

An Introduction to
International
Criminal Law
and Procedure



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Robert Cryer, Hakan Friman
Darryl Robinson, Elizabeth Wilmshurst

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An Introduction to INTERNATIONAL CRIMINAL LAW AND PROCEDURE

International criminal law has developed considerably in the last decade and a half, resulting in a complex and re-invigorated discipline. This has impacted directly on the popularity of the study of the subject, particularly on postgraduate law degrees. This textbook serves these courses by providing an introduction to the principles of international criminal law and processes. Written by four international lawyers with experience of teaching international criminal law, it is accessible yet sophisticated in its approach. It covers substantive international criminal law, the institutions designed to enforce it and their procedures, and the international law applicable to domestic prosecutions of international crimes. It will be essential reading for students and teachers of international criminal law. In addition to practitioners and researchers in the field, and in related fields such as criminal law, students of international law and international relations will find this introduction invaluable.

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Preface

With the start of the first prosecutions by the International Criminal Court and the closing phases of the work of the ad hoc Tribunals, this is a good time for a new book on international criminal law and its institutions. This book is intended as an accessible yet challenging explanation and appraisal of international criminal law and procedure for students, academics and practitioners. We focus on the crimes which are within the jurisdiction of international courts or tribunals – genocide, crimes against humanity, war crimes and aggression – and the means of prosecuting them. We also briefly discuss terrorist offences, torture, and other crimes which are not (yet) within the jurisdiction of an international court or tribunal.

International criminal law is now a vast subject, even on our circumscribed view of what it contains. This book is intended as a manageable and useful introduction to the field, and therefore does not attempt to delve into the entirety of the subject in the full detail it deserves. We welcome comments on possible improvements that could be made. We have sought to be succinct rather than simplistic in our presentation. We have included some references to academic commentary, both in the footnotes and in ‘further reading’ sections at the end of each chapter. However, there is a great deal of writing on international criminal law, and we could not refer to it all. We hope that this book piques the interest of those new to the subject to further investigations including into the considerable and insightful literature which the developments in international criminal law have engendered.

While we hope that this book will appeal to practitioners as well as to students, the chapters are intended to cover the subjects which can be dealt with during a university Masters course in international criminal law. Part **A** is introductory. Following a discussion in Chapter 1 of what we mean by international criminal law and of some of its most fundamental principles, we consider in Chapter 2 the objectives of this body of law: do they differ from those of national law, for example? Part **B** is concerned with prosecutions in national, rather than international, courts. Chapter 3 discusses the principles of jurisdiction as they relate to international crimes, Chapter 4 describes some instances of national prosecutions and Chapter 5 concerns extradition, transfer of information and other means by

which States cooperate to assist in bringing suspects to justice before national courts. Part C, which concerns international prosecutions, begins in Chapter 6 with a history of the trials following the Second World War and Chapters 7 and 8 respectively discuss the ad hoc Tribunals and the International Criminal Court. Chapter 9 describes in brief other courts with an international element which have been established to investigate and prosecute international crimes. Part D discusses the substantive law of international crimes. Chapters 10 to 13 cover genocide, crimes against humanity, war crimes and aggression; Chapter 14 introduces the subject of transnational crimes, and takes as examples terrorist offences and torture. Part E is concerned with the principles (in Chapters 15 and 16) and the procedures (in Chapters 17 and 18) used in international prosecutions. Part F considers various aspects of the relationship between the national and international systems: State cooperation with the international courts and tribunals (in Chapter 19) and immunities, in relation to both national and international jurisdictions (in Chapter 20). We end with our conclusions in Chapter 21, which contains our assessment of the development of international criminal law and its institutions and our forecast for the future.

The website which accompanies this book provides access to documents to which reference is most frequently made and material which may be useful in teaching. It also sets out questions which invite the reader to engage in further reflection and discussion of various issues in each of the chapters of the book.

The authors have all taught, to a greater or lesser extent, in international criminal law courses. Three of us took part in the negotiations on the International Criminal Court and participated at the Rome Conference. Some of the comments in this book rely directly on our experience in this capacity.

We have all had an input into each chapter. Each of us drafted a number of chapters, which were circulated and commented upon by the other three. Each chapter has been the object of intensive discussion amongst all of us to achieve as much coherence among our views as possible. We have attempted to produce a book which reads as a coherent whole, rather than as a collection of separate papers from different writers. Of course, with four authors, complete consensus on every matter of substance was neither possible nor expected and the views expressed in individual chapters are therefore those of the author of that chapter, and not necessarily of the group as a whole. The responsibility for Chapters 2, 3, 6, 7, 15 and 16 rests with Robert Cryer, for Chapters 4, 5, 9, 17, 18 and 19 with Håkan Friman, for Chapters 11, 12 and 20 with Darryl Robinson and for Chapters 8, 10, 13, and 14 with Elizabeth Wilmshurst. Chapters 1 and 21, which express the views of us all, were written by Rob and Elizabeth (Chapter 1) and by Rob (Chapter 21). Elizabeth has also had the responsibility of keeping us all together and seeking a consistent text.

We express particular thanks to Finola O’Sullivan and Sinead Moloney of Cambridge University Press; to Professor Claus Kress who gave his wise advice and substantial contributions to the conceptualization and development of this book and to Charles Garraway, for his contributions, including in particular to the section on command responsibility.

Robert Cryer
Håkan Friman
Darryl Robinson
Elizabeth Wilmshurst
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- 16.01.2002 Statute of the Special Court for Sierra Leone 68, 150, 151, 152, 193, 201, 229, 248, 259, 260, 302, 305, 310, 313, 316, 322, 343, 443, 451
- 13.06.2002 Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States OJ L190, 18.7.2002, pp. 1–20 74, 75, 76, 77, 83, 84, 85
- 13.06.2002 Council Framework Decision on Combating Terrorism OJ L164 22.6.2002 pp. 3–7 74, 76, 77, 83, 84, 85
- 09.09.2002 Agreement on Privileges and Immunities of the International Criminal Court ICC-ASP/1/3 124, 126
- 06.06.2003 Agreement Between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (draft Agreement annexed to GA resolution 57/228B) 153, 154
- 22.07.2003 Council Framework Decision on the Execution in the European Union of Orders Freezing Property or Evidence OJ L196 2.8.2003 pp. 45–55 87
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- 24.02.2005 Council Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties OJ L76 22.3.2005 pp. 16–30 88
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- 20.12.2006 International Convention for the Protection of all Persons from Enforced Disappearance GA resolution 61/177 281

Table of Abbreviations

A. Ch.	Appeals Chamber
ACHPR	African Charter of Human and People's Rights
ACHR	American Convention on Human Rights
AJIL	<i>American Journal of International Law</i>
All ER	All England Reports
AP	Additional Protocol to the Geneva Conventions
AU	African Union
BFSP	British and Foreign State Papers
BYBIL	<i>British Yearbook of International Law</i>
CAT	Convention Against Torture
CIS	Commonwealth of Independent States
CLF	<i>Criminal Law Forum</i>
CMR	Court Martial Reports
CPA	Coalition Provisional Authority
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EJIL	<i>European Journal of International Law</i>
EOC	Elements of Crime
ETS	European Treaty Series
EU	European Union
FRY	Federal Republic of Yugoslavia
F. Supp.	Federal Supplement
GA	General Assembly
GC	Geneva Convention
<i>Hague Recueil</i>	<i>Recueil des cours de l'Academie de droit international</i>
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICLR	<i>International Criminal Law Review</i>

ICRC	International Committee for the Red Cross and Red Crescent
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Implementation Force (NATO)
IGC	Interim Governing Council
IHL	international humanitarian law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal
JICJ	<i>Journal of International Criminal Law</i>
KFOR	(NATO) Kosovo Force
LJIL	<i>Leiden Journal of International Law</i>
LNTS	League of Nations Treaty Series
London Charter/ Nuremberg Charter	Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis
LRA	Lord's Resistance Army
LRTWC	Law Reports, Trials of War Criminals
NJIL	<i>Nordic Journal of International Law</i>
OAU	Organization of African Unity
OHR	Office of the High Representative
OIC	Organization of the Islamic Conference
OJ	Official Journal
OSCE	Organization for Security and Cooperation in Europe
PAUTS	Pan-American Union Treaty Series
PCIJ	Permanent Court of International Justice
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
SC	Security Council
SCR	Supreme Court Reports
SICT	Supreme Iraqi Criminal Tribunal
SCSL	Special Court for Sierra Leone
SFOR	Stability Force (NATO-led force deployed in Bosnia)
SOFA	Status of forces agreement
T.Ch.	Trial Chamber
UKTS	United Kingdom Treaty Series
UN	United Nations
UNMIK	UN Interim Administration Mission in Kosovo
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium

UNTAET	United Nations Transitional Administration In East Timor
UNTS	United Nations Treaty Series
WTO	World Trade Organization
YIHL	<i>Yearbook of International Humanitarian Law</i>
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

Book titles and their abbreviations as used in the text

- Antonio Cassese, Paolo Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002): Cassese, *Commentary*
- Roy Lee *et al.* (eds.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, 1999): Lee, *The Making of the Rome Statute*
- Roy Lee *et al.* (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (New York, 2001): Lee, *Elements and Rules*
- Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, 2000), vol. I: Henckaerts & Doswald-Beck, *ICRC Customary Law*
- Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes* (Baden-Baden, 1999): Triffterer, *Observers' Notes*

PART A

Introduction

1

Introduction: What is International Criminal Law?

1.1 International criminal law

International law typically governs the rights and responsibilities of States;¹ criminal law, conversely, is paradigmatically concerned with prohibitions addressed to individuals, violations of which are subject to penal sanction by a State.² The development of a body of international criminal law which imposes responsibilities directly on individuals and punishes violations through international mechanisms is relatively recent. It was not until the 1990s, with the establishment of the ad hoc Tribunals for the former Yugoslavia and for Rwanda, that it could be said that an international criminal law regime had evolved. This is a relatively new body of law which is not yet uniform, nor are its courts universal.

International criminal law developed from various sources. War crimes originate from the ‘laws and customs of war’, which accord certain protections to individuals in conflict situations. Genocide and crimes against humanity evolved to protect persons from gross human rights abuses including those committed by their own governments. With the probable exception of the crime of aggression with its focus on inter-State conflict, the concern of international criminal law is now with individuals and with their protection from wide-scale atrocities. As was said by the Appeal Chamber in the *Tadić* case in the International Criminal Tribunal for the former Yugoslavia (ICTY):

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach ... [I]nternational law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings ...³

The meaning of the phrase ‘international criminal law’ depends on its use, but there is a plethora of definitions, not all of which are consistent. The most dedicated chronicler of uses of ‘international criminal law’, Georg Schwarzenberger,⁴ described six

¹ See, e.g. Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law* (9th edn, London, 1994) 5–7.

² Glanville Williams, ‘The Definition of Crime’ (1955) 8 *Current Legal Problems* 107.

³ *Tadić* ICTY A. Ch. 2.10.1995 para. 97.

⁴ Georg Schwarzenberger, ‘The Problem of an International Criminal Law’ (1950) 3 *Current Legal Problems* 263.

different meanings that have been attributed to it, all of which related to international law, criminal law and their interrelationship, but none of which referred to any existing body of international law which directly created offences that could be committed by individuals; Schwarzenberger believed that no such law existed at the time. 'An international crime', he said in reference to the question of the status of aggression, 'presupposes the existence of an international criminal law. Such a branch of international law does not exist.'⁵

Cherif Bassiouni,⁶ on the other hand (and writing almost half a century later), listed 25 categories of international crimes, being crimes which affect a significant international interest or consist of egregious conduct offending commonly shared values, which involve more than the State because of differences of nationality of victims or perpetrators or the means employed, or which concern a lesser protected interest which cannot be defended without international criminalization. His categories include, as well as the more familiar ones, traffic in obscene materials, falsification and counterfeiting, damage to submarine cables, and unlawful interference with mail.

Different meanings of international criminal law have their own utility for their different purposes and there is no reason to decide upon one meaning as the 'right' one.⁷ Nevertheless, it is advisable from the outset to be clear about the sense in which the term is used in any particular situation. In this chapter we will attempt to elaborate the meaning which we give to the term for the purposes of this book and compare it with others.

1.1.1 Crimes within the jurisdiction of an international court or tribunal

The approach taken in this book is to use 'international crime' to refer to those offences over which international courts or tribunals have been given jurisdiction under general international law. They comprise the so-called 'core' crimes of genocide, crimes against humanity, war crimes, and the crime of aggression (also known as the crime against peace). Our use thus does not include piracy, slavery, torture, terrorism, drug trafficking, and many crimes which States Parties to various treaties are under an obligation to criminalize in their domestic law. But because a number of the practical issues surrounding the repression of these crimes are similar to those relating to international crimes, they are discussed in this book, although only terrorist offences and torture will be discussed in any detail. Some of them (terrorist offences, drug trafficking and individual acts of torture) have been suggested as suitable for inclusion within the jurisdiction of the International Criminal Court (ICC)⁸ and may therefore constitute international crimes within our meaning at some time in the future.

⁵ Georg Schwarzenberger, 'The Judgment of Nuremberg' (1947) 21 *Tulane Law Review* 329 at 349.

⁶ M. Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework' in M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. I, 32, 33.

⁷ But omnibus uses of 'international criminal law' risk implying that there is a structural unity to what is being referred to, and thus treating very different things as having similarities. For an example, see Barbara Yarnold, 'Doctrinal Basis for the International Criminalisation Process' (1994) 4 *Temple International and Comparative Law Journal* 85.

⁸ See Final Act of the Rome Conference A/CONF.183/10, Res. E.

Our approach does not differentiate the core crimes from others as a matter of principle, but only pragmatically, by reason of the fact that no other crimes are currently within the jurisdiction of international courts. However, it is clear that since these crimes have a basis in international law, they are also regarded by the international community as violating or threatening values protected by general international law.

‘International criminal law’, as used in this book, encompasses not only the law concerning genocide, crimes against humanity, war crimes and aggression, but also the principles and procedures governing the international investigation and prosecution of these crimes. As we shall see, in practice the greater part of the enforcement of international criminal law is undertaken by domestic authorities. The principle of complementarity, which is fundamental to the whole of international criminal law enforcement, shows that national courts both are, and are intended to be, an integral and essential part of the enforcement of international criminal law.⁹ In this book therefore we shall cover not only the international prosecution of international crimes, but also various international aspects of their domestic investigation and prosecution.

1.2 Other concepts of international criminal law

1.2.1 *Transnational criminal law*

Until the establishment of the international courts and tribunals in the 1990s, the concept of international criminal law tended to be used to refer to those parts of a State’s domestic criminal law which deal with transnational crimes, that is, crimes with actual or potential transborder effects. This body of law is now more appropriately termed ‘transnational criminal law’. A similar terminological distinction between ‘international criminal law’ (criminal aspects of international law) and ‘transnational criminal law’ (international aspects of national criminal law) can also be found in other languages, such as German (*‘Völkerstrafrecht’* compared with *‘Internationales Strafrecht’*), French (*‘droit international pénal’* and *‘droit pénal international’*) and Spanish (*‘derecho internacional penal’* and *‘derecho penal internacional’*).

Transnational criminal law includes the rules of national jurisdiction under which a State enacts and enforces its own criminal law where there is some transnational aspect of a crime. It also covers methods of cooperation among States to deal with domestic offences and offenders where there is a foreign element and the treaties which have been concluded to establish this inter-State cooperation. These treaties provide for mutual legal assistance between States in respect of crimes with a foreign element, and extradition of offenders by one State for prosecution in another State. Other treaties require States to criminalize certain conduct by creating offences in their domestic law

⁹ This is particularly the case with the ICC; see Arts. 17 and 18 of the ICC Statute. As to the situation generally, Judges Higgins, Kooijmans and Buergenthal have stated: ‘the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.’ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* 14.2.2002 Separate Opinion para. 51.

and to bring offenders to justice if found on their territory, or to extradite them to States that will prosecute. While international law is thus the source of a part of this group of rules, the source of criminal prohibitions on individuals is national law.¹⁰

Until recently, there was not a clear distinction in the literature between international criminal law with its more restricted meaning and transnational law. Transnational law, with its focus on domestic criminal law and on methods of inter-State cooperation in the sphere of criminal law, remains the body of ‘international criminal law’ with which national legal practitioners are most familiar. Providing full coverage of this body of law would require a volume in its own right. Our discussion of it will address only issues of State jurisdiction, such obstacles to national prosecution as immunities, and State cooperation in national proceedings relating to international crimes; we deal with ‘transnational crimes’ only in so far as they raise cognate issues to international crimes.

1.2.2 International criminal law as a set of rules to protect the values of the international order

Another, and more substantive, approach to determining the scope of ‘international criminal law’ is to look at the values which are protected by international law’s prohibitions.¹¹ Under this approach international crimes are considered to be those which are of concern to the international community as a whole (a description which is not of great precision), or acts which violate a fundamental interest protected by international law. Early examples include the suppression of the slave trade. The ICC Statute uses the term ‘the most serious crimes of concern to the international community as a whole’ almost as a definition of the core crimes,¹² and recognizes that such crimes ‘threaten the peace, security and well-being of the world’.¹³

It is of course true that those crimes which are regulated or created by international law are of concern to the international community; they are usually ones which threaten international interests or fundamental values.¹⁴ But there can be a risk in defining international criminal law in this manner, as it implies a coherence in the international criminalization process which may not exist. The behaviour which is directly or indirectly subject to international law is not easily reducible to abstract formulae. Even if it were, it is not clear that these formulae would be sufficiently determinate to provide a useful guide for the future development of law, although arguments from coherence with respect to the ambit of international criminal law can

¹⁰ See generally, Neil Boister, ‘Transnational Criminal Law?’ (2003) 14 *EJIL* 953 at 967–77.

¹¹ For discussion in relation to the core crimes, see Bruce Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (Oxford, 2003) 44–51.

¹² Arts. 1 and 5(1). The International Law Commission framed its investigation into international criminal law in the broad sense as being one into the ‘Crimes against the Peace and Security of Mankind’: Draft Code of Crimes Against the Peace and Security of Mankind, in Report of The International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10. See also Lyal Sunga, *The Emerging System of International Criminal Law* (The Hague, 1997).

¹³ ICC Statute, para. 3 of the Preamble.

¹⁴ Bassiouni, ‘The Sources and Content of International Criminal Law’, 98.

have an impact on the development of the law (as has occurred in relation to the law of war crimes in non-international armed conflict).¹⁵

1.2.3 Involvement of a State

Another approach to defining ‘international crimes’ relies upon State involvement in their commission.¹⁶ There is some sense in this. For example, aggression is necessarily a crime of the State, committed by high-level State agents. War crimes, genocide and crimes against humanity often, perhaps typically, have some element of State agency. But the subject matter of international criminal law, as we use it, deals with the liability of individuals, irrespective of whether or not they are agents of a State. In the definition of the crimes which we take as being constitutive of substantive international criminal law, the status of the perpetrator is irrelevant, with the exception of the crime of aggression.¹⁷

1.2.4 Crimes created by international law

An international crime may also be defined as an offence which is created by international law itself, without requiring the intervention of domestic law. In the case of such crimes, international law imposes criminal responsibility directly on individuals. The classic statement of this form of international criminal law comes from the Nuremberg International Military Tribunal’s seminal statement that

crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state.¹⁸

The definition of an international crime as one created by international law is now in frequent use.¹⁹ But this criterion may lead to fruitless debate as to what is and what is not ‘created’ by international law.²⁰ The more pragmatic meaning used in this book, which we do not claim is authoritative, excludes from detailed discussion certain

¹⁵ On such developments, see chapter 12.

¹⁶ See, e.g. M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (2nd edn, The Hague, 1999) 243–6, 256.

¹⁷ The reference in Art. 8(2)(b)(viii), ICC Statute, to the transfer of population ‘by the Occupying Power’ would also seem to require that the perpetrator is a State agent.

¹⁸ Nuremberg IMT: Judgment and Sentences (1947) 41 *AJIL* 172 at 221.

¹⁹ Broomhall, *International Justice and the International Criminal Court*, 9–10; Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, 2005) 1; Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn, 1951) 9; Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (Freiburg im Breisgau, 1966) 34; Gerhard Werle, *Principles of International Criminal Law* (The Hague, 2005) 25.

²⁰ A slightly different criterion of an international offence, one with a ‘definition as a punishable offence in international (and usually conventional) law’ leads to the inclusion of a much wider category of crimes, including hijacking, injury to submarine cables and drugs offences (Yoram Dinstein, ‘International Criminal Law’ (1975) 5 *Israel Yearbook on Human Rights* 55 at 67).

conduct which has been suggested to be subject to direct liability in international criminal law but which others dispute, such as piracy and slavery,²¹ a general offence of terrorism,²² and individual acts of torture.²³

Occasionally the *sui generis* penal system of the international criminal tribunals and courts is described as ‘supranational criminal law’ in process of development.²⁴ This term is somewhat misleading since it is normally reserved for law imposed by supranational institutions and not treaty-based or customary international law;²⁵ the ICTY, International Criminal Tribunal for Rwanda (ICTR) and ICC are not supranational in nature, neither as institutions nor as regards the laws they enforce.

1.3 Sources of international criminal law

As international criminal law is a subset of international law, its sources are those of international law. These are usually considered to be those enumerated in Article 38(1) (a)–(d) of the Statute of the International Court of Justice, in other words, treaty law, customary law, general principles of law and, as a subsidiary means of determining the law, judicial decisions and the writings of the most qualified publicists. As will be seen, all of these have been used by the ad hoc Tribunals. They are available for use by national courts in so far as the national system concerned will allow. The ICC Statute contains its own set of sources for the ICC to apply, which are analogous, although by no means identical, to those in the ICJ Statute.²⁶

1.3.1 Treaties

Treaty-based sources of international criminal law, either directly or as an aid to interpretation, include the 1907 Hague Regulations, the 1949 Geneva Conventions (and their additional protocols) and the Genocide Convention. They form the basis for many of the crimes within the jurisdiction of the ad hoc Tribunals and the ICC. The Statute of the ICC, which sets out the definitions of crimes within the jurisdiction of the ICC, is, of course, itself a treaty. Security Council resolutions 827(2003) and 955(2004), which set up the ICTY and ICTR respectively, were adopted by the Security Council pursuant to its powers under Chapter VII of the UN Charter, and thus find their binding force in Article 25 of the Charter. Their source is therefore a treaty. The Statutes of the Tribunals have had an important effect on the substance of international criminal law both directly, as applied by the Tribunals, and indirectly as

²¹ See, e.g. Broomhall, *International Justice and the International Criminal Court*, 23–4.

²² See, e.g. Antonio Cassese, *International Criminal Law* (Oxford, 2003) 128–30. ²³ *Ibid.*, 117–20.

²⁴ E.g. Roelof Haverman, Olga Kavran and Julian Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis* (Antwerp, 2003).

²⁵ See, e.g. Werle, *Principles of International Criminal Law*, 38–9, and Bassiouni, ‘The Sources and Content of International Criminal Law’, 4–5.

²⁶ Art. 21 of the ICC Statute.

a source for other international criminal law instruments;²⁷ the influence of the ICC Statute has so far largely been through its impact on national legislation.

It has been suggested that treaties might not suffice to place liability directly on individuals²⁸ and cannot be a direct source of the law for that reason. Such arguments run up against long-standing practice in international humanitarian law, which has been to apply to individuals the 'laws and customs of war' as found in the relevant treaties, as well as in customary law. As the Permanent Court of International Justice noted about eighty years ago, treaties can operate directly on individuals, if that is the intent of the drafters.²⁹ The International Committee for the Red Cross and Red Crescent (ICRC) study on customary humanitarian law reports that 'the vast majority of practice does not limit the concept of war crimes to violations of customary international law. Almost all military manuals and criminal codes refer to violations of both customary law and applicable treaty law.'³⁰ That does not mean that every provision of the Geneva Conventions, for example, imposes direct criminal responsibility on individuals. Breach of some of them, for example those regarding the finest details of the treatment of detainees, would probably not constitute a war crime.³¹

It is only those treaties or provisions of a treaty which are intended to apply directly to an individual that can give rise to criminal responsibility. The 'suppression conventions', for example, which require States to criminalize conduct such as drug trafficking, hijacking and terrorist bombing³² are not generally regarded as creating individual criminal responsibility of themselves; the conduct covered by those treaties will be incorporated in national law by whatever constitutional method is used by the State concerned. Further, if a court is to apply the terms of a treaty directly to an individual, it will be necessary to show that the prohibited conduct has taken place in the territory of a State Party to the treaty or is otherwise subject to the law of such a Party.³³ The practice of the ICTY has been, with occasional deviations,³⁴ to accept that treaties may suffice to found criminal liability. This began with the *Tadić* decision of 1995 and the position was unambiguously reasserted in the *Kordić and Čerkez* Appeal.³⁵

1.3.2 Customary international law

The ICTY has accepted that when its Statute does not regulate a matter, customary international law, and general principles, ought to be referred to.³⁶ Customary

²⁷ See Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78.

²⁸ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford, 2005) 7–9.

²⁹ *Jurisdiction of the Courts in Danzig* Case 1928 PCIJ Series B. No. 15, p. 17.

³⁰ Jean-Marie Henckerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, 2005) 572.

³¹ See chapter 11. ³² See chapter 14.

³³ This problem will no longer arise in regard to crimes derived from the four Geneva Conventions which now have universal State participation.

³⁴ *Galić*, ICTY T. Ch. 5.12.2003 Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 109–12; *Milutinović, Sainović and Ojdanić* ICTY A. Ch. 21.5.2003 paras. 10 ff.

³⁵ *Kordić and Čerkez* ICTY A. Ch. 17.12.2004 paras. 41–6, clarifying *Tadić* ICTY A. Ch. 2.10.1995 para. 143.

³⁶ *Kupreškić* ICTY T. Ch. II 14.1.2000 para. 591.

international law, that body of law which derives from the practice of States accompanied by *opinio iuris* (the belief that what is done is required by or in accordance with law),³⁷ has the disadvantage of all unwritten law in that it may be difficult to ascertain its content. This is not always the case, however, when the customary law originates with a treaty or other written instrument, for example a General Assembly resolution, which is accepted as reflecting custom, or has been recognized by a court as such.³⁸ Nevertheless the use of customary international law in international criminal law has sometimes been criticized on the basis that it may be too vague to found criminal liability³⁹ or, even, that no law that is unwritten should suffice to found criminal liability. These assertions will be discussed below at section 1.5.1 in relation to the principle of *nullum crimen sine lege*.

1.3.3 General principles of law and subsidiary means of determining the law

The ICTY has resorted to general principles of law to assist it in its search for the applicable rule of international law. Owing to the differences between international trials and trials at the national level the ICTY has been chary of uncritical reliance on general principles taken from domestic legal systems and acontextual application of them to international trials.⁴⁰ That said, the ICTY and ICTR have both resorted to national laws to assist them in determining the relevant international law through this source. As was said in the *Furundžija* decision, however, care must be taken when using such legislation, not to look simply to one of the major legal systems of the world, as ‘international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world’.⁴¹ In relation to criminal law, general principles of law are not ideal. After all they are, by their nature, general, and thus tend to be a last resort. Also, as the *Erdemović* case showed, at times there simply is no general enough principle to apply.⁴²

As regards the ICC, it is to apply, where the first two categories of law do not provide an answer:

... general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the] Statute and with international law and internationally recognized norms and standards.⁴³

³⁷ An alternative description of customary international law dispenses with the need for *opinio iuris*, relying on the constant and uniform practice of States (Maurice Mendelson, ‘The Formation of Customary Law’ (1998) 272 *Hague Recueil* 159).

³⁸ E.g. para. 3(g) of the Definition on Aggression in GA res. 3314(XXIX) of 14.12.1974; see section 13.1.2; and see Mendelson, ‘The Formation of Customary Law’, ch. 5.

³⁹ Vladimir Djuro-Degan, ‘On the Sources of International Criminal Law’ (2005) 4 *Chinese Journal of International Law* 45 at 67.

⁴⁰ *Erdemović* ICTY A. Ch. 7.10.1997 Separate and Dissenting Opinion of President Cassese, para. 5.

⁴¹ *Furundžija* ICTY T. Ch. II 10.12.1998 para. 178.

⁴² *Erdemović*, ICTY A. Ch. 7.10.1997 Opinion of Judges McDonald and Vohrah, paras. 56–72.

⁴³ Art. 21(1)(c) of the ICC Statute. This and all other sources of law available to the ICC are qualified by Art. 21(3) which requires application and interpretation of the law to be consistent with internationally recognized human rights, and without adverse discrimination.

The ICC may also apply ‘principles and rules of law as interpreted in its previous decisions’.⁴⁴ The ICC is not however bound by its previous decisions; it has no equivalent to the common law principle of *stare decisis*. The ICTY has frequently had recourse to judicial decisions for determining issues of law, and has constructed a system of precedents for dealing with its own jurisprudence.⁴⁵ The ICTY and ICTR have had reference to domestic, as well as international, case law.⁴⁶ Domestic case law is a major material source of evidence about international criminal law. However, a caveat must be entered in this regard. The assertions of international law in domestic cases can be affected by local idiosyncrasies. These can arise from the domestic statutes that are being evaluated or applied, or from a court seeing international criminal law through a distinctly national lens.⁴⁷

Finally, although the writings of scholars are not, in themselves, sources of international criminal law, it is possible to have recourse to the views of scholars.⁴⁸ However, care must always be taken to ensure that the statements relied on are accurate statements of the law as it stands, rather than a statement of how the author would like the law to be; this is important, not least because of the *nullum crimen sine lege* principle.⁴⁹

1.4 International criminal law and other areas of law

International criminal law relates to other areas of international law. The three areas for which an understanding is the most important are human rights law, international humanitarian law and the law relating to State responsibility.

1.4.1 International criminal law and human rights law

The development of crimes against humanity and the law of human rights was partially inspired by a wish to ensure that the atrocities that characterized Nazi Germany were not repeated. Thus the modern law of human rights and a considerable part of international criminal law have a common base.⁵⁰ More recent developments in the enforcement of international criminal law, in particular the creation of the two ad hoc Tribunals, were introduced in response to mass abuses of human rights by States against their own citizens or others within their territory. International criminal law developed in this context to respond to egregious violations of human rights in the absence of effective alternative mechanisms.

⁴⁴ *Ibid.*, Art. 21(2). ⁴⁵ *Aleksovski* ICTY A. Ch. 24.3.2000 paras. 89–115.

⁴⁶ For example, see *Tadić* ICTY A. Ch. 15.7.1999 paras. 255–70.

⁴⁷ See Leila Sadat Wexler, ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’ (1994) 32 *Columbia Journal of International Law* 289.

⁴⁸ For example, *Krstić* ICTY A. Ch. 19.4.2004 para. 10; *Stakić* ICTY T. Ch. II 31.7.2003 para. 519.

⁴⁹ See section 1.5.1.

