodial State Party to bring the arrested person promptly before a competent judicial authority in order to determine, in accordance with its domestic law, whether the warrant applies to the person, s/he has been arrested in accordance with proper process, and his/her rights have been respected.[96] As such, the Court may deem itself competent to examine a complaint by a surrendered individual relating to the failure of a State Party to observe this procedural requirement.[97] Although the Court is likely to avoid ruling upon the application of national law it may, nonetheless, hold a State Party in breach of its obligations under the Statute.[98] In considering any appropriate remedy for the individual, the Court will most probably be guided by a balancing of factors such as those elaborated by the ICTY Appeals Chamber in order to determine whether the breach is sufficiently grave to set aside jurisdiction, particularly where the conduct is attributable to the Court. It may indicate also the need for an appropriate remedy under the national law of the surrendering State Party.

As with the ICTY and ICTR Statues, the Rome Statute attempts to strike a balance between undue intrusion into the sovereign domestic domain and the need to ensure efficient proceedings. In so doing, it seeks to harmonise the numerous values represented by the Statute such as respect for States sovereignty, respect for the rights of the accused, the protection of victims and witnesses, and the need for

[95] This would be a necessary function of the Trial Chamber in order to enable it to make an assessment as to the application of exclusionary rules under article 69(7). Piragoff suggests that the provision, nonetheless, would limit the judges consideration of the facts where the alleged procedural irregularity was contested and, as such, required adjudication; Piragoff, 'Evidence', in Triffterer (1999), 915916

[96] Article 59(2), ICC Statute

[97] A failure to observe these procedures may arise, e.g., because of the absence of Rome Statute implementing legislation in the custodial State. In dualist systems, this may mean that the ICC has no legal personality under domestic law for the purpose of a national judicial hearing to effect surrender.

[98] Note, however, article 59 falls outside of Part 9 and the obligations to incorporate under article 88

effective punishment.[99] While the ICC judges will be independent in their determination of how these competing values will be assessed, they will be more restricted than their Tribunal counterparts in appraising national law, and thus represent a lower of intrusiveness.

4. INTERNATIONAL ORGANISATIONS

In the situations under ICC investigation, field missions of international organisations or peacekeeping of peace-enforcement operations may often represent the only interlocutor on the ground with access to certain information or to a particular piece of territory. Securing such cooperation, therefore, will be vital for the Court. As noted above, the Prosecutor may seek the cooperation of any intergovernmental organisation or 'arrangement' (a term adopted to refer, *inter alia*, to peacekeeping operations),[100] and may enter into specific agreements pursuant to article 54(3)(d). Article 87(6) of the Statute, moreover, enables the Court to ask any intergovernmental organisation to provide information or documents, or other forms of cooperation that are consistent with its mandate.[101] The manner and modalities for the operation of such forms of cooperation fall outside of regime established by Part 9 which deals with the State Party obligations, and are therefore subject to separate negotiation. As such, subject to agreement, none of the conditions for rendering of assistance in articles 93, 96 or 99 apply to a request for cooperation to an international organisation. Moreover, outside the forms of cooperation voluntarily agreed upon, international organisations, like third States, are under no legal obligation to cooperate with the Court. An international organisation, thus, cannot be bound by a decision of the Court, even when the ICC is acting pursuant to a Security Council referral.[102]

ICTY case law is mixed on the issue of whether international organisations are

---

[99] Lonsdale and Trapp, 'The International Criminal Court: Excluding Evidence under Article 69(7)', unpublished manuscript (1998), cited in *ibid*,915

[100] Article 54(3)(c); *see* Kreß and Prost, 'Article 87', in Triffterer (1999), 1065

[101] Such court-wide agreements will be particularly relevant for areas under the competency of the Court Registrar such as victim and witness protection, privileges and immunities, and finance and administration.

[102] It is Security Council practice to "call upon" international organisations to implement its resolutions rather than requiring them to do so; *see* Frowein & Krisch, 'Chapter VII: Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' in Simma, ed. *Commentary on the Charter of the United Nations* (2002), 715

subject to the Chapter VII based mandatory cooperation. In the *Kovačević* case, the Trial Chamber, in an unreasoned decision, held that it had no authority to issue a binding order to the OSCE under article 29 of the ICTY Statute, as the provision applied to States not international organisations.[103] In *Kordić*, the Trial Chamber first issued a request to the European Commission Monitoring Mission in BiH ('ECMM'), the Presidency of the EU Council and the EU Commission, and thereafter issued an order to ECMM and Member States of the European Community at the time of the establishment of the ECMM in BiH, requiring the production of the certain documents in accordance with article 29. The order was complied with.[104] In *Simić (Todorović)*, the Trial Chamber held that it was competent to issue a binding order under article 29 for the production of documents to the 33 participating States of SFOR and to SFOR itself. The order drew sharp criticism from NATO and a number of Member States who filed requests for review of the decision. The Appeal remained unheard given the subsequent entry of a guilty plea by the accused following a plea bargaining agreement with the prosecution.[105]

In terms of agreements entered into, the experience of the ICTY with SFOR has shown that the conclusion of such agreements will be particularly essential where an international organisation exercises military or law enforcement competencies over territories where the Prosecutor is conducting his investigative activities. In the case of the UN Mission in the Democratic Republic of Congo, known by its French acronym 'MONUC', the mandate of the mission was specifically revised to enable the possibility for ICC cooperation. After much debate which resulted in the deletion of explicit reference to the Court, the Security Council adopted a compromise text in Resolution 1565 which authorises MONUC to "cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations", while at the same time excluding this provision from the categories of tasks where the use of force is permitted.[106] In conjunction with

---

[103] *Prosecutor v Kovačević, Decision Refusing Defence Motion for Subpoena* (23 June 1998)
[104] *Prosecutor v Kordić et al., Order for the Production of Documents by the European Community Monitoring Mission and its Member States* (4 Aug. 2000)
[105] *Prosecutor v Simić et al., Decision on Motion for Judicial Assistance to be Provided by SFOR and Others* (18 Oct. 2000)
[106] S/RES/1565(2005), ¶5(g), but see ¶6. *See also* interpretative statements of the U.S. upon adoption S/PV5048

article 18 of the Relationship Agreement between the ICC and the UN,[107] the provision enables MONUC to respond to a request for cooperation from the ICC. However, in order to invoke its use of force provisions, MONUC will need to rely on other provision of its mandate. Paragraph 4 of Resolution 1565, for example, authorises MONUC to use all means necessary under a broad heading enabling assistance to the DRC authorities in re-establishing confidence, discouraging violence, and deterring use of force threatening the "political process", and to enable free movement of UN personnel. Also of relevance, paragraph 5(c) authorises use of force for the disarming of "foreign combatants". Moreover, Security Council Resolution 1493 "[a]uthorizes MONUC to use all necessary means to fulfil its mandate in the Ituri district and, as it deems it within its capabilities, in North and South Kivu". In the past, MONUC has implemented its use of force provisions to assist in arrest and detention of combatants and militia leaders located in its areas of deployment. In similar vein, the MoU concluded between MONUC and ICC provides that MONUC will give consideration, in principle, to a request from the DRC Government in carrying out the arrest of persons sought by the Court in the areas where it is deployed, where this would be consistent with its mandate.[108] The provision is likely to prove critical for the Court. Given that the current intelligence indicates that members of the LRA leadership have fled into North-Eastern DRC,[109] the ICC will likely rely on substantial MONUC assistance with respect to the arrest and detention of wanted persons in both the DRC and Uganda situations.

Conclusion

The Statute suffers from a litany of loopholes and obstacles in its State cooperation regime that could be abused in order to stall or effectively prevent a case from reaching trial. Included in this compound level assault course are multiple stage appeals of jurisdiction and admissibility that could suspend cooperation; execution of requests for assistance, arrest and surrender through national procedures;

[107] ICC-ASP/3/15. Article 18, inter alia, enables the ICC Prosecutor to enter into supplementary agreements with the UN or its programmes, funds and offices.
[108] Signed 8 November 2005; on file with author; forthcoming UNTS
[109] *See, inter alia*, IRINnews.org 'UGANDA: LRA's Joseph Kony now in DRC, says military', (7 February 2006)

modification, conditions or refusal of a request that violate domestic legislation or national security; competing request for extradition or assistance; and the application of immunities for third State officials. The Security Council also may at any stage intervene to suspend the whole process. Any of these mechanisms could be used to stall and undermine the Prosecutor's ability to secure evidence for trial or to conduct independent on-site investigations. Filtering procedures for investigation through the direction or assistance of the national authorities, moreover, may compromise the integrity of the evidence collected.

These concerns are all the more relevant bearing in mind the situations in which the ICC must act, where national authorities may be implicated in the crimes or may be otherwise incapable of rendering assistance. The political necessity of securing widespread acceptance of the Rome Statute clearly necessitated the adoption of comprises. However, the practical outcome means that the ICC in practice may be left dependent on the cooperation of those same States that have been found unwilling or unable to undertake genuine investigations and prosecutions.

IX

Implementing Legislation

Part II highlighted the divergent approaches in national legislation and practice in the prosecution of core crimes. The present chapter suggests that the obligations of State Parties under the Rome Statute, coupled with the Court's admissibility provisions, will promote broad harmonisation of national law with ICC standards and increased domestic activism. Chapter 9 assesses the effectiveness of implementing legislation passed to date, and the manner in which State Party obligations been transposed, interpreted, applied in domestic law. For, upon the actual incorporation and execution of these obligations at the national level will depend the ultimate enjoyment of the Court's powers.

Parties to the ICC are required to enact implementing legislation in order to enable them to observe their obligations under the Rome Statute. In particular, State Parties are required to ensure that procedures are available under national law for all forms of cooperation foreseen in Part 9; must extend their criminal laws to include offences against the administration of justice (article 70); and are obliged to enforce fines or forfeitures ordered by the Court (article 109). Since the Rome Statute does not permit reservations, Parties must accept these obligations in full. A State Party that does not observe its treaty obligations may risk a finding of non-compliance.

In a different category is a set of measures whose domestic incorporation is not obligatory, but is implicitly encouraged to enable States to avail themselves of the Court's complementarity regime. Included here is the assumption that State Parties will largely adopt the categorisation of substantive crimes under articles 6 to 8 of the Statute; that they will incorporate the general principles of applicable criminal law outlined in Part 3 of the Statute (such as command responsibility, irrelevance of official capacity, and definitions of mental element): and the guarantees of minimum fair trials and due process protections of Parts 5 and 6. A State Party that does not adopt such measures may risk an admissibility challenge under article 17, on the basis of any lacunae or deficiencies in its domestic law which renders it unable to carry out

genuine investigations and prosecutions. The Statute is based on the assumption that complementary national jurisdiction exists.[1] If domestic legislation fails this test, jurisdiction must revert to the Court. The proper functioning of both the cooperation and complementarity regimes, thus, will rely in large part on the effectiveness of national implementing legislation.[2]

1. NATIONAL APPROACHES TO IMPLEMENTATION

Security Council resolutions 827 and 955 established an obligation for all States to cooperate fully with the *ad hoc* Tribunals and to "take any measures necessary under their domestic law to implement the provisions" of the respective resolutions, including the obligation to comply with requests for assistance or orders issued by the Tribunals. From early on, however, the Tribunals noted the problem of divergent and unsatisfactory approaches that national authorities had taken in implementing these obligations. As the Tribunal President reported to the Security Council,

> A few countries have laid down an ad hoc procedure, while others plan to apply *mutatis mutandis* their national provisions relating to extradition, though only as regards questions of procedure and without making the transfer of the accused to the Tribunal subject to the same restrictions that apply to extradition (e.g. non-extradition of nationals or of persons accused of political crimes). In certain countries, provision has been made for appeals against or review of decisions of national courts on the Tribunal's requests for transfer.[3]

The repeated failures of national authorities to distinguish between extradition and surrender and the unsatisfactory outcomes resulting from the utilisation of mutual legal assistance regimes for Tribunal cooperation attest to the inadequacies of adapting horizontal mechanisms to vertical relationships.[4] Since obligations under the Rome Statute relate not just to cooperation, but to the right to exercise domestic

---

[1] *See* Triffterer, 'Legal and Policy Implications of Domestic Ratification and Implementation Processes', in Kreß and Lattanzi, eds., *The Rome Statute and Domestic Legal Orders Volume I: General Aspects and Constitutional Issues* (2000)

[2] *See generally* Duffy and Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in Kreß and Lattanzi (2000), 29

[3] ICTY first *annual report*, A/49/342(1994)¶180; *see also* Warbrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia' (1996) ICLQ 45, 948

[4] *See, inter alia*, the initial failed attempts of the ICTR to secure the surrender of Elizaphan Ntakirutimana from the U.S., which relied on its inter-State legal assistance instruments; Sluiter (1998)

jurisdiction over core crimes, State Parties have been comparatively more vigilant in their domestic implementation.

In the interest of expeditiously bringing the Statute into force, most States have chosen to separate the two related processes of ratification and implementation by opting for speedy ratification of the Statute, while proceeding carefully with the more demanding and resource intensive implementation process. For this reason, as of writing, the majority of State Parties are yet to enact the required implementing legislation. States leaning towards the monist school may enable the Statute to have automatic effect as part of domestic law upon ratification without the need for implementing legislation. Their domestic legal orders may even grant ratified international treaties such as the Rome Statute a privileged position *vis a vis* conflicting domestic laws.[5] Other States may require only a very basic legal framework stipulating general powers to render the obligations owed under the Statute. Most States whether dualist and monist, however, have chosen to engage in the task of comprehensive incorporation in order to capture fully the scope of duties under the Statute and to provide for efficient procedures and modalities for cooperation.[6] Where necessary, this has included the adoption of specific amendments to constitutional law. As the Statute is silent on the manner of implementation, the methods adopted by States have range from verbatim incorporation of various ICC provisions to incorporation with amendment of ICC definitions. The implementing legislation of other States refers, in part, to pre-existing provisions of domestic law or a modification thereof.

2. IMPLEMENTATION AS OBLIGATION

For a number of States ratification will raise questions of constitutional compatibility. To date, the most problematic issues have related to the constitutional immunities attaching to current or former State officials, the constitutional prohibition on the extradition of one's own nationals, and the constitutional prohibition on the

[5] *See*, e.g., art.96(1), Constitution of Spain

[6] Broomhall, 'The International Criminal Court: A Checklist for National Implementation', in Bassiouni, ed., *ICC Ratification and National Implementing Legislation*, 13 quarter Nouvelles Études Pénales (1999), 115

imposition of life imprisonment.[7] The manner in which such questions will be resolved will differ for each State. Under some constitutions ratified treaties, particularly those related to human rights, have constitutional rank or take precedence over other constitutional provisions or conflicting domestic legislation. The reception of the Rome Statute as hierarchically superior to conflicting norms, thus, may avoid any inconsistencies. Other States may chose to adopt an interpretative approach whereby the object and purpose of the constitution, such as the protection and promotion of internationally recognised human rights, is read in the light of the values represented by the ICC. Constitutional provisions such as the protection of nationals from uncertain legal proceedings in foreign jurisdictions, for example, could be read consistently with the objective of the ICC to prevent impunity and in the lights of the internationally recognised guarantees of fairness contained in the Rome Statute. For other States, constitutional amendment of either a general or specific nature, however, may represent the preferred option.[8] A brief review is provided below of some the chief constitutional and legal difficulties that have arisen to date.