⁵⁰ See, e.g. R. Emilio Vinuesa, ‘Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law’ (1998) 1 *YIHL* 69, 70–6.

Human rights obligations are imposed primarily on States, and it is frequently State agents who are the transgressors; where States are not implementing their human rights obligations, the principles of international criminal law are a useful and necessary alternative to State responsibility. The similarities in the objectives of both bodies of law are clear; both seek to provide a minimum standard of humane treatment. Both, unlike most other branches of international law, have a direct impact on individuals.

The international instruments on human rights played an obvious part in the drafting of the Statutes of the two ad hoc Tribunals and in the Statute of the ICC.⁵¹ And the ad hoc Tribunals have used human rights law, and decisions of international bodies applying that law, to assist them in their interpretation of substantive international criminal law and in establishing new procedural concepts of law. For example, the ICTY in *Kunarac*⁵² explained its past practice thus:

[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law.

The ICTR has used human rights jurisprudence on hate speech and freedom of expression to assist it in drawing the boundaries of the offence of direct and public incitement of genocide in the case of the Rwandan Radio Station RTLM.⁵³ In the area of international procedural law and, in particular, the right to a fair trial, the Tribunals have been especially ready to draw from human rights law. In *Dokmanović*, for example, the ICTY affirmed that an arrest must be made ‘in accordance with procedures prescribed by law’, as indicated in Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 9(1) of the International Covenant of Civil and Political Rights.⁵⁴ In *Tadić*, the Appeals Chamber recognized that a general principle of law may have its source in human rights instruments, in that case the principle that the Tribunal had to be ‘established by law’.⁵⁵

Nonetheless, although there are overlaps between human rights law and international criminal law, they are not synonymous, and there are dangers in treating them as being so. Almost every international crime would be a violation of human rights law, but the converse does not apply. International criminal courts and tribunals do not exist to prosecute breaches of the whole panoply of human rights. Further, human rights obligations are primarily imposed upon States, not individuals, and it is for

⁵¹ See, e.g. the provisions on the rights of the accused in Art. 21 of the ICTY Statute and Art. 20 of the ICTR Statute, largely reproducing Art. 14(1) to (3) and (5) of the International Covenant on Civil and Political Rights; the procedures in the ICC Statute are very heavily influenced by human rights instruments, but see in particular Arts. 55 and 67.

⁵² *Kunarac* ICTY T. Ch. II 22.2.2001 para. 467.

⁵³ *Nahimana, Barayagwiza and Ngeze* ICTR T. Ch. 3.12.2003 paras. 983–1010.

⁵⁴ See *Mrkšić, et al* ICTY T. Ch. II 22.10.1997 paras. 59–60.

⁵⁵ *Tadić* ICTY A. Ch. 2.10.1995. paras. 42–7.

States to decide how they will enforce them on their own agents; except in the case of the most serious abuses, this will not often be by criminalizing the activity concerned. Finally, whereas human rights norms may be given a broad and liberal interpretation in order to achieve their objects and purposes, in international criminal law there are countervailing rights of suspects that are protected through principles requiring that the law be strictly construed and that ambiguity be resolved in favour of the accused.

As the case law of the two Tribunals and, in time, the ICC grows, there will be less of a need for these courts to have recourse to human rights jurisprudence to supplement the sources of international criminal law.

1.4.2 International criminal law and international humanitarian law

International criminal law also shares common roots with international humanitarian law, the body of law designed to protect victims of armed conflict. Large areas of international humanitarian law are now criminalized as war crimes. Thus, international humanitarian law serves as a point of reference in understanding and interpreting the corresponding war crimes provisions. As with human rights norms, care must be taken before transposing humanitarian law standards directly into international criminal law; the latter has distinct principles of interpretation. These issues are discussed further in Chapter 12.

1.4.3 International criminal law and State responsibility

International criminal law in the sense in which we use it concerns the criminal responsibility of individuals, not States. The responsibility of a State under international law is a matter for a separate branch of international law, and is not dependent upon the legal responsibility of an individual. If an agent of a State is convicted of an international crime the act in question may, depending upon the circumstances, be attributable to the State, in which case that State may also be internationally responsible. The same act therefore can give rise to both individual criminal responsibility and State responsibility.⁵⁶ For example, an agent of Libya was convicted of offences in relation to the aircraft explosion over Lockerbie in 1988, and the governments of the United Kingdom and the United States separately made claims for compensation from Libya.⁵⁷

⁵⁶ In *Furundžija*, the ICTY stated: 'Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers.' (ICTY T. Ch. II 10.12.1998 para. 142.) For the relationship between State and individual responsibility, see further André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615.

⁵⁷ See section 9.5.

The question of whether acts of a State can be categorized under international law as *criminal* acts is one of some controversy. Draft articles on State responsibility prepared by the International Law Commission in 1976 used the term ‘international crime’ to refer to an internationally wrongful act by a State which results from the breach by that State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime.⁵⁸ But there were objections to the concept of criminal responsibility, many being based on the nature of the State. It is very difficult to apply elements of criminal liability such as *mens rea* to States. There is also the problem of punishment. In practice no international court or tribunal has ever provided for punishment of States different in kind from the law concerning tortious or delictual wrongs of a State. The final version of the draft articles of the ILC on State responsibility no longer uses the concept of State crime, but characterizes the acts concerned as ‘serious breaches of obligations under peremptory norms of general international law’.⁵⁹

1.5 A body of criminal law

International criminal law is double-structured, comprising both international law and criminal law. It should be appraised from the standpoints of both bodies of law. Its sources are those of international law, but its consequences are penal.⁶⁰ As a body of international law it requires an understanding of the sources and interpretation of international law. But it is also criminal law and as such needs substantive provisions that are clear and exact rather than the often more imprecise formulations of international law. Further, the relevant international courts and tribunals require methods and procedures proper to a criminal court, with due regard to the rights of the accused at all stages of the investigation and court procedures.

Certain fundamental principles of national criminal law systems have now become entrenched in international law, and more particularly, in human rights law. As we have seen in section 1.4.1, international criminal law has been influenced strongly by human rights law. One aspect of human rights law with a close analogue in criminal law theory is the prohibition of retroactive criminal prohibitions and penalties (sometimes referred to together as the principle of legality or *nullum crimen sine lege*).⁶¹ As shown below, this principle is important both in the application of the law and in the drafting of the instruments of the international courts and tribunals. Due to the relative imprecision of the nature and content of international law, the principle has greater prominence in international than in national courts.

⁵⁸ Art. 19.2 of the 1976 draft articles.

⁵⁹ Arts. 40 and 41 of the draft articles on Responsibility of States for Internationally Wrongful Acts (A/CN.4/L.602/Rev.1).

⁶⁰ On the nature of criminal law, see Glanville Williams, ‘The Definition of Crime’ (1955) 8 *Current Legal Problems* 107.

⁶¹ See generally, A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd edn, Oxford, 2003) ch. 1.

1.5.1 *Nullum crimen sine lege*

This principle has two aspects: non-retroactivity and clarity of the law. It is a fundamental principle of criminal law that criminal responsibility can only be based on a pre-existing prohibition of conduct that is understood to have criminal consequences. Article 15 of the International Covenant on Civil and Political Rights (ICCPR) states that:

No one shall be held guilty on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed . . . Nothing in this article shall prejudice the trial of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the community of nations.⁶²

Claims that prosecutions for international crimes violated this principle predate the ICCPR. The Nuremberg and Tokyo IMTs both faced claims that prosecution of crimes against peace involved violations of the *nullum crimen* principle. The Nuremberg IMT, with which the Tokyo IMT agreed, responded by asserting that crimes against peace were already criminalized in international law⁶³ and that, anyway:

The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong was allowed to go unpunished.⁶⁴

At the time, which was before the modern law of human rights, the Nuremberg IMT may have been correct about the law on point. On the other hand, it is possible that the prohibition of retroactive criminal laws was a general principle of law by then,⁶⁵ and the retroactive nature of liability for crimes against peace has been used to criticize the Nuremberg and Tokyo IMTs.⁶⁶

When drafting the Statute of the ICTY, the UN Secretary-General was sensitive to such critiques, stating that:

[T]he application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an

⁶² International Covenant on Civil and Political Rights, Art. 15. ⁶³ See section 13.1.2.

⁶⁴ Nuremberg IMT Judgment (1947) 41 *AJIL* 172 at 217.

⁶⁵ See Gordon Ireland, 'Ex Post Facto From Rome to Tokyo' (1946) 21 *Temple Law Quarterly* 27; *contra* Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege In International Criminal Law' in Cassese, *Commentary*, 733 at 740.

⁶⁶ See sections 6.3.2 and 6.4.2.

international tribunal prosecuting persons responsible for serious violations of international humanitarian law.⁶⁷

This statement emphasizes the fact that if a rule reflects customary law it will not be necessary for the relevant court to establish whether the parties to the conflict were Parties to the relevant treaty. But it is misleading in its formulation. The important issue from the perspective of the *nullum crimen* principle is whether the treaty was applicable to the relevant armed conflict, not whether it reflected customary international law. There is nothing in the *nullum crimen* principle in general or in Article 15 of the ICCPR⁶⁸ that requires that any particular source of international law provide the prohibition.⁶⁹

Suggestions that customary international law does not suffice to found criminal liability⁷⁰ are based on a strict construction of the *nullum crimen* principle (*nullum crimen sine lege scripta*),⁷¹ which, whilst applicable in some domestic legal orders, is not the principle applicable in international law.⁷² There is no reason in principle why customary international law cannot be used to form the relevant criminal law⁷³ and the ICTY has consistently taken this view.⁷⁴

The general practice of the ICTY has been to adopt a fairly relaxed standard to the *nullum crimen* principle.⁷⁵ However, in the *Vasiljević* case, a Trial Chamber asserted that:

[f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of his acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.⁷⁶

Owing to their view that customary law did not provide a sufficiently clear definition of the offence of ‘violence to life and person’, the Chamber refused to convict the defendant of that charge.⁷⁷ It is true that excessively vague offences can violate the *nullum crimen* principle, but it is questionable whether in this particular case, the

⁶⁷ Report of the Secretary General Pursuant to Paragraph 2 of Security Council resolution 808, UN Doc. S/25704, para. 34.

⁶⁸ Nor in the ECHR, Art. 7.

⁶⁹ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp, 2002) 127–87.

⁷⁰ Vladimir Djuro-Degan, ‘On the Sources of International Criminal Law’ (2005) 4 *Chinese Journal of International Law* 45 at 67.

⁷¹ ‘No crime without written law’. ⁷² Alain Pellet, ‘Applicable Law’ in Cassese, *Commentary*, 1051 at 1057–8.

⁷³ *Ibid.* ⁷⁴ See, for example, *Tadić* ICTY A. Ch. 2.10.1995 para. 94.

⁷⁵ William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) 63–7.

⁷⁶ *Vasiljević* ICTY T. Ch. I 29.11.2002 para. 193. ⁷⁷ *Ibid.*, paras. 203–4.

Tribunal's finding that the international law on the subject was excessively vague was correct.⁷⁸ This is particularly the case as clarification of the ambit of offences through case law does not inherently fall foul of the *nullum crimen* principle.⁷⁹ Judicial creation of crimes, which some have claimed the ICTY has done,⁸⁰ would.

The *nullum crimen* principle played an important role in the drafting of the ICC Statute. The ILC draft Statute with which the negotiations began⁸¹ did not contain definitions of the crimes within the jurisdiction of the ICC, the ILC maintaining that the Statute should be 'primarily an adjectival and procedural instrument'.⁸² There was soon however a move to define the crimes in the Statute with the clarity and precision needed for criminal law and it was with that objective that the definitions of crimes and, later, the elements of crimes were set out. The wish of the negotiating States to ensure that they knew what they were signing up to may have been at least as strong a motivating factor as the principle of *nullum crimen*.

The Statute itself contains a strong restatement of the *nullum crimen* principle. Article 22 reads in part:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

The first sentence of the second paragraph was intended to prevent the ICC from engaging in expansions of criminal liability not mandated by the States Parties.

1.5.2 *Nulla poena sine lege*

This, related, principle requires that there are defined penalties attached to criminal prohibitions.⁸³ In customary law, the punishment for international crimes may include the death penalty⁸⁴ though many States have undertaken international obligations not to impose such a penalty, or may not permit that sentence in their domestic law.

It appears that concerns about the *nulla poena* principle also caused the Secretary-General, when drafting the ICTY Statute, to require the Tribunal to 'have recourse to the general practice regarding prison sentences in the Courts of the former Yugoslavia'.⁸⁵ The ICTR Statute has a similar provision, but with reference to Rwandan sentencing practices.⁸⁶ The fact that both States provide for the death

⁷⁸ See Antonio Cassese, 'Black Letter Lawyering vs Constructive Interpretation: The Vasiljević Case' (2004) 2 *JICJ* 265.

⁷⁹ See Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of the Law?' (2004) 2 *JICJ* 1007; Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (London, 2001) 281–92.

⁸⁰ Mettraux, *International Crimes*, 13–18. ⁸¹ See section 8.2.

⁸² Report of the International Law Commission on the work of its forty-sixth session, UNGAOR 49th session Suppl. No.10, A/49/10 (1994) at 71.

⁸³ See chapter 18. ⁸⁴ *Klinge III LRTWC* 1 at 3.

⁸⁵ ICTY Statute, Art. 24. Lamb, '*Nullum Crimen*' 758–9. ⁸⁶ ICTR Statute, Art. 23.

penalty, but the Tribunal cannot impose that sentence has made this difficult to apply. The Rome Statute also contains an article entitled ‘*nulla poena sine lege*’: Article 23. This states, uncontroversially: ‘A person convicted by the Court may be punished only in accordance with this Statute.’⁸⁷

Further reading

- Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000).
- M. Cherif Bassiouni, *International Criminal Law* (2nd edn, New York, 1999), vol. I, ch. 1.
- Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp, 2002) 127–87.
- Bruce Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and International Justice* (Oxford, 2003) ch. 1.
- Antonio Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks’ and Erik Mose, ‘Impact of Human Rights Conventions on the two *ad hoc* Tribunals’ in Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijhoff, 2003) chs. II and VIII respectively.
- Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, 2005) Introduction, chs. 1 and 5.
- Vladimir Djuro-Degan, ‘On the Sources of International Criminal Law’ (2005) 4 *Chinese Journal of International Law* 45.
- Nina H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford, 2000).
- Krystina Marek, ‘Criminalising State Responsibility’ (1978–1979) 14 *Revue Belge de Droit Internationale* 460.
- Timothy L. H. McCormack, ‘From Sun Tzu to the Sixth Committee, The Evolution of an International Criminal Law Regime’ in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes, National and International Approaches* (The Hague, 1997) 31.
- Alain Pellet, ‘Applicable Law’ in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute: A Commentary* (Oxford, 2002) 1051.
- Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, 1997).
- Georg Schwarzenberger, ‘The Problem of an International Criminal Law’ (1950) 3 *Current Legal Problems* 263.

⁸⁷ See William Schabas, ‘Article 22’ in Triffterer *Observers’ Notes*, 463.

2

The Objectives of International Criminal Law

2.1 Introduction

The assertion of criminal jurisdiction over a person is amongst the most coercive activities any society can undertake. Punishing a person involves conduct towards them which requires a deprivation of some form of their liberty or a setting-back of their property interests.¹ Such a deprivation of liberty or property requires justification.² Furthermore, criminal law is not, in itself a good or a bad thing. It is a tool, designed to achieve certain ends. Some of those ends may be better pursued by means other than prosecutions.

It has been suggested by some that the justifications for punishment differ between international criminal law and criminal law at the domestic level.³ It is true that the general situations in which international criminal law is invoked are those of mass criminality, which are not the normal case in domestic criminal law enforcement.⁴ In addition, certain additional aims for international criminal law tend to be grafted onto those which are postulated for domestic systems of criminal law. These include the telling of the history of a conflict, distinguishing individual from group responsibility, reconciling societies and capacity building in domestic judicial systems.⁵

It is also true that international society is not the same as domestic society. Nonetheless, much of the implementation of international criminal law is intended to be at the domestic level, therefore it is questionable whether the objectives of punishment ought to differ significantly between international and municipal criminal law. It has also been suggested that the justifications for punishment at the international level are inconsistent, and at times incoherent.⁶ Even if this were the case, it would not necessarily undermine international criminal law. The same criticism could

¹ Indeed, in certain cases, unlawful imprisonment is, itself, an international crime. See, e.g. ICC Statute, Arts. 7(1)(e), 8(2)(a)(vii).

² See, generally, Lucia Zedner, *Criminal Justice* (Oxford, 2004) 84–111.

³ See, e.g. Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2004–2005) 99 *NorthWestern Law Review* 539.

⁴ Although not all instances where international criminal law is relevant occur against this background.

⁵ Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1 at 6–7.

⁶ See, e.g. Immi Tallgren, 'The Sense and Sensibility of International Criminal Law' (2002) 13 *EJIL* 561; but see Paul Roberts and Nesam McMillan, 'For Criminology in International Criminal Law' (2003) 1 *JICL* 315.

be made about the justifications for punishment at the domestic level and this has not led to widespread calls for the abolition of criminal law.⁷ It is true however that international criminal lawyers and the Tribunals have at times been profligate in their assertions about the benefits and purposes of prosecutions. There is a risk in doing so of setting unreasonable expectations for what criminal law can do.

It must also be remembered at the outset, that the turn to criminal justice has not occurred in a vacuum. It has occurred in part as a response to dissatisfaction with the other methods of dealing with international criminals, which were either extrajudicial executions, or ignoring them. The first of these is clearly unlawful now.⁸ The second, which was said by Robert Jackson to ‘mock the dead and make cynics of the living’⁹ is one which is rarely, if ever lawful.¹⁰

It is the purpose of this chapter to introduce some of the justifications for punishment and the purposes it seeks to achieve,¹¹ and to discuss some of the alternatives to it alongside their positive and negative aspects. We shall also consider the wider goals which are claimed for international criminal law and discuss whether those goals can be met.

2.2 The aims of international criminal justice

Broadly speaking, there are two approaches to justifying punishment: forward-looking (teleological); and those that focus on the crime itself (deontological).¹² In practice, most criminal justice systems tend to be defended on the basis of a mixture of the two.¹³ There are a number of different aims that have been postulated for punishment in international criminal justice. The primary place in which the ICTY (and ICTR) has discussed the aims of punishment is in relation to its sentencing practice.¹⁴ The two main aims that the ICTY has asserted for its practice are retribution and deterrence.¹⁵ It has also at times asserted the relevance of rehabilitation of offenders,¹⁶ and other objectives.

⁷ Although see, e.g. J. G. Murphy, ‘Marxism and Retribution’ (1973) 2 *Philosophy and Public Affairs* 217; Stanley Cohen, ‘Alternatives to Punishment – The Abolitionist Case’ (1991) 25 *Israel Law Review* 729; Philip Allott, *The Health of Nations* (Cambridge, 2003) 62–9.

⁸ Additional Protocol I, Art. 75, which represents customary international law, see *Hamdan v. Rumsfeld* 126 S Ct 2749, 2997 (2006); Geneva Conventions 1949, common Art. 3; ICCPR Art. 6, See, e.g. *Suarez de Guerrero v. Colombia* (Human Rights Committee 45/79). ECHR Art. 2.

⁹ Robert Jackson, ‘Report to the President’ (1945) 39 *AJIL* 178, 182. ¹⁰ See section 2.3.3.

¹¹ For more general surveys of the justification of punishment see, e.g. David Garland and Anthony Duff, *A Reader on Punishment* (Oxford, 1994); David Garland, *Punishment and Modern Society* (Oxford, 1990).

¹² For a useful introduction at the domestic level see Stanley Cohen, ‘An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment’ (1981–1982) 27 *McGill Law Journal* 73.

¹³ Which is acceptable, see Herbert L. A. Hart, *Punishment and Responsibility* (Oxford, 1968) ch. 1.

¹⁴ On which, see section 18.2 and William Schabas, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) 554–61.

¹⁵ See, e.g. *Aleksovski* ICTY A. Ch. 24.3.2000 para. 185. See also SC res. 827 (1993) on the ICTY.

¹⁶ *Momir Nikolić* ICTY T.Ch. I 2.12.2003 para. 85.

2.2.1 Retribution

Retributive theories have a long history in criminal law, but are now often associated with Immanuel Kant.¹⁷ They focus on the necessity of punishing those who have violated societal norms, irrespective of the possible future benefits of prosecution, on the basis that the offenders deserve punishment for what they have done. The specific focus of this approach is the perpetrators themselves, on the basis that to treat them as a means to another end (as teleological approaches are wont to do) is to fail to respect them as full persons (i.e. reasoning moral agents). In other words, such theories claim that to refuse to focus on the autonomous actions of the perpetrators by holding them responsible for those actions, is to treat the perpetrator as a lesser being, as responsibility is the concomitant of autonomy and full personhood.

Modern retributive theorists are careful to distinguish their position from that of simple vengeance. It is clear that the international criminal tribunals, when dealing with retributive justifications for punishment, have tried to avoid conflating the *lex talionis* and retributive justifications of punishment.¹⁸ For example the ICTY in the *Aleksovski* case asserted that retribution

is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognised by Trial Chambers of this International Tribunal as well as Trial Chambers of the International Criminal Tribunal for Rwanda. Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show ‘that the international community was not ready to tolerate serious violations of international humanitarian law and human rights’.¹⁹

Analogously, albeit in a passage that appears to place rather a lot under the rubric of retribution, the *Nikolić* case stated that

[i]n light of the purposes of the Tribunal and international humanitarian law generally, retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims. Furthermore, within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.²⁰

One positive aspect of retributivism was pointed out by the Trial Chamber in the *Todorović* case; it ‘must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed

¹⁷ See generally R. A. Duff and D. Garland, ‘Thinking About Punishment’ in Duff and Garland, *A Reader on Punishment*, 1, 2–3.

¹⁸ The *lex talionis* of the Biblical Old Testament is often expressed through the maxim ‘an eye for an eye, a tooth for a tooth’.

¹⁹ *Aleksovski* ICTY A. Ch. 24.3.2000 para 185. ²⁰ *Momir Nikolić* ICTY T. Ch. I 2.12.2003 paras. 86–7.

must be proportionate to the wrongdoing, in other words, that the punishment be made to fit the crime'.²¹ Still, there are problems with a purely retributive approach. Some claim that it is important, for example, to move beyond a culture of blame.²² Critics of retributivism can argue that, as it appears to demand punishment without regard to cost, it sets impossibly high standards, particularly in relation to disadvantaged societies, and requires punishment even where it is pointless. There may be merit in this position, although a pure Kantian could respond that it misses the point in that the question is not what is practicable, but what is morally right. Even so, there is a risk of moral absolutism and insensitivity to context in such a position.

2.2.2 Deterrence

Deterrence is perhaps the best known of the justifications of punishment. Such theories were championed in particular by utilitarian political theorists such as Jeremy Bentham, who, in distinction to retributivists, focused on the future-related benefits of prosecution. It is a commonplace that punishment ought to be imposed to prevent both the offender and the population more generally from engaging in prohibited conduct. Equally, there are risks involved in deterrence. The first is that there is nothing inherent in utilitarianism that prevents exceedingly heavy punishment, and indeed punishment of the innocent, to achieve its goals. After all, it is likely that punishing close family members of a criminal for their misdeeds would quite possibly give a greater degree of deterrence than punishing criminals directly. Also, threatening torturous punishment for even minor violations of the law could prevent such breaches. But that is the logic of the police State.

There are two other more general critiques of deterrence-based theories in international criminal law. The first is a philosophical one. Retributivists, in particular those of a Kantian persuasion, are right to point out that deterrence theories, especially those that look to general deterrence (i.e. deterrence of others, who see the punishment of others and decide not to engage in criminal conduct)²³ see people merely as a means to an end, which is inconsistent with their moral worth as human beings. The second is that deterrence-based approaches treat people as rational calculators, who carefully weigh up the costs and benefits of their actions, and this does not reflect the reality of the type of decision-making that precedes decisions to commit crimes.²⁴ Such critiques have led the ICTY to accept deterrence as a justification for punishment, but only within limits. For example, in the *Tadić* sentencing appeal the Appeal Chamber, when referring to deterrence, said that

²¹ *Todorović*, ICTY T.Ch. I 31.7.2001 para. 29. See also *Plavšić* ICTY T. Ch. III 27.2.2003 para. 23.

²² See, e.g. Desmond Tutu, *No Future Without Forgiveness* (London, 1999).

²³ The other type of deterrence, particular deterrence, is based on preventing particular offenders engaging in such conduct again, as they become all too aware of the costs of such behaviour.

²⁴ David Wippman, 'Atrocities, Deterrence and the Limits of International Justice' (1999) *Fordham International Law Journal* 473; Drumbl, 'Collective Violence and Individual Punishment' 590–1.

it is a consideration that may legitimately be considered in sentencing . . . Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.²⁵

Furthermore, the Appeals Chamber in the *Nikolić* case attempted to deal with some of the critiques of unmodified deterrence theories as follows:

During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of *respect* for the rule of law and not simply the *fear* of the consequences of breaking the law, and thereby deterring the commission of crimes. One may ask whether the individuals who are called before this Tribunal as accused are simply an instrument to achieving the goal of the establishment of the rule of law. The answer is no. Indeed, the Appeals Chamber has held that deterrence should not be given undue prominence in the overall assessment of a sentence.²⁶

Although the reasoning it contains is not a complete answer to the critiques above, as this quote implies, more sophisticated deterrence-based theories work on a more subtle level. They do not assert that deterrence works at the level of rational calculation, but at a preliminary stage, where people are (consciously or otherwise) setting up the available options. Where people simply think that certain options are not (in part, morally) open to them, they do not enter the second calculation of their costs and benefits, perhaps similarly to the way that now people simply do not think of settling disputes by duelling. This is linked to the denunciatory/educative function of punishment, which will be discussed below.

Like most criminal theorists, the ICC Statute accepts that there is a role for deterrence in international criminal law.²⁷ Preambular paragraph 5 of the Statute asserts that the parties are '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. It might be noted that, in the past, the absence of enforcement of international criminal law, and the small number of offenders that international criminal tribunals have prosecuted, undermined the goal of deterrence, as people do not think that they are likely to be punished.²⁸ Those doubting the possibility of deterrence in international criminal law have pointed to the fact that the creation of the ICTY did not stop crimes being committed in former Yugoslavia between 1993 and 1995. In that instance however, it might be noted that the Tribunal was a fledgling institution, with very few people in custody. Moreover, it was often thought that the Tribunal would be likely to be bargained away in a peace deal. Thus the example may not be transferrable to

²⁵ *Tadić* ICTY A.Ch. 26.1.2000 para. 48. ²⁶ *Momir Nikolić* ICTY T.Ch. I 2.12.2003 paras. 89–90.

²⁷ See also, more generally Payam Akhavan, 'Can International Criminal Justice Prevent Future Atrocities?' (2001) 85 *AJIL* 7.

²⁸ See Tom Farer, 'Restraining the Barbarians: Can International Law Help?' (2000) 22 *Human Rights Quarterly* 90 at 92–3.

international criminal law in general.²⁹ If a culture of accountability is created, and domestic courts play their part in prosecution of international crimes, as the drafters of the ICC Statute intended, then this critique may become blunted over time. There is already some anecdotal evidence of deterrence operating in relation to the international criminal tribunals, although there is no cause for complacency.³⁰

2.2.3 Incapacitation

Incapacitation is another utilitarian justification of punishment. It has links to individual deterrence, in that it seeks to prevent crimes by keeping the person in detention.³¹ This has not had a great influence on international criminal law,³² although Judge Röling, in the Tokyo IMT, asserted that the justification for prosecuting aggression, in spite of the fact that it was not previously criminal, was that the defendants were dangerous and their influence on Japan had to be excluded by their imprisonment.³³ Incapacitative theories of punishment are controversial, as they rely on the imprecise science of determining who will reoffend and who will not. They do not focus on what has been done but, in effect, punish people for what they might do in the future.³⁴

2.2.4 Rehabilitation

Rehabilitation is a theory of punishment which can trace its history back to the eighteenth century,³⁵ and is based on the idea that the point of criminal sanctions is reformation of the offender. It is a theory of punishment that has not made great advances in international criminal law, in part because the main perpetrators of international crimes are not thought to be the appropriate beneficiaries of rehabilitation. Nonetheless, there are occasions upon which the international tribunals have mentioned rehabilitation in relation to lower level offenders. Most notable in this regard is the decision of the Trial Chamber in the *Erdemović* case. Erdemović was a young Bosnian Croat who took part in the Srebrenica massacre under duress. In sentencing him to a relatively short, five-year period of imprisonment, the Trial Chamber noted his corrigible personality and that he was 'reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so'.³⁶

²⁹ Paul Williams and Michael Scharf, *Peace With Justice: War Crimes and Accountability in the Former Yugoslavia* (Oxford, 2003) 21–2.

³⁰ *Ibid.* ³¹ See, e.g. Zedner, *Criminal Justice*, 98–101.

³² Drumbl, 'Collective Violence and Individual Punishment', 589.

³³ Dissenting Opinion of the Member from the Netherlands, 10–51.

³⁴ Zedner, *Criminal Justice*, 100.

³⁵ Zedner, *Criminal Justice*, 95–8. See also Andrew von Hirsch and Andrew Ashworth, *Principled Sentencing* (Oxford, 1998) ch. 3.

³⁶ *Erdemović* ICTY T. Ch. 5.3.1998 para. 16.

2.2.5 Denunciation/education

One of the more modern theories designed to justify punishment, and one which has considerable support, is that of communication/denunciation.³⁷ In other words criminal procedures and punishment are ‘an opportunity for communicating with the offender, the victim and wider society the nature of the wrong done’.³⁸ This is designed to engage offenders, and attempt to make them understand what was wrong with what they have done,³⁹ whilst also reaffirming the norm in the community and educating society about the unacceptable nature of the conduct condemned. The ICTY has asserted the relevance of this function in the *Kordić and Čerkez* case, referring to ‘the educational function ... [which] ... aims at conveying the message that rules of international humanitarian law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.’⁴⁰

The fact that there are lively debates over whether the term genocide may be applied to certain events implies that the expressive function of punishment and labelling is important in international criminal law.⁴¹ The importance of the expressive function of punishment was seemingly accepted by the ICTY Appeals Chamber in the *Kršić* appeal when it said that:

Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.⁴²

2.2.6 Broader goals

Justice for victims

There are certain other goals which have been suggested for international criminal law, all of which have a utilitarian focus, and relate in some ways to the future of the societies in which international crimes are committed. The first of these is that

³⁷ R. Anthony Duff, *Punishment, Communication and Community* (Oxford, 2001); Andrew von Hirsch, *Censure and Sanctions* (Oxford, 1993) ch. 2; William Wilson, *Central Issues in Criminal Theory* (Oxford, 2002) 61–5.

³⁸ Zedner, *Criminal Justice*, 109.

³⁹ See Wilson, *Central Issues*, 62–3; Klaus Gunter, ‘The Criminal Law of “Guilt” as a Subject of a Politics of Remembrance in Democracies’ in Emiliós Christodoulidis and Scott Veitch (eds.), *Lette’s Law: Justice, Law and Ethics in Reconciliation* (Oxford, 2001) 3.

⁴⁰ *Kordić and Čerkez* ICTY A. Ch. 17.12.2004 paras. 1080–1.

⁴¹ Diane Marie Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 *ICLR* 93; see also Robert Sloane, ‘The Expressive Capacity of International Punishment’, Columbia Law School Public Law and Legal Theory Working Paper 06–112, available at <http://ssrn.com/abstract=900641>.

⁴² *Kršić* ICTY A.Ch. 19.4.2004 paras. 36–7.

prosecutions may engender a sense of justice having been done, or ‘closure’ for victims, either on the basis that seeing their persecutors prosecuted will have that result, or that the process of testifying will do so. Such a role in relation to victims was noted by the ICTY in the *Nikolić* case, which asserted that ‘punishment must therefore reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crimes’.⁴³

Recording history

The next postulated goal is that of truth telling. The claim is that the process of subjecting evidence to forensic scrutiny will set down a permanent record of the crimes that will stand the test of time.⁴⁴ Some go further to suggest that trials should be structured to create a narrative which will be useful to a post-conflict society.⁴⁵ The judgments of international criminal tribunals have been lengthy, and have engaged in detailed discussion of the background of the conflicts which have led to the crimes, and have been criticized for doing so.⁴⁶

Post-conflict reconciliation

Linked both to the satisfaction of victims and the telling of truths about international crimes, which has been said to form the basis of a society moving beyond its schisms, it has been claimed that providing a sense of justice through prosecutions for international crimes can facilitate societal reconciliation and provide the preconditions for a durable peace.⁴⁷ This is often expressed in the aphorism ‘no peace without justice’.⁴⁸ Evidence from Latin America, where policies of amnesty were rife in the 1970s but where prosecutions have continuously been sought and are now beginning to occur, provides some support for the statement. There is, however, no clear empirical proof of this, and other societies have managed without trials⁴⁹ (although some would say that those societies are not reconciled).⁵⁰

The Security Council provided significant support for the interconnection of peace and justice when it determined that in the situations in former Yugoslavia and Rwanda, prosecutions would assist in reconciliation and a return to peace in the area.⁵¹ It is interesting that in the *Tadić* jurisdictional appeal, the Appeals Chamber of the ICTY simply said that such a decision was within the competence of the Council

⁴³ *Momir Nikolić* ICTY T. Ch. I 2.12.2003 para. 86.

⁴⁴ See e.g. *ibid.* para. 60. Cassese, ‘Reflections on International Criminal Justice’, 6.

⁴⁵ Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, 1997).

⁴⁶ José Alvarez, ‘Rush to Closure: Lessons of the Tadić Judgment’ (1998) 96 *Michigan Law Review* 2061; José Alvarez, ‘Lessons from the Akayesu Judgment’ (1998–1999) 5 *International Law Students’ Association Journal of International and Comparative Law* 359.

⁴⁷ See, e.g. Cassese, ‘Reflections on International Criminal Justice’, 6.

⁴⁸ Indeed, this is the name of one well-known NGO working in the area of international criminal law.

⁴⁹ See, e.g. Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London, 2001) ch. 12.

⁵⁰ See Richard Wilson, *The Politics of Truth and Reconciliation: Legitimizing the Post-Apartheid State* (Cambridge, 2001).

⁵¹ Although such a determination was necessary to invoke Chapter VII of the UN Charter to create the ICTY and ICTR.

to make, rather than entering into any discussion of the substantive merits of the point.⁵² Later, in the *Nikolić* case, the ICTY gave the idea more direct support.⁵³

The high tide mark of support for the link between criminal justice and peace in the ICTY came in the *Plavšić* case. Biljana Plavšić was co-President of the *Republika Sprksa* during 1992. She surrendered to the Tribunal and pleaded guilty to crimes against humanity, expressing her remorse and stating that in doing so she wished to 'offer some consolation to the innocent victims – Muslim, Croat and Serb – of the war in Bosnia and Herzegovina'.⁵⁴ In sentencing Plavšić to eleven years imprisonment, the Tribunal noted 'that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation.'⁵⁵

Further benefits of international trials

Certain benefits have also have been postulated, not of international criminal law in general, but of international trials. One of the most powerful of these is that international tribunals, with international judges, operating at a distance from the events themselves, are not as open to political manipulation or influence from actors in those societies, or unconscious bias on the part of the judges.⁵⁶ Nonetheless, there have been a number of claims before the ICTY, ICTR and SCSL that judges are biased.⁵⁷ It is also sometimes claimed that international judges are the best judges of international crimes.⁵⁸ There are two possible bases for these claims, the first being that international judges and tribunals are representative of the relevant community affected by international crimes, which is the community of all humanity. The second basis is more prosaic: that international judges are more familiar with the relevant law. It is true that domestic judges are less likely to be fully aware of the intricacies of international criminal law than some of their international counterparts. Indeed, some eminent and experienced international lawyers have sat on the international criminal tribunals.⁵⁹ However, not all judges who have sat on international criminal tribunals go to them professing expertise in international criminal law; an in-depth knowledge of the workings of a criminal trial is an equally useful background for an international criminal judge.⁶⁰

It has also been suggested that international tribunals are better able to investigate and prosecute offences which occur across State borders than domestic courts.⁶¹ This may be the case, but the extent to which it is true depends on the extent of the tribunal's jurisdiction and investigatory powers, which differ between the various courts. Finally

⁵² See section 7.2.4. ⁵³ *Momir Nikolić* ICTY T. Ch. I 2.12.2003 para. 60.

⁵⁴ *Plavšić* ICTY T. Ch. III 27.2.2003 para. 19. ⁵⁵ *Ibid.* para. 80.

⁵⁶ Cassese, 'Reflections on International Criminal Justice', 4, 7. ⁵⁷ See section 17.2.2.

⁵⁸ Cassese, 'Reflections on International Criminal Justice', 7.

⁵⁹ Two examples being Professor Antonio Cassese and Judge Mohamed Shahabuddeen.

⁶⁰ The late ICTY judge Sir Richard May was a judge in the UK, and an acknowledged expert on (UK) evidence law prior to his appointment to the tribunal.

⁶¹ Cassese, 'Reflections on International Criminal Justice', 8.

it has been suggested that an international criminal court would provide for uniformity in the process and law for punishing international crimes.⁶² There is some truth in this. Although there have been a number of different international criminal tribunals, with different procedures and different substantive law, the ICC Statute has promoted harmonization of the law at the domestic level. Equally, the value of uniformity is strongly linked to the merits of the law which becomes the standard.⁶³

2.2.7 *Can international criminal law fulfil these goals?*

As can be seen, there are a large number of promises that have been made on behalf of international criminal law. Nonetheless, scepticism has been expressed about the ability of international trials, or (international) criminal law to live up to those promises. If nothing else, such criticism provides a corrective to glib statements which treat international criminal law as a panacea for all ills and which fail to take into account that criminal accountability can only be one part of a response to conflict situations and criminal justice is only one aspect of any defensible vision of justice.

Some of the critiques of the aims of international criminal law are transpositions of cognate criticisms of criminal law at the domestic level to the international sphere. For example, it has been said, not without some justification, that the assertion that those deciding to commit crimes are not the rational calculators of deterrence theories, applies particularly strongly in the situations of mass criminality which characterize the stock-in-trade of international criminal law.⁶⁴ Instead such persons are driven by ideologies of irrational hate. International crimes also have longer-term and more complex causes than simple rational calculation. There is truth in this, but it must also be remembered that more sophisticated forms of deterrence theories rely on inculcating defence mechanisms against those ideologies themselves, as well as what people (including leaders) believe the possible options are.

Others relate to the broader aims that have been postulated for international criminal law. One such assertion is that criminal trials are not always the best place to seek to write history.⁶⁵ There are various aspects to this claim. In relation to the Nuremberg and Tokyo IMTs the claim, which was made, *inter alia*, by one of the judges of the Tokyo IMT was that ‘distortions of history did take place’, for, at times, political reasons.⁶⁶ For the most part such comments relate to the findings on conspiracy and aggression, rather than war crimes and crimes against humanity.

⁶² *Ibid.*

⁶³ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) at 167–84.

⁶⁴ David Wippman, ‘Atrocities, Deterrence and the Limits of International Justice’ Drumbl, ‘Collective Violence and Individual Punishment’, 590–1.

⁶⁵ Martha Minow, *Between Vengeance and Forgiveness* (Boston, 1998) 46–7.

⁶⁶ B. V. A. Röling, ‘The Nuremberg and Tokyo Trials in Retrospect’ in M. Cherif Bassiouni and Ved Nanda (eds.), *A Treatise on International Criminal Law* (Springfield, 1973) 590 at 600. See Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001); Richard Minear, *Victors’ Justice* (Princeton, 1971); but see also Yasuaki Onuma, ‘Beyond Victors’ Justice’ (1984) 9 *Japan Echo* 63 at 66.

There are more general points that may be made about criminal tribunals writing history. It is difficult to write the whole history of a period without straying beyond the bounds of the criminal trial, which is to try a specific person for specific conduct.⁶⁷ This gives rise to the concern that the trial may resolve into a political debate about the validity of the different historical accounts that are being told. It is indeed strange that in long-running conflicts which are the context to the commission of atrocities, a court should be the arbitrator between competing historical accounts.⁶⁸ Such events are not easily cognizable or interpretable through the medium of criminal law.⁶⁹ The rule-bound nature of criminal trials is not one designed to ensure a full discussion of history. As Judge Röling put it, there is a difference between the 'real truth' and the 'trial truth'.⁷⁰

Nevertheless, the contextual elements of international crimes, in particular in crimes against humanity and genocide,⁷¹ make it necessary that the larger context in which a person's actions must be placed is an issue at trial in which the defence is entitled to introduce evidence too. Furthermore, the nature of a fair trial process is that it gives those responsible for international crimes the opportunity to raise political propaganda and to attempt to delegitimize the process.⁷² This may be a necessary aspect of such trials, since the alternative, that of silencing the defence, is unacceptable.⁷³ The temporal, geographical and subject-matter jurisdiction of international criminal tribunals means that the story they can tell is by no means the full one,⁷⁴ even though some of the international criminal tribunals have used evidence of events outside their jurisdictional reach.⁷⁵

While such critiques do not substantially undermine the work done by those Tribunals in collecting and making public primary evidence such as documents and witness testimony, they do cast aspersions on the role of courts as presenters or interpreters of history. The evidence brought before some tribunals can however be very useful in combating later denial of such crimes (as has occurred in relation to the practice of the Nuremberg IMT and the ICTR). The practice of 'plea bargaining' in the Tribunals has been said by some Trial Chambers of the ICTY to assist in the

⁶⁷ Osiel, *Mass Atrocity*, ch. 3; although see Ruti Teitel, *Transitional Justice* (Oxford, 2000) 74–5.

⁶⁸ See Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1. Of course, sometimes a court itself is split over the history, as was the case, for example, in the Tokyo IMT. See Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague, 1997) 1 at 26–8.

⁶⁹ Koskenniemi, 'Between' 12–3.

⁷⁰ B. V. A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge, 1992) 50. Many would query whether there is one form of 'real truth'.

⁷¹ Both in customary law and in the ICC Statute and its concomitant Elements of Crimes, see chs. 10 and 11.

⁷² See generally Gerry Simpson, 'Politics, Sovereignty, Remembrance' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford, 2004) 47 at 49.

⁷³ See generally, Koskenniemi, 'Between'.

⁷⁴ José E. Alvarez, 'Crimes of Hate/Crimes of State: Lessons from Rwanda' (1999) 23 *Yale Journal of International Law* 365 at 375.

⁷⁵ Nahimana, Barayagwiza and Ngeze, ICTR T.Ch.1, 3.12.2003, paras. 100–4.

process of truth-telling,⁷⁶ but other chambers have doubted that the full story can be told without full trials.⁷⁷

It can also be questioned whether criminal trials and punishment of offenders can have the suggested cathartic effects for victims.⁷⁸ It is doubtful, given the focus in international criminal tribunals on higher level offenders, that many victims will have an opportunity to see those people who committed the particular offences against them come to trial (although national courts have a large role here). Evidence that the experience of testifying is helpful is mixed, with some victim-witnesses reporting that they felt better having testified, whilst others did not.⁷⁹ There have been suggestions that the ICTY and ICTR have not always been exemplary in their treatment of victim-witnesses. Nonetheless, the ICC Statute has various provisions providing for victims' participation in proceedings and for reparations.⁸⁰

Some of the most serious doubts that have been expressed about international criminal law relate to the claim that it promotes peace and reconciliation.⁸¹ It has been suggested that to require prosecutions will simply cause parties to conflicts to fight to the last.⁸² On the other hand there is anecdotal evidence of the ICC's deterrent effect in the DRC.⁸³ It is simply too early to say whether the optimists or pessimists are correct. The parties to the ICC Statute affirmed, in the preamble of that treaty, that the commission of international crimes threatens the 'peace, security and well being of the world'.⁸⁴ The ambivalent relationship between international criminal justice and peace is perhaps shown by the fact that the Security Council, using its powers to restore and maintain international peace and security under Chapter VII of the UN Charter, may not only refer a situation to the International Criminal Court, but also defer the activity of that court in certain circumstances.⁸⁵

2.2.8 Other critiques of criminal accountability

Despite the functions which prosecutions may serve, there are also many critiques of criminal accountability, and international tribunals in particular. International tribunals are expensive. The ICTY and ICTR have, between them cost overall in the region

⁷⁶ Jokić T. Ch. I 18.3.2004 para. 77.

⁷⁷ Dragan Nikolić T. Ch. II 18.12.2003 para. 122., see Schabas, *The UN International Criminal Tribunals*, 427–8.

⁷⁸ Jamie O'Connell, 'Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 *Harvard International Law Journal* 295.

⁷⁹ Eric Stover, 'Witnesses and the Promise of the Hague' in Eric Stover and Harvey Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge, 2004) 104.

⁸⁰ See sections 17.3.4 and 18.4. Emily Haslem, 'Victim Participation at the International Criminal Court' in McGoldrick *et al.* (eds.), *Permanent International Criminal Court* 315.

⁸¹ Anthony D'Amato, 'Peace v. Accountability in Bosnia' (1994) 88 *AJIL* 500; Ian Ward, *Justice, Humanity and the New World Order* (Aldershot, 2004) 131.

⁸² Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 *Human Rights Quarterly* 249.

⁸³ William 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) 18 *LJIL* 557 at 587, 588.

⁸⁴ ICC Statute, Preambular para. 3.

⁸⁵ Arts. 13 and 16 of the ICC Statute; see further sections 8.6, 8.8.

of \$4.5 billion.⁸⁶ This is unquestionably a huge sum of money, and the ICTR has been accused of financial irregularity.⁸⁷ To gain some perspective though, it might be noted that annual military spending in the US in 2005 was \$478 billion.⁸⁸ In addition, the international criminal courts prior to the ICC were set up almost entirely from scratch, and international tribunals, unlike their domestic counterparts, are almost entire criminal justice systems in themselves.

International tribunals are also (with the exception of the Special Court for Sierra Leone) located far away from the places where the crimes occurred.⁸⁹ This means that they are inaccessible to many of the victims and seen as responding more to an international audience than the purported beneficiaries.⁹⁰ This gives succour to those that argue that the creation of the tribunals was more a sop to the conscience of those who failed to prevent or bring an end to the crimes now being punished.⁹¹ Where trials are held further from the *locus delicti* they often encounter domestic resistance there, in part because of misrepresentation of their work and allegations of bias. There is also a lack of 'ownership' of international tribunals at the local level. Given that such tribunals tend to focus on those most responsible, it is also the case that most victims will not see their immediate oppressors punished. In situations of large-scale commission of crimes, however, it is difficult to imagine any criminal justice system that could fulfil the task of ensuring all international criminals were punished.⁹²

More generally, it has been questioned whether criminal law is an adequate mechanism to comprehend events involving international crimes, particularly large-scale international crimes like genocide. The critique was perhaps most strongly made by Hannah Arendt,⁹³ but others have also made similar points. Martti Koskeniemmi, for example, has said that 'sometimes a tragedy may be so great, a series of events of such political or even metaphysical significance, that punishing an individual does not come close to measuring up to it'.⁹⁴ A strong counterargument to such assertions is given by Mark Osiel, 'There is a sense in which this argument is true, but trivial. After all, many ordinary offenders commit multiple offences for which they cannot "repay" ... in fitting measure, within their remaining lifespan'.⁹⁵ It could be queried if trials are any worse at 'measuring up to it' as the other methods that have been suggested for dealing with such events, and Arendt was not against the prosecution of international crimes as such, although she was critical of aspects of some proceedings.⁹⁶

More generally, prosecutions of international crimes are open to the criticism that they are designed to legitimate those that create them. For example, the creation of the

⁸⁶ Steven Roper and Lilian Barria, *Designing Criminal Tribunals* (Aldershot, 2006) at 61. ⁸⁷ See section 7.3.3.

⁸⁸ *SIPRI Yearbook 2006* (Oxford, 2006) at 302. The next largest military spender is the UK with \$48.3 billion in 2005.

⁸⁹ Alvarez, 'Crimes of Hate'. ⁹⁰ *Ibid.*

⁹¹ See Gary John Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000) ch. 6.

⁹² William Schabas, 'The Rwanda Case: Sometimes It's Impossible' in M. Cherif Bassiouni (ed.), *Post Conflict Justice* (New York, 2002) 499.

⁹³ Lotte Kohler and Hans Saner (eds.), *Hannah Arendt/Karl Jaspers: Correspondence* at 54, cited in Mark Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 *Human Rights Quarterly* 118, 128.

⁹⁴ Koskeniemmi, 'Between', 2. ⁹⁵ Osiel, 'Why Prosecute?', 129.

⁹⁶ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth, 1994) epilogue.

ICTY and ICTR may have allowed powerful States to cover their unwillingness to take more decisive action.⁹⁷ Prosecutions can also be used by States and successor governments to attempt to make the point that they are morally different from those on trial, even where there are international crimes that can be laid at their door too.⁹⁸ In addition, substantive international criminal law fails to deal with conduct very worthy of censure, thus providing some form of legitimacy for it.⁹⁹ International trials and international criminal law ought not to serve as an excuse to the international community for not dealing with other more difficult and deep-seated problems.

Finally, international criminal justice, and the international tribunals, reflect inequalities in the selection of cases. Selective justice is a problem from the point of view of the rule of law, and it can undermine many of the justifications of punishment.¹⁰⁰ For example, deterrence is unlikely to be possible if potential offenders take the view that they may be able to obtain exemption from prosecution. Retribution is not served well by selective punishment, and it causes the lessons that may be taught by international criminal law to be confused and equivocal. Selectivity is a large problem in international criminal law, although the critique is decreasing in potency.¹⁰¹ The answer to such critiques is not to abandon punishment altogether, but to work towards non-selective application of the law.

2.3 Alternatives and complements to criminal prosecution

As can be seen, there is truth in the proposition that '[c]riminal prosecution . . . does some things rather well, other things only passably well, and makes an utter hash of still others'.¹⁰² Thus it is unsurprising that there have been other models suggested for dealing with international crimes, on the basis that it is said that they fulfil more completely at least some of the purposes of trials, and incur fewer of the problems. This part of this chapter will provide an overview of them, alongside some of their positive and negative features.¹⁰³ It must be remembered that when decisions are being made on what to do about international crimes, practical limits, such as funding, political possibility and the available infrastructure are important.¹⁰⁴ This is particularly the case in relation to transitional societies. As was said in relation to the South African transition (which was itself by no means uncontroversial)

⁹⁷ See section 7.2. ⁹⁸ Simpson, 'War Crimes: A Critical Introduction', 19–26.

⁹⁹ Simpson, 'Politics, Sovereignty, Remembrance', 56.

¹⁰⁰ Drumbl, 'Collective Violence and Individual Punishment', 593.

¹⁰¹ See Cryer, *Prosecuting International Crimes*.

¹⁰² Mark Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre' (1995) 144 *University of Pennsylvania Law Review* 463 at 700.

¹⁰³ See further, e.g. W. Michael Reisman, 'Institutions and Practices for Restoring and Maintaining Public Order' (1995) 6 *Duke Journal of International and Comparative Law* 175; Minow, *Between Vengeance*; Teitel, *Transitional Justice*.

¹⁰⁴ See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, 2004), ch. 7; Stanley Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 *Law and Social Inquiry* 7 at 8.

the Constitution seeks to ... facilitate the transition to a new democratic order, committed to 'reconciliation between the people of South Africa and the reconstruction of society'. The question is how this can be done effectively with the limitations of our resources and the legacy of the past ... The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured 'untold suffering and injustice' in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs ... Those negotiators of the Constitution and leaders of the nation who were required to address themselves to these agonising problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the state be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the state, diverting to that extent, desperately needed funds in the crucial areas of education, housing and primary health care ... They were entitled to permit the claims of ... school children and the poor and the homeless to be preferred.¹⁰⁵

This is an important point. Equally, however, it must be noted that the language of necessity, appropriateness or feasibility is open to abuse,¹⁰⁶ and it often ignores the broader aspects of international crimes. One of the reasons which may justify a separate regime of international criminal accountability is that crimes which are thought to affect all humanity need to be dealt with sensitively as to both the national and international effects of such crimes, and that the international community of States has, at least at the rhetorical level, affirmed the unacceptability of impunity.¹⁰⁷ It must also be remembered that transitional societies are not the only societies that need to deal with issues relating to international criminal law. It is all too easy to assume that international criminal law is only an issue for such States. Many stable States also have nationals who have committed international crimes.

2.3.1 *Amnesties*

Probably the most well-known alternative to prosecution is amnesty. This is legislation that blocks criminal action against people in the State in which it is passed. It can also block civil claims. It is often said (but not empirically proved) that amnesties promote reconciliation between previously antagonistic parties, and allow populations to 'move on' from the past.¹⁰⁸ Whether reconciliation (which is itself a contested notion) can occur whilst there are still unsatisfied victims is an open question.

¹⁰⁵ *Azanian People's Organization (AZAPO) and others v. President of the Republic of South Africa* (1996) 4 SA 562 (CC), paras. 42–5 (hereinafter *AZAPO*).

¹⁰⁶ Susan Dwyer, 'Reconciliation for Realists' (1999) 13 *Ethics and International Affairs* 81.

¹⁰⁷ See, for example, resolutions 1012, 28.8.1995, 1545, 21.5.2004, (Burundi), 1556, 11.6.2004, 1564, 18.9.2004. General Assembly resolution 60/147.

¹⁰⁸ Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (The Hague, 2002) 23–33.

Amnesties have a lengthy history in international law. The Treaty of Westphalia, which was considered by many to usher in the modern era in international law and order, contained an amnesty.¹⁰⁹ More recently, they were frequently employed in Latin America during and after the military dictatorships, often as the price paid for the leaders of those dictatorships to hand over power to civilian governments.¹¹⁰ Probably the most famous amnesty is the South African one.¹¹¹

There are various types of amnesties, which go from those granted by regimes to themselves such as that in Chile, to those which are voted upon by the population. Although the latter are usually thought, with some justification, to have greater legitimacy than the former, it must also be said that the consent of the population in such instances is often coerced, as the alternative is the continuation in power of an abusive regime.¹¹² A further distinction must be made between 'blanket' amnesties, which prevent legal proceedings against all persons without distinction, and those, such as the South African amnesty legislation, which required certain conduct (often full confession of crimes) and/or certain motivations for the crimes (usually political ones) before an amnesty was granted.¹¹³

The legality of amnesties is tied to the extent of duties to extradite or prosecute international crimes.¹¹⁴ The duties do not cover all international crimes, however. The classic example of a duty to extradite or prosecute can be found in the grave breaches regime of the Geneva Conventions. The Genocide Convention places a duty to prosecute on States where genocide occurs by virtue of Articles IV and VI.

As well as treaties explicitly covering international crimes, some have argued that since States have duties to 'respect and ensure'¹¹⁵ the rights granted in the various human rights conventions, it could be that the latter clause implies a duty to prosecute certain serious violations of human rights. All acts constituting genocide and crimes against humanity would be serious violations of human rights when governments are responsible for them, as would most war crimes. This may be supported by some case law from the Inter-American Court of Human Rights, in particular the *Velasquez-Rodriguez v. Honduras* case.¹¹⁶ It is difficult to say, however, that *Velasquez-Rodriguez*, and the other cases on positive duties under human rights treaties can be read as creating an absolute duty to prosecute all international crimes in all circumstances.¹¹⁷ The same may be said of purported duties under general international law, either by

¹⁰⁹ Scott Veitch, 'The Legal Politics of Amnesty' in Christodoulidis and Veitch (eds.), *Lethe's Law*, 33.

¹¹⁰ For discussion, see Elster, *Closing the Books*, 62–6.

¹¹¹ Which has generated a huge literature, see, e.g. Charles Villa-Vincencio and Erik Doxtader, *The Provocations of Amnesty* (Cape Town, 2003).

¹¹² Osiel, *Mass Atrocity*, 138. ¹¹³ See e.g. Veitch, 'The Legal Politics of Amnesty', 37–8.

¹¹⁴ See section 4.3. ¹¹⁵ E.g. ICCPR, Art. 2.

¹¹⁶ (1989) 28 ILM 291. The classic statement of the argument is Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537. See also *Barrios Altos Case (Chumbipuma Aguirre et al v. Peru)* Judgment of 14 March 2001; Series C No. 75 [2001] IACHR 5.

¹¹⁷ E.g. Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 1; Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford, 2003) 98–100; Cryer, *Prosecuting International Crimes*, 103–5.

virtue of customary international law, or the *jus cogens* status of the prohibitions on some international crimes.¹¹⁸

There are a number of claims that amnesties for international crimes are always unlawful.¹¹⁹ Such claims are probably in advance of the current law, although UN policy is now formally against amnesties for international crimes.¹²⁰ The current position was summed up by the Special Court for Sierra Leone in the *Kallon and Kamara* decision: ‘that there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law is amply supported by materials placed before the Court [but the view] that it has crystallised may not be entirely correct ... it is accepted that such a norm is developing under international law’.¹²¹ As it stands, an amnesty is less likely to be unlawful if other mechanisms are put in place for victim compensation and the like.¹²²

Amnesties are often seen as fellow travellers of the ‘politics of impunity’, from which the tide seems to have turned away.¹²³ The preamble of the ICC Statute affirmed ‘that the most serious crimes of concern to the international community as a whole must not go unpunished’, that States Parties were ‘determined to put an end to impunity for the perpetrators of such crimes’ and recalled ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.¹²⁴ Although the preamble of the ICC Statute does not create legal obligations, a failure to do anything about crimes committed by nationals of, or on the territory of, States Parties to the ICC Statute could well lead to the ICC exercising its powers to prosecute offenders itself.¹²⁵ A domestic amnesty does not bind the ICC, including its Prosecutor.¹²⁶ Nor does it bind other States in the exercise of extraterritorial jurisdiction; legislation in one State does not alter the jurisdiction of another.

2.3.2 Truth commissions

One of the activities which often accompany amnesties is the setting up of a truth commission.¹²⁷ These are bodies of (usually) eminent people, who take evidence, and write a report about the relevant period of time. The terms of reference setting up the commission will define the time frame and sometimes the kinds of conduct to be investigated. The terms of reference are usually the outcome of negotiations between the relevant parties, and can reflect their relative power. This is partly why the reports

¹¹⁸ See further, section 4.3. ¹¹⁹ Orientlicher, ‘Settling Accounts’.

¹²⁰ UN practice, since the late 1990s (but not before) has been to say that amnesties are not acceptable, see *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* UN Doc. S/2000/915, 4 October 2000 para. 24.

¹²¹ *Prosecutor v. Kallon and Kamara*, SCSL, A.Ch. 13.3.2004.

¹²² See John Dugard, ‘Dealing With the Crimes of a Past Regime, Is Amnesty Still an Option?’ (1999) 12 *LJIL* 1001.

¹²³ See Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (New York, 2002) ch. 3.

¹²⁴ ICC Statute, preambular paras. 4–6. ¹²⁵ See section 8.5.5. ¹²⁶ See further *ibid.*

¹²⁷ See generally Hayner, *Unspeakable Truths*; Priscilla Hayner, ‘Fifteen Truth Commissions – A Comparative Study’ (1994) 16 *Human Rights Quarterly* 597; Minow, *Between Vengeance*, ch. 4.

of such commissions vary in quality, and differ on matters such as whether they are able to offer immunity from prosecution to those testifying before them or if they are entitled to name perpetrators. The South African Truth and Reconciliation report named names, for example, whilst the Argentinean commission did not have the authority to do so.¹²⁸ Some Truth Commissions, such as the Guatemalan commission, have the authority to make recommendations for reforms, although they are not always taken up.¹²⁹

Some truth commissions are able to reflect history in a more comprehensive manner than most criminal trials can, although again, their terms of reference can limit what is discussed in the report. The South African report, for example only had the mandate to deal with political violence. It could not, thus, deal with issues such as land dispossessions, forcible transfers and other aspects of apartheid.¹³⁰ The quality of the report depends in part on how good the information available to the commission is. It can be difficult to persuade perpetrators to come forward to testify about their role in repressions, or victims to speak about sensitive matters such as sexual offences committed against them.¹³¹ This was, in part, avoided in South Africa by making amnesty applications contingent on attending the commission and telling the full story. However, some important witnesses such as the ex-President P. W. Botha refused to testify before the commission. There are also questions about the extent to which the reports of truth commissions can reflect any form of 'objective truth', if such a concept exists, and if they can lead to an agreed history between old enemies.¹³² Some have also questioned if truth-telling does lead to reconciliation,¹³³ or if truth and reconciliation are congruent goals.¹³⁴

Sometimes, as occurred in South Africa, in an attempt to promote reconciliation and help provide victims with some form of healing, victims are given the opportunity to attend the hearings and discuss the revelations made by the perpetrators. Some scholars are of the view that truth commissions are particularly well suited to providing healing for victims.¹³⁵ Rather like in the case of testifying in criminal proceedings, the extent to which victims are assisted by the process depends on individual reactions, and these are not easily extrapolated into general statements about victims as a whole. Some victims in South Africa issued a court challenge to the truth and reconciliation commission and the amnesty process, although it was rejected by the South African Constitutional Court.¹³⁶

The evidence-taking engaged in by a commission often requires people to incriminate themselves and, therefore, truth commissions often stand in place of prosecutions. This does not, however, have to be the case. For example the Truth and Reconciliation Commission in Sierra Leone took place at the same time as the

¹²⁸ See Hayner, *Unspeakable Truths*, ch. 8. ¹²⁹ *Ibid.*, ch. 10. ¹³⁰ *Ibid.*, 73–4. ¹³¹ *Ibid.*, 77–8.