(a) Arrest and Surrender

(i) Immunities

Article 27 of the ICC Statute specifies that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". As a result, incorporation of Rome Statute has encouraged a significant re-examination of immunities under national legislation.[9] Some States have taken the view that amendment of their constitutions is not necessary for this purpose since immunities can be lifted, for example by parliament, in the light of treaty obligations. Other States have decided against amending constitutional immunities given the unlikelihood of a conflict ever arising. Spain, Norway and Denmark, for example,

[7] *See* Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court* (Council of Europe, 15 January 2001)
[8] *See generally* Duffy, 'National Constitutional Compatibility and the International Criminal Court', 11 Duke J. Comp. & Int'l L. 5 (2001)
[9] Broomhall (2003), 139

have deemed the possibility of their monarch being accused by the Court to be so remote as not to warrant concern, particularly in the light of the marginal role they play in relation to military or political affairs.[10] The Venice Commission of the Council of Europe has suggested that such States could maintain that "a tacit exception from immunity for the purpose of surrender to the Court was inherent in its constitution and consistent with the fundamental principles thereof".[11] Where States opt for an interpretative approach, it should be noted, a conflict with the Statute would only arise if the required waiver was not granted in a specific case.[12]

In other cases, in order to guarantee certainty, certain States have adopted amendments specifying that constitutional immunities do not apply to the crimes listed in the Statute. France and Luxembourg, for example, have adopted a general constitutional amendment that enables full cooperation with the Court, including the surrender of persons sought by the Court, but does not specifically amend constitutional immunities under national law. This means that immunity could not be lifted for the purpose of domestic prosecutions.[13] In order to avert the Court exercising its jurisdiction over their national and to enable trial domestically, some States have gone further by providing for the lifting of legal and constitutional immunities of their nationals for the purpose of domestic proceedings also.[14]

The incorporation of article 27, however, must remain consistent with other parts of the Statute. As noted in Chapter 8, article 98 subjects the surrender obligations of State Parties to their obligations under international law with respect to the State or diplomatic immunity of third State nationals. Outside of requests from the ICC, the observance of State immunities between States is not affected by Rome Statute. Thus, for example, while there is emerging domestic practice rejecting functional immunities with respect to *jus cogens* violations, current international law maintains the inviolability of personal immunities attaching to certain incumbent senior government officials. Therefore, a State Party which incorporates article 27 verbatim by declaring the non-applicability of immunities *per se*, including for the

[10] Duffy (2001), 28
[11] Venice Commission (2001)
[12] *See generally* Duffy and Huston (2000), 36-42
[13] *See* Buchet,'L'intégration en France de la convention portant statut de la Cour pénale internationale - Histoire brève et inachevée d'une mutation attendue', in Kreß and Lattanzi,65; Venice Commission, *ibid*
[14] Duffy and Huston (2000), 36-42

purpose of national prosecution or extradition, may run afoul of general international law.[15]

(ii) Constitutional bars

One of the goals of distinguishing between surrender and extradition in the Statute was to enable this legal distinction also in domestic law.[16] This has allowed certain countries to ratify the Statute without amending their constitutions, by incorporating a general clause or interpretation that permits the prohibition to be read in conformity with their treaty obligations under the Statute.[17] For other States, constitutional amendment will remain the preferred route because either their domestic law does not admit such an interpretation or does not alter the prohibition on delivering up nationals to foreign jurisdiction, or otherwise because they wish to avoid legal uncertainty and to limit the scope for future challenges.[18]

There is, of course, nothing preventing the Court from returning an convicted person to his State of nationality for enforcement of the sentence provided it has indicated its willingness to accept sentenced persons. In this context, article 103 of the Statute includes the nationality of the sentenced person as a factor to be taken into account by the Court when designating the State of enforcement. Although a State Party could not make this a condition for surrendering a person to the Court, a non-Party State could make its *ad hoc* cooperation under article 87(6) contingent upon such an agreement.[19]

Another obstacle facing arrest and surrender some in domestic systems is the constitutional prohibition against life imprisonment. This includes bars on extraditing persons to States where life imprisonment can be imposed, which is interpreted as part

[15] See above, Chapter 2; Kleffner (2003), 103-6

[16] The ban on extraditing or expelling nationals is to be found in many countries' constitutions. *See*, e.g., art.19 Constitution of Germany, art.11(2f) and 14 Constitution of Cyprus; art.9 Constitution of Croatia; art.36 Constitution of Estonia; art.13 Constitution of Georgia; art.69 Constitution of Hungary; art.13 Constitution of Lithuania; art.4 Constitution of "the former Yugoslav Republic of Macedonia"; art.23 Constitution of Slovakia; art.47 Constitution of Slovenia; art.55 Constitution of Poland; art.12 Constitution of the Czech Republic; art.19 Constitution of Romania; art.61 Russian Constitution and section 7 Finnish Constitution; Venice Commission (2001)

[17] See, e.g., procedure adopted by Italy and Norway; *ibid*

[18] See, e.g., constitutional amendments adopted in Germany and the Czech Republic; *ibid*

[19] During negotiations in Rome Denmark, Norway, Sweden and Switzerland tabled a failed proposal which would have required this as an explicit condition; Mochochoko, 'International Cooperation and Judicial Assistance', in Lee (1999), 311

of the prohibition against cruel and inhuman treatment.[20] The prohibition seeks, moreover, to secure the right to rehabilitation. Although article 77 of the Statute provides for the imposition of life imprisonment, it is envisaged as an exceptional measure to be justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Additionally, the Statute provides for mandatory review by the Court of all life sentences after 25 years has been served with a view to a reduction of sentence. The criteria for review includes the conduct of the sentenced person, the prospect of rehabilitation, and individual circumstances such as physical or mental health or advanced age.[21] The protection of mandatory review may in and of itself be a sufficient guarantee for those States that allow extradition in exceptional cases where sentence review is provided.[22] For other States, the constitutional prohibition may require amendment for the purpose of surrender to the Court.

Other provisions related to arrest and surrender that must be provided for domestically include, *inter alia*, the obligation to provide for provisional arrest under the terms of article 59; the duty to notify the Court of any application for interim release in the custodial State and to consider the recommendations of the Court before rendering a decision on such release;[23] and the duty to resolve competing requests in the manner contemplated in article 90. In addition, States may need to adopt a specific constitutional amendment providing that statute of limitations, amnesties and pardons will not apply to the crimes listed in the Statute.

(b) Other forms of cooperation

Most State Parties have chosen to incorporate verbatim the list of assistance types under article 93(1) of the ICC Statute, such as the taking of evidence, the questioning

[20] Duffy and Huston (2000), 36-42

[21] If review is initially denied, the Court is to continue to review the case at least every three years or at shorter intervals; *see* art.107 ICC Statute, Rules 223-4 ICC RPE

[22] See, e.g., Portugal Law No.144/99 (31 August 1999); Duffy (2001), 35

[23] In its *Report* the Venice Commission examined also whether the prohibition under art.59(4) preventing domestic courts from considering, for the purpose of interim release, whether the arrest warrant was properly issued endangered the principle of *habeas corpus* under art.5 ECHR. The Commission held that the character of deprivation of liberty in question was not of the nature foreseen in art.5(1)(c) ECHR, but was rather fell within the meaning of art.5(1)(f) which authorises a deprivation of liberty if it is pursuant to "...the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition"; Venice Commission (2001)

of persons, the conduct of searches and seizures, and the freezing of assets. Domestic procedures here will need to incorporate the conditions applicable to the execution of requests for assistance under the Statute and Rules. For example, national law must permit requests not only from the Prosecutor, but from the Court as a whole. The Pre-Trial or Trial Chamber may, for example, issue a request for cooperation at the request of the accused person or at the Chamber's own initiative.[24] State Parties will also need to adopt national procedures to enable compliance on a practical level by, for example, granting the relevant domestic authorities with the requisite powers to respond to ICC requests. Among other provisions, a State Party must have in place a mechanism to enable it to respond to urgent requests for documents or evidence (article 99(2)). When national authorities question a person in accordance with articles 93(1)(b) and 93(1)(c), due regard must be given to the rights of persons during an investigation and the person must be informed of his or her rights.[25] When national authorities facilitate the appearance of witnesses before the Court under 93(1)(e), State Party authorities must provide the witness an instruction from the Court relating to self-incrimination.[26] State Parties must be able ensure that information that is made available is provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.[27] A State Party must also have consultative mechanisms available in case of denial or postponement, or where the State has identified problems with the execution of a request, in order to enable it to "consult with the Court without delay in order to resolve the matter".[28]

[24] Article 57; *see also* article 61(11) which enables the Trial Chamber, after confirmation of the charges, to exercise any function of the Pre-Trial Chamber that is relevant and capable of application.
[25] Article 55; Rule 111
[26] Rule 190
[27] Article 87(4)
[28] *See* articles 89(2), 89(4), 91(4), 93(3), 93(5), 96(3), 97. For other conditions applicable to Part 9 see above, Chapter 8

(c) Direct execution of investigative measures

The other major issue that has necessitated constitutional amendment is the provision in article 99(4) empowering the Prosecutor to directly execute non-compulsory measures on a territory of a State Party. The *Conseil Constitutionnel* in France declared that the provision breached the 1958 French constitution and necessitated constitutional amendment, holding that "although the measures are in no way compulsory, the authority granted to the Prosecutor to take such measures without the presence of the competent French judicial authorities may violate the essential conditions of the exercise of national sovereignty".[29] In response, France adopted a broad new constitutional article in order to that enable the Republic to observe its treaty obligations under the Rome Statute.[30]

3. IMPLEMENTATION AS SAFEGUARD

Unlike other international treaties which oblige State Parties to repress certain conduct, the Rome Statute does not impose an express obligation on Parties to criminalise the listed crimes or to investigate or prosecute them. The regime established by complementarity, however, assumes that such an obligation prevails under existing conventional and customary sources.[31] Thus, the preamble recalls that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", that "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and that

---

[29] Decision No.98-408 DC, 1999 J.O.(20)1317. The *Conseil Constitutionnel* also held that an application of an amnesty act or a national statute of limitations with respect to ICC crimes could lead to a determination of France's unwillingness or inability by the Court; *ibid*

[30] The provision reads "*the French Republic may recognise the jurisdiction of the International Criminal Court under the conditions specified by the treaty signed on 18 July 1998*"; Constitutional Law No. 99-568 of 8 July 1999. For discussion *see* Turns, in McGoldrick et al. (2004), 366-375. Note, the absence trial by jury may also present difficulties for States that provide for a constitutional guarantee to that right. However, this guarantee is normally restricted to a State's own national proceedings, and does not form a bar to extradition or surrender of persons to jurisdictions that do not provide for jury trials. *See* e.g. art.38 Irish Constitution; art.150 Belgian Constitution and art.97 Greek Constitution; Venice Commission,(2001)

[31] Duffy and Huston (2000), 31. *Compare* Kleffner (2003), 92-94, who reviews arguments based on a teleological interpretation whereby the Statute itself creates an implied obligation for Parties to investigate and prosecute ICC crimes and therefore to faithfully incorporate the listed crimes.

the establishment of the ICC will be "complementary to national criminal jurisdictions". The Statute is, thus, intended to serve as a catalyst for national action, although it does not form the basis for the obligation. Because the jurisdiction of the Court will only become operative if a State is shown to be unwilling or unable to genuinely investigate or prosecute, it is assumed that States will want to avoid the referral of a case over which they would have jurisdiction.

States may decide to implement ICC offences by referring to pre-existing provisions of domestic criminal law or modifications thereof.[32] The ordinary crimes approach, however, raises a number of problems: there may be lacunae in domestic law;[33] it may cover a narrower range of offences;[34] the sentencing framework may not adequately reflect the gravity of the offence;[35] or the domestic crime in question may be subject to defences not available under international law,[36] to statutes of limitation or to conditional amnesties.[37] Although the ICC judges are likely to apply a margin of discretion, such discrepancies could call into doubt a State's genuine ability to undertake guarantee the prosecution of ICC crimes.

In order to ensure the successful prosecution of core crimes and, at the same time, to guard against admissibility challenges, the vast majority State Parties to date have opted to repeal previous legislation and to incorporate afresh the crimes under the Statute. Thus, although the Statute does not formally require States to amend the substantive categorisation of crimes under national law, or to match them exactly with the terms of articles 6-8 of the Statute, most States have chosen to do so in order to limit the likelihood of a finding of unwillingness of inability. Accordingly, they have sought to exclude ICC jurisdiction by exhaustive capture.[38]

For similar reasons, many States Parties have incorporated also the general principles of criminal law under the Statute. As a result, concepts hitherto alien to certain legal system, such as command responsibility, have required the incorporation

---

[32] Broomhall (1999), 149; Kleffner (2003), 95-100

[33] *E.g.*, persecution or enforced disappearances, articles 7(1)(h)-(i) ICC Statute; making improper use of flag of truce, or forced conscription of nationals or prisoners of war belonging to a hostile party; articles 8(2)(v), (vii), (xv) ICC Statute

[34] *E.g.* charging assault or murder in the absence of the contextual elements for war crimes or crimes against humanity

[35] *E.g.* resulting in a reduced sentence disproportionate to the applicable international offence, and which could thereby bring into doubt the intent of the State to bring the person to justice.

[36] *E.g.* the exclusion of defences of superior orders, article 33 ICC Statute

[37] Article 29 ICC Statute; on amnesties for domestic offences see above, Chapter 4

[38] "We want to ensure that UK courts can always investigate allegations against a British national so that the ICC cannot have jurisdiction"; HC *Hansard*, Standing Committee D (3 May 2001)

of new, although not wholly unfamiliar, principles of criminal law.[39] Furthermore, the minimum fair trials and due process protections under Parts 5 and 6 of the Statute have also been reproduced, to varying degrees of faithfulness, in national implementing legislation so as to minimise discrepancies.[40] This includes the right to remain silent without adverse inference; the right of a suspect (and not just an accused person) who is indigent to legal assistance at State expense; the right of a suspect to be questioned in presence of counsel during all investigative proceedings; the right, in principle, of the accused to be present at the trial (prohibition against *in absentia* trials); the right, in principle, of the accused to examine a witness against him or her; as well as certain mental element requirements and defences.

Compared to the international humanitarian law and human rights treaty obligations of States, the 'instutionalisation' of treaty norms through the creation of the ICC, coupled with a regime threatening intervention in the face of State inaction, has proven to be a far more effective way of securing domestic incorporation of international crimes than the often unfulfilled express obligations of prior instruments.[41] In this process, the Rome Statute has served as both a standard-setting instrument and a compliance-inducing mechanism. This process of increased harmonisation promises to reinforce the normative value of the international law provisions.[42] By improving coherence, moreover, the Statute is helping to enhance the credibility and effectiveness of the whole system. As such, one of the benefits of harmonisation between national laws and the ICC Statute will be to diminish the shortcomings prevalent in the previous incorporation of international humanitarian law, arising from national variations as to the substantive definition and interpretation of international offences.[43] Such processes represents a 'hybridization' of norms around a common set of international rules, which are themselves the outcome of negotiated interactions between different legal systems.[44] Most importantly, complementarity promises to strengthen actual State practice in the enforcement of those norms.

---

[39] *See*, e.g., §65 International Criminal Court Act 2001 (Eng) [UK Act]; see above, Chapter 3
[40] *See*, e.g., UK Act, Schedule 3, incorporating verbatim article 55 ICC Statute
[41] *See* Kleffner (2003), 94; Bothe, *National Implementation of International Humanitarian Law* (1990), xviii
[42] Turns, 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States', in McGoldrick et al. (2004), 340
[43] See above, Chapters 3 and 4
[44] *See* Delmas-Marty (2002); Chapter 2 above

4. IMPLEMENTATION BEYOND THE ROME STATUTE

While the harmonisation of national law with the Rome Statute is a welcome development, it is important that other obligations arising from international treaty and custom which did not make it into the Rome Statute do not fall thereby into desuetude or obsolescence at the national level. As article 10 recalls, the Statute should not be interpreted in a manner that would limit or prejudice in any way existing or developing rules of international law.[45] The inclusion of a treaty review mechanism providing for the possible inclusion of new crimes emphasises further the notion of the evolving nature of substantive international criminal law. Accordingly, the process of adopting implementing legislation may well go beyond the minimum obligations under the Statute to comprehensively consolidate under domestic law other criminal conduct arising from pre-existing treaty and custom norms. This may include certain forms of war crimes not included in article 8, or other international crimes which were omitted from the Statute once the idea of including of treaty crimes was abandoned. The German 'Code of Crimes against International Law' (*Völkerstrafgesetzbuch*) provides a notable example of domestic efforts that have gone far beyond the minimum requirements of the Statute by adopting a comprehensive new criminal code.[46]

Conversely, the adoption of broad framework in national implementing legislation could prove counter-productive. States may decide, for example, to provide grounds excluding criminal responsibility in addition to those foreseen in the Statute, whether derived from national or international law.[47] States that have matched ICC offences to ordinary crimes under national law are, similarly, likely to provide for all the applicability of all domestic defences. The Court may rule that national legislation which permits additional defences in a manner that narrows the range of punishable offences would render a national forum unable to genuinely prosecute a particular case.