¹³² François du Bois, 'Nothing But the Truth: The South African Alternative to Corrective Justice in Transitions to Democracy' in Christodoulidis and Veitch (eds.), *Lethé's Law*, 91.

¹³³ *Ibid.*, 112–14; Hayner, *Unspeakable Truths*, 155–61. ¹³⁴ *Ibid.*, 155

¹³⁵ Minow, *Between Vengeance*, 61–79. ¹³⁶ *AZAPO*.

Special Court for Sierra Leone.¹³⁷ Relations between the two were strained, however, and the Commission was critical of the Special Court in its report, in particular of the fact that the Special Court was not willing to allow Sam Hinga Norman, being tried before that court, to testify before the Commission in the manner it preferred.¹³⁸

2.3.3 *Lustration*

One way of dealing with large-scale administrative complicity in international crimes is lustration, i.e. purging of public servants who are thought to be responsible for international crimes.¹³⁹ There are elements of this approach in the removal of members of the Baath party from the Iraqi public service and judiciary. Lustration may be seen as a means of removing corrupt or inefficient staff, but the main purpose is often a form of punishment. Although it can deal in some ways with large-scale complicity, the fact that it is a form of punishment (or intended to be) is problematic, because it involves serious consequences for people, but is almost always done on a mass basis, without individual hearings to determine what precise responsibility a lustrated person bears. As a result, it is questionable whether lustration is consistent with human rights law, in particular the right to have rights and duties at law determined by a judicial process.¹⁴⁰ Punishment is only appropriate following a criminal proceeding.¹⁴¹

2.3.4 *Reparations and civil claims*

Finally, international crimes, where attributable to States, have been the subject of reparations. Germany, for example, has paid over \$60billion to victims in reparations for the Holocaust. Reparations have also been given to those who were the victims of the Argentinean junta in the 1970s and 1980s.¹⁴² There is a human right to a remedy for violations of human rights, which may involve some form of financial recompense.¹⁴³ The levels of such reparations are often controversial, however, and many societies in which international crimes are committed do not have large funds to finance reparations programmes.

There may also be the possibility of bringing private civil actions against those responsible for international crimes, either in the State where the activity occurred, or in a third State.¹⁴⁴ The US is perhaps the most well known of those third States, owing

¹³⁷ See generally William Schabas, 'Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone' in Cesare Romano *et al* (eds.), *Internationalized Criminal Courts* (Oxford, 2004) 157.

¹³⁸ *Report of the Truth and Reconciliation Commission for Sierra Leone*, vol. 3b, ch. 6; Norman SCSL A. Ch. 28.11.2003.

¹³⁹ See generally, Teitel, *Transitional Justice*, ch. 5; Cohen, 'State Crimes of Previous Regimes'.

¹⁴⁰ ICCPR, Art. 14; *Casanovas v. France* Human Rights Committee (441/90).

¹⁴¹ Joel Feinberg, *Doing and Deserving* (1970) 95–118, reprinted in Duff and Garland (eds.), *A Reader on Punishment*, 71.

¹⁴² See Hayner, *Unspeakable Truths*, ch. 11; Teitel, *Transitional Justice*, ch. 4.

¹⁴³ ICCPR, Art. 2(3).

¹⁴⁴ Although amnesties may limit the possibility of civil actions in the *locus delicti*.

to its Alien Tort Claims Act and the *Filartiga* jurisprudence on it, which permit non-US nationals to bring tort actions against certain violators of international law.¹⁴⁵ Civil claims may mean quite a lot to victims, as the continued attempts by 'comfort women' to obtain compensation from Japan show.¹⁴⁶ The problem with such claims, even where they succeed, is that it is difficult to enforce the judgments,¹⁴⁷ and they rely on the person sued having money. Evidence gathering is also difficult, and bringing such claims can be expensive. In the absence of a legal aid programme, or lawyers willing to work *pro bono*, such actions can be beyond the means of victims. Also, financial measures may not bring the same satisfaction to victims as would the criminal prosecution of the offenders.

Further reading

- Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 *Modern Law Review* 1.
- M. Cherif Bassiouni (ed.), *Post-Conflict Justice* (Ardsey, 2002).
- Antonio Cassese, 'On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2.
- Stanley Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 *Law and Social Inquiry* 7.
- David Dyzenhaus, *Judging Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford, 1998).
- Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (Washington DC, 1995).
- Juan Méndez, 'National Reconciliation, Transnational Justice and the International Criminal Court' (2001) 15 *Ethics and International Affairs* 25.
- Carlos Nino, 'The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619.
- Laura Olsen, 'Measures Complementing Prosecution' (2002) 84 *International Review of the Red Cross* 173.
- Steven Ratner, 'New Democracies, Old Atrocities: An Inquiry in International Law' (1999) 87 *Georgetown Law Journal* 707.
- Paul Roberts, 'Restoration and Retribution in International Criminal Justice' in Andrew von Hirsch *et al* (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford, 2004) 115.
- Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449.
- Carsten Stahn, 'United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?' (2002) 845 *International Review of the Red Cross* 191.

¹⁴⁵ *Filartiga v. Pena-Irala* 630 F. 2d 876 (1980) *Sosa v. Alvarez-Machain* 542 US 692 (2004).

¹⁴⁶ Kelly Askin, 'Comfort Women – Shifting Blame and Stigma from Victims to Victimizers' (2001) 1 *International Criminal Law Review* 5.

¹⁴⁷ Which may be disappointing for victims expecting to obtain anything other than moral satisfaction from the proceedings.

PART B

Prosecutions in National Courts

3

Jurisdiction

3.1 Introduction

Jurisdiction is the power of the State to regulate affairs pursuant to its laws. Exercising jurisdiction involves asserting a form of sovereignty. This fact causes difficulties when jurisdiction is exercised extraterritorially. Where extraterritorial jurisdiction is asserted sovereignties overlap, and general international law has not yet developed any principles to determine any hierarchy of lawful jurisdictional claims. This chapter discusses the principles of jurisdiction as they relate to international crimes. In some instances the extent to which international law allows jurisdiction over international crimes is broader than the jurisdiction which it offers over other crimes. Therefore this chapter must be read with the caveat that it is not a general discussion of the law of jurisdiction, but an explanation of jurisdiction over international crimes, a topic which is not coterminous with the general international law of jurisdiction, although it forms part of it.

3.2 The forms of jurisdiction

There are three ways in which jurisdiction may be asserted; legislative, adjudicative and executive. The extraterritorial assertion of legislative jurisdiction is less controversial than that of adjudicative jurisdiction, and claims of extraterritorial executive jurisdiction almost inevitably infringe the sovereignty of the territorial State.

3.2.1 Legislative jurisdiction

This is the right of a State to pass laws that have a bearing on conduct. Some States take the view domestically that they are entitled to pass legislation covering matters which take place throughout the globe: hence the aphorism that the UK Parliament could pass a statute making it a crime for a French person to smoke on the streets of Paris. However, enforcement of such a statute would be difficult from a practical point of view, as well as problematic in international law owing to the principle of

non-intervention. States are entitled to protest assertions of legislative jurisdiction which are unwarranted under international law, and there is an increasing trend towards them doing so. However, other States do not always consider their rights to be heavily affected by those claims until a specific case arises in which they are relied on.

3.2.2 *Adjudicative jurisdiction*

This is the extent to which domestic courts are able to pass judgment on matters brought before them. At this point other States may, rightly or wrongly, be more assertive in expressing their concerns about the exercise of jurisdiction. By passing judgment over offences abroad it is possible that courts, hence States, are intervening in the domestic jurisdiction of the State in which the offences occurred. In criminal cases, ‘jurisdiction to prescribe and jurisdiction to adjudicate in criminal matters are generally congruent in scope’.¹

3.2.3 *Executive jurisdiction*

Executive (or enforcement) jurisdiction is the most intrusive of jurisdictional claims. Executive jurisdiction is the right to effect legal process coercively, such as to arrest someone, or undertake searches and seizures. In the vast majority of cases, this is done by domestic law enforcement agencies such as the police. The *Lotus* case,² which is generally accepted to reflect current international law on executive jurisdiction accurately, stated that:

The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory ...³

In the *Eichmann* case, it was accepted by Israel that, irrespective of the moral rectitude of its action in bringing Adolf Eichmann out of hiding in Argentina to Israel for trial, doing so without the consent of Argentina violated its sovereignty.⁴ Care must be taken, however, to distinguish the exercise of executive jurisdiction over a person and the later exercise of adjudicative jurisdiction over them. That an arrest is illegal does not necessarily mean that a court cannot proceed against a person brought before them unlawfully. The maxim is often expressed as *male captus bene detentus* (roughly, bad capture, good detention). The ICTY has come close to adopting this approach, by claiming that, in relation to its own jurisdiction:

¹ Claus Kieß, ‘Universal Jurisdiction Over International Crimes and the *Institut de Droit International*’ (2006) 4 *JICJ* 561 at 564.

² *SS Lotus* (France v. Turkey) (1927) PCIJ Rep., Ser. A, No. 10. ³ *Ibid.*, at 18.

⁴ *Attorney-General of Israel v. Eichmann* 36 ILR 5 paras 40–50 (District Court). For comment see, e.g., Helen Silving, ‘In re Eichmann: A Dilemma of Law and Morality’ (1961) 55 *AJIL* 307.

Apart from such exceptional circumstances [egregious human rights violations, not abduction *simpliciter*] however, the remedy of setting aside jurisdiction will . . . usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.⁵

As the quote shows though, the ICTY left itself some elbowroom in extreme cases to refuse jurisdiction. Some national courts have adopted the position that abduction or human rights violations may vitiate jurisdiction,⁶ but, in spite of a trend towards such a position, it is not clear that there is an established principle of international law requiring them to do so.⁷

3.3 Conceptual matters

3.3.1 *The question of proof*

It is often said that States are entitled to exercise jurisdiction unless there is a specific rule of international law that prevents them from doing so. The basis for this belief is the *Lotus* case's pronouncement that 'far from laying down a general prohibition to the effect that States may not extend the application of their laws, and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.⁸ However, even if that was the position in 1927 (which is doubtful), it does not reflect State practice since, which is to assert a positive ground for the exercise of jurisdiction, rather than to rely on the absence of a prohibition.⁹ When the separate opinions in the *Yerodia* case came to deal with the '*Lotus* presumption' they could not agree on its continued relevance.¹⁰

3.3.2 *Treaties and jurisdiction*

It is important to note that States are entitled to pass jurisdiction to one another. The treaty-based transnational crimes are usually examples of where States have agreed between themselves that they may exercise jurisdiction on each other's behalf.¹¹

⁵ Nikolić ICTY A. Ch. 5.6.2003 para. 30.

⁶ See, e.g. *R v. Horseferry Road Magistrates ex parte Bennett* [1993] 2 All ER 318 (UK). *State v. Ebrahim* (1992) 1 *South African Criminal Law Reports* 307.

⁷ See, for example, Bundesverfassungsgericht, (1986) *Neue Juristische Wochenschrift* 3021, denying the existing of an 'established principle of international law'; the arguments to the contrary are in Stefan Wilske, *Die völkerrechtswidrige Entführung und ihre Rechtsfolgen* (Berlin, 2000) at 338–40.

⁸ *SS Lotus*, at 19.

⁹ See Michael Akehurst, 'Jurisdiction in International Law' (1972–1973) 46 *BYBIL* 145, 167; Vaughan Lowe, 'Jurisdiction' in Malcolm Evans (ed.), *International Law* (Oxford, 2003) 329, at 335–6.

¹⁰ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) ICJ General List 121, 14.2.2002 (hereinafter '*Yerodia*'); see Separate Opinion of President Guillaume, paras. 13–14; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 49–51; Dissenting Opinion of Judge *ad hoc* van den Wyngaert, paras. 48–51.

¹¹ See section 14.1.2.

An example of this is Article 5(1)(2) of the 1979 New York Convention Against the Taking of Hostages.¹² Such treaties include obligations on (or permissions to) State parties to criminalize certain conduct on quite broad jurisdictional bases, and either to extradite or prosecute suspects. These treaties are often seen, albeit somewhat inaccurately, as creating universal jurisdiction. The jurisdiction conferred, strictly speaking, is only a matter of concessions between the parties, who agree that other States may exercise their jurisdiction on their behalf. There is nothing unlawful about this. States are entitled to pass jurisdiction to one another. However, if a State were to assert a right to prosecute someone on the basis of a treaty which is not referable to a concession of one of the accepted forms of jurisdiction by a State party to the convention, it would violate international law,¹³ unless the convention can be regarded as reflective of custom. Such claims of customary status are easier to make than prove. In the following sections, this chapter will concentrate on the jurisdiction States have pursuant to customary international law.

3.4 The ‘traditional’ heads of jurisdiction

3.4.1 *The territoriality principle*

The territoriality principle is the least controversial basis of jurisdiction. Under this principle, States have the right to exercise jurisdiction over all events on their territory. This includes ships and aeroplanes which are registered in those countries. A State has jurisdiction over a crime when the crime originates abroad or is completed elsewhere, so long as at least one of the elements of the offence occurs in its territory. If it is the former, it is said to be ‘objective’ territorial jurisdiction, if it is the latter, then it is ‘subjective’ territoriality. An example is Article 14 of the Armenian Criminal Code, which provides that:

[A] crime is considered committed in the territory of the Republic of Armenia when:

1. it started, continued or finished in the territory of the Republic of Armenia;
2. it was committed in complicity with the persons who committed crimes in other countries.¹⁴

An example of objective and subjective territoriality in international criminal law would be where a rocket is fired from one State at a civilian object in another. The State in which the rocket was fired would have jurisdiction over the event on the basis of subjective territoriality, whilst the State in which the rocket landed would have jurisdiction over it on the basis of objective territoriality.

The problem for international criminal law with the territoriality principle is not its existence, but the reluctance of many States to prosecute offences which occur on their

¹² 1316 UNTS 205. ¹³ See, Lowe, ‘Jurisdiction’, 343–4.

¹⁴ Available at http://www.nottingham.ac.uk/shared/shared_hrlcicju/Armenia/Criminal_Code_English_doc

territories, or, conversely, the extent to which fair trial guarantees are offered where such prosecutions occur. Examples of trials for international crimes based on territoriality include the Rwandan *gacaca* trials,¹⁵ and the trials ongoing in the Bosnian War Crimes Chamber. These latter examples include cases originally investigated by the ICTY, but referred by it to the War Crimes Chamber.¹⁶

3.4.2 *The nationality principle*

The second generally accepted principle of jurisdiction is nationality (sometimes known as ‘active nationality’).¹⁷ States are entitled under international law to legislate with respect to the conduct of their nationals abroad. Many States adopt this head of jurisdiction quite broadly. Article 12(2) of the Bosnia/Herzegovina Criminal Code, for example, states that ‘[t]he criminal legislation of Bosnia and Herzegovina shall be applied to a citizen of Bosnia and Herzegovina who, outside the territory of Bosnia and Herzegovina, perpetrates a criminal offence . . .’

Nationality is an important basis of jurisdiction in international criminal law, in particular in relation to armed forces stationed overseas who, in the legislation of most States, ‘carry the flag’ abroad with them.¹⁸ The principle, nonetheless, applies beyond the armed forces, and also covers civilians. An example of this is section 9 of the UK’s Offences Against the Person Act 1861, which, as an exception to the usual preference of common law countries for territoriality jurisdiction, also asserts jurisdiction over murders committed by British nationals irrespective of the place of commission.

Nationality jurisdiction relies on the link between a national and the State to which he or she owes allegiance. For the most part the question of who is a national is relatively uncontroversial and dealt with by the legislation of the State granting nationality. Equally, the extent to which other States are required to accept that nationality (and thus any jurisdiction based on it) is probably governed by the test enunciated in the *Nottebohm* case.¹⁹ This is that the person asserting nationality (or, as in the case of jurisdiction, having nationality asserted against them) must have a ‘genuine connection’ with the State of which he or she is an alleged national. For nationality jurisdiction, it is often required that the person over whom that jurisdiction is being asserted was a national at the time of the offence rather than after. Otherwise, it has been claimed, a violation of the *nullum crimen sine lege* principle could occur.²⁰ Nevertheless, some States provide for jurisdiction in the situation where suspects later

¹⁵ See Erin Daly, ‘Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda’ (2001–2002) 34 *New York University Journal of International Law and Politics* 355.

¹⁶ *Stanković* ICTY T. Ch. 17.5.2005; *Rašević and Todović* ICTY T. Ch. 8.7.2005.

¹⁷ For some of the benefits of nationality jurisdiction, see Paul Arnell, ‘The Case for Nationality Based Jurisdiction’ (2001) 50 *ICLQ* 955.

¹⁸ This is important as often, under Status of Forces agreements, territorial States agree to waive their jurisdiction over foreign forces in their territory.

¹⁹ *Liechtenstein v. Guatemala* (1955) ICJ Reports 4.

²⁰ See Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *JICJ* 735, 742–3.

acquire their nationality.²¹ Those States tend to view such an exercise of the jurisdiction as being a vicarious use of the authority of the *locus delicti*.²² As a result, the lawfulness of any such use depends on whether the conduct for which the suspect is prosecuted was criminal in the *locus delicti* (or in international law) at the time of its commission,²³ or if that State makes its opposition to the ‘borrowing’ of its jurisdiction known.²⁴

A number of States assert jurisdiction over the activities of their permanent residents even when they are abroad. This is an expanded form of nationality jurisdiction, but one which is acceptable under international law, as those who have chosen to reside permanently in a State are clearly analogous to its nationals. A similar consideration applies to non-nationals who serve a State’s armed forces.

Perhaps the most famous example of nationality jurisdiction was the US prosecution of Lieutenant William Calley for his role in the My Lai massacre in Vietnam.²⁵ This case also provides an example of one of the criticisms often laid at the door of nationality jurisdiction, that prosecutions by States of their own nationals for war crimes may tend to be overly lenient.²⁶

3.4.3 *The passive personality principle*

Passive personality jurisdiction is jurisdiction exercised by a State over crimes committed against its nationals whilst they are abroad. In most instances the assertion of such jurisdiction is controversial. All of the judges that expressed an opinion on the matter in the *Lotus* case took the view that customary international law does not accept such a principle.²⁷ There has been an increase in the use of passive personality jurisdiction, particularly by the US, in relation to terrorist offences.²⁸ However, considerable disagreement remains surrounding the lawfulness of its application.²⁹ There are fears that passive personality jurisdiction favours powerful States at the expense of weaker States. Concerns have also been raised that passive personality jurisdiction could lead to people being subjected simultaneously to the laws of many different States, which would include prohibitions of which they were understandably unaware.³⁰

²¹ See e.g. Swedish Penal Code ch. 2 s. 2.

²² This is justified on the basis that many States adopting such a position refuse to extradite their nationals.

²³ If it was not, then a violation of the *nullum crimen* principle would result.

²⁴ As we will see, however, in relation to international crimes, States can exercise their own jurisdiction over international crimes wherever they occur anyway.

²⁵ *US v. Calley* (1969) 41 CMR 96; (1973) 46 CMR 1131; (1973) 48 CMR 19.

²⁶ See Timothy L. H. McCormack, ‘Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their “Own Nationals” for International Crimes’ in Philippe Sands and Mark Lattimer (eds.), *Justice for Crimes Against Humanity* (Oxford, 2003) 107.

²⁷ See, e.g. David J. Harris, *Cases and Materials on International Law* (6th edn, London, 2005) 281; the judgment itself, however, does not contain a ruling on the matter.

²⁸ One example is *US v. Yunis* (1991) 30 *ILM* 403. ²⁹ See Lowe, ‘Jurisdiction’, 346.

³⁰ James L. Brierly, ‘The “Lotus” Case’ (1928) 44 *Law Quarterly Review* 154, 161.

The latter problem only arises where the law differs between States. The problem ought not to apply to international criminal law, as its prohibitions apply across States rather than reflecting national oddities. One of the few areas in which passive personality jurisdiction has traditionally been accepted is in relation to war crimes.³¹ Thus States have the right to prosecute war crimes committed against their nationals. One of many examples is the *Washio Awochi* trial,³² in which a Japanese national was prosecuted by a Netherlands Court Martial for forcing Dutch women into prostitution in a club in Batavia. International law goes beyond this, however, to permit prosecution of offences committed against the nationals of co-belligerent States. For example, in the *Velpke Baby Home* case the UK prosecuted German nationals for neglect and mistreatment of Polish children which took place in Germany.³³

Where passive personality jurisdiction is asserted over international crimes the same questions arise in relation to determining nationality as for nationality jurisdiction. The same test, that of a genuine link, applies here. The relevant time for determining nationality is generally considered to be the time of the offence. Consequently, the fact that a person later gains the nationality of a State that wishes to prosecute offences against him or her does not grant that State passive personality jurisdiction. Israel sought to assert passive personality jurisdiction in the *Eichmann* case on behalf of Eichmann's Jewish victims. Although Israel's right to try Eichmann on the basis of the universality principle was generally accepted, the same cannot be said for the claim that it had the right to use passive personality jurisdiction in relation to victims who were not Israeli nationals at the time of Eichmann's offences.³⁴

3.4.4 *The protective principle*

A State is entitled to assert protective jurisdiction over extraterritorial activities that threaten State security, such as the selling of a State's secrets, spying or the counterfeiting of its currency or official seal. Although the principle could be used to justify the assertion of jurisdiction over aggression, and was asserted by Israel as one of the bases of jurisdiction over Adolf Eichmann,³⁵ practically all its imaginable uses in relation to international criminal law overlap with territorial, nationality or passive personality jurisdiction. The assertion of the protective principle in *Eichmann* was criticized on the basis that, irrespective of its right to prosecute him, the State of Israel did not exist during the Holocaust.³⁶

³¹ E.g. Rohrig, *Brunner and Heinze* (1950) 17 ILR 393. ³² XII LRTWC 122.

³³ George Brand, *Trial of Heinrich Gerike* (London, 1950). Lauterpacht ('Foreword', *ibid.*, at xv) went further, to assert that the trial was based on universality, but see George Brand, 'Introduction', *ibid.* at xxix.

³⁴ James E. S. Fawcett, 'The Eichmann Case' (1962) 38 *BYBIL* 181, 190–2.

³⁵ *Attorney-General of Israel v. Eichmann* 36 ILR 18, 54–57, 304.

³⁶ David Lasok, 'The Eichmann Trial' (1962) 11 *ICLQ* 355, 364.

3.5 Universal jurisdiction

3.5.1 Introduction

Universal jurisdiction is probably the most controversial principle of jurisdiction in international criminal law. It is certainly the most talked-about.³⁷ The term ‘universal jurisdiction’ refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. It is a principle of jurisdiction limited to specific crimes. There are those that deny that universal jurisdiction exists at all.³⁸ However, the view more consistent with current practice is that other than piracy, which is subject to universal jurisdiction owing to it occurring, by definition, on the high seas,³⁹ States are entitled, but not obliged,⁴⁰ to assert universal jurisdiction over war crimes, crimes against humanity, genocide and torture.⁴¹ There are no examples of universal jurisdiction prosecutions for aggression.

Jurisdiction tends to inhere in States for the purpose of protecting their own interests. The purpose of universal jurisdiction, on the other hand, is linked to the idea that international crimes affect the international legal order as a whole.⁴² Owing to the recognition that such offences affect all States and peoples, international law grants all States the right to prosecute international crimes. The precise conditions under which a State may do so, however, are controversial, and matters are not helped by a tendency to roll together the issues of whether universal jurisdiction exists and whether or not there is a duty to exercise such jurisdiction. This is compounded by a conflation of two questions: if States may exercise universal jurisdiction and whether they ought to do so. The discussion below relates to whether States are entitled to assert universal jurisdiction as there is no real evidence that, outside of treaty obligations, States are obliged to do so.

3.5.2 Approaches to universal jurisdiction

Universal jurisdiction has often, at least since the ICJ’s decision in the *Yerodia* case⁴³ if not before, been separated into two questionable sub-categories. These are what

³⁷ For a useful overview of the voluminous literature on the subject at the turn of the millennium, see A. Hays Butler, ‘The Doctrine of Universal Jurisdiction: A Review of the Literature’ (2000) 11 *CLF* 353.

³⁸ See, e.g. Alfred Rubin, ‘Actio Popularis, Jus Cogens and Offences Erga Omnes’ (2001) 35 *New England Law Review* 265; Marc Henzelin, *Le Principe de l’Universalité en Droit Pénal International* (Brussels, 2000).

³⁹ Some question whether piracy is an appropriate analogy for modern assertions of universal jurisdiction: see Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45 *Harvard International Law Journal* 183. Even if this is the case, it does not, however, undermine State practice in the area.

⁴⁰ Outside of treaty-based obligations.

⁴¹ See *Institut de Droit International*, Seventeenth Commission, Universal Jurisdiction Over Genocide, Crimes Against Humanity and War Crimes, Krakow, 2005, 2. See Kreß, ‘Universal Jurisdiction’. On torture see *Furundžija*, ICTY T. Ch. II 10.12.1998, para. 156.

⁴² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, 1994) 56–63.

⁴³ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) ICJ General List 121, 14.2.2002.

is often termed ‘absolute’ or ‘pure’ universal jurisdiction (also known as universal jurisdiction *in absentia*) and ‘conditional’ universal jurisdiction, (sometimes known as ‘universal jurisdiction with presence’). Pure universal jurisdiction arises when a State seeks to assert jurisdiction over an international crime (usually by investigating it and/or requesting extradition of the suspect) even when the suspect is not present in the territory of the investigating State. Conditional universal jurisdiction is universal jurisdiction exercised when the suspect is already in the State asserting jurisdiction.⁴⁴

The distinction has gathered considerable acceptance in academic literature.⁴⁴ Nonetheless, and although the matter is not entirely not beyond controversy, the better view is that the distinction is non-existent at a conceptual level.⁴⁵ Although a number of States have limited their use of universal jurisdiction to where a person is present on their territory, this can be explained on the basis that adopting pure universal jurisdiction ‘may show a lack of international courtesy’.⁴⁶ Where States have adopted such a limit it appears that those States have done so as a matter of practical prudence, or as the result of political pressure, rather than as a matter of law.

3.5.3 *The rise of universal jurisdiction*

The possibility of universal jurisdiction being exercised over war crimes was mooted during the Second World War.⁴⁷ A number of cases prosecuted after the Second World War could be justified or explained on the basis of universal jurisdiction.⁴⁸ The United Nations War Crimes Commission⁴⁹ took the view that ‘the right to punish war crimes ... is possessed by any independent State whatsoever’.⁵⁰ Equally those cases could be justified on the basis of the expanded passive personality jurisdiction which international law accepts for war crimes.

In 1949 the Geneva Conventions provided a treaty-based analogue to universal jurisdiction in relation to their grave breaches provisions. Article 49 of Geneva Convention I (to which the other three conventions have similar provisions) reads:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts [or hand them over to another High Contracting Party].⁵¹

⁴⁴ See, e.g. Antonio Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) 1 *JICJ* 589, 592–3; Georges Abi-Saab, ‘The Proper Role of Universal Jurisdiction’ (2003) 1 *JICJ* 596, 601.

⁴⁵ O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, is a particularly powerful argument to this effect; See also Thomas Weigend, ‘Grund und Grenzen universaler Gerichtsbarkeit’, in Jörg Arnold et al. (eds.), *Festschrift für Albin Eser* (Munich, 2005) 955.

⁴⁶ *Yerodia*, Separate Opinion of Judge *ad hoc* van den Wyngaert, para. 3.

⁴⁷ Willard Cowles, ‘Universality of Jurisdiction Over War Crimes’ (1945) 33 *California Law Review* 177.

⁴⁸ E.g. *Tesch and Others* (the *Zyklon B Case*) I LRTWC 93.

⁴⁹ Which, for clarity’s sake, it should be noted was an inter-Allied body, rather than the (practically) universal international organization.

⁵⁰ XV LRTWC 26 (Commentary).

⁵¹ See Richard van Elst, ‘Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions’ (2000) 13 *LJIL* 815.

The grave breaches regime is often considered a paradigmatic case of universal jurisdiction, and in practice is exceptionally similar to it. Still, it should be noted that the Conventions speak of 'grave breaches' of their own provisions. Given that (other than common Article 3) the Conventions only apply to conflicts between High Contracting Parties,⁵² by their own terms the grave breaches provisions only have *inter partes* effect as a matter of treaty law.⁵³ Still, the fact that every State in the world has ratified the Conventions makes this a distinction of form rather than substance.

Probably the most famous exercise of universal jurisdiction was the Israeli prosecution of Adolf Eichmann. Eichmann was abducted from Argentina in 1960 by the Israeli Security Service, Mossad, and flown to Jerusalem to be tried.⁵⁴ The District Court, in affirming Israel's right to prosecute him, stated that:

The abhorrent crimes defined under this Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an international court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.⁵⁵

It might be noted that in spite of its comments about an international criminal court which, in the light of the principle of complementarity, now seem anachronistic, the District Court's opinion is a strong affirmation of a right (and perhaps even a duty) to establish universal jurisdiction over international crimes. Israel did rely on other bases of jurisdiction, but its primary jurisdictional claim was universality, as the Supreme Court explained:

'if in our judgment we have concentrated on the international and universal character of the crimes . . . one of the reasons for our so doing is that some of them were directed against non-Jewish groups.'⁵⁶

After *Eichmann*, there was little evidence of any political will to engage in universal jurisdiction prosecutions until 1985, when Israel requested the extradition of John Demjanjuk from the US. Demjanjuk was suspected of being a notorious camp guard in Treblinka known as 'Ivan the Terrible'. The US agreed to extradite Demjanjuk,⁵⁷ who stood trial in Israel, but was acquitted on the basis that although he was a guard at Sobibor and Trawniki camps, he was not 'Ivan the Terrible'.⁵⁸

⁵² *Ibid.*, Common Article 2. ⁵³ Their prohibitions, however, clearly reflect customary law.

⁵⁴ Israel originally claimed that the 'rendition' (in modern terminology) was undertaken by public-spirited private Israeli citizens, but its assertion was not widely believed. See also section 3.2.3.

⁵⁵ (1968) 36 ILR 5 at para. 12 (DC). ⁵⁶ (1968) 36 ILR 277 at para. 12 (SC).

⁵⁷ *Demjanjuk v. Petrovsky* 776 F. 2d 571 (USCA 6th Cir. 1985); cert. den. 475 US 1016 (1986), 628 F. Supp. 1370; 784 F. 2d 1254 (1986).

⁵⁸ See Jonathan M. Weinig, 'Enforcing the Lessons of History: Israel Judges the Holocaust' in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague, 1997) 103, at 115–18.

The next possible examples of assertions of universal jurisdiction were Acts such as the UK's War Crimes Act 1991,⁵⁹ and Australia's War Crimes Amendment Act 1988,⁶⁰ both of which dealt with offences committed in the Second World War by those acting on behalf of the Axis but who later became residents of those countries. As jurisdiction crystallizes at the time of the offence, these Acts and the (limited) prosecutions under them, are best seen as based on universal jurisdiction.⁶¹ This is because later residence per se is not a head of jurisdiction, and the basis of jurisdiction is not territoriality or nationality.⁶²

The conflicts in Yugoslavia and Rwanda (which notably gave rise to the ICTY and ICTR) led to a number of prosecutions of people who had come to countries such as Germany and Switzerland as refugees.⁶³ A number of prosecutions were undertaken in Belgium, pursuant to its Law of 16 June 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocols I and II of 8 June 1977,⁶⁴ which criminalized certain violations of those treaties without regard to the place of their commission.⁶⁵

By 1999 it appeared that universal jurisdiction was developing considerable momentum. The *Pinochet* litigation throughout Europe,⁶⁶ for example, was thought by careful commentators to represent 'the globalization of human rights law through the affirmation that the consequences of, and jurisdiction over, gross violations are not limited to the State in which they (mostly) occur, or of that of the nationality of the majority of the victims'.⁶⁷ In the same year Belgium revised its 1993 legislation on grave breaches to add to it jurisdiction over genocide and crimes against humanity 'irrespective of where such breaches have been committed'.⁶⁸ The presence of the suspect in Belgium was not required for the initiation of proceedings, which could be brought by private parties. The 1999 law also declared that immunities were inapplicable in proceedings relating to the Act.⁶⁹

⁵⁹ War Crimes Act 1991, s. 1(a). On the Act see Christopher Greenwood, 'The War Crimes Act 1991' in Hazel Fox and Michael A. Meyer (eds.), *Armed Conflict and the New Law: Effecting Compliance* (London, 1993) 215.

⁶⁰ War Crimes Amendment Act 1988, s. 5. See generally Gillian Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987) 16 *Melbourne University Law Review* 382.

⁶¹ See ch. 4.

⁶² It would be possible to argue that jurisdiction could be co-belligerent (or passive personal jurisdiction), but the Acts do not limit themselves to victims who were nationals of the Allied powers.

⁶³ Andreas Ziegler, 'International Decisions: In re G' (1998) 82 *AJIL* 78; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, 2003) 196–200.

⁶⁴ *Moniteur Belge*, 5 August 1993.

⁶⁵ See Reydam, *Universal Jurisdiction: International and Municipal*, 109–16.

⁶⁶ See the comments on the various cases in (1999) 93 *AJIL* 690–711.

⁶⁷ Christine Chinkin, 'R v. Bow Street Stipendiary Magistrate, ex parte Pinochet (no 3) [1999] 2 WLR 827' (1999) 93 *AJIL* 703 at 711. The precise bases of jurisdiction were made more complex by the fact that jurisdiction under general international law was supplemented in a number of States with arguments based on the Torture Convention.

⁶⁸ (1999) *ILM* 921, Art. 7. For an overview see Damien Vandermeersch 'Prosecuting International Crimes in Belgium' (2005) 3 *JICJ* 400.

⁶⁹ (1999) *ILM* 921, Art. 5(3).

3.5.4 The decline of universal jurisdiction?

Although the 1993 statute gave rise to a number of proceedings relating to Rwanda, which did not upset the Rwandan government,⁷⁰ the Belgian law proved to be politically controversial. Proceedings were brought though never completed against, amongst others, Ariel Sharon, Yassir Arafat, Fidel Castro and Hashemi Rafsanjani.⁷¹ These proceedings all led to political embarrassment for Belgium. The case against Abduldaye Yerodia Ndobasi led to a challenge to the Belgian law in the International Court of Justice.

The Yerodia case

Yerodia, then Foreign Minister of the Democratic Republic of Congo, was the subject of an international arrest warrant issued by Damien Vandermeersch, a Belgian investigating judge on 11 April 2000. Six months later the DRC brought a suit against Belgium in the ICJ, alleging that Belgium had acted unlawfully by asserting universal jurisdiction over Yerodia and ignoring his immunity as a Foreign Minister.⁷² Late in the proceedings the DRC dropped the claim relating to universal jurisdiction, and concentrated on the issue of immunities, on which the ICJ eventually found in its favour.⁷³

Owing to the DRC's litigation strategy, the majority decided that the ICJ did not need to determine the lawfulness of Belgium's assertion of universal jurisdiction. The majority was criticized for this by a number of the judges, including the President of the Court, Gilbert Guillaume,⁷⁴ Judges Higgins, Koojimans and Buergenthal,⁷⁵ and the Belgian *ad hoc* judge, Christine van den Wyngaert.⁷⁶ Their critiques are telling, logically the question of jurisdiction precedes that of immunity (as there must be immunity from something).⁷⁷ Also, the arguments about immunity may have been affected by the arguments about universal jurisdiction (in particular those relating to *jus cogens*).

Unlike the majority decision, a number of the separate and dissenting opinions dealt with universal jurisdiction in detail. They revealed a deeply divided court. Four judges (President Guillaume, Judges Ranjeva, Rezek and Judge *ad hoc* Bula-Bula) were opposed to the assertion of jurisdiction, whereas six judges (Judge Koroma, Judges Higgins, Buergenthal and Koojimans in their joint opinion, Judge al-Khasawneh and Judge *ad hoc* van den Wyngaert) supported it (Judge al-Khasawneh at least implicitly took that view).⁷⁸ Although many saw this case as a blow to universal

⁷⁰ See Luc Reydam's, 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case' (2003) 1 *JICJ* 428.

⁷¹ See Steven R. Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *AJIL* 888, 890.

⁷² *Yerodia*. See Neil Boister, 'The ICJ in the *Belgian Arrest Warrant* Case: Arresting the Development of International Criminal Law' (2002) 7 *Journal of Conflict and Security Law* 293; O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept'.

⁷³ See ch. 20. ⁷⁴ *Yerodia*, Separate Opinion of the President, para. 1.

⁷⁵ *Ibid.*, Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal, paras. 3–5.

⁷⁶ *Ibid.*, dissenting Opinion of Judge *ad hoc* van den Wyngaert, para. 41. ⁷⁷ *Yerodia*, para. 46.

⁷⁸ Judge Oda also seemed sympathetic: *ibid.*, Dissenting Opinion of Judge Oda, para. 12.

jurisdiction, it must be noted that the majority of judges who expressed a view on the matter upheld the universality principle and only one of the judges questioned the use of universal jurisdiction where the person is found in the territory of the State asserting jurisdiction. Three of the four judges who criticized universal jurisdiction appear only to be referring to such jurisdiction being asserted *in absentia*.⁷⁹ Only President Guillaume appeared hostile to any sort of universal jurisdiction outside of treaty regimes.⁸⁰

Limiting universality

Belgium's political problems with its law did not end with the *Yerodia* case. Following attempts to indict ex-President George H. W. Bush, Vice-President Dick Cheney and Colin Powell for war crimes alleged to have been committed by them in the Gulf War 1991, Belgium came under heavy pressure from the United States to alter its legislation.⁸¹ In response, Belgium altered its legislation twice in 2003 to limit its jurisdiction and reintroduce immunities.⁸² Some saw the Belgian action as signalling the demise of broad notions of universality.⁸³ The Belgian law is no longer as wide, but it retains some universal jurisdiction elements. For example, jurisdiction may be exercised if a perpetrator later becomes a Belgian resident.⁸⁴ It is also clear that the Belgian position is not that universal jurisdiction *in absentia* is unlawful. Its stated reason for repealing the Act was that it had been abused. After 2003, Belgium sought the extradition of Hissene Habré, the ex-dictator of Chad, pursuant to a complaint made before the Act was amended, on the basis of absolute universality. This implies that its view is that universal jurisdiction remains available in international law, although in the particular case it was decided that Habré was to stand trial in Senegal.

The other State whose use of universal jurisdiction appeared to have been reined in somewhat is Spain. Spain was the first State to ask the UK to extradite General Pinochet.⁸⁵ It has, since 1999, also indicted (and in one instance convicted) a number of ex-members of military juntas from Latin America. Although the Pinochet case failed to lead to an extradition owing to the UK Home Secretary's determination that the defendant's ill-health prevented it, Spain has used universal jurisdiction successfully in other cases. It has obtained the extradition of Ricardo Cavallo, accused of torture in Argentina, and convicted Adolfo Scilingo for crimes against humanity for

⁷⁹ Alain Winants, 'The *Yerodia* Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction' (2003) 16 *LJIL* 491 at 500.

⁸⁰ *Yerodia*, Separate Opinion of President Guillaume, para 16.

⁸¹ Ratner, 'A Postmortem'.

⁸² See *ibid.* and see Luc Reydam, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1 *JICJ* 679.

⁸³ Antonio Cassese, 'Is the Bell Tolling for Universality: A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *JICJ* 589.

⁸⁴ Criminal Procedure Code, Article 6.1^{°bis}.

⁸⁵ Although it ought to be noted that some, but not all, of the victims of the conduct for which Spain sought to extradite Pinochet were Spanish.

his role in torture and killings in Argentina after he went to Spain to testify about his actions in another case.⁸⁶

A number of cases since 2000 did, however, place a fairly restrictive interpretation on universal jurisdiction, requiring that Spanish universal jurisdiction be 'subsidiary' to the jurisdiction of the territorial State, with Spain only having jurisdiction if there is no effort to prosecute by that State. This may be a sensible practical limit, but is not required by international law.⁸⁷ The Spanish cases also appeared to require the presence of the suspect in Spain, although presence pursuant to extradition, as in the Cavallo case, seemed sufficient.⁸⁸ A firm reaffirmation of universal jurisdiction, without any of the limitations suggested in the previous cases, came from the Spanish Constitutional Tribunal in the *Guatemala Genocide* case, which expressly repudiated the earlier, more limited, jurisprudence.⁸⁹

Other practice

Having becoming parties to the Statute of the International Criminal Court, a number of countries have introduced international crimes into their domestic law and, when doing so, have also adopted universal jurisdiction over them. Some States, such as New Zealand, have not included any residence or other requirement in their legislation and have thus adopted absolute universality.⁹⁰ Germany has adopted similar legislation, although a prosecutor is entitled to dismiss the case if there is no linking point to Germany or it is being investigated by a more closely related State or an international criminal court.⁹¹ The UK and Canada have both included jurisdiction over offences committed by non-nationals who later become linked to them in specified ways. It suffices for Canada's War Crimes and Crimes Against Humanity Act that the person is later present in Canada (s. 8). For prosecution in the UK, the relevant legislation requires the person later to become a resident of the UK.⁹² Nonetheless, given that the UK does not extradite to States on bases of jurisdiction it considers to be in excess of international law, by providing (in s. 72) for extradition to States who have broader extra-territorial jurisdiction than it takes over international crimes itself, the UK accepts that international law allows States to adopt universal jurisdiction over war crimes, genocide and crimes against humanity. Owing to the fact that the ICC Statute does not require States to take universal jurisdiction (or even mention it), this acceptance must be based on the position in customary international law.

⁸⁶ See Christian Tomuschat, 'Issues of Universal Jurisdiction in the Scilingo Case' (2005) 3 *JICJ* 1074; Alicia Gil Gil, 'The Flaws of the Scilingo Judgment' (2005) 3 *JICJ* 1082; Guilia Pinzanuti, 'An Instance of Reasonable Universality' (2005) 3 *JICJ* 1092.

⁸⁷ *Guatemalan Generals Case*, Tribunal Supremo, Sala de lo Penal, Sentencia 327/2003. See Hervé Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*' (2003) 1 *JICJ* 690, 695–7. For an argument that this may have entered into international law, see Kreß, 'Universal Jurisdiction' 19–20.

⁸⁸ Cassese, 'Is the Bell Tolling for Universality' 590.

⁸⁹ Naomi Roht-Arriaza, 'Guatemala Genocide Case' (2006) 100 *AJIL* 207.

⁹⁰ International Crimes and International Criminal Court Act 2000, ss. 8, 9, 10, 11.

⁹¹ Code of Crimes Against International Law, s. 1; Criminal Code, s. 153f.

⁹² International Criminal Court Act 2001, s. 68(1).

Turning to the views of the international (and internationalized) criminal tribunals, both the ICTY and ICTR have asserted that States may exercise universal jurisdiction,⁹³ as has the Special Court for Sierra Leone.⁹⁴ Against this background, reports of the death of universal jurisdiction are greatly exaggerated, even if the status of such jurisdiction being asserted *in absentia* remains controversial.

3.5.5 Universal jurisdiction's practical problems

One of the major problems with undertaking prosecutions on the basis of universal jurisdiction is that the existence of jurisdiction *per se* does not give rise to any obligations on behalf of the territorial or nationality State to assist in any investigation, provide evidence or extradite suspects.⁹⁵ The matter of cooperation falls to treaty obligations or comity.⁹⁶ It is perhaps unsurprising that some of the most successful prosecutions on the basis of universal jurisdiction, the Belgian prosecution of the 'Butare four', the Niyontenze case in Switzerland and the UK prosecutions of the Afghan warlord, Faryadi Zardad and Nazi war criminal Anthony Sawoniuk occurred with the concurrence, if not the support, of the territorial States. Those States permitted investigations and on-site visits, as well as providing witnesses to testify in the forum State. Although in some prosecutions under universal jurisdiction, witnesses are found in the forum State among the refugee community,⁹⁷ the availability of evidence, both human and physical, cannot be presumed. A number of cases based on universal jurisdiction have failed to achieve the standard of proof for a criminal conviction.⁹⁸

Even where witnesses are available, problems of inter-cultural understanding can arise. Translation difficulties, as well as difficulties of appraising the credibility of witnesses testifying through interpretation and from different cultural backgrounds, make the appraisal of witness evidence very difficult. In some cases (the Sawoniuk case being an example), this problem is mitigated by on-site visits by the fact-finders, who can thereby achieve a better understanding of the witnesses' cultural and material context.

There is also the possible problem of 'forum shopping', in which victims or NGOs may seek to initiate prosecutions in multiple fora, to maximize the possibility of a conviction. This can raise important issue of the rights of defendants, who could be prosecuted (and have to defend themselves) repeatedly in relation to the same facts, something which, if done in one State, would violate the *ne bis in idem* principle. The

⁹³ *Tadić* ICTY A. Ch. 2.10.1995 para. 62; *Ntuyuhaga* ICTR T. Ch. I 18.3.1999 (in relation to genocide).

⁹⁴ *Kallon and Kamara*, SCSL A. Ch. 13.3.2004 paras. 67–71.

⁹⁵ See Bruce Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (Oxford, 2003) 119–23.

⁹⁶ See ch. 4.

⁹⁷ Dusko Tadić, who achieved notoriety as the first defendant before the ICTY, was originally proceeded against in Germany, having been recognized by other refugees. The case was dropped after his transfer to the ICTY.

⁹⁸ E.g. the Dusko Cvetković prosecution in Austria and *In re Gabrez* in Switzerland.

absence of such a principle operating between States makes this a possibility, albeit one which is not unique to universal jurisdiction nor one which has occurred in practice.⁹⁹

3.5.6 Policy-based/political criticisms of universal jurisdiction

There have been a number of arguments of policy brought against universal jurisdiction, which are of varying persuasiveness. The first of these is that prosecutions on the basis of universal jurisdiction may upset the balance struck between prosecution and amnesty in an emerging democracy, where amnesties have been used.¹⁰⁰ This critique has more purchase when applied to processes such as South Africa's than when compared to General Pinochet's self-granted immunity.¹⁰¹ On the other hand, international crimes are not simply the concern of one State alone. Crimes against humanity, genocide and war crimes all violate *erga omnes* obligations; therefore all States have an interest in the response to such offences.¹⁰² From a purely legal point of view, domestic amnesty legislation does not bind any other State, and the problem is, again, not one unique to universal jurisdiction.

The practical ability of more powerful nations both to assert jurisdiction beyond their borders, and the ability of such States to pressure other countries into leaving their nationals alone has led to claims that universal jurisdiction can be selective in its application. As President Guillaume argued in *Yerodia*, to support universal jurisdiction would be to 'encourage the arbitrary for the purposes of the powerful, purportedly acting for an ill-defined "international community"'.¹⁰³

This argument frequently takes on a neo-colonial twist, as in Judge Rezek's opinion in the same case: '[I]t is not without reason that the Parties before the court have discussed the question of how certain European countries would react if a judge from the Congo had indicted their officials for crimes supposedly committed on their orders in Africa.'¹⁰⁴ As this quote shows, however, this would apply in relation to territorial jurisdiction in a similar manner to universal jurisdiction. Judge *ad hoc* Bula-Bula, however, made the criticism directly on the basis that the exercise of universal jurisdiction was a form of neo-colonial intervention by Belgium in its former colony.¹⁰⁵

⁹⁹ See Albin Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism' (2003–2004) 39 *Tulsa Law Review* 955, 957–8, 963–71.

¹⁰⁰ Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86 at 90–1.

¹⁰¹ Kenneth Roth, 'The Case For Universal Jurisdiction' (2001) 80 *Foreign Affairs* 150 at 153.

¹⁰² *Furundžija*, para. 156; *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (1996) ICJ Rep. para. 79; *Kupreskić et al.* ICTY T. Ch. II 14.1.2000 para. 520 (although this last case goes a little far in asserting that all norms of humanitarian law have this status).

¹⁰³ *Yerodia*, Separate Opinion of President Guillaume, para. 15.

¹⁰⁴ *Ibid.*, Separate Opinion of Judge Rezek, para. 9 (translation in Reydam's, *Universal Jurisdiction: International and Municipal*, 229).

¹⁰⁵ *Yerodia*, Separate Opinion of Judge Bula-Bula.

There is no evidence that universal jurisdiction prosecutions are directed by States for nefarious political reasons (or at least no more than on other heads of jurisdiction).¹⁰⁶ Also, the uses of universal jurisdiction to date have all centred on those who have failed to have been prosecuted in their territorial or nationality States. Selective enforcement, nonetheless, remains a problem in relation to international crimes, whatever the principle of jurisdiction invoked. Some, if not all, of these problems could be mitigated by the adoption of an international agreement on the exercise of universal jurisdiction, although there are no official proposals for such a treaty at present.

Further reading

- Michael Akehurst, 'Jurisdiction in International Law' (1972–1973) 46 *BYBIL* 145.
- Derek W. Bowett, 'Jurisdiction: Changing Patterns of Authority Over Activities and Resources' (1982) 53 *BYBIL* 1.
- Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford, 2003) ch. 6.
- Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, 2005) 75–101.
- 'Harvard Draft Convention on Jurisdiction With Commentary' (1935) 29 *AJIL Supplement* 439.
- Menno T. Kamminga, 'Lessons Learned From the Exercise of Universal Jurisdiction Over Gross Human Rights Abuses' (2001) 23 *Human Rights Quarterly* 940.
- Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86.
- Claus Kreß, 'Universal Jurisdiction Over International Crimes and the *Institut de Droit International* (2006) 4 *JICJ* 561.
- Vaughan Lowe, 'Jurisdiction' in Malcolm Evans (ed.), *International Law* (Oxford, 2003) 329.
- Steven Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, 2003).
- Frederick A. Mann, 'The Doctrine of Jurisdiction in International Law' (1964–1) 111 *Recueil des Cours, Academie de Droit International* 9.
- Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *JICJ* 735.
- Kenneth C. Randall, 'Universal Jurisdiction Under International Law' (1988) 65 *Texas Law Review* 785.
- Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, 2003).

¹⁰⁶ 'Final Report on the Exercise of Universal Jurisdiction in Relation to Gross Human Rights Abuses' in ILA, *Report of the Sixty-Ninth Conference, held in London* (London, ILA, 2000) 403 at 422.

National Prosecutions of International Crimes

4.1 Introduction

International crimes are primarily intended to be prosecuted at the domestic level, although the 1948 Genocide Convention foresaw a possible ‘international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’.¹ This has been described as an ‘indirect enforcement system’ whereby international criminal law is to be enforced through national systems.² National prosecutions are not only the primary vehicle for the enforcement of international crimes, they are also often considered a preferable option – in political, sociological, practical, and legitimacy terms – to international prosecutions.³

But although the world vowed after the Second World War never again to allow such atrocities to occur, they continue to be committed in many places around the world and domestic prosecutions are far apart. Indeed, the international criminal jurisdictions are an answer to the impunity that generally exists domestically. This chapter will address international obligations in this regard and some major legal issues that arise concerning national prosecutions of international crimes. Among the complicating factors, insufficient legislation, *ne bis in idem* (double jeopardy) and statutory limitations are addressed here, while amnesties are dealt with in Chapter 2, state cooperation in Chapter 5 and immunities in Chapter 20.

4.2 National prosecutions

Of the international crimes that are the subject of this book, war crimes have been regulated in domestic law the longest and have been prosecuted most often.⁴ Early examples are prosecutions with respect to the American Civil War in the 1860s and Anglo-Boer Wars in the late eighteenth and early nineteenth centuries. The quite

¹ Art. 6, Genocide Convention. See also Art. 5, 1973 Apartheid Convention.

² See, e.g. Cherif Bassiouni, *Introduction to International Criminal Law* (New York, 2003) 333.

³ See chs. 2 and 21. ⁴ For national case law, see the ICRC webpage: www.icrc.org/ihl-nat.

reluctant prosecutions in Germany and Turkey after the First World War, the Leipzig trials and the Istanbul (Constantinople) trials in the 1920s, related to war crimes and were conducted under domestic laws.⁵

No conflict has generated as many national prosecutions as the Second World War, sometimes for international crimes, but in many instances for ‘ordinary’ crimes under national penal law; the Nuremberg and Tokyo IMTs and the subsequent trials in the occupation zones of Germany and in the Far East are addressed in Chapter 6. Apart from the (literally) thousands of cases in Germany,⁶ many other European States have instituted prosecutions.⁷ Well known are the French cases against Klaus Barbie (head of the Gestapo in Lyon), Paul Touvier (a pro-Nazi militia man), and Maurice Papon (a high-ranking official of the French Vichy regime), all convicted for crimes against humanity in 1987, 1994 and 1998 respectively, after very long proceedings plagued with difficulties.⁸ Prosecutions have also taken place, inter alia, in Italy (e.g. the *Hass and Priebeke* case⁹), Austria, the Netherlands, and former Eastern European countries. In the UK, only one Second World War case, *R v. Anthony Sawoniuk*, has resulted in a conviction for war crimes.¹⁰

But Second World War crimes have also been prosecuted elsewhere, most notably by Israel. The seminal *Eichmann* case addressed important issues of jurisdiction,¹¹ including the exercise of jurisdiction upon abduction of the accused from another State,¹² but also criminal defences (superior orders and the ‘act of state’ doctrine) and the principle of non-retroactivity of criminal law.¹³ Adolf Eichmann stood trial for ‘crimes against the Jewish people’, crimes against humanity and war crimes. He was found guilty, sentenced to death and executed in Ramleh Prison on 31 May 1962. Jurisdictional issues were also considered when US courts decided to extradite John Demjanjuk to Israel to stand trial for war crimes and crimes

⁵ See section 6.2. See also Timothy McCormack, ‘Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their “Own Nationals” for International Crimes’ in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes Against Humanity* (Oxford, 2003) 121–5.

⁶ For German judgments concerning Nazi crimes (in German), see Christiaan Rüter and Dick de Mildt (eds.), *Justiz und NS-Verbrechen: Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945–1999* (Amsterdam and Munich, 1968–c.2011), and Christiaan Rüter (ed.), *DDR-Justiz und NS-Verbrechen: Sammlung ostdeutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen* (Amsterdam and Munich, 2002–c.2009).

⁷ Generally, see Axel Marschik, ‘The Politics of Prosecution: European National Approaches to War Crimes’ in T. McCormack and G. Simpson, *The Law of War Crimes: National and International Approaches* (The Hague, 1997) 65–101.

⁸ See Leila Sadat Wexler, ‘The French Experience’ in Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. III, 273–300.

⁹ Convictions for war crimes and crimes against humanity; Rome Military Tribunal 22.7.1997, Military Court of Appeal 7.3.1998, and Supreme Court of Cassation 16.11.1998. See Paola Gaeta, ‘War Crimes Trials Before Italian Criminal Courts: New Trends’ in H. Fischer et al., *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin, 2001) 751–68. On other Italian trials, see also Pier Paolo Ravello, ‘The Prosecution of War Crimes Committed by Nazi Forces in Italy’ 3 *JICJ* (2005) 422.

¹⁰ [2000] 2 Crim App Rep 220. ¹¹ See ch. 3. ¹² See section 5.4.7.

¹³ *A-G of Israel v. Eichmann* (1968) 36 ILR 5 (1st DC) and *A-G of Israel v. Eichmann* (1968) 36 ILR 277 (SC); see Matthew Lippman, ‘Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice’ (2002) 8 *Buffalo Human Rights Law Review* 45.

against humanity.¹⁴ Before the Israeli courts, however, evidentiary matters came to the forefront, and Demjanjuk was finally acquitted because of doubts in respect of his identity (as the concentration camp guard ‘Ivan the Terrible of Treblinka’).¹⁵

Other interesting cases are the Canadian *Finta* case, where very strict mental and material requirements for crimes against humanity and war crimes were introduced,¹⁶ and the Australian *Polyukhovic* case, where the constitutional validity of war crimes legislation was challenged with respect to jurisdiction and retroactivity.¹⁷

Conflicts after the Second World War did not produce many national criminal proceedings. A few examples are the US court-martials concerning the infamous My Lai massacre during the Vietnam War, albeit not for international crimes,¹⁸ some cases in Romania and Ethiopia where reference was made to ‘genocide’,¹⁹ a show trial in Cambodia of Pol Pot and the Khmer Rouge in 1979,²⁰ and preparations for prosecution of crimes during the 1971 Pakistan–Bangladesh war.²¹

It was not until the 1990s with the renewed focus on international criminal justice in general, and the establishment of the ad hoc Tribunals in particular, that the frequency of national prosecutions increased. This is particularly true in Rwanda and the States of the former Yugoslavia. Rwanda introduced new legislation on genocide in 1996 – dividing genocide into three categories based on the gravity of the crime, carrying different penalties – and started a large number of prosecutions. But with a huge number of detainees awaiting trial, said to be more than 100,000 people, the criminal system had to be reformed and traditional *gacaca* courts were introduced in 2001.²²

In the former Yugoslavia, the Dayton Agreement laid the ground for interaction between the ICTY, having primary jurisdiction over the relevant offences, and national authorities.²³ These relationships have improved over time and the ICTY has referred cases (where no ICTY indictment was issued) to courts in Croatia and Serbia. With respect to Bosnia and Herzegovina, a special scheme applied (called ‘Rules of the Road’) whereby the ICTY Prosecutor in effect vetted national cases before a domestic arrest warrant for war crimes was to be issued. The latter scheme ended in 2004 when the ICTY stopped issuing new indictments²⁴ and State authorities in Bosnia and Herzegovina took over the reviews. As part of the completion strategy

¹⁴ *Demjanjuk*, US District Court (N.D. Ohio) 15.4.1985, and *Demjanjuk v. Petrovsky et al.* US Court of Appeals (Sixth Circuit) 31.10.1985; see Jonathan Wenig, ‘Enforcing the Lessons of History: Israel Judges the Holocaust’ in McCormack and Simpson, *Law of War Crimes*, 115–18.

¹⁵ Israel Supreme Court 29.7.1993.

¹⁶ Supreme Court of Canada 24.3.1994; see Irwin Cotler, ‘Bringing Nazi War Criminals in Canada to Justice: A Case Study’ (1997) *ASIL Proceedings* 262, and Leslie C. Green, ‘Canadian Law, War Crimes and Crimes Against Humanity’ (1988) 59 *BYBIL* 217.

¹⁷ High Court of Australia 14.8.1991.

¹⁸ *US v. Calley* conviction of 29.3.1971 (sentence 31.3.1971), and US Military Court of Appeals decision 21.12.1973. However, Lieutenant Calley’s commander, Captain Medina, was acquitted by court-martial on 22.9.1971.

¹⁹ See William Schabas, ‘National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes’ (2003) 1 *JICJ* 39.

²⁰ UN Doc. A/34/491 (20.9.1979), available at www.icrc.org/ihl-nat.

²¹ See Cherif Bassiouni, *Crimes Against Humanity in International Law* (2nd edn, The Hague, 1999) 549–51.

²² See, e.g. William Schabas, ‘Genocide Trials and Gacaca Courts’ (2005) 3 *JICJ* 879.

²³ See McCormack, ‘Their Atrocities’, 127–34. ²⁴ See ch. 7.

of the ICTY, cases where the ICTY has issued an indictment can now also be referred to national jurisdictions.²⁵

In addition, prosecutions of crimes committed in Rwanda and the former Yugoslavia have taken place in third States, such as Austria, Belgium, Denmark, Germany, Sweden and Switzerland. For example, the *Tadić* case originated as a domestic case in Germany but was taken over by the ICTY,²⁶ while the Butare Four case in Belgium proceeded after the ICTR had declined to exercise jurisdiction.²⁷

The trend has extended beyond these two conflicts. A number of cases, often based on private complaints, have commenced in domestic courts, particularly in Europe,²⁸ regarding different conflicts all around the world. In some countries, however, for example the United States and Canada, denaturalization and deportation under the citizenship and immigration legislation have been preferred to criminal prosecution.²⁹ Specialized domestic courts for international crimes, sometimes referred to as 'internationalized courts', have been established in some countries with international assistance.³⁰

National prosecutions of international crimes have been highly selective and, generally, States have been unwilling to prosecute their own nationals.³¹ There are examples to the contrary, however, and the numerous post-Second World War prosecutions of nationals in West and East Germany, and the more recent prosecutions in the former Yugoslavia³² and Rwanda, are notable exceptions. A high degree of selectiveness within one and the same conflict may project the message that all other activities were legal, or the non-prosecuted parties acted in an irreproachable way.³³ The political willingness to pursue national prosecutions is decisive.³⁴ A case regarding crimes committed in the prosecuting State may well end up putting the State itself on trial. The Barbie trial, for example, led to embarrassing questions about the State's collaboration with the Nazis and the commission of international crimes in the more recent conflict in Algeria.³⁵ There are also other political considerations which either prevent national prosecutions altogether or make them highly selective.³⁶ Serious questions of legality present themselves (selectivity, vagueness of the law,

²⁵ *Ibid.* See also section 9.3.2.

²⁶ See, e.g. Jan MacLean, 'The Enforcement of Sentence in the Tadić Case' in: Fischer *et al*, *International and National Prosecution*, 727–31.

²⁷ See, e.g. Luc Reydam, 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case' (2003) 1 *JICJ* 428, and Damien Vandermeersch, 'Prosecuting International Crimes in Belgium' (2005) 3 *JICJ* 400.

²⁸ For a survey, see e.g. Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (June 2006), available at www.hrw.org.

²⁹ See, e.g. Irwin Cotler, 'R v. Finta' (1996) 90 *AJIL* 460, and Matthew Lippman, 'The Pursuit of Nazi War Criminals in the United States and Other Anglo-American Legal Systems' (1998) 29 *California Western International Law Journal* 1.

³⁰ See ch. 9. ³¹ See McCormack, 'Their Atrocities', 107–42.