---

[45] *See* ILC *Commentary* to draft text for VCLT (art.39(5)), YBILC (1966), 237

[46] *See* Zimmerman, 'Implementing the Statute of the International Criminal Court: The German Example', in Vohrah et al., eds., *Man's Inhumanity to Man* (2003), 977-994

[47] Kleffner (2003), 102; *see*, e.g., implementing legislation in Canada and Germany; *ibid.*

5. JURISDICTION

Another area not explicitly framed as an obligation, but implied by the Statute's complementarity regime, is the availability of domestic jurisdiction under the bases foreseen in the Statute. Some States have adopted a minimalist approach that just satisfies the Statute's jurisdictional requirements. Thus, section 51(2) of the ICC Act (UK) limits jurisdiction to ICC offences committed in the UK or by UK nationals, residents and those subject to service jurisdiction abroad. As the Foreign and Commonwealth ('FCO') Minister of State expressed in parliamentary debate "We have a long-established practice of taking universal jurisdiction only as part of international law".[48] Despite attracting criticism from academic and NGO commentators, the position of the FCO has been that since the Rome Statute does not require the assumption of jurisdiction under bases other than territoriality and active personality, UK jurisdiction should be limited thereto. As a result, where a foreign suspect is taken into custody in the UK for conduct committed abroad, the UK will seek to yield jurisdiction to either the ICC or to the State of territoriality or nationality.[49] The Act also contains a hard-won provision that extends jurisdiction to "a person who commits acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom".[50] As Cryer indicates, since no nexus to the UK may have existed at the time of commission of the offence, the provision enables the application of a very limited form of universal jurisdiction subject to the requirement of later UK residency or citizenship, as opposed to mere presence on UK soil.[51] The Act also removes the traditional requirement of dual criminality for extradition in relation to ICC crimes.[52] This will enable the UK to extradite suspects to States that proscribe extra-territorial

[48] HC *Hansard*, vol.366, col.278 (3 April 2001); see also HL *Hansard*, vol.623, col.418-9 (8 March 2001)

[49] Turns argues that the minimalist approach of the UK turns complementarity on its head, since the object of Rome Statute is to encourage States to fulfil their duty to prosecute cases domestically and the Court is only meant to intervene where a State is unwilling or unable genuinely to prosecute. The position of the UK that it will pass up cases where there is no nexus to the UK defeats this purpose; Turns, in McGoldrick et al. (2004), 351

[50] UK Act, §68(1)

[51] Cryer, 'Implementation of the International Criminal Court in England and Wales' (2002) ICLQ 51, 742

[52] UK Act, §§72-73

offences via jurisdictional bases that the UK does not itself assert.[53]

Others States have taken a more progressive route by utilising the adoption of new legislation to extend the bases under which they can exercise jurisdiction over international crimes. Canada's *Crimes Against Humanity and War Crimes Act* provides jurisdiction over a person alleged to have committed an ICC offence if "(a) at the time the offence is alleged to have been committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a State that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a State, (iii) the victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a State that was allied with Canada in an armed conflict; or (b) after the time the offence is alleged to have been committed, the person is present in Canada."[54] The legislation thus recognises jurisdiction on the bases of nationality, protective principle, passive personality (extended to allied States), as well as universality by enabling the taking of custody regardless of the place of commission. South Africa's *Implementation of the Rome Statute of the International Criminal Court Act, 2002* similarly provides for the assertion of extra-territorial jurisdiction based on nationality, passive personality, and universality (presence of the accused in South Africa).[55] New Zealand's International Crimes and International Criminal Court Act (2000) goes one step further by providing for jurisdiction over article ICC offences "regardless of – (i) the nationality or citizenship of the person accused; or (ii) whether or not any act forming part of the offence occurred in New Zealand; or (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence."[56] The last ground, whereby jurisdiction may be asserted in the absence of custody over the offender, provides the broadest variant on universal jurisdiction by enabling New Zealand to request the extradition of any person

[53] Cryer (2002), 739
[54] Crimes Against Humanity and War Crimes Act (2000, c. 24) (Canada)
[55] Implementation of the Rome Statute of the International Criminal Court Act 2002 (South Africa), §4(3)
[56] International Crimes and International Criminal Court Act 2000 (New Zealand), §8(1)(c)

suspected of committing an ICC offence anywhere. German domestic legislation provides for a similar application of jurisdiction.[57]

Arbour has suggested that the adoption of extraterritorial bases of jurisdiction may come to be encouraged as a deliberate policy by the Court in order to prevent gaps in enforcement. She suggests that the Assembly of State Parties, moreover, may develop consensus towards the widespread exercise of extraterritorial jurisdiction by national authorities as a cheaper and more efficient exercise of jurisdiction than maximal funding of multiple situations before the ICC.[58]

6. NON-PARTY STATES

While the adoption of the Rome Statute primarily impacts on States that have become Parties, the Statute may create repercussions for States non-parties in a number of ways. The Rome Statute itself, which was adopted by an overwhelming majority of States, may come to be viewed by non-Party States as a crystallisation of substantive and procedural international criminal law. It may influence general State practice by serving as a template for the definition of crimes and principles of criminal law in domestic legislation.[59]

Another way in which the ICC Statute may positively influence the behaviour of third States is the opportunity provided under the complementarity regime for all States, including non-Party States, to challenges the admissibility of cases.[60] In order to invoke complementarity, a non-Party State will have to show that it can genuinely meet the test of willingness and ability. The existence of the Court may persuade non-Party States that the most effective way to exclude ICC jurisdiction over their nationals is to harmonise their domestic legislation with the Statute.[61]

The most obvious 'external' impact of the ICC, however, will arise from Security Council referrals of situations involving States non-parties. Consistent with article 34 of the Vienna Convention on the Law of Treaties, the Statute cannot create

---

[57] *Völkerstrafgesetzbuch* (VStGB),§1: "Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, *wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist*" (emphasis added). *See* Wirth (2003), 158

[58] Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?' (2003) J Int'l Crim. Justice 1, 587

[59] *See*, e.g., adoption of ICC standards in East Timor and Iraq; Chapter 4

[60] *See* articles 18(1),18(2) and 19(2)

[61] Kleffner (2003), 111-2

obligations for a State that is not party to the treaty without its consent. Accordingly, cooperation by non-Party States under the Statute is framed in voluntary terms, as reflected in article 87(5)(a) of the Statute, which provides that the Court "may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis". Where the Security Council refers a situation to the ICC, the source of an obligation for a non-Party State to cooperate with the Court stems not from the Rome Statute, but from the resolution of the Council adopted under Chapter VII of the UN Charter.[62] Thus, Security Council Resolution 1593 referring the situation in Darfur recognises that "States not party to the Rome Statute have no obligation under the Statute", but decides that the Government of Sudan and all other parties to the Darfur conflict shall cooperate fully with the Court "pursuant to this resolution".

Notwithstanding the limitation of the resolution to the Government of Sudan and parties to the Darfur conflict, the legal nature of the obligation imposed by Resolution 1593 is similar to the mandatory regime established by article 29 of the ICTY Statute (article 28, ICTR Statute). It creates binding obligations for the identified entities to take whatever steps are necessary to implement the decision.[63] In the case of resolution 1593, this requires the Government of Sudan and all other parties to the Darfur conflict to respond to requests for cooperation from the Court. The Government of Sudan cannot plead deficiencies or lacunae in its domestic law to relieve it of its international treaty obligations under the UN Charter.[64] Nor can it argue the existence of competing international obligations to avoid its duty under the Council resolution.[65] The Court, in turn, cannot act *ultra vires* its Statute since its authority to seek the cooperation of a non-Party State stems from the Statute and not from the Council resolution. Thus, the Court cannot request forms or modalities of cooperation that are beyond its competencies under the Statute absent the consent of the State concerned.

[62] Kreß and Prost 'Article 87', in Trifterer (1999), 1061
[63] See *Report of the Secretary General*, S/25704, ¶125
[64] Article 27, VCLT
[65] Article 103 UN Charter

Part IV: Conclusions

X

Closing the Gap

This study has sought to examine why the behaviour of States in the field of international criminal law is so markedly at variance with their international obligations. In particular, the aim has been to discover, firstly, whether there are gaps in compliance and if such gaps matter; in which specific areas have they occurred and why; what lessons can be learned from past experience with enforcement models; and lastly, what the prospects are for closing these various gaps with the entry into force of the Rome Statute.[1] The review undertaken in this study has identified persistent gaps that hamper enforcement at the normative level, in the application of substantive law and the discovery of specific enforcement obligations and at the structural level, as to the exercise of criminal jurisdiction. The divergence between norms and practice may be partly an inevitable consequence of the increasingly regulated nature of international life which, as it has placed more intrusive demands on Parties, has raised the bar for expected behaviour.[2] At the same time, compliance rates show variability across different areas of international law, depending on the cost-benefit calculations of national actors.[3] Most States routinely observe their obligations under international law most of the time because compliance redounds to the functional interest of the State. In a minority of difficult, high-profile areas, however, participants may view their interests best served by non-compliance. The enforcement of human rights and humanitarian law regimes has traditionally suffered the highest degrees of defection. This has led to a preponderance of a culture of impunity, in particular, in the States directly affected by conflict. The persistence of gaps in these fields matters because they may have far reaching consequences for international peace and security and for the long term stability of entire regions. As the experience of the Balkans and the

[1] The methodological framework set out here is drawn from Luck (2004), 303
[2] See above, Introduction; Luck (2004), 304-5
[3] See above, Chapter 2

Great Lakes region of Africa demonstrates, the perpetration of massive atrocities often precipitates future conflicts, including in neighbouring countries, as small arms, soldiers and extremist rhetoric migrate from one conflict zone to another, leaving in their wake a bankrupt society wracked by organised crime and unstable governance.

Enforcement gaps at the national level

The review of domestic practice has displayed gaps in the compliance levels of States with their pre-existing duty to prosecute crimes in their national courts. This has occurred because of variations in the manner in which States have prescribed, adjudicated and enforced their jurisdiction over internationally criminal conduct. As a result of these deficiencies, an offender will be able to exploit the gaps in the system of jurisdictional coverage spanning the globe. He or she may take shelter in States that have failed to legislate adequately for the conduct in question or to have established the extra-territorial bases required for the assertion of jurisdiction with respect to the particular offender. The offender will be also benefit in cases where States do not have mutual legal assistance or extradition agreements with the national forum pursuing the case or may recognise exemptions thereto.

Wide discrepancy between the construction, interpretation and application of core crime offences, moreover, has undercut the emergence of consistent State practice. As a rule, violations of core crime norms have seldom been the object of domestic sanction, there being far too many examples of an absence of trials, either through inaction or a deliberate passing of blanket amnesties. Despite the *aut dedere aut judicare* requirement of numerous conventions, third States not involved in a particular conflict have proved reluctant to exercise their jurisdiction. As experience has shown, the main weakness of a system relying on domestic enforcement is that rules bearing on exercise of jurisdiction display permissive rather than mandatory characteristics. This is because the obligation to prosecute or extradite an offender remains subject to domestic principles related to prosecutorial discretion, proportionality, and *forum non conveniens*. Thus, despite the legal certainty of even the most robust treaty provisions, a State is not obliged to try or extradite every possible offender that it finds within its territory, but will have to balance its available resources and capacities against other public goals and interests. The rules are permissive, moreover, in terms of their practical implementation, because there is no

central authority with the capacity to sanction States for their inaction. Where States do comply with their enforcement obligations, they typically do not do so out of a sense of a sanctionable legal duty. Moreover, States may be coerced or induced to comply because of factors unrelated to the treaty mechanisms themselves, whether by way of media exposure, diplomatic exchanges, economic leverage or threat of military action.

It is at this level that the introduction of the ICC Statute may have its most important impact, both in terms of the content of national legislation and actual enforcement in practice. The analysis above suggests that the Court is altering incentive structures for national authorities and profoundly altering State behaviour. The admissibility provisions of the ICC are serving as base-line standards for domestic reform efforts by States both in terms of substantive law as well as in respect of principles of criminal law and procedural law. This has occurred despite the absence of an express obligation in the ICC Statute requiring Parties to do so. Instead, States have matched domestic law closely to the Statute in order to limit the likelihood of an admissibility challenge to their jurisdiction based on substantive inconsistencies or lacunae. By doing so, States have improved the overall coherence of international criminal law, which in turn serves to enhance both its credibility and effectiveness. Such harmonisation between national laws and the ICC Statute is helping to diminish the discrepancies in the previous incorporation of international law by national authorities. Moreover, the ICC judges will come to exercise increasing influence in guiding this internal reform process as the Pre-Trial Chambers develop jurisprudence on the application of the admissibility provisions.[4] This includes elaborations on the definition of 'genuineness', the applicability of certain amnesty exceptions, basic standards for judicial integrity, and the unavailability of national jurisdictions because of an incomplete rendering of international offences in domestic law. Compared to the oft unfulfilled obligations deriving from international humanitarian law, or the requirements of parties under monitored human rights conventions, or even the duties flowing from the Security Council resolutions creating *ad hoc* Tribunals, the complementarity framework of the Rome Statute establishes a far more profound set of interactions between international norms and domestic practice.

[4] Burke-White (2005), 576

Moreover, complementarity promises heightened prospects for actual enforcement. The ability of the Court to supervise the compliance of States with their pre-existing international duties and its ability to assert jurisdiction where a State fails to do so serves as a powerful incentive for domestic activism. The Statute, thus, serves as a catalyst for national action, although it does not form the basis for the obligation. Evidence for this assertion comes from the statements of governments during their own internal adoption process expressly declaring their intention to exhaustively capture the requirement of the Rome Statute so as to ensure the successful assertion of national jurisdiction whenever required. This suggests that the admissibility provisions of the Statute will have a significant impact on the policies of national authorities in the actual repression of crimes. The prosecutorial and strategic choices made by the ICC Prosecutor in selecting particular situations or targets, moreover, may have a causal impact on the enforcement of national law. The most important contribution of the ICC, therefore, will not be the number of trials it conducts, but rather its compliance-inducing effect in promoting regularity in the functioning of national enforcement mechanisms.

Because of the gaps in the jurisdictional regime of ICC Statute itself, this influence may initially be limited to the State of the territory where the crime occurred and the State of the nationality of the offender (article 12). The international attention that such trials will attract, however, may have some impact on inducing a virtuous cycle of accountability. Third States may be influenced by public exposure, moral persuasion or political expediency to try, extradite or deport co-perpetrators found on their territory. The experience of trials held in a number of third States during the 1980s and 1990s related to the WWII and the conflicts in the former Yugoslavia and Rwanda lend some credibility to this assertion. For the reasons outlined above, however, the expectation that third States will routinely be willing or able to exercise their extra-territorial jurisdiction over offences committed abroad appears misplaced.

Enforcement gaps between the national level and the ICC

The complementarity relationship of the ICC to national authorities provides a number of strong guarantees for an effective Court. Despite initial proposals to limit the referral mechanism to State Parties and the Security Council, the conferral of *proprio motu* powers on the Prosecutor guarantees that there are no significant gaps in

the ICC enforcement regime at the triggering stage. This is particularly important given the traditional under-utilisation of inter-State complaint systems and the anticipated exceptional use the Security Council would make of its referral power. An independent trigger mechanism is an important aspect also of the catalytic effect of the Court. The prospect of *proprio motu* powers provides a significant incentive for States to take domestic action so as to avert ICC intervention or to otherwise submit a self-referral to avoid the embarrassment of an external trigger. Without the threat of cases being independently initiated the incentive for national action would have been drastically reduced. As such, the Prosecutor will be able to use his good offices, in line with the goals of complementarity, to provide early warning to States and intergovernmental organisations of gross violations; to crystallise international attention; and to encourage domestic action, with possible international support, in order to avert ICC intervention. The inclusion of such an oversight mechanism capable of regulating State behaviour poses a serious challenge to the notion of a sovereignty bound 'statist' Court, and heightens the prospects for reducing gaps in enforcement at the national level.