³² E.g. in Croatia, see Ivo Josipović, 'Responsibility for War Crimes before National Courts in Croatia' (2006) 88:861 *International Review of the Red Cross* 145.

³³ Gerry Simpson, 'War Crimes: A Critical Introduction', in McCormack and Simpson, *Law of War Crimes*, 21–6.

³⁴ Marschik, 'The Politics of Prosecution', 100.

³⁵ See Guyora Binder, 'Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie' (1989) 98 *Yale Law Journal* 1321.

³⁶ See e.g. examples regarding Italy after the Second World War, and Pakistan and Bangladesh after the 1971 Cessation War; Bassiouni, *Crimes Against Humanity*, 548–51.

retroactivity, and very long time-periods between crime and prosecution).³⁷ The rather ambivalent feelings that exist also have an impact on legal mechanisms and principles relating to the obligations of States to prosecute or extradite the perpetrators of international crimes.

Another problem is that national courts often expose uneasiness and insecurity when dealing with international crimes. For example, national courts frequently refer to ‘customary international law’, but without an accompanying attempt to demonstrate the existence of such norms. Also the legal reasoning in some of the judgments has been criticized as ‘lightweight and generally superficial’, at least when compared with the ICTY and ICTR judgments.³⁸

4.3 State obligations to prosecute or extradite

4.3.1 Treaty obligations

A number of international treaties, which address international (or transnational) crimes, oblige the State Parties to investigate and prosecute the offence in question, or to extradite suspects to another State Party willing to do so: the so-called *aut dedere, aut judicare* (‘to extradite or prosecute’) principle.³⁹ Examples can be found in the four Geneva Conventions and Additional Protocol I,⁴⁰ covering war crimes that constitute ‘grave breaches’ under these instruments. The provisions are phrased in the imperative:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts [or hand them over to another High Contracting Party].

For other serious violations of the Geneva Conventions, which are not ‘grave breaches’, the principle does not apply under the treaty scheme, but States still have a right, although not a duty, to prosecute such violations.⁴¹

The principle also exists, *inter alia*, in the 1984 Torture Convention, and many terrorism-related treaties.⁴² Such treaty clauses are often considered as allowing States to exercise ‘universal jurisdiction’,⁴³ and normally phrased in mandatory terms.⁴⁴ Newer provisions require States to ‘submit’ cases of alleged violations to the

³⁷ See, e.g. Gerry Simpson, ‘War Crimes: A Critical Introduction’ in McCormack and Simpson, *Law of War Crimes*, 1–30.

³⁸ Schabas, ‘National Courts’, 63.

³⁹ This maxim was originally devised by Hugo Grotius (*De Jure Belli ac Pacis*, 1624) as ‘*aut dedere... aut punire*’ (‘to extradite or punish’). For an extensive study, see Cherif Bassiouni and Edward Wise, *Aut Dedere, Aut Judicare: A duty to extradite or prosecute in international law* (Dordrecht, 1995).

⁴⁰ Arts. 49–50 of GC I, Arts. 50–1 of GC II, Arts. 129–30 of GC III, Arts. 146–7 of GC IV, Arts. 11, 85–6, and 88 of AP I.

⁴¹ See Theodor Meron, ‘Is International Law Moving towards Criminalization?’ (1998) 9 *EJIL* 18 at 23.

⁴² See ch. 14. ⁴³ See section 3.5.

⁴⁴ Exceptions to this, however, are Art. 5 of the 1973 Apartheid Convention, and Art. 105 of the 1982 Law of the Sea Convention (piracy on the high seas), where the exercise of jurisdiction is instead phrased in permissive terms (‘may’).

‘competent authorities for the purpose of prosecution’, which is a wording that takes into account modern fair trial rights, such as the presumption of innocence, but which should not be understood to lessen the duty to prosecute if the evidence is there;⁴⁵ one should also note that many civil law jurisdictions provide for compulsory prosecutions when an evidentiary threshold is met. However, the obligations are only applicable between the parties to the particular treaty.

The 1948 Genocide Convention, on the contrary, includes an undertaking by the States Parties to prevent and punish genocide, but the jurisdictional scope is restricted to the courts of ‘the State in the territory of which the act was committed’,⁴⁶ and there is no explicit *aut dedere, aut judicare* provision.⁴⁷ Nonetheless, some argue that the Convention may be read to include an obligation to prosecute or extradite.⁴⁸ Support for broader duties than those explicitly set out in the Convention has also been sought in ICJ jurisprudence, but such conclusions have been questioned.⁴⁹

Domestic prosecution of crimes against humanity is not treaty-regulated except for torture (as a separate crime) and apartheid.

It is sometimes asserted that the general duty to ‘protect and ensure’ rights set forth in (general) human rights conventions implies an obligation to prosecute serious violations of such rights, or that a duty follows from the right to an ‘effective remedy’ before a competent body.⁵⁰ But as already described in section 2.3.3, national and international practice does not unequivocally support a duty to prosecute (that is, to institute criminal proceedings) in all circumstances.

4.3.2 Customary obligations and *ius cogens* arguments

Beyond treaty obligations, genocide, crimes against humanity and, at least in part, war crimes are also criminalized in customary international law.⁵¹ As mentioned above, some national prosecutions have taken place, but these are rare and actual State practice does not support the position that States have a general duty to prosecute international crimes. In legal commentary, it has been suggested that a duty to prosecute or extradite nevertheless exists in customary international law; if correct,

⁴⁵ Michael Scharf, ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 *Law and Contemporary Problems* 41 at 46–7.

⁴⁶ Art. 6 of the Genocide Convention; see also Arts. 1, 4 and 5.

⁴⁷ The States Parties do agree, however, to grant extradition and not consider genocide a ‘political crime’, *ibid.*, Art. 7 (see section 5.4.3).

⁴⁸ See, e.g. Eric David, *Principes de droit des conflits armés* (2nd edn, Brussels, 1999) 667–8 (a modern interpretation of the Convention in light of Art. 1), and Lee A. Steven, ‘Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations’ (1999) 39 *Virginia Journal of International Law* 425 at 460–1 (interpretation of Arts. 1 and 4–7).

⁴⁹ Antonio Cassese, *International Criminal Law* (Oxford, 2003) 302–3, referring to the *Genocide* case ICJ opinion 28.5.1951 para. 23, and the *Bosnian Genocide* case ICJ judgment 11.7.1996 para. 31; cf. William Schabas, *Genocide in International Law* (Cambridge, 2000) 404–6, and Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) 102–3.

⁵⁰ See, e.g. Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *The Yale Law Journal* 2537 at 2568–82, and Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78 *California Law Review* 449.

⁵¹ See further, chs. 10–12.

the duty would bind States regardless of whether they are parties to the relevant treaty. The claim is sometimes made by reference to a particular crime, but sometimes by reference to all international crimes.

There are expressions in support of a customary duty. The 1996 ILC Draft Code of Crime Against the Peace and Security of Mankind, for example, advocated a duty to prosecute or extradite individuals accused of genocide, crimes against humanity and war crimes, as defined in the Code, and to prohibit such crimes regardless of where or by whom the crime was committed.⁵² The ICTY Appeals Chamber in *Blaškić* has stated that there is a customary obligation to prosecute or extradite those who have allegedly committed grave breaches of international humanitarian law, but without developing the argument further.⁵³ The Preamble of the ICC Statute ‘recall[s] the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’, although without clarifying the jurisdictional scope of this ‘duty’ or being reinforced by any operative provision in the Statute.

In making the case for a customary duty, reference has been made to certain General Assembly resolutions as an expression of *opinio juris*.⁵⁴ But close scrutiny of the wording and voting record gives rise to doubts, and the majority of State practice, particularly on amnesties, speaks against an existing customary duty to prosecute international crimes.⁵⁵ A strong case can be made, however, that such a duty is emerging concerning prosecutions based on territoriality, and perhaps nationality, jurisdiction.⁵⁶

Another line of argument is that a duty to prosecute follows from the nature of international crimes: the core crimes of international criminal law rest on norms of *ius cogens* (peremptory norms)⁵⁷ and as such give rise to obligations *erga omnes* (towards the entire international community).⁵⁸ Advocating this position, Bassiouni has argued that the *erga omnes* obligation is not to grant impunity to violators of such crimes and thus to prosecute or extradite, and this argument wins support in ICJ case law so far as genocide is concerned.⁵⁹ A linked hypothesis is the existence of an international community (a *civitas maxima*) with a common interest in repressing international crimes which, combined with the right of every State to prosecute international crimes, has led to a duty to prosecute or extradite. Hence, shared moral values have turned into a legal obligation. Taken together, the proponents assert that a customary duty exists in spite of the fact that there is no consistent State practice or *opinio juris* in

⁵² Arts. 8–9. See also the 1996 ILC Report, at 42–50.

⁵³ *Blaškić* ICTY A. Ch. 29.10.1997 para. 29. Cf. *Furundžija* ICTY T. Ch. II 10.12.1998 paras. 153–7, where the implication of torture being a *jus cogens* crime was discussed, but not with respect to a duty to prosecute or extradite.

⁵⁴ GA Res. 2840(XXVI) of 18.12.1971 and 3074(XXVIII) of 3.12.1973; see Jordan Paust, *International Law as Law of the United States* (Durham NC, 1996) 405.

⁵⁵ See, e.g. Cryer, *Prosecuting International Crimes*, 105–10.

⁵⁶ See, e.g. Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *EJIL* 481.

⁵⁷ See Art. 53 of the Vienna Convention on the Law of Treaties.

⁵⁸ See *Barcelona Traction* ICJ 5.2.1970 at 32.

⁵⁹ Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 *Law and Contemporary Problems* 63. See also the ICJ in the *Genocide* case 28.5.1951 para. 23 and the *Bosnian Genocide* case 11.7.1996 para. 31.

support of this view. Unsurprisingly, others reject or question this conclusion and many of the underlying assertions.⁶⁰

The conclusion that there is a duty to prosecute or extradite does not automatically resolve the scope of criminal jurisdiction to be exercised by States, in particular third States. But as we have seen in Chapter 3, it is widely held that these crimes are subject to permissive ‘universal jurisdiction’ by States. An argument of mandatory ‘universal jurisdiction’ (due to the *ius cogens* status of the crimes or otherwise) would in fact result in most States being in constant breach of the obligation, which brings into question whether State practice does indeed indicate the existence of such a custom.

4.4 Domestic criminal law and criminal jurisdiction

4.4.1 Domestic legislation

Of course, national prosecutions presuppose that there is applicable criminal law and criminal jurisdiction.⁶¹ The Genocide and Geneva Conventions explicitly require that the States Parties enact necessary legislation.⁶² Some States adopt implementing legislation, while others rely upon direct application of international law in the domestic system; hence, not all States will need domestic legislation to meet their treaty obligations. A number of States have enacted special penal law on war crimes and genocide, either in a civil or a military penal system or both. Prior to the ICC Statute, there was no general convention on crimes against humanity, and thus these crimes were only rarely provided for as distinct crimes in domestic law. Aggression is criminalized in a minority of States.⁶³

Most of the underlying offences that can constitute genocide or crimes against humanity have long been criminalized and prosecuted under domestic law, but as ordinary crimes and not in the qualified form of genocide or crimes against humanity. This posed an obstacle to prosecutions in France until the Court of Cassation in *Barbie* established that crimes against humanity, as embodied in the Nuremberg Charter, were directly applicable in France.⁶⁴ The ruling paved the way for further prosecutions of Second World War crimes and for subsequent French legislation on genocide and other ‘*crimes contre l’humanité*’.

Reliance upon ‘ordinary crimes’ may fall short of criminalization in international law, and thus the State may violate its duty to enact with the manifestation of seriousness that is embedded in the international crimes.⁶⁵ In Australia, the approach to rely on ordinary crimes in meeting the obligations under the Genocide Convention

⁶⁰ See Cryer, *Prosecuting International Crimes*, 110–17. For arguments for and against, see Bassiouni and Wise, *Aut Dedere, Aut Judicare*.

⁶¹ On jurisdiction, see ch. 3.

⁶² Art. V of the Genocide Convention, Art. 49 of GC I, Art. 50 of GC II, Art. 129 of GC III, and Art. 146 of GC IV.

⁶³ See ch. 13.

⁶⁴ Court of Cassation 26.1.1984, rejecting an earlier ruling by the same court in *Touvier* 30.6.1976 where crimes against humanity were considered ‘ordinary crimes’; see Sadat Wexler, ‘The French Experience’, 293–4.

⁶⁵ This approach will also hinder referral of cases from the Tribunals; *Bagaragaza* ICTR A.Ch. 30.8.2006.

led a domestic court to the conclusion that genocide was not recognized and could not be prosecuted.⁶⁶

In some cases, the special legislation that is introduced is unsatisfactory. And even if the definitions correspond to those of international law, other aspects such as the modes of liability set forth in the Genocide Convention are sometimes overlooked or inadequately addressed by the application of ordinary domestic criminal law principles.⁶⁷ Customary international law is rarely reflected.⁶⁸ This will hinder prosecution of crimes that are based on international custom only.⁶⁹ Some States (e.g. Germany) do not accept non-written criminal law, due to a strict interpretation of the legality principle. Other States do accept such law (e.g. common law jurisdictions like the United Kingdom), and also direct application of customary international law by national courts, but not that customary international law is capable of creating offences in domestic law;⁷⁰ the power to create new crimes should be reserved for the democratic process and elected assemblies.⁷¹

Moreover, national legislation has sometimes been carefully designed or interpreted to have a selective application. Perhaps the most criticized feature of the *Barbie* case was the imposition by the Court of Cassation of the (additional) requirement that crimes against humanity be committed 'in the name of a State practising a hegemonic political ideology'.⁷² This requirement, which also affected subsequent French trials, excluded application to crimes during France's own de-colonialization conflicts in Indochina and Algeria. Likewise, earlier Australian law on war crimes, as interpreted in the *Polyukhovic* case, excluded brutalities in East Timor. In Israel, the Nazis and Nazi Collaborators (Punishment) Act of 1950, providing for crimes against humanity, war crimes and 'crimes against the Jewish people', is solely retroactive.⁷³ Yet another example is the 1991 War Crimes Act in the United Kingdom which was restricted to violations of the laws of war when committed on German or German-occupied territory between 1939 and 1945; an Act that the House of Lords rejected twice with reference to retroactivity and selectivity.⁷⁴

⁶⁶ *Nulyarimma v. Thompson* [1999] FCA 1192.

⁶⁷ See Art. III of the Genocide Convention; see also Schabas, *Genocide* at 350–2.

⁶⁸ See, however, the Canadian Crimes Against Humanity and War Crimes Act 2000, s. 4(4), which allows for custom, and the German Code of Crimes against International Law 2002 which incorporates rules of customary international law into the definitions of certain crimes.

⁶⁹ See Helmut Kreicker, 'National Prosecution of Genocide from a Comparative Perspective' (2005) 5 *ICLR* 313 at 319–20. Note, however, that French courts in *Barbie* and other cases accepted criminal responsibility grounded on customary international law.

⁷⁰ See, e.g. *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, and *Nulyarimma v. Thompson* [1999] FCA 1192.

⁷¹ Concerning English law, see e.g. the House of Lords in *R v. Jones and Others* [2006] UKHL 16.

⁷² French Court of Cassation 20.12.1985.

⁷³ See further Wenig, 'Enforcing the Lessons of History', 102–22.

⁷⁴ See, e.g. A. T. Richardson, 'War Crimes Act 1991' (1992) 55 *Modern Law Review* 73 at 77, and Marschik, 'The Politics of Prosecution', 87–9.

4.4.2 The ICC as a catalyst for domestic legislation

The fundamental principle that the ICC is to assume jurisdiction only when States fail to do so, the complementarity principle,⁷⁵ provides a strong incentive for States to enact the crimes laid down in the ICC Statute and, to a greater or lesser extent, assume jurisdiction over crimes committed abroad.⁷⁶ Although not a legal obligation under the Statute, States will want to meet the ‘complementarity test’.⁷⁷ It is also an opportunity to express a commitment to combating impunity for the most abhorrent international crimes. This has already led to new penal legislation being passed in a number of States, sometimes in spite of having been parties to the relevant conventions for a long time, and it is under way in others.⁷⁸

The introduction of such laws is a complex task, however, and requires careful political and legal considerations. When it is politically important to ensure a criminalization that coincides with that of the ICC, and thus to prevent the ICC from intervening in future cases, the safest option is to adopt the offences as defined in the ICC Statute. This is the approach taken by, *inter alia*, Australia, Canada, New Zealand, South Africa and the United Kingdom.⁷⁹ Another approach is to transform the offences into the normal legal terminology of the national system, as has been done, for example, in Germany.⁸⁰ In this process, however, States must also take into account their other international obligations concerning international crimes. Accordingly, the German approach has been to focus on customary international law offences.⁸¹ Yet another approach is to ensure that ‘ordinary’ domestic offences cover all conduct that also falls within the crimes of the Statute. Neither the ‘complementarity test’ nor the related *ne bis in idem* provisions (see section 4.7) require that the State and the ICC make the same legal characterization of the underlying conduct (i.e. that national law also includes genocide, crimes against humanity and war crimes as specific offences).

In this process, the scope of national criminal jurisdiction as well as the applicable principles of criminal law and penalties must also be considered. States are free to choose other solutions than those provided for the ICC, but again the choice may

⁷⁵ See section 8.5.

⁷⁶ See, e.g. Katherine Doherty and Timothy McCormack, ‘Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation’ (1999) 5 *UC Davis Journal of International Law and Policy* 147; Mark Ellis, ‘The International Criminal Court and Its Implications for Domestic Law and National Capacity Building’ (2002) 15 *Florida Journal of International Law* 215; Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford, 2003) 86–93; Darryl Robinson, ‘The Rome Statute and Its Impact on National Law’ in Cassese, *Commentary* 1849–69.

⁷⁷ But see section 8.5 for cases of uncontested admissibility.

⁷⁸ For a collection of such legislation, see www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php.

⁷⁹ See D. Turns, ‘Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States’ in D. McGoldrick *et al.* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford, 2003) 337–87.

⁸⁰ See, e.g. Helmut Satzger, ‘German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes against International Law’ (2002) 2 *International Criminal Law Review* 261.

⁸¹ However, this approach entails risks of going further than other States would accept, or not going far enough to meet the ‘complementarity test’; see Darryl Robinson, ‘The Rome Statute and Its Impact on National Law’ in Cassese, *Commentary* at 1861–2.

affect the capacity to meet the ‘complementarity test’; other international obligations must also be adhered to.

4.4.3 Impact of domestic and international case law

National courts consider foreign case law to a greater or lesser extent. While it is natural in common law jurisdictions to pay attention to decisions from other (common law) jurisdictions, civil law jurisdictions often have a more reluctant approach to jurisprudence as a source of law. But the persuasive effect of court decisions, particularly those of higher courts, is similar. Domestic jurisprudence may also have an impact as a source of law for international criminal courts, as the practice of the ICTY and ICTR shows.⁸² Such decisions may serve as tools for the interpretation of treaties, identification and interpretation of rules of customary international law or general principles of law, and perhaps even as independent authorities.

Decisions of international courts are a recognized, but formally a subsidiary, means for determining international law. In practice, these decisions have made very important contributions to the development of international criminal law, from the Nuremberg and Tokyo IMTs to the ICC. Not the least the ICTY and ICTR have made a lasting impact by operating for many years and providing important clarifications of various issues. To what extent international jurisprudence is considered by national courts depends upon how international law is generally integrated into and applied within the domestic legal order. Some domestic legislation, for example in the United Kingdom, explicitly requires that national courts take into account decisions and judgments of the ICC and any other relevant international jurisprudence.⁸³ In other States which have incorporated international crimes into domestic law, national courts will normally be under an obligation to interpret the domestic provisions in accordance with the interpretation of equivalent international provisions, including that made by international criminal tribunals.⁸⁴

4.5 Statutory limitations

Most domestic systems know statutory limitations, or prescription. But while most civil law jurisdictions provide for a general application, most common law jurisdictions exclude murder and other very serious crimes. Neither the post-Second World War trials, nor the Geneva Conventions or Genocide Conventions, address the issue, but subsequently there has been much debate regarding the application of statutory limitations with respect to genocide, crimes against humanity and war crimes.

⁸² See André Nollkaemper, ‘Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY’ in William Schabas and Gideon Boas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden, 2003) 277–96.

⁸³ International Criminal Court Act 2001, s. 66(4) (UK).

⁸⁴ See, e.g. the *Jorgic* case German Federal Constitutional Court 12.12.2000.

Statutory limitations aim to prevent unjust delays between the commission of the offence and prosecution (or punishment), but could, if applicable, lead to impunity for the most heinous international crimes. In order to close this possible 'technical' escape from liability, treaties on the non-applicability of statutory limitations to genocide, crimes against humanity and war crimes were adopted under the auspices of the UN and the Council of Europe.⁸⁵ Some States have also passed laws which make statutory limitations inapplicable to such crimes, but these laws vary in scope. There is also some municipal and international case law to the effect that statutory limitations shall not apply to international crimes, for example the ICTY ruling regarding torture (as a *ius cogens* crime) in *Furundžija*.⁸⁶ The ICC Statute explicitly provides that statutory limitations do not apply.⁸⁷

But statutes of limitations have been obstacles in national prosecutions.⁸⁸ In the *Barbie* case,⁸⁹ for example, the French law on non-application of such limitations was strictly interpreted to apply only to crimes against humanity, thus barring prosecution for war crimes. Similarly, prescription concerning war crimes also led to the acquittal by Italian courts in the *Hass and Priebke* case, where the accused had admitted to a massacre of many hundred civilians during the Second World War. But war crimes carrying life imprisonment under Italian law were considered exempt from statutory limitations. In 1976, Swiss authorities had to refuse extradition to the Netherlands of Second World War criminal Pieter Menten due to statutory limitations (and were also prevented from prosecuting the case),⁹⁰ as did the lower Argentine courts when considering the extradition of Priebke to Italy.

It has been claimed that the non-applicability of statutory limitations to war crimes has developed into a norm of customary international law.⁹¹ Others restrict the claim of a customary rule to genocide, crimes against humanity and torture.⁹² While there is clearly a move towards an acceptance that statutory limitations shall not apply, the fact remains that many States still apply such limitations to international crimes and that the two Conventions have a modest number of States Parties.⁹³ For example, both German and Dutch law retain statutory limitations for the least serious war

⁸⁵ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26.11.1968; European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes of 25.1.1974.

⁸⁶ *Furundžija* ICTY T. Ch. II 10.12.1998 para. 157. See also the *Barrios Altos Case* IACtHR 14.3.2001 para. 41. A recent domestic decision is the *Sandoval case*, Supreme Court of Chile 17.11.2004 (on enforced disappearances).

⁸⁷ Art. 29 of the ICC Statute.

⁸⁸ See further C. Van den Wyngaert, 'War Crimes, Genocide and Crimes Against Humanity – Are States Taking National Prosecutions Seriously?' in Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. III, 233–235.

⁸⁹ French Court of Cassation 26.1.1984.

⁹⁰ See Andreas Ziegler, 'Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The Case of Switzerland' (1997) 7 *Schweizerische Zeitschrift für internationales und europäisches Recht* 561 at 570–1.

⁹¹ Henckaerts and Doswald-Beck, *ICRC Customary Law*, 614–18.

⁹² See, e.g. A. Cassese, *International Criminal Law* (Oxford, 2003) 319.

⁹³ In September 2006, the UN Convention had forty-nine States Parties (and nine signatories) and the European Convention three parties (and two signatories).

crimes, even against the general non-applicability of the ICC Statute.⁹⁴ The assertion of a customary norm may thus be premature.⁹⁵ It is worth mentioning too that domestic legislation does not affect liability under international law, and there is no positive rule providing for prescription of liability for international crimes.

4.6 Principle of non-retroactivity

Related to statutory limitations is the principle of non-retroactivity of criminal law, which in turn forms part of the legality principle.⁹⁶ The question of compatibility with the non-retroactivity principle arises when a limitation period is extended or set aside retroactively (or when extraterritorial jurisdiction is introduced retrospectively). But national courts have accepted retroactive criminality with respect to Second World War crimes, in so far as the crimes were considered covered by conventional or customary international law at the time the offence was committed. Both the Supreme Court of Canada in *Finta* and the High Court of Australia in *Polyukhovich* accepted this regarding crimes committed abroad; the French Court of Cassation in *Barbie* resolved the issue by considering crimes against humanity as directly applicable international crimes. States will consider statutory limitations as either substantive or procedural rules, and the principle of legality is only applicable to the latter, but there must in any case be grounds for concluding that the crime existed at the time of its commission.⁹⁷

Some ICC-related legislation addresses the question of retroactivity. According to the Canadian Crimes Against Humanity and War Crimes Act 2000, for example, crimes committed outside Canada may be prosecuted retrospectively, but prosecution of crimes committed before the adoption of the ICC Statute (on 17 July 1998) is allowed only in so far as the crimes correspond to the state of customary law at the time of their commission.⁹⁸ The Act also clarifies that the crimes defined in the ICC Statute are deemed to reflect customary law at the latest when the Statute was adopted, possibly earlier, and that crimes against humanity were criminal according to customary international law or general principles of law recognized by civilized nations prior to the Nuremberg IMT Charter or the Tokyo IMT Charter.⁹⁹ The New Zealand International Crimes and International Criminal Courts Act 2000 establishes start dates for jurisdiction over genocide and crimes against humanity,¹⁰⁰ which reflect the date when New Zealand ratified the Genocide Convention (for genocide) and the date when the jurisdiction of the ICTY commenced (for crimes against humanity).

⁹⁴ See Harry Verweij and Martijn Groenleer, 'The Netherlands' Legislative Measures to Implement the ICC Statute' in R. S. Lee, *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (New York, 2005), 97, and Satzger, 'German Criminal Law and the Rome Statute', 272–3.

⁹⁵ See also Gaeta 'War Crimes Trials' in Fischer *et al*, *International and National Prosecution*, 766.

⁹⁶ See section 1.5.1. ⁹⁷ See Van den Wyngaert, *National Prosecutions*, 235–7.

⁹⁸ Crimes Against Humanity and War Crimes Act 2000, s. 6.

⁹⁹ *Ibid.* The charters were adopted on 8.8.1945 and 19.1.1946 respectively.

¹⁰⁰ International Crimes and International Criminal Courts Act 2000, s. 8(4).

4.7 *Ne bis in idem* or double jeopardy

4.7.1 *Application between States*

The principle that no one shall be tried or punished more than once for the same offence, expressed as *ne bis in idem* or double jeopardy, is reflected in the major human rights treaties,¹⁰¹ and is an expression of the broader principle of finality and the binding effect of judgments (the doctrine of *res judicata*). Reasons of fairness to defendants and the interest of thorough investigations and preparations of cases by the prosecutorial authorities motivate the principle. The principle also applies in the context of international cooperation in criminal matters.¹⁰²

But these provisions relate only to proceedings in one and the same State.¹⁰³ Hence, it is lawful for a State to prosecute a person for an offence for which he or she has been prosecuted, and even punished, elsewhere. Part of this is an outcropping of the principle of sovereign equality. One State's courts cannot bind another. Different States view the effects of a foreign criminal judgment differently. In many common law jurisdictions, for example, the plea of *autrefois acquit*, *autrefois convict* is not restricted to a previous acquittal or conviction in the same domestic jurisdiction.¹⁰⁴ In other States, the practice ranges from almost complete recognition of foreign judgments to no recognition at all, while most States recognize such judgments to a limited extent. When retrials are allowed, municipal law sometimes demands that a penalty imposed and served abroad is taken into account in sentencing.

Basic differences in the common law and civil law traditions, on issues such as the finality of a judgment, appeals against acquittals, and determination of the same act (*idem*), influence the application of the principle.¹⁰⁵ While some States apply a narrow interpretation of *idem*, covering only the conduct in law ('the offence'), other States give it a broader meaning whereby the conduct both in law and in fact is covered. Exceptions may apply, however, and difficult questions arise with respect to conduct that constitutes multiple offences, or continuing offences. When interpreting the principle, the European Court of Human Rights has arrived at different conclusions,¹⁰⁶ and the European Court of Justice has accepted that the principle is applied differently by different EU member States.¹⁰⁷ There is also no general consensus as to

¹⁰¹ E.g. Art. 14(7) of the ICCPR, and Art. 4 of Protocol 7 to the ECHR. ¹⁰² See section 5.3.3.

¹⁰³ See, e.g. Christine van den Wyngaert and Guy Stessens, 'The International *non bis in idem* Principle: Resolving Some of the Unanswered Questions' (1999) 48 *ICLQ* 779. However, some argue that this is a serious lacuna in the protection of individual human rights, e.g. Alexander Poels, 'A Need for Transnational Non Bis In Idem Protection in International Human Rights Law' (2005) 23 *Netherlands Quarterly of Human Rights* 329.

¹⁰⁴ See, e.g. *Treacy v. DPP* [1971] AC 537.

¹⁰⁵ C. Van den Wyngaert and T. Ongena, *Ne bis in idem* Principle, Including the Issue of Amnesty' in Cassese, *Commentary*, 710–15.

¹⁰⁶ On Art. 4 of Protocol 7 to the ECHR: see, e.g. *Gradinger v. Austria* ECtHR 23.10.1995 and *Fischer v. Austria* ECtHR 29.8.2001 (broad interpretations of *idem*), *Oliveira v. Switzerland* ECtHR 30.7.1998 (more narrow interpretation).

¹⁰⁷ On Art. 54 of the 1990 Convention Implementing the Schengen Agreement: see, e.g. *Gözütok and Brügge* ECJ 11.2.2003 paras. 31–3, *Miraglia* ECJ 10.3.2005, and *Van Esbroeck* ECJ 9.3.2006 paras. 25–42 (also applying a broad interpretation of *idem*).

what decisions, apart from convictions and acquittals, may bar new proceedings. Candidates are other decisions which prevent further proceedings, based on *abuse of process*, ‘extinction’ of the right to prosecute, certain out-of-court settlements, and more controversial plea-bargaining agreements and decisions not to prosecute.¹⁰⁸

Thus, although the principle applies internally in almost all domestic systems, its cross-border application remains controversial and is not recognized as a customary rule or a general principle of law.¹⁰⁹ It is sometimes argued, however, that a customary rule concerning cross-border application of the principle is evolving, at least with regard to international crimes,¹¹⁰ as a corollary to the right to exercise ‘universal jurisdiction’. But instead of (even more) complex *ne bis in idem* provisions, which provide a ‘first come first served’ solution, attempts are being made within the EU to find a mechanism that identifies and prioritizes the most appropriate jurisdiction.¹¹¹ In support of the evolving norm there are the provisions of the ICTY, ICTR and ICC Statutes, which all establish that the principle shall apply both ways in the relationship between the international court and national courts (see section 4.7.2).