The Court will also be the final arbiter of its own jurisdiction where States challenge the admissibility of a case. Thus, although States may invoke national proceedings to deflect the Court's jurisdiction, it is for the ICC judges to decide whether such efforts are undertaken in good faith. The manner by which the Court will weigh the genuineness of political will and national capacity, however, will be critical. Too deferential a margin of appreciation may undermine the credibility of ICC intervention and reduce incentives to promote compliance; too much intrusion could inhibit national efforts and undermine complementarity.

Although the ability of the Court to determine its own jurisdiction is unqualified, as noted above, the disappointing result of the negotiation on article 12 of the Statute means that significant gaps will remain in the jurisdictional reach of the Court. To this extent, unless the Security Council refers a situation, the ICC will have less power to bring perpetrators of mass violence to trial than do national jurisdictions.

It is at the cooperation stage, however, that gaps in the Statute's enforcement regime are most apparent. If heightened domestic compliance is predicated on the avoidance of ICC intervention, the incentive for good behaviour will arguably disappear where a State fails an admissibility challenge and, as a result, the Court

exercises its jurisdiction. Unless jurisdiction is uncontested and the States concerned provide full cooperation, the ICC will face a considerable structural gap due to unavailability of an international enforcement agent. This lacuna creates both normative and structural ambiguities. The Court is supra-national in so far as it exercises its jurisdiction over individuals directly under international law, irrespective of the official capacity of the accused. Yet, the ICC cannot enforce its jurisdiction without State cooperation. The transposition of a vertical normative regime over a horizontal structure is a product of compromise. It is indicative of the differences that persisted during ICC negotiations between supra-national and statist positions. The manner in which the tension between State sovereignty and the Court's powers plays out over time remains to be seen. It may, however, lead to absurd results: where a State has been found unwilling or unable, the Court could be placed in the paradoxical situation of having to depend on the same institutional and procedural weaknesses that were deemed unsuitable to support domestic investigations and prosecutions. Thus, without either States acting in good faith or robust international intervention, the Court may lack the tools for the effective discharge of its investigative functions.

The experience of the *ad hoc* Tribunals demonstrates that notification of non-cooperation to the Security Council may do little to effect concerted action. Instead, enforcement is likely to depend on the extent to which the international community is prepared assign a credible reputational risk to non-cooperation, by instituting issue linkages with other areas of international activity. Successful enforcement, therefore, will depend on the convergence of a number of policy considerations for each State. In the case of the countries of the former Yugoslavia, it is only some ten years after the end of the Bosnian war that national authorities in the region have been reported as providing satisfactory cooperation, despite periodic relapses, with the ICTY and to have become suitably reformed to try cases transferred from The Hague. As the soft power pull of EU and NATO membership and conditional donor assistance has heightened the reputational risk of non-compliance these States have, somewhat reluctantly, ventured down an unsteady path towards transparent government, public scrutiny of their war time past, and the entrenchment of the rule of law. This suggests that compliance with international norms, ultimately, may rely upon the extent to which the international community is able to establish concrete and tangible tools to reward satisfactory performance and punish transgressions. Moreover, the fact that progress with cooperation in these States has been linked to the development of

democratic governance suggests there may be some support for the view that the *ad hoc* Tribunal, together with the panoply of international, governmental and civil society actors that have operated in the region over the past decade, have induced a trickle-down process of normative internalisation. These same factors, nonetheless, may lend themselves equally to a realist critique. As Rubin has stated, "[i]nternational law is not a criminal law system; it is more akin to constitutional laws, where enforcement rests on political counterpressures and foreseeable middle- and long-term reactions."[5]

The referral of the Darfur situation to the ICC provides a good example. Unlike the Uganda and DRC self-referrals, Sudan has contested the jurisdiction of the ICC and has openly stated that it will not cooperate with any trials of its nationals before the Court. Without Sudanese support, the Prosecutor will have limited capacity to gather evidence inside Darfur. The mandate of the African Union peacekeeping mission in Darfur (AMIS) does not extend to providing investigative assistance to the ICC, nor does its current capacity allow it to do so. It is uncertain the extent to which the mandate of the UN military presence in Sudan (UNMIS) may be expanded to enable direct cooperation with the Court when it takes over duties in Darfur from the AU.[6] The possibility for targeted sanctions by the Security Council sanctions committee on Sudan of persons responsible for serious human rights and humanitarian law violations is a positive example of issue linkage.[7] However, the imposition of assets freezes and travel bans on individual Sudanese officials aimed at restricting their movement abroad, if at all forthcoming, may also limit the opportunities for arrest in third States. Economic sanctions against Sudan's critical oil industries have been ruled out by China, on the basis of its own linked energy needs, how much more military intervention. Moreover, the absence of U.S. engagement with the ICC, even if nuanced by the Darfur referral, limits the potential for successful policy linkage and external coercion.

It remains unclear the extent to which the referral of the situation to the ICC has had any preventative impact in reducing the scale of crimes being committed in Darfur. With the current spotlight of international attention on the region, nonetheless, should renewed massacres recur in Darfur the call for robust military intervention

[5] Rubin, 'International Crime and Punishment', *The National Interest* (1993), 73
[6] AU PSC/PR/Comm.(XLV) (12 January 2006); S/PRST/2006/5 (3 February 2006); PSC/MIN/Comm. (XLVI) (10 March 2006)
[7] S/RES/1591(2005)

may prove irresistible. The pressure for collective action may also be guided by recent debates in the General Assembly and the Security Council on the international community's responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity where a State has failed its primary role.[8] Even then, however, such action would be aimed primarily at putting a stop to the specific humanitarian crises unfolding on the ground: it is unlikely that it would include a mandate to arrest the most responsible military and political officials in that nation's capital. As the Somalia experience demonstrates, moreover, it is doubtful that such an operation would prove successful. Thus, while NATO forces intervened in Kosovo to protect civilian life, the Alliance did not storm Belgrade to execute the warrant for the arrest of Milosevic et al that had been issued by the ICTY.

Thus, in the absence of an international enforcement agent, the ICC will be severely curtailed in its ability to enforce its jurisdiction where a powerful State contests its jurisdiction. Even more than in other circumstances, enforcement here will be determined by factors external to those foreseen in the Rome Statute.

Enforcement gaps at the ICC level

Lastly, even with a well functioning cooperation regime, there will be gaps in enforcement because the ICC cannot deal with possible every situation. As noted above, the ICC faces territorial, temporal, and resource bound limitations to the exercise of its jurisdiction. In addition, the Prosecutor has determined that he will focus only on the persons most responsible for the commission of crimes. In the case of the ICTY and ICTR, the focus on the senior leadership and gravest atrocities has resulted in the trial of approximately 100 individuals per institution, over a protracted

[8] *See* 2005 World Summit Outcome A/RES/60/1(24 October 2005),¶¶138-9; Security Council debate S/PV5319 (9 December 2005). As UK Home Secretary, Jack Straw, has stated: "... [T]he work of the International Criminal Court runs in parallel to this very important extension of the jurisprudence of the Security Council of the U.N. that it should intervene where the responsibility to protect has been broken by a sovereign member state. So what you now have in place of the old, sort of, Westphalian idea that what goes on inside a state has nothing to do with anybody else provided it doesn't threaten any other state, is, first of all, this concept of the state's responsibility to protect qualifying, as it were, an absolute view of sovereignty; and, alongside that, an individual responsibility, which is based on individuals inside those governments and others, not to commit international crimes, which would bring them before the International Criminal Court if their own local courts prove ineffective"; Press conference on UN reform (London, 31 January 2006); CICC news-list

period.[9] In the interests of conducting expedited proceedings within a relatively short span of years, by contrast, the Special Court for Sierra Leone will try approximately ten individuals out of thirteen indicted. A strategic question for the ICC, therefore, is how many people it should try in each situation and how restrictively the Prosecutor should define his policy determination of focusing on the persons most responsible. Given its far more limited resources compared to its *ad hoc* predecessors and the need to balance multiple situations, the ICC is likely follow a path similar to the Special Court for Sierra Leone and focus on an extremely limited number of individuals per situation.[10] This may have significant implications in terms of public expectations. It may also negatively influence reconciliation efforts, particularly if one of the purposes of attributing individual responsibility is to prevent the ascription of collective guilt to a particular ethnic or national group. The prosecution of the most responsible may come to be seen as token justice if it paradoxically exonerates the many co-offenders.[11]

A related strategic question is how many situations the ICC should concurrently handle. Should the Prosecutor investigate more than three situations at a time? With the issuance of arrests warrants in relation to Uganda and DRC, should limited resources be focussed on pursuing more perpetrators in these situations or on opening investigations in relation to another referral such as that of Central African Republic or the declaration of Cote D'Ivoire? These choices are not straightforward. Continuing investigations in Uganda and DRC would serve to consolidate the impact of the ICC in these countries, but could weaken the deterrent effect of the Court elsewhere. Perpetrators in other conflicts may be emboldened if they perceive that the Court focus is absorbed in its current investigations. Abandoning ongoing investigations to maximise the global impact of the Court, on the other hand, may result in mere superficial engagement with each situation, thereby undermine the credibility of the Court and the expectations of victims.

---

[9] As of March 2006, the ICTY had indicted 161 persons, and concluded proceedings against 85 persons. As of March 2006, the ICTR had arrested over 70 persons, and has concluded proceedings against 26.

[10] "A focused prosecutorial strategy: This means centring our efforts on perpetrators bearing the greatest responsibility, with a policy of short investigations, targeted indictments and expeditious trials, and an interdisciplinary investigative approach, adjusted to the peculiarities of each situation"; *Address by the Prosecutor to the Assembly of State Parties* (2004), available at www.icc-cpi.int. The first ICC arrest warrant relating to the investigation in Northern Uganda charges five members of the Lord's Resistance Army leadership; *Situation in Uganda, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58* (ICC-02/04-01/05-1-US-Exp) (20 October 2005)

[11] Côté, 'Compliance with the Laws of War', in Luck and Doyle (2004), 164; Bass (2000), 300-301

The effort to close these gaps raises a host of legal questions bearing on the exercise of the Prosecutor's discretion under article 53 and the supervisory functions of the Pre-Trial Chamber. Should the Prosecutor investigate and prosecute all crimes over which the Court has jurisdiction, or only the most serious occurrence of these crimes?[12] What is the threshold for a determination that a case is of insufficient gravity to justify action by the Court?[13] For cases that are of sufficient gravity, how should decisions not to proceed that are based on 'interests of justice' or 'interests of victims' be balanced? What factors should guide such determinations?[14] Which prosecutorial decisions should the Pre-Trial Chamber review: all discretionary decisions to initiate or continue an investigation or prosecution, or only the initial decision to initiate an investigation or prosecution, but not subsequent determinations made within the scope of that decision?[15] In addition, these discussions have a financial implication relating to the budget set by the Assembly of State Parties and the levels of commitment States are willing to invest: the Court cannot act beyond its means. It also has a strategic perspective as to the desired scope and role of the Court, and which therefore includes all stakeholders, including victims, effected communities, tribal and religious leaders, NGOs, national authorities and intergovernmental organisations.[16]

As it would be highly undesirable, and contrary to the intent of the Statute, for the ICC to deal with every possible situation or to try all offenders, the primary burden of prosecuting these crimes will reside at the national level.[17] However, this assumes that national legal systems have the capacity and political will to enforce such a duty. Where domestic authorities cannot fulfil their complementary role, a gap may persist in the enforcement of international criminal law at the national level. As Madeline Morris points out:

> Clearly the rational for a regime of "stratified-concurrent jurisdiction," in which the international tribunal prosecutes (or strives to prosecute) the leaders, leaving to national governments the rest of the defendants, cannot rest on a view of international tribunals as supplements or substitutes for reluctant,

[12] *See* art.53(1)(a), 53(2)(a) ICC Statute
[13] *See* art.53(1)(b), 53(2)(b), 17(1)(d) *ibid*
[14] *See* art.53(1)(c), 53(2)(c) *ibid*
[15] *See* art.53(3) *ibid*
[16] *OTP Presentation to UN Legal Advisors* (2005), available at www.icc-cpi.int
[17] *See above* regarding ICTY and ICTR completion strategies and resource concerns which have led to a reduction in the number of cases through the withdrawal of indictments and the transfer of less grave cases to national jurisdictions

> ineffective, or incapacitated national courts. Having an international tribunal try a few top-level defendants while leaving the staggering bulk of the caseload to the national courts would not necessarily be a sensible strategy for an incapacitated or unwilling national judicial system.[18]

The Rome Statute will clearly fail in its goal to prevent impunity if it merely creates an instrument to replace failed national courts. The vast majority of cases, therefore, will continue to rely on national prosecutions. This means that effective incorporation and interpretation of statutory obligations in domestic law will be vital. It may require also the strengthening or rebuilding national justice systems or the provision of international assistance, including through possible internationalised processes.[19] Enhancing the domestic extra-territorial jurisdiction will also help close remaining gaps in enforcement,[20] as will extending the number and range of their treaties for extradition and mutual cooperation in criminal matters. In particular, national efforts will be critical where the offence was not committed on the territory of a State Party or by one of its nationals, or occurred prior to the entry into force of the Rome Statute. Thus, without parallel domestic efforts, the Prosecutorial policy of focusing on the decision makers may entrench patterns of impunity for the actual perpetrators of crimes.[21]

Conclusion

With the coming into force of the Rome Statute, an enforcement system has been established between ICC and States subject to its jurisdiction. This new system will encourage the closing of enforcement gaps at the national level through the catalytic presence of the ICC as a compliance-inducing institution on the world stage.

---

[18] Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', (1997) Duke Jrn'l Comp.& Int'l Law 7, 367. *See also* OTP Policy Paper

[19] *See*, e.g., Ferrero-Waldner, EU Commissioner for External Relations and European Neighbourhood Policy: "As has been repeatedly said, in an ideal world, there would be no need for an institution such as the ICC because all States would themselves prosecute genocide, war crimes and crimes against humanity. We believe that the ICC should not have the ambition, and will never have the means, to respond to all existing international justice needs. It is crucial that national jurisdictions should play their role. This is why the EU has provided significant financial support for the reconstruction of legal structures in countries concerned with crimes under the Rome Statute. Training judges, prosecutors and lawyers is a powerful way to avoid impunity, facilitate the implementation of the principle of complementarity and thus assist the ICC in its mission." *The International Criminal Court, Transatlantic Relations and Co-operation with Third Parties to Promote the Rule of Law,* SPEECH/05/228 (European Parliament, Strasbourg, 14 April 2005)

[20] See above, Chapter 1; *Commentary* to Princeton Principles, 24

[21] OTP Policy Paper, 7

Enforcement gaps will persist, however, at the level of State cooperation. The system established by the Rome Statute, moreover, is unlikely to result in routine State compliance with the requests and decisions of the Court. This is because the Court's normative framework has been interposed on top of an inter-State enforcement structure. Moreover, practical gaps will remain in the global coverage the ICC. It is important, thus, that the Court is not drowned under the weight of expectations.[22]

A measure of perspective may also be warranted. As Roberts reminds us, international courts and tribunals "are only likely to have a minor impact on vast problems, and are not necessarily the most important mechanism even for the limited objective of securing implementation of the laws of war."[23] It is therefore hoped that increased activity at the enforcement end of the law will have a virtuous effect on the prevention of offences. In particular, the credible prospect of enforcement may lead States to more vigorously disseminate applicable laws and regulations among their armed forces through their military manuals, codes of conduct, rules of engagement and training systems, as well as by maintaining and enforcing military discipline. In this manner, the Rome Statute may be able to contribute to the gradual transformation of the State practice.

Ultimately, enforcement will depend on the observance of critical norms by individuals and on the degree of their commitment to the values and ideas so represented, whether as perpetrators, commanders, prosecutors, judges, diplomats, member of civil society, national officials, or policy decision makers. For, although norms, standards, and even the institution with vertical binding authority have emerged, their effectiveness and ability to adjust national behaviour remain largely in the shackles of traditional debates over sovereignty, national interest and political will. As has been observed, "any agency whatever, though it be the instrument of mankind's greatest good, is capable of misuse. Its proper use or abuse depends on the varying degrees of enlightenment, capacity, faith, honesty, devotion and highmindedness of the leaders of public opinion."[24] The key issue for closing the gap between norms and practice may therefore remain one of enlightened leadership rather than law.

---

[22] Roberts (1995), 73
[23] *ibid*
[24] 'Abdu'l-Bahá, *Secret of Divine Civilization*, 16

Bibliography

A. INTERNAITONAL INSTRUMENTS AND RESOLUTIONS

Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907)
Treaty of Peace between the Allied and Associated Powers and Germany (Versailles 28 June 1919), 11 Martens (3d) 323
Slavery Convention, 60 LNTS 253 (1926)
International Convention for the Suppression of Counterfeiting Currency, 112 LNTS 371 (1929)
Declaration Concerning Atrocities Made at the Moscow Conference (30 October 1943)
Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis (8 August 1945)
Communique and Report on the Moscow Conference (27 December 1945)
Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of Major War Criminal of the European Axis (8 August 1945), 82 UNTS 279
Charter of the International Military Tribunal for the Far East, reprinted in Ferencz (1980)
Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948)
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1949)
Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 75 UNTS 85 (1949)
Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135 (1949)
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949)
Convention for Protection of Human Rights and Fundamental Freedoms, ETS No. 5 (4 November 1950)
Convention Relating to the Status of Refugees, 189 UNTS 150 (1951)
Amending Protocol to Slavery Convention, 212 UNTS 17 (1953)
European Convention on Extradition, ETS No. 24 (1957)
Convention on the High Seas, 450 UNTS 82 (1958)
European Convention on Mutual Assistance in Criminal Matters, ETS No. 30 (1959)
Single Convention on Narcotic Drugs, 520 UNTS (1961)
Brussels Convention on Penal Jurisdiction in Matters of Collision, 429 UNTS 233 (1952)
UN Standard Minimum Rules for the Treatment of Prisoners; E/3048 (1957), amended E/5988 (1977)
Geneva Convention on the High Seas, 450 UNTS 82 (1958)
International Convention of the Suppression and Punishment of the Crime of Apartheid 1015 UNTS 243 (1973)
International Covenant on Civil and Political Rights, 3 UNTS 1 (1966)
Vienna Convention on the Law of Treaties, 1155 UNTS 331(1969)
Convention on Special Missions, 1410 UNTS 231 (1969)
Convention for the Suppression of Unlawful Seizure of Aircraft; 860 UNTS 105(1970)
European Convention on the Validity of Criminal Judgments, ETS No. 70 (1970)
European Convention on the Transfer of Criminal Proceedings, ETS No. 73 (1972)
European Convention on State Immunities ETS No. 74 (1972)
Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; 974 UNTS 177 (1971)
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; 1035 UNTS 167 (1973)
UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity; A/RES/3074 (XXVIII), A/9030/Add.1 (1973)
Additional Protocol to European Convention on Mutual Assistance in Criminal Matters, ETS No. 99 (1978)
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609
International Convention Against the Taking of Hostages, 1316 UNTS 205 (1979)
European Convention on the Suppression of Terrorism, ETS 90 (1977)
United Nations Convention on the Law of the Sea, 1833 UNTS 3 (1982)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984)
UN Basic Principles on the Independence of the Judiciary, A/CONF.121/22/Rev.1 (1985)
UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/40/53 (1985)
Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 185 UNTS 453 (1988)
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 221 (1988)
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 304 (1988)
UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/43/49 (1988)
UN Guidelines on the Role of Prosecutors, A/CONF.144/28/Rev.1 (1990)
UN Basic Principles on the Role of Lawyers, A/CONF.144/28/Rev.1 (1990)
Declaration on Protection of All Persons from Enforced Disappearance, UN.Doc.A/47/13,3(1992)
Treaty on European Union, 31 ILM 247(1992)
The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/RES/827 (25 May 1993)
The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, S/RES/955 (8 November 1994)
Rules of Evidence and Procedure (ICTY), IT/32/Rev. 36 (as amended 21 July 2005)
Rules of Evidence and Procedure (ICTR), (as amended 21 May 2005)
Inter-American Convention of Forced Disappearance of Persons 33 I.L.M.1429(1994)
The Rome Statement on Sarajevo, Reflecting the Work of the Joint Civilian Commission Sarajevo, (February 18 1996); available at http://www.nato.int/ifor/general/d960218b.htm
Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996 (10 September 1996)
Guidelines to the parties for the submission of cases under the Rules of the Road Agreement, Appendix B to the Rome Statement on Sarajevo
Rome Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998)
Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998), A/CONF.183/10
Rules of Evidence and Procedure (ICC), ICC-ASP/1/3 (part II-A)(2002)
Elements of Crimes (ICC), ICC-ASP/1/3 (part II-B)(2002)
Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197/3 (2000)
UNMIK/REG/1999/1 (25 July 1999) *On the Authority of the Interim Administration in Kosovo*
UNMIK/REG/1999/6 (7 September 1999) *On the Recommendations for the Structure and Administration of the Judiciary and Prosecution Service*
UNMIK/REG/1999/24 (12 December 1999), amended by UNMIK/REG//2000/59 (27/10/00) *On the law applicable in Kosovo*
UNTAET/REG/1999/1 (27 November 1999) *Authority of transitional administration*
UNTAET/REG/2000/11 (6 March 2000) *Organization of courts*
UNTAET/REG/2000/15 (6 June 2000) *Panels with jurisdiction over serious criminal offences*
UNTAET/REG/2000/25 (3 August 2000) *Amending Regulation No. 1999/3*
EU Council Common Position 2001/443/CFSP (11 June 2001)
UNTAET/REG/2001/10(13 July 2001) *Commission for Reception, Truth and Reconciliation*
UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/55/89 Annex 4 (2000)

UNMIK/REG/2002/6 (18 March 2002) *On the use in criminal proceedings of written records of interviews conducted by law enforcement authorities*
EU Council Decision 2002/494/JHA (13 June 2002)
UNMIK/REG/2002/7 (28 March 2002) *On covert and technical measures of surveillance and investigation*
Convention on Jurisdictional Immunities of States and their Property, A/RES/59/38 (2 December 2004)
Treaty on European Union (consolidated text) Official Journal C 325 (24 December 2002)
EU Council Decision 2003/335/JHA (8 May 2003)
World Summit Outcome A/RES/60/1 (24 October 2005)

B. NATIONAL LEGISLATION

Belgium, *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions* (Moniteur Belge, 5 août 1993)
Proposition de loi relative à la répression des violations graves du droit international humanitaire, Belgian Senate 1st December 1998, 1-749/4; 38 ILM 921 (1999)
Bosnia and Herzegovina, *Official Gazette of the Republic of Bosnia and Herzegovina* (OGRBiH) No.2/92, 8/92, 10/92, 16/92 and 13/94
Official Gazette of the Federation of Bosnia and Herzegovina (OGFBiH) No.43/98, 2/99, 15/99 and 29/00
OGFBiH No.43/98, 23/99 and 50/01
Official Gazette of the Republika Srpska (OGRS) No. 22/00 and 37/01. The RS Criminal Procedure Code was that of OGSFRY 4/77, 14/85, 74/87, 57/89, 3/90 and 27/90, and OGRS No. 26/93, 14/94 and 6/97
BiH Criminal Code & Criminal Procedure Code (OGBH No.37/03, 36/03)
Brcko District Criminal Code, OGBD No.6/00 & 1/01
Brcko District Law on Criminal Procedure OGBD No.7/00 & 1/01.
Brcko District Criminal Code & Criminal Procedure Code (OGBD No.10/03)
FBiH Criminal Code & Criminal Procedure Code (OGFBiH No.36/03, 56/03)
RS Criminal Code & Criminal Procedure Code (OGRS No.49/03, 50/03)
Federation BiH Law on Amnesty (FBiHOG 48/99,3 December 1999)
RS Law on Amnesty, (RSOG 13/96, amendments RSOG 17/99)
Cambodia, *Articles of Cooperation Between the United Nations and the Royal Government of Cambodia [in/Concerning] the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*; published in Phnom Penh Post, Issue 9/22,October 27-November 9,2000
Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/0801/12, No. 174 Ch. L (Phnom Penh, 10 August 2001)
Canada, *Crimes Against Humanity and War Crimes Act* (2000, c. 24)
Croatia, *Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts Against the International Law on War and Humanitarian Law*, Law No. 01-081-03-3537/2 (24 October 2003)
France, *Code of Criminal Procedure*, enacted under Law No.75-624, I *Dalloz* 1975 (11 July 1975)
Law implementing S/RES/827, No. 95-1 (2 June 1995), published in Yearbook of the ICTY (1995)
Law implementing S/RES/955, No. 96-432 (22 May 1996)
Federal Republic of Yugoslavia/ Serbia and Montenegro
Criminal Code of the Federal Republic of Yugoslavia, renamed Basic Criminal Code, (OGSFRY Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90; OGFRY No. 35/92, 16/93, 37/93, 24/94 and 61/2001; OG Republic of Serbia No. 39/2003); OGFRY No. 70/2001 and 68/2002
Germany, *Völkerstrafgesetzbuch* (VStGB) (26 June 2002) Fundstelle: BGBl I 2002, 2254
Indonesia, *Law on Human Rights Courts*, Act No.26/2000
Memorandum of Understanding between the Republic of Indonesia and the UNTAET Regarding Co-operation in Legal, Judicial and Human Rights Related Matters, (6 April 2000), UNTAET/GAZ/2000/Add.2, 93

Iraq, *Statute of the Special Tribunal for Crimes Against Humanity*, issued by the Governing Council of Iraq on 10th December 2003
Coalition Provisional Authority Memorandum Number 3 Criminal Procedures, CPA/MEM/18 Jan 2003/03
New Zealand, *International Crimes and International Criminal Court Act* 2000
Rwanda, *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990*, Law No. 8/96, Rwanda Official Gazette, 30 August 1996; J.O. 1996, Year 35, No.17
Organic Law on the Establishment of "Gacaca Jurisdictions" and the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994, Law No 40/2000, Rwanda Official Gazette (26 January 2001)
Sierra Leone, *Lomé Peace Accord* of 7 July 1999
Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY* (OGSFRY) No.44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90
OGSFRY No.26/86, 74/87, 57/89 and 3/90
South Africa, *Implementation of the Rome Statute of the International Criminal Court Act 2002*
United Kingdom, *Offences Against the Person Act* 1861
1969 Genocide Act [UK], Halsbury's Statutes of England, 4th ed., vol. 12 (1994)
Protection of Trading Interests Act 1980 (c. 11)
Sex Offenders Act 1997 (c. 51)
War Crimes Act 1991 (c. 13)
International Criminal Court Act 2001 (Eng), Royal Assent 11 May 2001
United States, *Alien Tort Claims Act Judiciary Act* 1789, 28 U.S.C.§1350(1993)
Terrorist Prosecution Act 1985 (99th Cong., 1st sess.,132 Cong. Rec.1382)
Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ('Helmes-Burton Act'); H.R.927, 140th Congress (Codified in Title 22, Sections 6021-6091 of the U.S. Code)
Omnibus Diplomatic Security and Antiterrorism Act 1986 (100 Stat.896, USC s.2331)
Torture Victims Protection Act, Pub.L.No.102-256, 106 Stat. 73(1992), 28 U.S.C.§1350
Anti-Terrorism and Effective Death Penalty Act, S.735 (April 24 1996)

C. DECISIONS OF NATIONAL AND INTERNATIONAL COURTS

Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Rep. 3 (1971)
Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep. 1951
Reparations case, ICJ Rep. (1949)
Abele-Jiri v. Negewo, No.90-2010 (N.D.Ga.) (20 August 1993), 72 F.3d 844 (11th Cir.1995)
Al-Adsani v. The United Kingdom, 34 EHRR 273 (2001) (ECtHR)
Al-Adsani v. Government of Kuwait (1996) 107 ILR 536
Argentine Republic v. Amerada Hess Shipping Corporation (1989) 488 U.S. 428
Attorney-General of Israel v. Eichman, District Court of Jerusalem; 36 ILR 5 (1961)
Avsar v. Turkey (25657/94) [2001] ECHR 435 (10 July 2001)
Barbie case, Cass.crim., 6 Oct 1983, Gaz. Pal. Jur. 710; reprinted 78 IILR 125; Cass.crim., 20 Dec 1985, [1985] Bull. Crim., no.7, at 1038;[1986] JCP II.20655 and Cass.crim., 3 June 1988,[1988] Bull.Crim., no.1
Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970
Barrios Altos case (*Chumbipuma Aguirre et al. vs Peru*) Judgment of 14 May 2001, Inter-Am Ct.H.R. (Ser. C) No.75 (2001)
Breard case (14 April 1998) U.S. Supreme Court Nos. 97-8214(A-732), 97-1390(A-738), 97-8660(A-767), and No.125, Orig. (A-771)
Bo Xilai, Bow Street Magistrate,(8 November 2005), unreported
Bouterse, Gerechtshof Amsterdam [Court of Appeal] (20 November 2000)
Bouzari v Iran, Ontario Superior Court of Justice (Court of First Instance) 114 ACWS (3d) 57, 2002 ACWS
Cabiri v Assasie-Gyimah (1996) 921 F.Supp.1189 (SDNY)
Çakıcı v. Turkey (23657/94) [1999] ECHR 41 (8 July 1999)
Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Rep. 2002, 41 ILM 536 (2002)

Cavallo, Supreme Court, Amparo en Revisión 140/2002(10 June 2003) (Mexico)
Čegar case, Case no.CH/96/21 (BiH Human Rights Chamber)
Chuidian, (1990) 912 F.2d 1099
Church of Scientology case (1978) 65 ILR 193 (German Supreme Court)
Darko Knezevic case, Decision on Jurisdiction, Hoge Raad Der Nederlanden [Supreme Court], Criminal Division, No.3717 Besch (11 November 1997)
Decision on Constitutionality and Lack of Jurisdiction, (Case No.SCSL-04-14)(13 March 2004)
Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, (Case No.SCSL-04-15-PT-060-I)(13 March 2004)
Demjanjuk v. Petrovsky 776 F.2d 571 (6th Cir.1985)
Doe v. Karadzic, No.93-878 (S.D.N.Y. filed 11 Feb.1993)
Eduardo Bleier v. Uruguay, HRC Communication No. R.7/30 (23 May 1978)
Ertak v. Turkey (20764/92) [2000] ECHR 192 (9 May 2000)
Evans et al., Judge Advocate General (UK), *Decision following submission of no case to answer* (3 November 2005) OJAG Case Ref:2005/59, unreported
Fidel Castro, Audiencia Nacional, Order (auto) no.1999/2723 (4 March 1999)(Spain)
Filartiga v Pena-Irala, 630 F.2d 876 (2d Cir.1980)
Flick case, Law Reports of the Trial of War Criminals, Vol. IX (London: 1949)
Forti v. Suarez-Mason, 672 F. Supp.1531 (N.D.Cal.1987) *modified by* 694 F.Supp.707 (N.D.Cal.1988)
France v Turkey (*Lotus case*) PCIJ Rep. Ser. A, No.10 (1927)
France v GB (*Savarkar case*) Scott, Hague Court Reports, 275(1911)
Gadaffi, Cour de Cassation (13 March 2001), 125 ILR 490 (France)
German High Command case, Law Reports of the Trial of War Criminals, Vol.XII
Habré, Cour de Cassation,(20 March 2001),125 ILR 569 (Senegal)
Hadž Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar against BiH and FBiH, Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691 (11 October 2002) (BiH Human Rights Chamber)
Herbage v Meese (1990) 747 F.Supp.60
Hermas case, Case no.CH/97/45, *Decision on Admissibility and Merits* (18 February 1998) (BiH Human Rights Chamber)
Heinz Eck et al (The Peleus Trial), British Military Court, Hamburg (17-20 October 1945)
Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767(9th Cir. 1996)
Hostages case (*US v. List*) Law Reports of the Trial of War Criminals, Vol.VIII
IMT Nuremberg *Judgment* (30 Sept 1946); 22 IMT 447; 41 AJIL (1947)
In Re G., Military Tribunal, Division 1, Lausanne, Switzerland (18 April 1997)
In Re N., Military Tribunal, Division 1, Lausanne, Switzerland (30 April 1999)
In Re Estate of Ferdinand E. Marcos, 25 F.3rd 1467 (9th Cir.1994), 94 F.3d 539(1996)
In Re Extradition of John Cheung, 968 F.Supp.791 (D.Conn.1997)
In Re Federal Office for Police Matters, Case 1-A.87/1997/err (10 Dec.1997)
Island of Palmas Case (Netherlands v U.S.), Permanent Court of Arbitration (1928), 2 UN Rep. Int'l Arbitral Awards 829
Jaffe v Miller (1993) ILR 446 (Ontario Court of Appeal)
Jones v Saudi Arabia [2004] EWCA Civ 1394 (CA)
Kadic v Karadzic, 70 F.3d 232(2d Cir.1995),116 S.Ct.2524(1996)
Kuwait Airways Corporation v. Iraqi Airways Co. (No. 1), [1995] 1 WLR 1147
Lawler Incident,(1860)1 McNair Int'l L Opinions 78
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Rep. 1971
Libya v. US; Libya v. UK, ICJ Rep.1992; Judgment on Preliminary objections, 27 February 1998
Lotus case (France v. Turkey), PCIJ Rep. Ser.A, no.10 (1927)
Marčeta case, Case no.CH/97/41 (BiH Human Rights Chamber)
Martinez-Baca v. Suarez-Mason (N.D.Cal.1988)
Mofaz, Bow Street Magistrate (12 February 2004), reproduced in (2004) ICLQ 53
Mugabe, Bow Street Magistrate,(14 January 2004) reproduced in (2004) ICLQ 53
Mutimura v. France, Judgment (8 June 2004) (application no. 46621/99)
Namibia case, Advisory Opinion, ICJ Reports 1971
Nedjeljko Obradovic against BiH and FBiH, Case no. CH/02/12470 (7 November 2003) (BiH Human Rights Chamber)
Nottebohm case (Liechtenstein v. Guatemala) ICJ Rep (1955)
Papon case, Cass.crim. [1997], Bull.crim., no.502; [1996] Bull. crim., no.806