4.7.2 Application vis-à-vis international criminal jurisdictions

The establishment of international criminal jurisdictions adds another dimension to the *ne bis in idem* principle. What should the relationship be between the international and national verdicts? The answer depends upon the general relationship between the jurisdictions. In line with their primary jurisdiction vis-à-vis States,¹¹² the ICTY and ICTR Statutes provide that no one may be tried for the same conduct after he or she has been prosecuted at the Tribunal, but the Tribunals are not hindered by domestic proceedings in certain circumstances;¹¹³ the set criteria relate both to the quality of the national proceedings and to the interest of enjoining the seriousness of international crimes. Only finalized national proceedings can bar prosecution before the Tribunal.¹¹⁴ The ‘deduction of sentence’ principle applies in the event that the Tribunal retries the person.

The jurisdiction of the ICC, on the other hand, is complementary to that of States, which calls for a different *ne bis in idem* regime.¹¹⁵ Apart from barring subsequent ICC proceedings regarding the same (factual) conduct,¹¹⁶ convictions and acquittals by the

¹⁰⁸ In this sense, the ECJ has adopted a quite far-reaching approach, see cases referred to in n. 107.

¹⁰⁹ See, e.g. Gerard Conway, ‘Ne Bis in Idem in International Law’ (2003) 3 *ICLR* 217.

¹¹⁰ See, e.g. Cassese, *International Criminal Law*, 320–1.

¹¹¹ EC Commission, *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings* 23.12.2005 (COM(2005)696 final). See also Anke Biehler, Roland Kniebühler, Juliette Lelieur-Fischer and Sibyl Stein (eds.), *Freiburg Proposal on Concurrent Jurisdiction and the Prohibition of Multiple Prosecutions in the European Union* (Saarbrücken, 2003).

¹¹² See ch. 7.

¹¹³ Art. 10 of the ICTY Statute and Art. 9 of the ICTR Statute. The same applies between the SCSL and Sierra Leone, see Arts. 8–9 of the SCSL Statute.

¹¹⁴ *Tadić* ICTY T. Ch. II 14.11.1995; *Musema* ICTR T. Ch. I 12.3.1996 para. 12. ¹¹⁵ Art. 20 of the ICC Statute.

¹¹⁶ This provision is subject to exceptions as provided in the ICC Statute, for example revision of conviction or sentence (Art. 84) and, according to some, appeals against an acquittal (Art. 81).

ICC preclude the person being tried by a national (or another international) court 'for a crime referred to in Article 5' that was subject to the conviction or acquittal. Interestingly, it seems that owing to the latter provision, although national courts cannot prosecute a person for an international crime after he or she has been prosecuted for it at the ICC, they could prosecute him or her, on the basis of the same conduct, for a domestic crime.¹¹⁷ It may be understandable that States would want to preserve the right to try a person for murder after an unsuccessful war crimes charge at the ICC, for example when no armed conflict could be established, but as worded the provisions would also allow a subsequent national murder trial in spite of a war crimes conviction on the same facts by the ICC.

The ICC Statute also provides that national decisions concerning 'conduct also proscribed under Article 6, 7 or 8' (of the Statute) hinder prospective ICC prosecutions, but with certain exceptions. Again 'sham trials' do not bar subsequent international proceedings. But there is no exception for cases where the national court has dealt with the matter as an 'ordinary crime'; it is the underlying facts, not the legal characterization, that are decisive. Moreover, the ICC is required to assess whether the national proceedings were conducted independently and impartially 'in accordance with the norms of due process recognized by international law'. The ICC Statute does not require the Court to apply the 'deduction of sentence' principle, but provides instead for discretionary deduction of time spent in detention 'in connection with conduct underlying the crime'.¹¹⁸

4.8 Practical obstacles to national prosecutions

Where national prosecution is of crimes committed abroad, there are special demands relating to security, logistics and international cooperation. Some countries have established specialized police and prosecution units to deal with crimes of this kind, for example Canada, Denmark, the Netherlands, Norway and the United Kingdom.

Where international cooperation is required it may have attendant problems. In many cases, proceedings have been extended due to problems concerning apprehension of the accused.¹¹⁹ Eichmann was abducted in another State, Barbie was 'expelled' (but not 'extradited') from Bolivia, Touvier was for long in hiding in France, and many others have escaped justice because of extradition requirements. Documentary and physical evidence are normally difficult to secure and witness evidence is therefore crucial.

National prosecutions have regularly taken place long after the event. This may make live evidence impossible to obtain or may affect the reliability of the statements made; key witnesses may have forgotten critical events and misidentified the accused, as in the *Polyukhovich* and *Demjanjuk* cases. The difficulty of obtaining evidence may

¹¹⁷ Immi Tallgren, 'Article 20' in Triffterer, *Observers' Notes*, 428; Van den Wyngaert and Ongena, *Ne bis in idem*, 723.

¹¹⁸ Art. 78(2) of the ICC Statute. ¹¹⁹ See ch. 5.

also affect fair trial rights and some national courts have applied rules of evidence more liberally to defence evidence as a protection against unjust convictions. Examples are the *Finta* case in Canada and the *Demjanjuk* case in Israel.¹²⁰ Furthermore, old defendants may no longer be fit to stand trial or to serve a prison sentence; for example, the *Papon* case and the abandoned UK trial against *Szyman Serafinowicz*.¹²¹

Further reading

M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague, 1999).

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Christine Van den Wyngaert, 'War Crimes, Genocide and Crimes Against Humanity – Are States Taking National Prosecutions Seriously?' in Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. III, 227–39.

Christine Van den Wyngaert and Tom Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty' in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court* (Oxford, 2002) 705–29.

The ICRC collects and makes available national legislation and case law (www.icrc.org), with updates also published in the *International Review of the Red Cross*.

Country reports on legislation and practice are collected in:

Albin Eser, Ulrich Sieber and Helmut Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen-National Prosecution of International Crimes* (Max-Planck Institute (2003–05) S 95.1–95.6) vols. 1–6.

¹²⁰ Richard May, 'The Collection and Admissibility of Evidence and the Rights of the Accused' in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes Against Humanity* (Oxford, 2003) 167–9.

¹²¹ See Jane Garwood-Cutler, 'The British Experience' in: Bassiouni, *International Criminal Law*, 325–6.

5

State Cooperation with Respect to National Proceedings

5.1 Introduction

Criminal law and proceedings are at the heart of state sovereignty and cooperation in criminal matters is a voluntary undertaking; a State is not obliged to cooperate with others in criminal matters unless it has agreed to do so. But over time, the parochial view that criminal law, including its effects, is local in nature has given way to an ever growing need for and actual regulation of international legal cooperation. Influential factors in this regard are increased cross-border activities, including the commission of crimes, international terrorism and the development of human rights.

International crimes are of concern to all States and therefore lend themselves to efforts at cooperation. A commitment to cooperate, in the form of extradition, is the alternative to prosecution in accordance with the *aut dedere, aut judicare* principle, when applicable.¹ Cooperation is particularly important when the State is exercising jurisdiction over crimes committed abroad, but may also be necessary when a State is investigating and prosecuting crimes committed on its own territory. Prosecution of genocide, crimes against humanity, and war crimes is no exception. For example, regional cooperation has been internationally promoted in the Balkans between Serbia, Montenegro, Croatia and Bosnia and Herzegovina (the ‘Palic process’) and regional agreements are being developed.²

But international law, treaty and custom, has not (yet) developed a special regime for State-to-State cooperation concerning these crimes.³ The Geneva Conventions and Additional Protocol I, for example, explicitly refer to cooperation in accordance with domestic legislation.⁴ One must therefore resort to general principles and provisions of international and domestic law on international cooperation in criminal matters. In relation to the ICTY, ICTR and ICC, however, State cooperation is subject to separate regimes to which we shall return in Chapter 19.

¹ See ch. 4. ² *Annual Report on Activities of the OSCE Mission to Serbia and Montenegro 2005* at 16–17.

³ See, however, e.g. GA Res. 3074(XXVIII) of 3.12.1973, which establishes a special regime but does not reflect custom.

⁴ Art. 49 of GC I, Art. 50 of GC II, Art. 129 of GC III, Art. 146 of GC IV, and Art. 88 of AP I.

Traditional forms of legal cooperation⁵ are: extradition, mutual legal assistance, transfer of criminal proceedings, and enforcement of foreign penalties. In addition, there is an ever-increasing degree of cooperation, at various levels of formality, between police and other law enforcement authorities in different States.

5.2 International agreements

Originally informal, extradition was the first form of legal cooperation to be regulated by international (bilateral and later multilateral) agreements. Other forms of cooperation were subsequently added, first as auxiliary measures to extradition and only later as independent forms of assistance. In the 1960s further steps were taken, especially within the Council of Europe, to extend the cooperation into transfer of criminal proceedings (delegation of prosecution) and post-conviction measures.

Most States require a bilateral or multilateral agreement as a condition for providing cooperation, and thus reciprocity, but States can also grant assistance unilaterally. However, the quantity and quality of international agreements and, even more pronounced, domestic legislation on legal cooperation is unevenly distributed across the world. Some States have concluded a great number of bilateral agreements. Some regions have very advanced multilateral regimes, for example in Europe where both the Council of Europe and the EU are very active in this field,⁶ and also within the Commonwealth. But there is no global extradition or mutual legal assistance treaty of general application and many States rely on international and national regimes that are rudimentary, outdated, or restricted to special crimes. In order to assist States, the UN has developed Model Treaties concerning all major forms of cooperation.⁷ Assistance with implementing legislation is also provided by the UN, other organizations and individual States.

State cooperation is addressed in various multilateral treaties, the primary function of which is to codify international or transnational crimes and oblige the States Parties to combat them by criminalizing certain acts and provide for criminal jurisdiction. The older treaties, however, address cooperation only in very general terms. For example, the contracting parties to the 1948 Genocide Convention 'pledge themselves . . . to grant extradition in accordance with their laws and treaties';⁸ the 1977 AP I to the Geneva Conventions,⁹ as well as the 1984 Torture

⁵ The terminology in this field is subject to some controversy. Civil law jurisdictions seem to prefer the term 'international judicial assistance', which reflects the judicial involvement in criminal investigations in these countries, while common law jurisdictions rather refer to 'international or mutual legal assistance'. Other distinctions have been suggested between assistance (to a foreign criminal investigation or trial) and transfer (of proceedings or penalty enforcement), and between extradition and other (lesser) forms of assistance.

⁶ Regional treaties have also been adopted under the auspices of the Organization of American States, the League of Arab States, and the Commonwealth of Independent States.

⁷ On 14.12.1990 the UN General Assembly adopted Model Treaties on extradition (Res. 45/116), mutual assistance in criminal matters (Res. 45/117), transfer of proceedings in criminal matters (Res. 45/118), and transfer of supervision of conditionally sentenced or conditionally released (Res. 45/119).

⁸ Art. 7. See also Art. 49 of GC I, Art. 50 of GC II, Art. 129 of GC III and Art. 146 of GC IV.

⁹ Art. 88.

Convention,¹⁰ require the parties to afford each other ‘the greatest measure of assistance’. Nevertheless, many treaties explicitly provide that the relevant crime shall be an extraditable offence and that the treaty may satisfy domestic conditions that a treaty obligation for extradition exists.

More recent treaties, however, elaborate further on legal cooperation in criminal matters and include more or less complete regimes for extradition, mutual legal assistance and sometimes other forms of legal cooperation. Examples of multilateral UN treaties are the 1988 Drug Trafficking Convention,¹¹ the 2000 Organized Crime Convention (the Palermo Convention),¹² and the 2003 Corruption Convention.¹³ Less detailed, and with a particular focus on extradition (and temporary transfer of detainees and prisoners), are the 1997 Terrorist Bombings Convention¹⁴ and the 1999 Terrorist Financing Convention.¹⁵

With respect to terrorism, however, there are also some examples where the Security Council has ordered a State to surrender suspects for prosecution in another State, and thereby circumvented the normal requirements for extradition, including that of a treaty base.¹⁶

Some specialized organizations operate in this area.¹⁷ Most well-known is the International Criminal Police Organization (Interpol), originally established in 1923 and with 184 member countries, which provides a police communications system, databases (of criminals and stolen property), and operational police support services. Other examples are the European Police Office (Europol) and the EU’s Judicial Cooperation Unit (Eurojust), both created within the EU.

5.3 Some basic features

Both in law and in practice, cooperation in criminal matters is characterized by a dichotomy between state sovereignty, and hence a preference for one’s own system, and a common interest and solidarity among States in combating crimes, which in turn requires trust in the legal systems of others. State-to-State cooperation is horizontal in nature – each State is considered sovereign and equal – which is manifested, inter alia, by reciprocity requirements and extensive grounds to refuse a request for cooperation.

There is also an obvious link between international legal cooperation and the exercise of extraterritorial criminal jurisdiction.¹⁸ The more far-reaching the

¹⁰ Art. 9. ¹¹ Arts. 6–11. ¹² Arts. 13–14, 16–21.

¹³ Arts. 43–50. In addition, the Convention entails an advanced scheme for cooperation concerning asset recovery, Arts. 51–59.

¹⁴ Arts. 8–14. ¹⁵ Arts. 9–17.

¹⁶ See ch. 14; see also Michael Plachta, ‘The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aud Dedere Aud Judicare*’ (2001) 12 *EJIL* 125.

¹⁷ See, e.g. D. McClean, *International Co-operation in Civil and Criminal Matters* (Oxford, 2002) 161–2 and 167–8.

¹⁸ See, e.g. Christopher Blakesley and Otto Ladogny, ‘Finding Harmony Amidst Disagreement over Extradition, the Role of Human Rights, and Issues of Extraterritoriality under International Criminal Law’ (1991) 24 *Vanderbilt Journal of Transnational Law* 1.

extraterritorial jurisdiction is, the more problematic the issue of competing, concurrent jurisdictions will be, and this in turn will often hamper cooperation.

5.3.1 *Traditional assistance and ‘mutual recognition’*

Traditionally, the requesting State asks for assistance with a certain measure (or seeks a particular result) and the requested State, if granting the request, takes the measure according to the conditions and the procedures prescribed by its domestic law. Strict formalities and lengthy procedures often plague cooperation and a scheme of this kind does not always produce results that are useful in the requesting State, particularly if the laws are very different or if strict conditions apply regarding, for example, the admissibility of evidence. Efforts have therefore been made to improve this traditional format, *inter alia*, by allowing the requesting State to prescribe procedural requirements and to participate when measures are taken on its behalf.¹⁹ There is also a move away from the traditional, and often inefficient, diplomatic channel for cooperation requests in favour of specialized central authorities in the States, often within the Ministry of Justice or Home Office, or even direct communications between the judicial authorities in the different States.

Within the EU a further, and more radical, step has been taken with the introduction of a principle of ‘mutual recognition’ of foreign judicial decisions as the cornerstone for the legal cooperation among the Member States. This development of the horizontal approach to cooperation includes an *ipso facto* recognition and execution of foreign orders or requests with a minimum of formality. The concept rests on a high level of mutual trust and similar, or at least well-known, procedural principles and human rights standards; the ‘approximation’ of laws (the politically correct term within the EU for ‘harmonization’) is a closely related issue. First articulated as a general principle in 1999, it has subsequently been implemented in different instruments, most notably regarding the European Arrest Warrant.²⁰

5.3.2 *Double criminality, rule of specialty and statutory limitations*

Although cooperation originates from a common interest in combating crimes, international agreements and domestic laws impose strict requirements for cooperation and States retain broad powers to refuse requests from other States.

The principle of ‘double criminality’ (or ‘dual criminality’) has long been applied, requiring that the underlying act (or omission) is criminal in both the requesting and the requested State. The principle stems from the principle of legality (*nulla poene sine lege*), but is also closely linked to state sovereignty and reciprocity.²¹ It is often

¹⁹ See, e.g. Art. 18 of the 2000 Palermo Convention and Arts. 2 and 8 of the 2001 Additional Protocol II to the 1959 European Convention on Mutual Assistance in Criminal Matters.

²⁰ Council Framework Decision of 13.6.2002 on the European Arrest Warrant and the Surrender Procedures between Member States, OJ L190, 18.7.2002, pp. 1–20. See section 5.4.1.

²¹ Generally, see Nils Jareborg (ed.), *Double Criminality – Studies in International Criminal Law* (Uppsala, 1989).

asserted that the requirement, although sometimes discretionary, constitutes a major obstacle to effective cooperation and many commentators argue that it is no longer necessary; other grounds for refusal, such as *ordre public*, offer sufficient protection of State interests.²² But the assertion is not empirically proven and some argue that the double-criminality requirement serves to protect human rights.²³ Many newer instruments, particularly in the EU, seek to abolish the requirement; the European Arrest Warrant, for example, does not require double criminality regarding selected crimes, including 'crimes within the jurisdiction of the International Criminal Court'.²⁴ Some older examples exist too regarding States with similar laws and a long tradition of close cooperation, for example extradition among the Nordic States.²⁵

Moreover, the double-criminality rule is applied differently. Some States require identical crimes while others are satisfied if the underlying facts constitute any crime (of sufficient gravity, if required) in both legal systems. However, this could entail not only a comparison of the definition of the crime (*in abstracto*), but also applicable grounds for excluding criminal responsibility in the case at hand (*in concreto*). A further restriction is the requirement in some countries that not only the conduct but also the applicable criminal jurisdiction of the requesting State must be equivalent to that of the requested State; the exercise of jurisdiction in the requesting State must have been possible also in the requested State.²⁶ The latter practice hinders cooperation when the requesting State applies extraterritorial jurisdiction and the jurisdiction of the requested State is primarily based upon territoriality, as is normally the case in common law jurisdictions. In addition to these conditions, the double-criminality rule also has a temporal aspect; the House of Lords in the *Pinochet* case controversially established that the double-criminality requirement must be met at the time of the offence and not (only) at the time of the extradition request.²⁷

With respect to genocide, crimes against humanity, and war crimes, the ICC Statute and the incentive to enact domestic legislation that the complementarity principle provides, offers hope for improved cooperation even if a double-criminality requirement is retained among States. Many have adopted, or are considering, similar, if not identical, crimes and broader criminal jurisdiction in national law, which should reduce the room for refusals on double-criminality grounds.

²² See, e.g. Thomas Weigend, 'Grundsätze und Probleme des Deutschen Auslieferungsrecht' (2000) 40/2 *Juristische Schulung* 105 at 107.

²³ See, e.g. Michael Plachta, 'The Role of Double Criminality in International Cooperation in Penal Matters' in Jareborg (ed.), *Double Criminality* 128–9.

²⁴ Art. 2 of the Framework Decision on the European Arrest Warrant; see also the 1996 EU Extradition Convention (Art. 7).

²⁵ As a result of legislative cooperation, extradition laws with substantively the same content have been enacted by Denmark, Finland, Norway and Sweden in 1959–61 (double criminality is not required except concerning extradition of nationals and political offences). Similarly, witnesses are required to give evidence before a court of another Nordic State without any double-criminality requirement.

²⁶ See also the Framework Decision of 13.6.2002 on the European Arrest Warrant, Art. 4(7)(b).

²⁷ *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)* [1999] 2 All ER 97, HL. See Colin Warbrick, 'Extradition Aspects of Pinochet 3' (1999) 48 *ICLQ* 958.

The rule of specialty, which is common in extradition treaties,²⁸ restricts the requesting State to bringing proceedings only with respect to the crimes for which the suspect were extradited; the double-criminality principle and other conditions for extradition, such as the political offence exception, would otherwise easily be defeated. However, the requested State could always consent to prosecution of other offences and within the EU some agreements provide a presumption of consent under certain circumstances as well as a possibility for the suspect to waive entitlement of the specialty rule.²⁹ For mutual legal assistance, the imposition of conditions on the use or transmission of information and material furnished by the requested State, may serve the same purpose.³⁰

Also linked to the double-criminality requirement are statutory limitations, which in some domestic systems apply generally and may bar cooperation; concerning extradition, some agreements, such as the 1957 European Extradition Convention,³¹ explicitly allow statutory limitations as a discretionary ground for refusal. In other systems, like the United Kingdom, serious offences are not subject to such limitations, but extradition may still be refused because the passage of time would make it ‘unjust and oppressive’ (a *habeas corpus* ground).³² As we have seen in Chapter 4, this also applies to international crimes in many States and no customary rule prevents this practice.

5.3.3 *Ne bis in idem or double jeopardy*

As described in section 4.7, the principle of *ne bis in idem* is a general criminal law principle in most national systems, but one that is normally confined to application within the same system. But so long as criminal proceedings are not prevented by a judgment (or other final decision) in another State, criminal proceedings concerning the same person and criminal act (or omission) might already be finalized in the requested State when the request is made. This is even more likely regarding offences over which States exercise extraterritorial jurisdiction.

Traditionally, international extradition agreements acknowledge the principle with regard to the requested State by prohibiting extradition if that State has already passed a final judgment against the fugitive. The 1957 European Extradition Convention and, more recently, the European Arrest Warrant provide such grounds for refusal.³³ Similarly, this ground for refusal is provided for other forms of

²⁸ E.g. Arts. 14–15 of the 1957 European Extradition Convention.

²⁹ E.g. Art. 10 of the 1996 EU Extradition Convention, and Art. 27 of the Framework Decision on the European Arrest Warrant.

³⁰ E.g. Art. 18(19) of the 2000 Palermo Convention.

³¹ Art. 10 of the 1957 European Extradition Convention.

³² Extradition Act 2003, ss.11, 14, 79 and 82 (UK).

³³ Art. 9 of the 1957 European Extradition Convention (and the 1975 Additional Protocol), and Art. 3(2) of the Framework Decision on the European Arrest Warrant.

cooperation; while some treaties aim at preventing double punishment only,³⁴ others seek to prevent double prosecutions too.³⁵

Furthermore, there is a trend towards giving the principle a broader application, especially in the EU with the commitment to recognize each other's judicial decisions (mutual recognition). Not only evidence gathering and seizure but also arrests are now subject to such recognition. Consequently, the EU States are allowed, under certain conditions, to refuse execution of a European Arrest Warrant if the fugitive has already been finally adjudged by a third State concerning the same act.³⁶ This increases the scope for rejecting a request and preserves the common law plea of *autrefois acquit*, *autrefois convict* without a special reservation to the international instrument.³⁷ But there is no general rule of international law preventing extradition because of a judgment in a third State.

However, the lack of common standards for the application of the *ne bis in idem* principle (see section 4.7) complicates cooperation and increasingly international courts such as the European Court of Human Rights and the European Court of Justice have had to address how it should be applied to different forms of cooperation.³⁸

5.3.4 Human rights and legal cooperation

In criminal law there is often a tension between the fundamental human rights afforded to individuals and the State interest in efficient law enforcement and prosecution; international cooperation in criminal matters is no exception. Extradition laws and treaties have traditionally been interpreted in favour of the request. In common law jurisdictions the 'rule of non-inquiry' has often discouraged the courts from inquiring into the fairness of the proceedings of the requesting State. But while the trend is generally to limit the grounds for refusing cooperation, human rights considerations point in the opposite direction; cooperation, particularly extradition, should not be granted if fundamental human rights of the person concerned would be at risk.

Indeed, one important prerequisite for the more far-reaching cooperation in Europe, and the underlying level of confidence in each other's legal systems, is the adherence to common and well-developed human rights standards. There are calls for better safeguards within the EU, a task that is complicated by the separate system of the Council of Europe, to which all EU Member States belong, but not the EU itself.

³⁴ See, e.g. Arts. 35–7 of the 1972 European Convention on Transfer of Proceedings in Criminal Matters (mandatory ground for refusal), and Art. 18(1)(e) of the 1990 European Proceeds from Crime Convention (optional ground for refusal).

³⁵ See, e.g. Arts. 54–8 of the 1990 Convention Implementing the Schengen Agreement (albeit with certain exceptions).

³⁶ Art. 4(5) of the Framework Decision on the European Arrest Warrant.

³⁷ The United Kingdom made a formal reservation to Art. 9 of the 1957 European Extradition Convention.

³⁸ See, e.g. John Vervaele, 'The transnational *ne bis in idem* principle in the EU mutual recognition and equivalent protection of human rights' (2005) 1 *Utrecht Law Review* 100.

Such efforts are particularly important today when the international fight against terrorism, which includes improved cooperation, is challenged for violating and eroding fundamental human rights.³⁹

An early expression of the human rights concerns is the *non-refoulement* principle which applies in refugee law and provides that a refugee should not be returned to a country where he or she is likely to be persecuted, as established in the 1951 Refugee Convention; a principle to which exception is made, however, to those who have committed a 'crime against peace, a war crime, or a crime against humanity' or 'a serious non-political crime'.⁴⁰

That domestic human rights protection, constitutional or otherwise, is applicable also to legal cooperation is natural, and established by courts in many States. It was long unclear, however, whether international human rights obligations would apply, and even trump, international cooperation obligations. But in the groundbreaking *Soering* decision of 1989, the European Court of Human Rights established that States Parties to the ECHR have certain obligations to protect individuals against a serious breach of their human rights in another State; 'knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture', as well as of inhuman or degrading treatment, would be a violation of the ECHR.⁴¹ The UN Human Rights Committee has followed suit when interpreting the ICCPR.⁴²

However, the international human rights bodies only apply the treaties they are established to protect and do not have to choose between conflicting treaty obligations or apply the domestic laws⁴³ by which these obligations are implemented. The opposite is true for domestic courts. In some countries the courts can rely upon the constitution, or laws which take precedence over other laws, for example a law incorporating the ECHR, to afford priority to human rights considerations, while in other countries this is reflected in the legislation on international cooperation in criminal matters. From an international law perspective, however, the justification must be sought elsewhere; it has been suggested that certain human rights norms have higher status, based on *jus cogens* notions, and that multilateral human rights conventions have primacy over other international agreements on *ordre public* grounds.⁴⁴ But this is controversial and would in any case not go beyond the most serious violations, such as torture, and no general human rights exception from extradition exists today.⁴⁵

³⁹ See generally, ch. 14, and Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge, 2005).

⁴⁰ Art. 1 of the 1951 Refugee Convention. ⁴¹ *Soering v. United Kingdom* (1999) ECHR 14, para. 88.

⁴² See, e.g. *Ng v. Canada* HRC 5.11.1993.

⁴³ The ECtHR has nonetheless assumed certain powers to review the compliance with domestic law, which also applied to detention pending extradition; see, e.g. *Bordovskiy v. Russia* (2005) ECHR 66, paras. 41–4.

⁴⁴ J. Dugard and C. van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 *AJIL* 194–5.

⁴⁵ *Ibid.*, at 205–6.

But human rights standards do not only play a role in extradition. Material that has been obtained abroad through mutual legal assistance could also be affected by violations, for example evidence obtained by torture,⁴⁶ and therefore be inadmissible in the requesting State. Other difficulties relate to data protection concerning transferred information and third party rights in case of the seizure or freezing of property.

5.4 Extradition

Extradition is the surrender of a person by one State to another, the person being either accused of a (extraditable) crime in the requesting State or unlawfully at large after conviction. This is a considerable intrusion in the liberty of the person concerned, but one which is justified by the common interest of States in combating crimes and expunging safe havens for fugitives. The standard term being ‘extradition’, terms such as ‘surrender’ or ‘transfer’ are sometimes used, often with a view to signal a substantive difference.⁴⁷

Extradition is normally subject to strict requirements. The already mentioned principles of double criminality and the rule of specialty apply and the offences must also be extraditable. The requested State may deny extradition with reference to *ne bis in idem*, which sometimes also covers a pardon or an amnesty in that State or a third State.⁴⁸

Additionally, numerous grounds for refusal apply and conditions may be imposed. By allowing States to grant extradition in accordance with domestic law and applicable treaties, as is the case in the 1948 Genocide Convention and in the 1949 Geneva Conventions, the *aut dedere aut judicare* obligation is qualified. Hence, the States may apply the same conditions as for all other crimes. The provisions of the 1984 Torture Convention are different, however, and it is sometimes argued that a condition such as non-extradition of nationals (see section 5.4.4) may not be invoked to refuse extradition concerning torture; but in practice many States do refuse extradition of nationals even in torture cases.⁴⁹ With all these hurdles requests for extradition are not always successful and one may ask what effect the obligation has on the requested State when refusing to extradite. To be meaningful the principle must mean that the requested State shall take domestic action if extradition is denied.⁵⁰ But this could entail jurisdictional and practical difficulties and there is little State practice in support of this view to date.⁵¹

⁴⁶ *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71; [2006] 2 AC 221.

⁴⁷ See, e.g. Michael Plachta, “Surrender” in the context of the International Criminal Court and the European Union’ (2004) 19 *Nouvelles études pénales* 465.

⁴⁸ The 1975 Additional Protocol (Ch. II.2) and the 1978 Second Additional Protocol (Ch. IV.4) to the 1957 European Extradition Convention.

⁴⁹ See, e.g. Arnd Düker, ‘The Extradition of Nationals: Comments on the Extradition Request for Alberto Fujimori’ (2003) 4 *German Law Journal* 1165.

⁵⁰ See also Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (Geneva, 1960), vol. III, 623.

⁵¹ See Dugard and Van den Wyngaert, ‘Reconciling Extradition’, 209–10.

5.4.1 *Extradition agreements and the European Arrest Warrant*

Many States insist on reciprocity and require an international agreement for extradition. Apart from numerous bilateral agreements, the basic multilateral treaty in Europe is the 1957 European Extradition Convention and its Additional Protocols, adopted by the Council of Europe, which represent a traditional scheme. The EU has followed suit and adopted two conventions in 1995 and 1996, which provide for simplified proceedings and reduced grounds for refusal but they are not widely ratified.⁵²

Among the EU Member States, however, the European Arrest Warrant has replaced the traditional extradition scheme and introduced a system whereby a warrant in one State shall be recognized and enforced (arrest and surrender) in all other member States. Building upon the principle of mutual recognition of judicial decisions, the European Arrest Warrant restricts many traditional grounds for refusal.⁵³ This has prompted amendments to domestic laws, either by special legislation (e.g. Sweden) or amendments to the existing extradition legislation (e.g. the United Kingdom). In relation to non-EU States, however, extradition still applies in accordance with multilateral or bilateral agreements and domestic extradition legislation.

5.4.2 *Extradition procedures*

The extradition procedures follow the law and practice of the requested State and applicable extradition agreements. Traditionally, the requesting State requests the arrest and extradition, or provisional arrest to be followed within a certain time by a surrender request, of the accused or convicted person. The requested State institutes proceedings to execute the request. In most States, both the executive and the judiciary have a role to play in the proceedings; a court considers the formal requirements and the actual surrender is an executive decision. The European Arrest Warrant, on the other hand, is to be recognized and enforced as such in the other Member States with minimal formalities. This scheme is also an example of a general trend towards a primarily judicial process.

The framing of the procedures depends upon the view taken on the extradition process as such.⁵⁴ Traditionally, it is seen as exclusively an arrangement between sovereign States, which will check the formal requirements and protect fundamental rights and fairness; the individual will play an insignificant role being merely the object of the proceedings. The opposite view, inspired by the development of human rights, is

⁵² The 1995 Convention on Simplified Extradition Procedures (OJ C78, 30.3.1995, p. 2) and the 1996 Convention Relating to Extradition between the Member States of the European Union (OJ C313, 13.10.1996, p. 12).