Paul v.Avril, 812 F.Supp.207(S.D. Fla. 1993)
Pinochet, Spanish National Court, Criminal Division, Case 19/97 (4 November 1998), Case 1/98 (5 November 1998)
Polyukhovich v.Commonwealth, 172 CLR (1991), 579
Princz v. Federal Republic of Germany, 26 F. 3d 1166 (D.C. Cir. 1994)
Prefecture of Voiotia v Federal Republic of Germany, case no 11/2000, Areios Pagos (Hellenic Supreme Court) (4 May 2000), (2001) 95 AJIL 198
Propend Finance Pty Ltd v Sing [1997] 111 ILR 611(CA)
*Prosecutor v. Ademi and Norac, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis (IT-04-78) (14 September 2005)
Prosecutor v. Barayagwiza, Decision (ICTR-97-19-A) (3 November 1999)
Prosecutor v. Blaskic, (IT-94-14) *Decision on the Objection of the Republic of Croatia to the Issuance of* Subpeona Duces Tecum (18 July 1997)
—— *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997) (Appeals Chamber)
Public Prosecutor v Djajic, Case No. 20/96, Bayrisches Oberlandesgericht (Supreme Court of Bavaria), 3d Strafsenat (23 May 1997)
Prosecutor v. Delalic et al., (IT-96-21-T) *Decision on Zdravko Mucic's Motion for the Exclusion of Evidence* (2 September 1997)
—— *Decision on the Tendering of Prosecution Exhibits 104 - 108* (9 February 1998)
—— *Judgement* (16 November 1998)
—— *Judgement on Appeal* (20 February 2001)
Prosecutor v. Drljaca and Kovacevic, (IT-97-24) *Decision on Defence Motion for Provisional Release* (20 January 1998)
Prosecutor v. Jelisic (IT-95-10) *Judgement* (14 December 1999)
Prosecutor v. Kajelijeli, (ICTR-98-44-I) *Decision on the Defence Motion concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing* (8 May 2000)
Prosecutor v. Kanyabashi, (ICTR-96-15-T) *Decision on the Defence Motion for the Provisional Release of the Accused* (21 February 2001)
Prosecutor v. Karemera, (ICTR-98-44-I) *Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be used by the Prosecutor in preparing an Indictment against the Applicant* (10 December 1999)
Prosecutor v. Kordić et al., (IT-95-14/2-AR108*bis*) *Decision on the Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999)
—— *Order for the Production of Documents by the European Community Monitoring Mission and its Member States* (4 August 2000)
Prosecutor v. Kovačević, (IT-97-24-PT) *Decision Refusing Defence Motion for Subpoena* (23 June 1998)
Prosecutor v. Krstić, (IT-98-33-PT) *Binding Order to the Republika Srpska for the Production of Documents* (12 March 1999)
Prosecutor v. Kupreskic et al., (IT-95-16) *Decision on Defence Challenges to Form of the Indictment rendered in Kupreskic et al.* (15 May 1998)
Prosecutor v. Mejakić et al., (IT-02-65-PT) *Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis (20 July 2005)
Prosecutor v. Mrksić el al., (95-13a-PT) *Decision on the Motion for Release by the Accused Slavko Dokmanović* (22 October 1997)
Prosecutor v. Ngirumpatse, (ICTR-97-44-I) *Decision on the Defence Motion challenging the Lawfulness of the Arrest and Detention and seeking Return or Inspection of Seized Items* (10 December 1999)
Prosecutor v. Nikolić, (IT-94-2-PT) *Decision on Defence Motion challenging the Exercise of Jurisdiction by the Tribunal* (9 October 2002)
—— *Decision on Interlocutory Appeal Concerning Legality of Arrest* (5 June 2003)
Public Prosecutor v. N.N., High Court (Ostre Landsrets) 3rd Division (25 November 1994)
Prosecutor v. Hinga Norman (SCSL-2003-08-PT-122) *Decision* (28 November 2003)
Prosecutor v. Nyiramasuhuko, (ICTR-97-21-T) *Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized* (12 October 2000)

Prosecutor v. Nzirorera, (ICTR-98-44-T) *Decision on the Defence Motion challenging the Legality of the Arrest and Detention of the Accused and requesting the Return of Personal Items Seized* (7 September 2000)
Prosecutor v. Rutaganda (ICTR-96-3), *Judgement and Sentence* (6 December 1999)
Prosecutor v. Stankovic, (IT-96-23/2-PT) *Decision on Referral of Case Under Rule 11*bis (17 May 2005) (Referral Bench)
Prosecutor v. Simić, (IT-95-9/1) *Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović* (25 March 1999)
Prosecutor v. Simić, (IT-95-9/1) *Order on Defence Requests for Judicial Assistance for the Production of Information* (7 March 2000);
—— *Decision on Application for Leave to Appeal Against Trial Chamber Decision of 7 March 2000* (3 May 2000)
—— *Decision on Motion for Judicial Assistance to be provided by SFOR and Others* (18 October 2000)
Prosecutor v. Simić et al., Decision on Motion for Judicial Assistance to be Provided by SFOR and Others (IT-95-9-PT) (18 Oct. 2000)
Public Prosecutor v. T, Appeal Court (Hojesteret) (15 August 1995)
Prosecutor v. Tadic, Bundesgerichtshof [Supreme Court] (13 February 1994), Oberlandesgericht Düsseldorf [Düsseldorf High Court] (26 September 1997)
Prosecutor v. Tadic, (IT-94-I) *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) (Appeals Chamber)
—— *Decision on Defence Motion on Form of the Indictment* (14 November 1995)
Prosecutor v Charles Ghankay Taylor, (SCSL-2003-01-I) *Decision on Immunity from Jurisdiction* (31 May 2004)
Ribitsch v. Austria (18896/91) [1995] ECHR 55 (4 December 1995)
R. v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, R. v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, Judgment, (No 3) [2000] 1 AC 147 (HL)
R. v Brocklebank, Court Martial Appeal Court, Judgment (2 April 1996) 134 DLR (4th) 377 (Canada)
R. v Brown, Court Martial Appeal Court, Judgment (6 January 1994) (Canada), unreported
R. v.Finta, [1994] 1 S.C.R. 701, 165 N.R. 1, 88 C.C.C.(3d) 417, 112 D.L.R.(4th) 513, 28 C.R.(4th) 265(S.C.C.); 50 C.C.C.3d. 236(1994); 61 D.L.R.4th 85(1989)
Reg. v Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 AC 42 (95 ILR 380)
R v Mullen [1999] 2 Cr App R 143
R v Staines' Magistrates' Court, Ex parte Westfallen [1998] 4 All ER 210
R. v Zardad, Central Criminal Court (Old Bailey)(18 July 2005), unreported
Republic of Austria v. Cvjetkovic, Judgment of the Oberster Gerichstshof, Vienna (13 July 1994), Landesgericht, Salzburg (31 May 1995)
Salman v. Turkey (21986/93) [2000] ECHR 356 (27 June 2000)
Sanchez-Espinoza v.Reagan, 586 F. Supp.596 (D.D.C.1983), *aff'd* 770 F.2d 202 (D.C.Cir.1985)
Scilingo, Audiencia Nacional, Order (auto) no.1998/22604 (Spain)
Selmouni v. France (25803/94) [1999] ECHR 66 (28 July 1999)
Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992)
Situation in Uganda, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58 (ICC-02/04-01/05-1-US-Exp) (20 October 2005)
Situation in DRC, Decision following the consultation held on 11 October 2005 and the Prosecution's submission on Jurisdiction and admissibility filed on 31 October 2005 (ICC-01/04 Public redacted version) (9 November 2005)
SN, Rechtbank Rotterdam, Judgment (7 April 2004) (The Netherlands), unreported
Stögmüller v. Austria, Judgment (10 November 1969) (Series A no. 9)
Tel-Oren v.Libyan Arab Republic case (726 F.2d 774, 824 D.C.Cir.1984)
The Schooner Exchange v McFaddon 7 Cranch 116 (1812)
Timurtaş v. Turkey (23531/94) [2000] ECHR 221 (13 June 2000)
Todd v.Panjaitan,No.92-12255,(D.Mass. filed Sept.17.1992)
Tojo case, Law Reports of the Trial of War Criminals, Vol. XIV
Tomasi v. France (12850/87) [1992] ECHR 53 (27 August 1992)
Touvier case, Cass.crim., 6 Feb 1975,[1975] D.J. Jur. 386, [1975] Bull.Crim., no. 42, at 113
Trajano v Marcos (1992) 978 F.2d 493, 61 U.S.L.W.3834 (June 14,1993)
United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*) (1980) ICJ Rep.3
U.S. v Alvarez-Machain, 504 U.S.669 (95 ILR 355)

U.S. v. Yunis, 924 F.2d 1086 (D.C.Cir.1991)
U.S. v. Rezaq, 134 F.3d 1121, 1130 (D.C.Cir.1998)
U.S. v. Ekwunoh, 888 F.Supp.369(E.D.N.Y.1994)
Van Anraat, Rechtbank s'Gravenhage, Judgment (23 December 2005) (The Netherlands), unreported
V.Č. case, Case no.CH/98/1366, Decision on Admissibility and Merits (9 March 2000) (BiH Human Rights Chamber)
Velasquez Rodriguez case, Judgment (29 July 1988) IACtHR(Ser. C) No.4(1988)
Wemhoff v. Germany, Judgment (27 June 1968) (Series A no. 7)
W. v. Switzerland, Judgment (26 November 1992) (92/1991/344/417)
Wenceslas Munyeshyaka case, Nîmes Court of Appeal (20 March 1996), Cour de Cassation, Chambre Criminelle (6 January 1998), No. X96-32.491 PF
X Ely, Cour de Cassation (23 October 2002) (France), appeal no.02-85379, [2002] Bull.crim.,no.195,725
Xuncax v. Gramajo, 886 F.Supp.162(D.Mass.1995)
Yamashita case, U.S. Mil. Comm'n (Dec 7 1945) 13 ILR 255 (1946)
Zimmerman and Steiner v. Switzerland, Judgment (13 July 1983) (Series A, No 66)
09_751105-04_55006-05, Rechtbank s'Gravenhage, Judgment (14 October 2005) (The Netherlands), unreported

D. BOOKS, JOURNAL ARTICLES, PRESS ARTICLES

'Abdu'l-Bahá, *The Secret of Divine Civilization* (originally published in 1860s, translated into English 1910) (Baha'i Publishing Trust, Wilmettte 1990)
Abbott, Kenneth W., 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 Yale Journal of International Law (Summer 1989)
Akehurst, Michael 'Jurisdiction in International Law' (1972-73) BYIL 46
Akhavan, Payam, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?'(2001) 95 AJIL 7
Allott, Philip, *International Law and International Revolution: Reconceiving the World*, Josephine Onoh Memorial Lecture 1989
—— 'The Concept of International Law', 10, European Journal of International Law (1999)
Anzilotti, Dionisio, *Corso di diritto internazionale* (1964)
Arbour, Louise, 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court' (1999) Windsor Yearbook of Access to Justice 17, 207-220
—— *Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court* (8 December 1997)
—— 'Will the ICC have an Impact on Universal Jurisdiction?' (2003) J Int Criminal Justice 1, 587
—— and Morten Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in von Hebel et al.
Bach, Peter; Björnberg, Kjell; Ralston, John, and Rodrigues, Almiro, *The Future of War Crimes Prosecutions in Bosnia and Herzegovina: Consultancy Project Proposal* (May 2002)
Bank, Roland 'Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence', 4 Max Planck Yearbook of United Nations Law (2000) 233-269
Bass, Gary Jonathan, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000)
Bassiouni, M. Cherif, *International Crimes: Digest/Index of International Instruments* 1815-1985, 2. Vols (1985)
—— *Crimes Against Humanity* (Nijhoff: 1992)
—— 'Observations Concerning The 1997-98 Preparatory Committee's Work', 13 Nouvelles Études Pénales (1997), 20
—— ed., *ICC Ratification and National Implementing Legislation*, 13 quarter Nouvelles Études Pénales (1999)
—— and Wise, *Aut dedere aut judicare* (Nijhoff: 1995)
—— and Nanda, eds., *A Treatise on International Criminal Law* (Illinois: 1973)
—— and Derby, 'Final Report on the Establishment of an International Criminal Court of the Implementation of the Apartheid Convention and Other Relevant Instruments' (1981) 7 Hofstra L.Rev. 523
Benzing, Markus and Bergsmo, Morten 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court', in Romano et al. (2004)

Bergsmo, Morten 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and their Possible Implications for the Relationship between the Court and the Security Council' (2000) 69:1 Nordic Journal of International Law
—— and Pejić, Jelena, 'Article 16, Deferral of an investigation or prosecution' in Triffterer (1999)
Berman, Franklin, 'Preface' in Fox and Meyer (1993)
Bertodano, Sylvia de, 'East Timor: Trials and Tribulations', in Romano et al. (2004)
Bhattacharyya, Rupa 'Establishing a Rule-of-Law International Criminal Justice System' 31 Texas Int'l Law Jrnl (1996)
Bleich, Jeffrey, 'Complementarity', 13 Nouvelles Études Pénales (1997)
Bolander, Michael, 'The Direct Application of International Criminal Law in Kosovo', Kosovo Legal Studies vol.1, 2001/1
Bothe, Michael, *National Implementation of International Humanitarian Law* (Kluwer, 1990)
Boyd, Alan, *Cambodia's legal system on trial*, Asia Times Online: Southeast Asia (May 20, 2003)
Bowett, Derek, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) BYIL 53
Brierly, James L., *The Law Of Nations* (Oxford, 1963)
Broomhall, Bruce 'The International Criminal Court: A Checklist for National Implementation', in Bassiouni (1999)
—— *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP, 2004)
Brownlie, Ian, *Principles of Public International Law*, 6th ed. (Oxford, 2003)
Burgers, J.H. and Danelius, H., *The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Handbook on the Convention* (Nijhoff: 1988)
Burke-White, William, 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 Michigan Journal of International Law 1
—— 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo', (2005) Leiden JIL 18
Buchet, Antoine, 'L'intégration en France de la convention portant statut de la Cour pénale internationale - Histoire brève et inachevée d'une mutation attendue', in Kreß and Lattanzi (2000)
Cady, Jean-Christian and Booth, Nicholas, 'Internationalized Courts in Kosovo: An UNMIK Perspective', in Romano et al. (2004)
Carrasco, Mariá del Carmen Márquez and Fernández, Joaquín Alcalde, *In Re Pinochet* (Spanish Report), 93 AJIL(1999)
Cassese, Antonio, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 EJIL (1999)
—— 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) EJIL 13
—— Gaeta, Paola, and Jones, John R.W.D., eds., *The Rome Statute of the International Criminal Court: A Commentary* (2002)
Cerone, John and Baldwin, Clive, 'Explaining and Evaluating the UNMIK Court System', in Romano et al. (2004)
Chayes, Abram and Chayes, Antonia Handler, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995)
Chesterman, Simon, 'Justice Under International Administration : Kosovo, East Timor and Afghanistan', International Peace Academy Report (September 2002)
Cogan, Jacob Katz, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', YJIL 27/1(Winter 2002)
Cohen, David, 'Intended To Fail - The Trials Before the Ad Hoc Human Rights Court in Jakarta', International Centre for Transitional Justice (August 2003)
—— 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' Asia Pacific Issues, No.61 (August 2002)
Colemen, Katharina P. and Doyle, Michael W., 'Introduction: Expanding Norms, Lagging Compliance', in Luck and Doyle (2004)
Conot, Robert, *Justice at Nuremberg* (1983)
Costi, Alberto, 'Problems with Current International and National Practices Concerning Extraterritorial Abductions', 9 RJP/NZACL Yrbk 8
Côté, Luc, 'Compliance with the Laws of War', in Luck and Doyle (2004)
Crawford, James, 'Prospects for an International Criminal Court' (1995) 48 Current Legal Problems 312

Cryer, Robert, 'Implementation of the International Criminal Court in England and Wales' 51 ICLQ (July 2002)
Del Ponte, Carla, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility',(2004) 2 Jrnl Int'l Crim. Justice
Delmas-Marty, Mireille, 'L'Influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in A. Cassese and Delmas-Marty, eds., *Crimes internationaux et juridictions internationales* (2002) 95
Dembowski, L.C., 'The International Criminal Court: Complementarity and its Consequences', in Jane Stromseth, ed., *Accountability For Atrocities: National and International Responses* (Transnational, 2003)
Derby, D.H. 'A Framework for International Criminal Law, in Bassiouni ed., *International Criminal Law*, (1986),33;
Dickinson, 'Introductory Remarks to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935' (1935) 29 A.J.I.L., Supp., 443
Dinstein, Yoram, 'International Criminal Law' (1975) 5 Israel Yrbk on Human Rights 69
—— and M. Tabory, eds., *War Crimes in International Law* (Kluwer: 1996)
Downs, George W. and Trento, Andrea W., 'Conceptual Issues Surrounding the Compliance Gap', in Luck and Doyle (2004)
Deutsch, Anthony, 'ICC Deters Tribal Warfare' (AP: 22 January 2004); 'A Deterrent International Criminal Court – The Ultimate Objective' (PGA: 6-7 December 2004)
Dubinsky, Paul R., *Hague Conference on Private Int'l Law Working Document No. 117: Proposals of the Hague Conference and Their Effect on Efforts to Enforce International Human Rights Through Adjudication* (November 1998)
Duffy, Helen, 'National Constitutional Compatibility and the International Criminal Court', 11 Duke J. Comp. & Int'l L. 5(2001)
—— and Huston, Jonathan, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in Kreß and Lattanzi (2000)
Enslen, Alan, 'Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with its Decision in *Kadic v. Karadzic*' (1997) 48 Ala.L.Rev 695
Evenson, Elizabeth M., *Truth and Justice in Sierra Leone: Coordination Between Commission and Court,* 104 Colum. L. Rev. 730 (2004).
Falk, Richard, 'Theoretical Foundations of Human Rights', in Richard Falk, ed., *Human Rights and State Sovereignty* (Holmes and Meier, 1981)
Ferencz, Benjamin, *An International Criminal Court - A Step in the Right Direction?*, 2 Vols. (Oceana: 1980)
Ferdinandusse, Ward, 'The Interaction of National and International Approaches in the Repression of International Crimes', (2004) EJIL 15
Feiveson, Harold A. and Shire, Jacqueline W., 'Dilemmas of Compliance with Arms Control and Disarmament Agreements', in Luck and Doyle (2004)
Ferrero-Waldner, Benita, *The International Criminal Court, Transatlantic Relations and Co-operation with Third Parties to Promote the Rule of Law,* SPEECH/05/228 (European Parliament, Strasbourg, 14 April 2005)
Fischer, Horst; Kreß, Claus, and Lüder, Sascha Rolf, eds., *International and National Prosecution of Crimes under International Law: Current Developments 2* (2004 BWV)
Fox, Hazel and Meyer, Michael A., eds., *Armed Conflict and the New Law. Effecting Compliance, Vol. II* (London: British Institute of International and Comparative Law, 1993)
Frank, Thomas, *Fairness in International Law and Institutions* (OUP, 1995)
Fritz, Nicole & Smith, Alison, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 Fordham Int'l L.J. (2001)
Frowein, J., and Krisch, N., 'Article 39' and 'Chapter VII: Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' in Simma, Bruno, et.al., eds., *The Charter of the United Nations, A Commentary* (NY: OUP, 2002)
Greenwood, Christopher, 'International Humanitarian Law and the *Tadic* Case', 7 (1996) E.J.I.L. 277
—— *The War Crimes Act 1991*, in Fox and Meyer, eds.
—— 'The Twilight of the Law of Belligerent Reprisals' (1989) 20 Netherlands YIL
Goodwin, G.L., 'World Institutions and World Order', in C. A. Cosgrove and K. J. Twitchett, eds, *The New International Actors: The United Nations and the European Economic Community* (London, 1970)
Haas, Peter M., 'Why Comply? Or Some Hypothesis in Search of an Analyst', in Edith Brown Weiss, ed., *International Compliance with Nonbinding Accords* (ASIL, 1997)

Hall, Christopher, 'The History of the ICC Part I', in *CICC Monitor* 6 (1997)
Harmon, Mark B. and Gaynor, Fergal, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) Journal of International Criminal Justice 2
Harris, David J., *Cases and Materials on International Law* (London: 1991)
Higgins, Rosalyn, *Problems and Process: International law and how we use it* (Oxford: 1996)
Jallow, Hassan B., *The OTP-ICTR: ongoing challenges of completion*,(1 November 2004, The Hague) Guest Lecture Series of the ICC Office of the Prosecutor
Hayner, Priscilla B., *Fifteen Truth Commissions -1974 to 1994: A Comparative Study* (1994) HRQ 16
Hebel, H.A.M. von., Lammers, J.G. and Schukking, J., eds., *Reflections on the International Criminal Court* (Asser: 1999)
Henckaerts, Jean-Marie and Doswald-Beck, Louise, *Customary International Humanitarian Law*, Volume I Rules, Volume II Practice (2 Parts) (Cambridge University Press, 2005)
Henquet, Thomas, 'Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR', in Boas, Gideon & Schabas, William A, eds., *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff, 2003)
Holmes, John T., 'The Principle of Complementarity', in Lee (1999)
—— 'Complementarity: National Courts *versus* the ICC', in Cassese et al.
Ingadottir, T., 'The Financing of Internationalized Criminal Courts and Tribunals', in Romano et al (2004)
Isenberg, Beth Ann, 'Genocide, Rape, and Crimes Against Humanity: an Affirmation of Individual Accountability in the Former Yugoslavia in the *Karadzic* Actions', 60 Albany L.Rev.1051
Jessup, Philip C., *A Modern Law of Nations* (New York: Macmillan, 1948)
Jennings, Robert and Watts, Arthur, eds., *Oppenheim's International Law*, Vols. I & II, 9th ed. (London: Longman 1996)
Joyner, Christopher, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', 26 Denver J. Int'l L. & Policy (1998)
Kapel, Michael and Alter, Zandy, 'Our Shame, His Haven', in *Australia Israel Review* (1997)
Katzenstein, Suzanne, 'Hybrid Tribunals: Searching for Justice in East Timor', Harvard Human Rights Journal, Vol. 16:6 (June 2003)
Kaul, Hans-Peter and Kreß, Claus, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) Yrbk IHLVol. 2
Kazazi, Mojtaba, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals* (Kluwer 1995)
Kelsen, Hans, *General Theory of Law and the State* (NY, 1945)
Kendall, Sara and Staggs, Michelle, *From Mandate to Legacy: The Special Court for Sierra Leone as a Model for "Hybrid Justice"* (Berkeley War Crimes Studies Center: April 2005)
Kleffner, Jann K.,'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', (2003) JICJ 1
Koh, Harold H., 'Review Essay: Why Do Nations Obey International Law?', 8 Yale Law Journal (June 1997)
Kokott, Juliane, *No Impunity for Human Rights Violations in the Americas* (1993) HRLJ 14
Koumjian, Nicholas, *Accomplishments and limitations of one hybrid tribunal: experience at East Timor*, ICC-OTP Guest Lecture Series (14 October 2004, The Hague)
Kreß, Claus and Prost, Kimberly, 'Article 87',in Trifterer (1999)
Kritz, Neil J., 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) Law & Contemp. Probs. 59
Lamb, Susan, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia', (1999) BYIL 70
Lauterpacht, Hersch, *International Law and Human Rights* (London, 1950)
Lee, Roy S., ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law, 1999)
Lillich, Richard B., ed., *Fact-Finding Before International Tribunals* (New York, 1990)
Linton, Suzannah, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor', Melbourne University Law Review 25(1)
Lonsdale, Christine and Trapp, Kimberly, 'The International Criminal Court: Excluding Evidence under Article 69(7)', unpublished manuscript (McGill University, 1998)
Luck, Edward C., 'Gaps, Commitments and Compliance Challenges', in Luck and Doyle (2004)
—— and Doyle, Michael W., eds., *International Law and Organization: Closing the Compliance Gap* (2004)

MacDonland, Janine, 'War crimes unit closed after five years, no results', in *The Age* (Canberra: 5 January 2000)
MacPherson, Bryan, 'Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings', ASIL Insights (July 2002)
Malekian, Farhad, *International Criminal Law* (Uppsala: 1991)
Mendelson, Maurice H., 'The Formation of Customary International Law', *Recueil des cours* (Nijhoff: 1998)
Marschik, Axel, 'European Approaches to War Crimes', in McCormack and Simpson (1997)
McKay, Fiona, *Universal Jurisdiction in Europe, Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide* (Redress Trust: 30 June 1999)
McCormack, Timothy L.H. and Simpson, Gerry J., eds., *The Laws Of War Crimes, National and International Approaches* (Kluwer: 1997)
McGoldrick, Dominic; Rowe, Peter, and Donnelly, Eric, eds., *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford and Portland: 2004)
Meijer, Ernestine E., 'The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal', in Romano et al. (2004)
Meron, Theodor, 'Comments in the ILA Panel on the ICTY', 5 ILSA Journal of International and Comparative Law (1999)
Meyer, Jürgen, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction' (1990) Harvard ILJ 31
Minear, Richard, *Victor's Justice: The Tokyo War Crimes Trial* (1971)
Mitrany, David, *A Working Peace System* (OUP, 1943)
Mochochoko, Phakiso, 'International Cooperation and Judicial Assistance', in Lee (1999)
Morris, Madeline, 'High Crimes and Misconceptions: the ICC and Non-Party States' (Winter 2001) 64 Law & Contemp. Probs. 13
—— 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', 7 Duke Jrn'l Comp.&Int'l Law
—— 'Complementarity and Its Discontents: States, Victims, and the International Criminal Court', in Shelton, Dinah, ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000)
Mueller, G.O.W. and Besharov, D., 'The Existence of International Criminal Law and its Evolution to the Point of its Enforcement Crisis', Bassiouni and Nanda (1973)
Mullins, C., *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (1921)
O'Donohue, Jonathan, 'Towards a Fully Functional International Criminal Court: The Adoption of the 2004 Budget' (2004) LJIL 17
Oosthuizen, G.H., 'Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council', XLVI NILR (1999) 320
Orentlicher, Diane F., 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) Yale Law Journal Vol.100, No.8
Paust, Jordan J.; Scharf, Michael P.; Sadat, Leila; Bassiouni, M. Cherif; Gurulé, Jimmy; Zagaris, Bruce, and Williams, Sharon A., eds., 2nd ed., *International Criminal Law: Cases and Materials* (Carolina Academic Press: September 2000)
Pasqualucci, Jo M., *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter American Human Rights System*, 12 BU Int'l L Rev (1994)
Pella, Vespasian V., 'Towards an International Criminal Court' (1950) 44 AJIL 37
Piccigallo, P., *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (1987)
Piragoff, Donald, 'Evidence', in Triffterer (1999)
Plachta, Michael, 'The Lockerbie Case: The Role of the Security Council in the Enforcing of the Principle *Aut Dedere Aut Judicare*' (2001) EJIL 12
Politi, M., 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee', 13 Nouvelles Études Pénales (1997)
Prost, Kimberly, 'Article 90',in Trifterer (1999)
—— and Schlunck, Angelika, 'Article 99' in Trifterer (1999)
Ratner, M. and Stevens, B, 'Using Law and the Filartiga Principle in the Fight for Human Rights' in *American Civil liberties Report* (December 1993)
Reydams, Luc, '*In Re Pinochet* (Belgian Report)' (1999) AJIL 93
Roberts, Adam, 'The Laws of War: Problems of Implementation in Contemporary Conflicts', (1995) Duke J. Comp.& Int'l L.6, 36-37
—— and Guelff, Richard, eds., *Documents on the Laws of War* (Oxford: 1995)

Robinson, Darryl, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) EJIL 14
Rogers, A.P.V., 'War Crimes Trials under the Royal Warrant: British Practice 1945-1949' (1990) ICLQ 39
Röling, B.V.A. and Rüter, C.F., eds., *The Tokyo Judgment* (Amsterdam: 1977)
Romano, Cesare P.R. and Nollkaemper, André, *The Arrest Warrant Against The Liberian President, Charles Taylor*, ASIL Insights (June 2003)
Romano, Cesare P.R.; Nollkaemper, André, and Kleffner, Jann K., *Internationalized Criminal Courts Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP, 2004)
Rubin, Alfred P., *The Law of Piracy* (1988)
—— 'International Crime and Punishment', *The National Interest*, (1993),73
Safferling, Christoph J.M., '*Public Prosecutor v. Djajic*', International Decisions (1998) AMIJ 92
Sands, Philippe, 'After Pinochet: the Proper Relationship between National and International Courts', *Institute of Advance Legal Studies Lecture Series* (4 November 1999)
Sarkin, Jeremy, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach In the New Millennium of Using Community Based Gacaca Tribunals To Deal With the Past' (2000) International Law FORUM du droit international 2
Sarooshi, Danesh, 'The Powers of the United Nations Criminal Tribunals', 2 *Max-Planck Yrbk UN Law* (1998)
—— *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (Oxford, 1999)
—— 'Aspects of the Relationship between the International Criminal Court and the United Nations', 32 Netherlands Yearbook of International Law (2001)
—— 'The Peace and Justice Paradox', in Dominic McGoldrick, Peter Rowe and Eric Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford, 2004)
Schabas, William A., 'Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems' (1996) *Criminal Law Forum* 7:3
—— *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 Hum. Rts. Q. 1035-1066 (2003)
—— 'The enigma of the International Criminal Court's success', OpenDemocracy.net (17 February 2006)
Scharf, Michael P., 'The ICC's Jurisdiction Over The Nationals Of Non-Party States: A Critique of the U.S. Position' (2001) Law & Contemporary Problems 64
—— 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) Cornell ILJ 32
—— 'The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY', Leiden J.I.L 11/2 (1998) 369
Schermers, H.G. and Blocker, N.M., *International Institutional Law: Unity within Diversity* (Martinus Nijhoff 1995)
Schocken, Celina, 'Notes and Comments, The Special Court for Sierra Leone: Overview and Recommendations', (2002) Berkeley J. Int'l L. 20
Shraga, Daphna, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in Romano et al. (2004)
Schwarzenberger, Georg, *International Law as Applied by Courts and Tribunals* (London: 1968)
—— *The Frontiers of International Law* (London: 1962)
Scheffer, David J., 'The United States and the International Criminal Court' (1999) AJIL 93
Schwartz, Daniel W., 'Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the "Dirty War" in International Law' (2004) Emory International Law Review, vol. 18, 317
Simpson, Gerry, 'War Crimes: A Critical Introduction', in McCormack and Simpson (1997)
Setear, John K., 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37 Harvard ILJ (Winter 1996)
Slaughter-Burley, Anne-Marie, 'International Law and International Relations Theory: A Dual Agenda' (1993) AJIL 87
Sloan, Joan, 'Prosecutor v Todorovic: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction', Leiden JIL 16/1 (2003)
—— 'Prosecutor v Dragan Nikolic: Decision on Defence Motion on Illegal Capture', Leiden J.I.L. 16/3 (2003)
Sluiter, Göran, 'To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal' (1998) LJIL 11
—— *International Criminal Adjudication and the Collection of Evidence* (Intersentia, 2002)

—— 'Legal Assistance to Internationalized Criminal Courts and Tribunals', in Romano et al. (2004)
—— 'International Criminal Proceedings and the Protection of Human Rights', (2003) New England LR 37
Smis, Stefaan and Borght, Kim Van der, 'Introductory note - Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law' (1999) 38 ILM 918
—— 'Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives' in *ASIL Insights* (July 2003)
Smith, Alison, 'Sierra Leone: The Intersection of Law, Policy, and Practice', in Romano et al. (2004)
Stern, Brigitte, '*In Re Pinochet* (French Report)' (1999) AJIL 93
Strohmeyer, Hansjörg, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor,* (2001) AJIL 95
Swart, Bert, 'General Problems', in Cassese et al. (2002)
—— and Sluiter, Göran, 'The International Criminal Court and International Criminal Cooperation', von Hebel, Lammers and Schukking (1999)
Tallgren, Immi, 'Article 20 Ne bis in idem', in Triffterer (1999)
Tejan-Cole, Abdul, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, (2003) Yale Hum. Rts. & Dev. L.J. 6
Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999)
—— 'Legal and Policy Implications of Domestic Ratification and Implementation Processes', in Kreß and Lattanzi (2000)
Turns, David, 'Aspects of National Implementing Legislation of the Rome Statute: The United Kingdom and Selected Other States', in McGoldrick et al. (2004)
Vanderbloemen, Thomas E., 'Assessing the Potential Impact of the Proposed Hague Jurisdiction and Judgments Convention on Human Rights Litigation in the United States', 50 Duke L.J. 917
Vasconcelos, Carlos, *Briefing to the Annual Conference of the International Association of Prosecutors held in Sydney, 2-7 September 2001*; available at Judicial System Monitoring Programme ('JSMP'), http://www.jsmp.minihub.org/
Warbrick, Colin, 'Co-operation with the International Criminal Tribunal for Yugoslavia', (1996) ICLQ 45
Wedgwood, Ruth, 'The International Criminal Court: An American View' (1999) EJIL 10
Wendt, Alexander, *Social Theory of International Politics* (CUP, 1999)
White, Nigel D., *The Law of International Organisations* (MUP, 1996)
Widner, Jennifer, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case* (2001) AJIL 95
Wierda, Marieke; Hayner, Priscilla, & Zyl, Paul van, Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone (24 June 2002), http://www.ictj.org/downloads/TRCSpecialCourt.pdf
Willis, J.F., *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982)
Wirth, Steffen, 'Immunity for Core Crime? The ICJ's Judgment in the Congo v Belgium Case' (2002) EJIL 877
—— 'Germany's New International Crimes Code: Bringing a Case to Court', 1 JICJ (2003)
Wise, E.M., 'Terrorism and the Problem of an International Criminal Law', 19 Connecticut Law Rev (1987)
Woetzel, Robert, *The Nuremberg Trials in International Law* (London,1962)
Wolfrum, Rüdiger, 'The Decentralised Prosecution of International Offences through National Courts' in *British Manual of Military War*, Part III (1958)
Works, 'Filartiga v.Pena-Irala: Providing Federal Jurisdiction for Human Rights Violations through the Alien Tort Statute' (1981) 10 Den. J.Int'l L. & Pol'y
Wyngaert, Christine Van den and Ongena, Tom, 'Ne bis in idem Principle, Including the Issue of Amnesty', in Cassese et al. (2002)
Zacklin, Ralph, 'The Failings of Ad Hoc International Tribunals', 2004 J. Int. Criminal Justice 2
Ziegler, Andreas R., '*In re G.*', International Decisions (1998) AJIL 92
Zimmerman, Andreas, 'Implementing the Statute of the International Criminal Court: The German Example', in Vohrah, L.C. et al., eds., *Man's Inhumanity to Man* (2003)
Reuters, *Sierra Leone court seeks more authority*, (June 11)
'Symposium. International Criminal Law: Living History Interview with Judge Richard Goldstone', (1995) 5 Transnational Law and Contemporary Problems 373

E. REPORTS AND DRAFTS INSTRUMENTS

Address by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Carla Del Ponte, to the UN Security Council, (27 November 2001)

Address by the Prosecutor to the Assembly of State Parties (6 September 2004) available at http://www.icc-cpi.int

Address by ICTY Prosecutor to the Security Council (13 June 2005) CDP/MOW/977-e

Americas Watch Report, *Challenging Impunity: The Ley de Caducidad and the Referendum Campaign in Uruguay* (1989)

Americas Watch Report, *Chile: The Struggle for Truth and Justice for Past Human Rights Violations IV* (1992)

Amnesty International, *Gacaca: A question of justice*, AI Index: AFR 47/007/2002,(December 2002)

Amnesty International, *Rwanda: End of provisional release of genocide suspects*, AI Index: AFR 47/005/2003(29 April 2003)

Amnesty International, *East Timor - Justice past, present and future*, AI-index:ASA57/001/2001 (27/07/2001)

Amnesty International, *Making the Right Choices - Part III - Ensuring effective cooperation* (IOR 40/013/1997, November 1997)

Amnesty International, *Sierra Leone: Renewed Commitment Needed to End Impunity* (24 September 2001), AI Index *AFR 51/007/2001*

Amnesty International, *The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice* (AI Index: IOR 40/006/2003)

Amicus curiae brief of Croatia in *Prosecutor v. Mejakic et al.* (ICTY Case No. IT-02-65-PT)

Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications (ICC-OTP)

Argentina Report 13 HRLJ (1992) 336-340;*Uruguay Report,ibid*,340-5;*Chile Report*, Inter-American Commission on Human Rights, Report No. 25/98,¶76; Inter-American Commission on Human Rights, Report No. 36/96

Bar Human Rights Law Committee, *Report on Kosovo 2000* (UK)

Baron Deschamps, in P.C.I.J. Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (June 16-July 24, 1920)

Comments and Observations of Governments on the Draft Code of Crimes against the Peace and Security of Mankind, A/CN.4/448 (1993)

Comments of States on ILC Draft Articles on State Responsibility, A/54/10(1999)

Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR, Supp. No. 10, U.N. Doc. A/51/10, (1996)

End of mandate report of the Secretary-General on the United Nations Mission of Support in East Timor, S/2005/310 (12 May 2005)

'Harvard Research Draft Convention on Jurisdiction with Respect to Crime', 29 A.J.I.L.,Supp.,443(1935)

Hetherington, Thomas and Chalmers, William, *War Crimes: Report of the War Crimes Inquiry, Presented to Parliament by the Secretary of State for the Home Department* (London: HMSO, 1989)

Human Right Ad Hoc Court for East Timor Monitoring Team (ELSAM), *Jakarta Ad-hoc Court Monitoring Progress Reports*

Human Rights Watch Briefing Paper, *Justice Denied for East Timor* (New York, 20 December 2002)

Human Rights Watch, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* (Briefing Paper: April 2003)

Human Rights Watch, *Memorandum to the Iraqi Governing Council on 'The Statute of the Iraqi Special Tribunal'* (17 December 2003)

Human Rights Watch Policy Paper: *The Meaning of "the interests of justice" in Article 53 of the Rome Statute* (June 2005)

HRFOR Status Report, *The Administration of Justice in Post-Genocide Rwanda*,(June 1996)

ICTY *Annual report*, A/49/342 (1994)

ICTY *Annual Report*, A/50/365(1995)

ICTR *Annual Report*, A/52/375 (1997)

Informal expert paper: Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation (ICC-OTP 2003)

Informal expert paper: The principle of complementarity in practice (ICC-OTP 2003)

International Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina* (25 March 2002)
I.L.C. *Report*, A/48/10(1996), Yrbk I.L.C.,Vol. II(2), (1996)
ILC *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), A/56/10 (2001)
ILC *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, A/56/10 (2001)
ILC Commentary on *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, A/56/10 (2001)
ILC *Commentary* to draft text for VCLT (art.39(5)), in YBILC (1966)
Institute for War and Peace Reporting (IWPR) 'Lora Policemen Convicted In Retrial', *Tribunal Update No. 442* (3 March 2006)
Joint conclusions of the Working Group of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Office of the High Representative regarding domestic prosecution of war crimes in Bosnia and Herzegovina (The Hague, 21 February 2003)
Judicial Systems Monitoring Programme, *Report on East Timor's Draft Law on Amnesty and Pardon* (November 2002)
Lawyers Committee for Human Rights, *Prosecuting War Crimes in the Former Yugoslavia: The International Tribunal, National Courts and Concurrent Jurisdiction* (May 1995)
Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: the ICTR and National Trials* (1997)
Lawyers Committee for Human Rights, *A Court for Cambodia?* (1 April 2003)
Ninth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2001/228 (14 March 2001)
Office of the Deputy General Prosecutor for Serious Crimes Timor Leste, *Serious Crimes Unit Update* (30 April 2004)
OSCE Mission to Croatia, *Status Report No. 10*,(21 May 2002)
OSCE Mission to Croatia, *Status Report No. 12* (03 July 2003)
OSCE Mission to Croatia, *Status Report No. 13* (December 2003)
OSCE Croatia, *Status Report No.17* (10 November 2005)
OSCE Mission in Serbia and Montenegro, *War Crimes before Domestic Courts* (October 2003)
OSCE and International Bar Association, *Review of the Draft law on Organisation and Jurisdiction of Government Authorities in Prosecuting Persons Guilty of War Crimes*, on file with author.
OSCE Mission in Kosovo, *Review of the Criminal Justice System* (March 2002 - April 2003)
OSCE Mission in Kosovo, *Review 4: The Criminal Justice System in Kosovo* (29 April 2002)
OSCE Mission in Kosovo, *Kosovo's War Crimes Trials: A Review* (September 2002)
OSCE Mission in Kosovo, *Parallel Structures in Kosovo* (7 October 2003)
Paper on some policy issues before the Office of the Prosecutor(September 2003) ('OTP Policy Paper'), available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf
Preliminary Report on Disappearances of the National Commissioner for the Protection of Human Rights in Honduras: The Facts Speak For Themselves (1994)
Princeton Principles on Universal Jurisdiction, and commentary, The Princeton Project on Universal Jurisdiction (Princeton: New Jersey, 2001) 50
Progress report of the Secretary-General on the United Nations Transitional Administration in East Timor, S/2001/719(14 July 2001)
Program on Crimes Against Humanity and War Crimes (Canada), *Eighth Annual Report 2004-2005*; http://www.cbsa.gc.ca/general/enforcement/annual/wc-cg2005-e.html
Question of International Criminal Jurisdiction, Report by Ricardo J. Alfaro, Special Rapporteur, 1950 Yrbk I.L.C. Vol II. A/CN.4/15(1950);
Question of the impunity of perpetrators of human rights violations (civil and political) Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997)
Records of 4568th meeting S/PV.4568 (Resumption 1) + Corr.1 (10 July 2002)
Records of 4772nd meeting S/PV.4772 (12 June 2003).
Records of 4563rd meeting S/PV.4563 (30 June 2002)
Records of 4568th meeting S/PV.4568 (Resumption 1) + Corr.1 (10 July 2002)
Records of XXXX meeting S/PV.5158 (31 March 2005)
Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, U.N. Doc. A/CONF.183/2/Add.1 (14 April 1998) [final draft consolidated text]
Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (1920) 14 AJIL116

Report of the International Law Commission on its work on its forty-sixth session, 49 U.N. GAOR, Supp. No. 10, U.N. Doc. A/49/10 (1994) [1994 I.L.C. Draft Statute and Commentary]
Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50 U.N. GAOR, Supp. No. 22, U.N. Doc. A/50/22 (1995)
Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol.I, 51 U.N. GAOR, Supp. No. 22, U.N. Doc.A/51/22 (1996)
Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol.II, 51 U.N. GAOR, Supp. No. 22A, U.N. Doc. A/51/22 (1996)
Report of the I.L.C., A/1316, Supp.No.12 (1950)
Report of the International Law Commission, 6 U.N. GAOR, Supp.No.12, A/1316,(1950)
Report of the Committee on International Criminal Jurisdiction, 7 U.N. GAOR, Supp. No.11, A/2136(1952) [1951 I.L.C. Draft Statute]
Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, S/1995/134 (13 February 1995)
Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993) [*Secretary-General's Report*], U.N.Doc.S/25704, reprinted 32 I.L.M.1159(1993)
Report of the Committee No.III on the Recommendations by the Committee of Jurists at the Hague
*Report of the I.L.C.*1950, (A/1316, Supp.No.12)
Report of the I.L.C., (A/47/10)
Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add.1 and Add.2, adopted by the Preparatory Commission on 30 June 2000
Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616 (3 August 2004)
Report of the Secretary-General on Khmer Rouge trials, A/57/769 (31 March 2003)
Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, S/1999/1257(16 December 1999)
Report of the International Commission of Inquiry on East Timor to the Secretary- General, UN Doc A/54/726, S/2000/59 (2000)
Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol.II, 51 UN GAOR, Supp.No.22A, A/51/22(1996)
Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993), S/25704
Report of the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions, on Torture, and on Violence against Women, UN. Doc A/54/660(10 December 1999) presented in accordance with Commission resolution 1999/S-4/1 of 27 September 1999
Reports of the Secretary-General, S/2000/738 and S/2001/42
Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 ('Commission of Experts on East Timor Report'), S/2005/458 (26 May 2005)
Report of the Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy; E/CN.4/2003/65/Add.2 (13 January 2003)
Report of the Secretary-General on the establishment of a Special Court for Sierra Leone ('*SG Sierra Leone Report*'), S/2000/915 (4 October 2000)
Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi, transmitted by the Secretary-General to the Security Council on 11 March 2005 (S/2005/158)
Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, annexed to U.N. Doc. S/2002/246 (2002)
Report of the Burundi Commission to the Security Council S/1996/682 (25 July 1996)
Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act (A/Conf.183/2/Add.1, 1998)
Report of the Committee on Budget and Finance, ICC-ASP/3/18 (13 August 2004)
Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSR 1593 (2005), available at http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf
Report of the Justice Commission, Sénat de Belgique Session de 1998-99 (1 December 1998) 1-749/3
Restatement of the Law: Third Restatement of US Foreign Relations Law [*Restatement*], Vol.2 (1987), §702,3
Revised Report of the Working Group on the Draft Statute of an International Criminal Court, (A/CN.4/L.490) A/CN.4/L.490/Add.1 (1993)

Senate Committee on the Judiciary, *The Torture Victims Protection Act of 1991*, S. Rep. No. 102-249

Statement by Russian Representative, Preparatory Committee on the Establishment of an International Criminal Court (4th Session, 4-15th August 1997) ['PrepCom IV (August 1997)']; on file with author

Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC(16 June 2003)

Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps (The Hague, 12 February 2004); available at http://www.icc-cpi.int

Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs (New York, 24 October 2005); available at http://www.icc-cpi.int

Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Theo Van Boven, E/CN.4/Sub.2/1993/8

Summary Statement by the Secretary-General on Matters of which the Security Council is Seized and on the Stage Reached in their Consideration, U.N. Doc. S/2005/15 (2005)

Tenth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2001/627 (25 June 2001)

United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: 1948)

Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court* (Council of Europe, 15 January 2001)

Yayasan HAK Briefing Paper, *Serious Concerns regarding the Independence of the Judiciary under United Nations Transitional Administration in East Timor* (24 July 2001)