⁵³ See, e.g. Nicola Venneman, 'The European Arrest Warrant and Its Human Rights Implications' (2003) 63 *ZaöRV* 103.

⁵⁴ For further discussion, see M. Cherif Bassiouni, *International Extradition: United States Law & Practice* (4th edn, New York, 2002) 51–66.

that the process entails rights that the fugitive may claim individually. Hence, the proceedings can be more or less extensive and time consuming in different States. In common law countries the *habeas corpus* principle extends also to extradition and offers an additional ground to challenge a foreign request.⁵⁵ Linked to this, these countries also require that the prosecution evidence against the fugitive justifies the trial for which extradition is sought; supporting evidence is required and a *prima facie* test is applied. While the United Kingdom has made exceptions to this requirement in recent years – vis-à-vis EU member States and certain other countries, including the USA⁵⁶ – it still applies in many other common law jurisdictions.

In many common law jurisdictions, courts have long applied a rule of non-inquiry regarding the good faith and motive behind the extradition request or the standards of criminal justice of the requesting State;⁵⁷ such considerations of justice and international relations instead form part of the executive decision whether to extradite. A consequence is that the fugitive may not bring evidence concerning discrimination or other possible human rights violations, and the practice has been criticized.⁵⁸ But the rule is not without exceptions and the application varies considerably between different jurisdictions. In the United Kingdom and Ireland, the European Arrest Warrant has prompted mandatory judicial considerations of human rights issues.⁵⁹ In civil law jurisdictions as well, the presumption is that the extradition request is made in good faith, but the courts often accept challenges by the fugitive regarding human rights violations.

5.4.3 Extraditable and non-extraditable offences

Extradition is normally restricted to serious offences, often by reference to a minimum level of punishment,⁶⁰ which might simplify, but does not do away with, a double-criminality requirement. International and transnational crimes are regularly extraditable, regardless of whether the *aut dedere aut judicare* principle of a particular treaty or a general requirement of gravity applies.

In addition, certain classes of offences are typically excluded from extradition. Most agreements, and thus domestic legislation, provide, as the main rule, that offences of a political nature are non-extraditable; the requested State avoids getting involved in conflicts abroad and preserves its right to grant political asylum. What will be

⁵⁵ On UK law, see e.g. I. Stanbrook and C. Stanbrook, *Extradition Law and Practice* (2nd edn, Oxford, 2000), 237–48.

⁵⁶ Extradition Act 2003.

⁵⁷ For jurisprudence, see Dugard and van den Wyngaert, 'Reconciling Extradition', 189–91.

⁵⁸ See, e.g. Richard J. Wilson, 'Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition' (1997) 3 *ILSA Journal of International & Comparative Law* 751, and David B. Sullivan, 'Abandoning the Rule of Non-Inquiry in International Extradition' (1999) 15 *Hastings International & Comparative Law Review* 111.

⁵⁹ See Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant' (2004) 10 *European Law Journal* 200 at 203–5.

⁶⁰ Some countries, e.g. the United Kingdom and the USA, have instead referred to a list of offences, with the drawback of repeatedly requiring amendments.

considered a ‘political offence’ is not internationally defined, however, which leaves room for considerable discretion.⁶¹ In the past, politically motivated violence was sometimes considered a ‘political offence’, and thus extradition was denied, but today a number of terrorism treaties explicitly provide that the crimes in question shall not be regarded as a political offence for the purpose of extradition.⁶² The 1948 Genocide Convention⁶³ also has such a clause and, in Europe, the 1975 Additional Protocol to the 1957 European Extradition Convention clarifies that genocide and certain war crimes shall not prevent extradition from being political offences.⁶⁴ The European Arrest Warrant applies to offences of a certain gravity, including the crimes under the ICC Statute, and does not include a political offence exception.

Another, often excluded, group of offences is military offences.⁶⁵ These are offences according to military law, but not ordinary criminal law, and should not hinder extradition for international crimes such as war crimes. Fiscal offences are also traditionally exempt from extradition.

5.4.4 Non-extradition of nationals

Many States, primarily civil law jurisdictions, prohibit the extradition of their own nationals; the principle is based on a historical duty of the State to protect its citizens, sovereignty, and indeed distrust in foreign legal systems, and it is often constitutionally protected.⁶⁶ As a counterweight, many of these States provide for extensive criminal jurisdiction over offences committed abroad. This in turn may prevent extradition, however, if the national is in a third State and that State also considers the applied theory of jurisdiction when determining the double-criminality requirement (see section 5.3.2) and takes a restrictive view on jurisdiction, which is often the case in common law countries. This was a key issue in the *Pinochet* case in the United Kingdom where the House of Lords accepted the jurisdiction of the requesting State (Spain) only from the date when the UK had implemented the 1984 Torture Convention (and thus accepted extraterritorial jurisdiction).⁶⁷

Within the EU, efforts have been made to do away with nationality as a ground for refusal.⁶⁸ The European Arrest Warrant is an example, but still the requested State retains a right to refuse surrender if it chooses to exercise jurisdiction itself or it may

⁶¹ See, e.g. Bert Swart, ‘Human Rights and the Abolition of Traditional Principles’ in A. Eser and O. Ladogny (eds.), *Principles and Procedures for a New Transnational Criminal Law* (Freiburg, 1992) 505–34. Generally, see Christine van den Wyngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (The Hague, 1980).

⁶² See ch. 14. ⁶³ Art. 7.

⁶⁴ Art. 3 of the Additional Protocol.

⁶⁵ E.g. Art. 4 of the 1957 European Extradition Convention.

⁶⁶ See, e.g. Michael Plachta, ‘(Non-)Extradition of Nationals: A Never-ending Story?’ (1999) 13 *Emory International Law Review* 77.

⁶⁷ *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No. 3)* [1992] 2 All ER at 107 and 135–6. For a critical view, see Warbrick, ‘Extradition Aspects of Pinochet 3’.

⁶⁸ See, e.g. Zsuzsanna Deen-Racsmány and Rob Blekxtoon, ‘The Decline of the Nationality Exception in European Extradition?’ (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 317.

request the return of the fugitive for service of any custodial sentence or detention order.⁶⁹ Similarly, the 2000 Palermo Convention acknowledges the condition that an extradited national of the requested State be returned for the service of any sentence imposed.⁷⁰

5.4.5 *Death penalty, life imprisonment and other human rights grounds*

Many States that have abolished capital punishment domestically also prohibit extradition when the fugitive may face the death penalty, unless the requesting State undertakes not to impose this penalty in the case at hand or at least not to enforce it.⁷¹ This is in keeping with commitments made in certain human rights treaties and the *Soering* principle that a State is bound by its human rights obligations with respect to extradition. Some international treaties also enshrine this extradition condition.⁷² But the penalty as such is not banned under customary international law (see section 18.1), and hence the *Soering* case addressed the matter as a part of the prohibition of torture or inhumane or degrading treatment or punishment.⁷³

The 1984 Torture Convention also provides that extradition is not allowed to a country where the fugitive would be in danger of torture.⁷⁴ Inhumane and degrading treatment or punishment is a less clear and thus more difficult concept. While the *Soering* case found that ‘the death-row phenomenon’ falls under the prohibition, the UN Human Rights Commission has not so found and instead attacked the methods of execution.⁷⁵ Corporal punishment, poor prison conditions and harsh interrogation methods may also meet the criteria for refusal.⁷⁶

Life imprisonment is also a problematic concept in some States, and even unconstitutional, and there are regional examples where life imprisonment prevents extradition.⁷⁷ One solution, as provided for by the European Arrest Warrant, is to allow States to make the surrender conditional on the issuing State providing for review of life sentences.⁷⁸

A common clause in international agreements, inspired by the *non-refoulement* principle, prevents extradition when there are substantial grounds for believing that there is a discriminatory purpose behind the prosecution or punishment in the

⁶⁹ Arts. 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant. ⁷⁰ Art. 16(11).

⁷¹ See William Schabas, ‘Indirect Abolition: Capital Punishment’s Role in Extradition Law and Practice’ (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 581.

⁷² E.g. Art. 11 of the 1957 European Extradition Convention.

⁷³ Art. 3 of the ECHR. See also *Öcalan v. Turkey* (2005) ECHR 282, paras. 162–75 (also considerations under Art. 2 of the ECHR regarding unfair proceedings and the death penalty).

⁷⁴ Art. 3(1); see ch. 14. See also Art. 3(f) of the UN Model Treaty on Extradition.

⁷⁵ See *Ng v. Canada* HRC 5.11.1993 and *Kindler v. Canada* HRC 11.11.1993.

⁷⁶ See, e.g. *Tyrer v. United Kingdom* (1978) ECHR 2 25.4.1978, *Ireland v. United Kingdom* ECtHR 18.1.1978, and *Boudellaa et al v. Bosnia and Herzegovina et al.* Human Rights Chamber for Bosnia and Herzegovina 11.10.2002.

⁷⁷ E.g. Art. 9 of the 1981 Inter-American Extradition Convention.

⁷⁸ Art. 5(2) of the Framework Decision on the European Arrest Warrant.

requesting State.⁷⁹ The UN Model Treaty on Extradition 1990 extends this prohibition to cases where the fugitive does not receive the minimum guarantees in criminal proceedings according to the ICCPR.⁸⁰ But without any qualifications this condition would be difficult to apply and could seriously hamper cooperation. The European Court of Human Rights, beginning with the *Soering* decision, is instead requiring a flagrant denial of a fair trial. Moreover, potential future violations are more difficult to establish than already suffered violations. While a refusal of extradition based upon a judgment *in absentia*, which cannot be appealed, has support already in some extradition agreements⁸¹ and accords with the case law of the European Court of Human Rights,⁸² there has been a reluctance to conclude a risk for violations. Increasingly, however, national courts in Europe consider allegations that extradition will result in a serious breach of human rights, at least when the fugitive can support the claim; the mere fact that the requesting State is also party to the ECHR is not sufficient per se for ruling out potential violations.⁸³ Denying extradition would arguably be consistent with the right to decline cooperation on *ordre public* grounds. Following the European Arrest Warrant,⁸⁴ judicial human rights considerations are now mandatory in the extradition proceedings of some countries, for example the United Kingdom and Ireland.

In practice, assurances by the requesting State often make extradition possible in spite of human rights concerns – non-application or non-enforcement of the death penalty, guarantees against torture, the right to a new trial, etc. But such assurances are difficult to follow up and normally without sanctions if breached. Hence, a thorough assessment must be made in each case as to whether they offer sufficient protection and conditional extradition is not always a solution.⁸⁵

5.4.6 Re-extradition

In order to observe all the conditions for extradition, and often as part of the rule of specialty, the requesting State is generally not allowed to re-extradite the fugitive to a third State without the consent of the requested State. This is provided, for example, in the 1957 European Extradition Convention concerning re-extradition for offences committed before the surrender to the requesting State.⁸⁶ However, the European Arrest Warrant allows re-extradition to another EU State without consent in some cases and also provides that a general waiver from the remaining consent requirement may be made; but re-extradition to a third State will always require

⁷⁹ E.g. Art. 11 of the 1957 European Extradition Convention, Art. 9 of the 1979 Hostage Convention, Art. 4(5) of the 1981 Inter-American Extradition Convention, and the 1990 Commonwealth Scheme for the Rendition of Fugitive Offenders.

⁸⁰ Art. 3(f) of the Model Treaty.

⁸¹ E.g. Art. 3 of the 1978 Second Additional Protocol to the 1957 European Extradition Convention. Cf. the conditional surrender provided for in Art. 5(12) of the Framework Decision on the European Arrest Warrant.

⁸² E.g. *Stoichkov v. Bulgaria* ECtHR 24.6.2005 paras. 53–8.

⁸³ See Vennemann, 'The European Arrest Warrant', 117–19.

⁸⁴ See Art. 1(3) of the Framework Decision on the European Arrest Warrant.

⁸⁵ See Dugard & Van den Wyngaert, 'Reconciling Extradition', 206–8. ⁸⁶ Art. 15.

consent.⁸⁷ In practice this means that the third State seeking re-extradition will have to meet the conditions both in the original requesting and requested States. There are examples, however, where the requirements for re-extradition have, in effect, been circumvented by instead deporting the fugitive under immigration laws (see section 5.4.7).⁸⁸

5.4.7 Abduction, rendition or expulsion

When there are no extradition arrangements, or these are inapplicable (for example the political offence exception) or seen as ineffective, some States will resort to other measures in order to apprehend the fugitive – abduction or ‘irregular rendition’. This may be conducted in a particular case, such as the *Eichmann* case,⁸⁹ or even as a state policy for certain cases, such as the United States anti-terrorist rendition programme. Such activities can, but do not have to, violate international law, depending on whether the territorial sovereignty of another State and the human rights of the individual concerned are respected or not.⁹⁰ Additionally, international humanitarian law may also be invoked in case of an ‘armed conflict’ (see Chapter 12).

In accordance with the maxim *male captus, bene detentus* national courts have long been prepared to try accused persons regardless of how they came under the jurisdiction of the court, even if the arrest and surrender of the person was unlawful under national or international law. Hence in the *Eichmann* case, the District Court of Jerusalem saw no obstacle to trying the accused although he had been abducted from Argentina, without that State’s consent, by Israeli agents. While this principle still applies in some States, notably the United States, it is being replaced in other States by the so-called abuse of process doctrine.⁹¹ Originally established by the House of Lords, the doctrine has been applied by courts, inter alia, in the United Kingdom, New Zealand, Australia, South Africa and Zimbabwe. But the case law is inconsistent and different factors have had an impact on the decision whether to decline jurisdiction due to abuse of process: involvement by officials of the forum State, the nationality of the accused, protests by the injured State, the possibility to seek extradition, the treatment of the accused, and the gravity of the crimes.⁹² In addition, an ‘Eichmann exception’ has been argued concerning ‘universally condemned offences’.⁹³

⁸⁷ Art. 28 of the Framework Decision on the European Arrest Warrant. See also Art. 12 of the 1996 EU Extradition Convention, which removed the consent requirement among the EU States but never entered into force.

⁸⁸ See, e.g. *Bozano v. France* ECtHR 18.12.1986.

⁸⁹ See ch. 3; see also P. O’Higgins, ‘Unlawful Seizure and Irregular Rendition’ (1960) 36 *BYIL* 279.

⁹⁰ Generally, see the Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 17.3.2006 (www.venice.coe.int).

⁹¹ For a survey of national case law, see *Dragan Nikolić* ICTY T. Ch. II 9.10.2002 paras. 79–93.

⁹² *Ibid.*, para. 95.

⁹³ See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, 1994) 72–3. See also section 17.7.3.

State authorities sometimes choose to deport a fugitive under immigration laws instead of dealing with the matter as extradition. This is usually much faster and the surrender normally unconditional. But as the South African Constitutional Court has stated, deportation and extradition serve different purposes and the former method must not, as in that case, be used unlawfully and with the effect that no undertaking was obtained regarding the non-imposition of the death penalty.⁹⁴ As for human rights protection, the European Court of Human Rights has ruled that the *Soering* principle also applies to deportation and other forms of expulsion.⁹⁵

The way in which the fugitive is apprehended and surrendered may also violate his or her right to liberty and to security under international human rights law. It is important to note, however, that instruments such as the ECHR do not regulate extradition or deportation as such, nor do they prevent cooperation in criminal matters as long as it does not interfere with any specific rights.⁹⁶ Hence, atypical measures are not contrary per se to these instruments and the lawfulness of the detention must be assessed against national law and the purpose behind the relevant human rights provision.

5.5 Mutual legal assistance

Mutual legal assistance developed from the so-called 'Letters Rogatory',⁹⁷ a comity-based system of requests for assistance with the taking of evidence, but is mainly treaty based today and covers a wide range of measures.⁹⁸ These may relate to a criminal investigation, prosecution or trial, and include for example: the taking of witness statements, search and seizure, service of documents, and tracing of persons and information.

The usefulness of such assistance in the requesting State depends in part upon the nature of its criminal procedures. The more adversarial the proceedings, the greater importance is normally attached to witnesses appearing in the courtroom and being subject to cross-examination. Evidence obtained abroad by foreign authorities thus becomes less attractive.⁹⁹ In inquisitorial systems, where written evidence is more relied upon, the problem is reduced, although there might be concerns that the evidence was not obtained in a required manner. Consequently, common law jurisdictions were traditionally more hesitant than civil law jurisdictions to make use of mutual legal assistance. But this position has changed and the cooperation is now

⁹⁴ *Mohamed and Dalvie v. President of the Republic of South Africa and Six Others* 2001 (1) SA 893, Constitutional Court.

⁹⁵ See, e.g. *Chahal v. United Kingdom* ECtHR 15.11.1996.

⁹⁶ See *Öcalan v. Turkey* ECtHR 12.5.2005 paras. 83–90.

⁹⁷ Among some States, the practice of sending delegations to another State to conduct its own investigation ('Commission Rogatory') also existed.

⁹⁸ For a comprehensive survey of multilateral treaties in Europe, see McClean, *International Co-operation*.

⁹⁹ See Christopher Gane and Mark Mackarel, 'Admitting Irregularly or Illegally Obtained Evidence from Abroad into Criminal Proceedings – A Common Law Approach' (1997) *Criminal Law Review* 720–9.

generally seen as a very important tool for combating crimes; increasingly, the focus is on the proceedings for which the assistance is sought.

In Europe, the basic multilateral instrument¹⁰⁰ is the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, to which Additional Protocols have been adopted in 1978 and 2001. The Protocols were developed to improve the cooperation and reflect progress elsewhere, particularly in the 2000 EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. This introduced new forms of cooperation and simplified many procedures. Some of the new measures involve both judicial and law enforcement cooperation, for example 'joint investigation teams',¹⁰¹ and the use of modern technology such as video and audio conferencing. In the EU, the principle of mutual recognition applies also in this field by, inter alia, the adoption of a Framework Decision on the execution in the EU of orders freezing property and evidence¹⁰² and work towards a European Evidence Warrant.

Globally, advanced schemes for mutual legal assistance are provided in more recent treaties on transnational crimes, for example the 2000 Palermo Convention and the 2003 Corruption Convention;¹⁰³ other treaties such as the 1984 Torture Convention and the 1999 Terrorist Financing Convention mainly contain a general obligation to cooperate. Bilateral agreements also exist. Many States have implemented the treaties by special legislation.

Mutual legal assistance is circumscribed by conditions, or grounds for refusal, which are similar to those applicable to extradition. Although treaties often phrase such exceptions in facultative rather than mandatory terms,¹⁰⁴ many States have insisted on applying them. But here too there is a trend to do away with, or at least restrict, the various grounds for refusal.¹⁰⁵

In spite of improvements such as allowing the requesting State to prescribe procedures to be followed, differences in the procedures of the different countries still create problems. Different views as to whether the accused may give testimony or the scope for witness testimonies are two examples. Another shortcoming is that, so far, the accused cannot independently seek assistance from a foreign State; it has to be done between public authorities or courts in the different States.¹⁰⁶

¹⁰⁰ In addition, many States have concluded bilateral agreements with other countries, and there are also sub-regional agreements, for example between the Nordic States.

¹⁰¹ First introduced in the 2000 Palermo Convention, and thereafter adopted in different EU and Council of Europe instruments; see Michael Plachta, 'Joint Investigation Teams' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 284.

¹⁰² OJ L196, 2.8.2003, pp. 45–55.

¹⁰³ An interesting regional treaty is the 2001 Cyber Crime Convention (Council of Europe).

¹⁰⁴ See, e.g. the 1959 European Convention on Mutual Assistance in Criminal Matters.

¹⁰⁵ See, e.g. the 2000 EU Convention on Mutual Assistance in Criminal Matters and its 2001 Additional Protocol; and the 2000 Palermo Convention.

¹⁰⁶ The refusal to seek measures abroad at the request of the accused may, however, affect the fairness of the subsequent trial, e.g. *Papageorgiou v. Greece* ECtHR 9.5.2003.

5.6 Transfer of proceedings

With diverging views on criminal jurisdiction and all the restrictions and difficulties concerning international legal cooperation, alternative solutions have been considered. One model is the transfer of criminal proceedings from one State to another, both of which have jurisdiction over the offence; a double-criminality requirement always applies and, due to the nature of the cooperation, is often far-reaching. Most well-known is a multilateral convention adopted by the Council of Europe.¹⁰⁷ But States tend to insist on reciprocity and the measure is infrequently used since only a few States have ratified the instruments.

Transfer of proceedings is not primarily a device for giving priority to particular jurisdictional grounds; the motive is rather that the accused has ties to the requesting State or that proceedings there would be more convenient. Coordination between the different proceedings is important and many agreements include *ne bis in idem* provisions, albeit often optional instead of mandatory ones. Furthermore, numerous grounds for refusal apply and a transfer of proceedings could be difficult in practice; for example, prosecutorial and judicial decisions taken in the transferring State have little effect, if any, and evidence collected may be inadmissible in the requesting State.

5.7 Enforcement of penalties

While States have historically been reluctant to recognize foreign criminal judgments formally, cooperation does exist regarding enforcement of foreign prison sentences and other penalties. Apart from humanitarian aspects, this possibility sometimes facilitates extradition; an otherwise reluctant State may accept extradition on condition that the fugitive is returned to serve any sentence imposed.¹⁰⁸

Both bilateral and multilateral agreements on the point have been concluded. In Europe, the Council of Europe took the lead with the 1970 European Convention on the International Validity of Criminal Judgments and the 1983 Convention on the Transfer of Sentenced Persons (and its 1997 Additional Protocol). Under all regimes, the penalty will regularly be converted into a new penalty in the administering State, whereafter it is being enforced there. A mandatory double-criminality requirement applies, as do numerous conditions and grounds for refusal. In practice, the multilateral conventions have few ratifications and are seldom applied. Hence, various initiatives have been taken within the EU based on the principle of mutual recognition regarding fines,¹⁰⁹ confiscation orders, and other non-custodial criminal penalties.

¹⁰⁷ The 1972 European Convention on the Transfer of Proceedings in Criminal Matters. See also the 1990 UN Model Treaty on Transfer of Proceedings in Criminal Matters. Transfer of criminal proceedings is also referred to in other multilateral treaties, such as the 1988 Narcotic Drugs Convention (Art. 8).

¹⁰⁸ For a general survey, see Michael Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation. A Comparative Study* (Freiburg, 1993).

¹⁰⁹ Council Framework Decision of 24.2.2005 on the application of the principle of mutual recognition of financial penalties, OJ L76, 22.3.2005, pp. 16–30.

Further reading

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- Rob Blekxtoon and Wouter van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (The Hague, 2005).
- Gilles de Kerchove and Anne Weyembergh (eds.), *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne* (Brussels, 2001).
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- Wolfgang Schomburg, Otto Ladogny, Sabine Gless and Thomas Hackner, *Internationale Rechtshilfe in Strafsachen* (4th edn, Munich, 2006).
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PART C

International Prosecutions

6

The History of International Criminal Prosecutions: Nuremberg and Tokyo

6.1 Introduction

International criminal law, or something similar to it, has a very long history.¹ Its closest European precursor before the modern era was the chivalric system applied in the medieval era.² The most notable of the trials that were related to this system was that of Peter von Hagenbach in Breisach in 1474.³ Although its status as a legal precedent is highly limited, the issues involved at that trial, superior orders, sexual offences, cooperation in evidence gathering, and pleas as to the jurisdiction of the court, have clear present day relevance.⁴ The purpose of this chapter, however, is to introduce the modern history of international criminal prosecutions rather than provide a comprehensive overview of the entire history of the subject. Therefore we may start in the early part of the twentieth century, at the end of the First World War.

6.2 The Commission on the Responsibility of the Authors of the War

After the First World War, the Allies set up a fifteen-member commission to investigate the responsibility for the start of the war, violations of the laws of war and what tribunal would be appropriate for trials.⁵ It reported in March 1919, determining that the central powers were responsible for starting the war⁶ and that there were violations of the laws of war and humanity.⁷ They recommended that high officials, including the Kaiser, be tried for ordering such crimes and on the basis of command responsibility.⁸

¹ See Timothy L. H. McCormack, 'From Sun Tzu to the Sixth Committee, The Evolution of an International Criminal Law Regime' in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes, National and International Approaches* (The Hague, 1997) 31; M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years, The Need to Establish an International Criminal Court' (1997) 10 *Harvard Human Rights Law Journal* 11.

² See, e.g. Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London, 1965); Theodor Meron, *Bloody Constraint, Crimes and Accountability in Shakespeare* (New York, 1998).

³ See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (London, 1968), vol. II, ch. 39.

⁴ See, e.g. Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, 2005) ch. 1.

⁵ Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 *AJIL* 95.

⁶ *Ibid.*, 107. ⁷ *Ibid.*, 114–15. ⁸ *Ibid.*, 116–7, 121.

Further to this, the Commission suggested the setting up of an Allied ‘High Tribunal’ with members from all of the allied countries to try violations of the laws and customs of war and the laws of humanity.⁹ This aspect was criticized by the Commission’s US and Japanese members. The US members said that they knew ‘of no international statute or convention making violation of the laws and customs of war – not to speak of the laws or principles of humanity – an international crime’.¹⁰ The Japanese representatives questioned ‘whether international law recognizes a penal law applicable to those who are guilty’.¹¹ The majority, however, clearly considered there to be a body of international criminal law, albeit one which did not include aggression as a crime.¹²

As a result, the Treaty of Versailles provided, in Article 227, that the Kaiser was to be ‘publicly arraigned’ for ‘a supreme offence against international morality and the sanctity of treaties’ before an international tribunal. It was never implemented as the Netherlands refused to hand the Kaiser over to the Allies on the basis that the offence was political.¹³ Articles 228 and 229 of the Treaty of Versailles also provided for prosecutions of German nationals for war crimes before Allied courts, including mixed commissions where the victims came from more than one State. These provisions, however, were never put into practice. Some prosecutions, but far fewer than the Allies wanted, were undertaken by Germany itself in Leipzig between 1921 and 1923. The proceedings were characterized by bias towards the defendants, questionable acquittals and lenient sentences.¹⁴ However, two of these cases later formed important precedents in international criminal law.¹⁵

6.3 The Nuremberg International Military Tribunal

6.3.1 *The creation of the Tribunal*

Although in 1937 a treaty to create an international criminal court to try terrorist offences was negotiated,¹⁶ this was not supported by States, and never came into force. The real leap forward in international criminal law came about at the end of the Second World War. The Allies initially issued a declaration in Moscow in 1943, which promised punishment for Axis war criminals, but stated that this was ‘without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the governments of the Allies’.¹⁷ After considerable discussion amongst the Allies during the war, Churchill

⁹ *Ibid.*, 122. ¹⁰ *Ibid.*, 144–6. ¹¹ *Ibid.*, 152. ¹² *Ibid.*, 118.

¹³ See M. Cherif Bassiouni, ‘World War I, “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System’ (2002) 30 *Denver Journal of International Law and Policy* 244 at 269–73.

¹⁴ Claus Kress, ‘Versailles-Nuremberg-the Hague: Germany and International Criminal Law’ (2006) 40 *International Lawyer* 15 at 16–20.

¹⁵ *The Dover Castle* (1922) 16 AJIL 704; *The Llandovery Castle* (1922) 16 AJIL 708. See Kress, ‘Versailles-Nuremberg-the Hague’, 16–18.

¹⁶ 1937 Convention for the Creation of an International Criminal Court. See Manley O. Hudson, ‘The Proposed International Criminal Court’ (1938) 32 *AJIL* 549.

¹⁷ Declaration of Moscow 1.11.1943.

was persuaded by the US and the USSR that a trial of such persons was preferable to their summary execution.¹⁸ As a result, France, the UK, the US and the USSR met in London to draft the charter of an international tribunal. The negotiations leading to the London charter, which formed the basis of the Nuremberg IMT, were tense, in particular as the US and USSR representatives clashed over a number of important issues. The USSR thought that the purpose of the tribunal was simply to determine the punishment to be meted out to the defendants, who they thought were to be presumed guilty. This was unacceptable to the US. Differences between the civil law States (France and the USSR) and their common-law counterparts (the UK and US) on the appropriate procedures for the trial also caused considerable difficulties. Nonetheless, on 8 August 1945, the four Allies signed the London Agreement, which created the tribunal.¹⁹ Nineteen other States also adhered to the charter later.

6.3.2 *The Tribunal and the Trial*

The Tribunal had eight judges, four principal judges (one for each of the major Allies (France, the USSR, the UK and the US) and four alternates (understudies drawn from the same States). The President of the Tribunal was Lord Justice Geoffrey Lawrence from the UK, who exercised a firm, but largely fair, hand over the proceedings. Each of the main Allies was entitled to appoint a chief prosecutor. The defence was undertaken by a number of German lawyers, the leading lights of whom were Hermann Jahreiss, an international lawyer from Cologne, and Otto Kranzbühler, a naval judge-advocate.

The indictment was received by the Tribunal on 10 October 1945, at its official seat of Berlin. It contained four main charges, all of which were based on Article 6 of the IMT's charter. Count one was the overall conspiracy, which was handled by the US prosecution team. Count two concerned crimes against peace. This count was dealt with by the UK prosecutors. Count three charged war crimes and count four concerned crimes against humanity. The prosecution of these two offences was split between the French and Soviet prosecutors, the French dealing with the western zone of conflict, the Soviet with the eastern. Twenty-four defendants were arraigned before the tribunal.²⁰ There were also prosecutions of six criminal organizations.²¹ Having received the indictment, the Tribunal moved to the city it is now associated with, Nuremberg.

¹⁸ See Arieh Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Durham, 1998).

¹⁹ 1945 London Agreement for the IMT.

²⁰ Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Karl Dönitz, Willem Raeder, Baldur von Schirach, Fritz Saukel, Alfred Jodl, Franz von Papen, Arthur Seyss-Inquart, Albert Speer, Konstantin von Neurath and Hans Fritzsche. Martin Bormann was tried *in absentia*. Gustav Krupp was declared mentally incapable of standing trial, Robert Ley committed suicide in custody, prior to the trial.

²¹ See Telford Taylor, *The Anatomy of the Nuremberg Trial* (London, 1993) 501–33.

In the opening session, the US Chief Prosecutor, Justice Robert Jackson (who had represented the US at the London negotiations)²² began the prosecution case with a stirring speech, embodying many of the ideas that have later been adopted into the ideals of international criminal law. Jackson described the Tribunal as ‘the greatest tribute ever paid by power to reason’, and sought to deflect concerns about the fairness of the trial and the non-prosecution of Allied nationals by saying that ‘while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment’.²³

The trial took place over ten months, and 403 open sessions. In the end three of the defendants (Schacht, Fritzsche and von Papen) were acquitted, as were three of the six indicted organizations (the SA, High Command and Reich Cabinet). Of the remaining defendants twelve were sentenced to death and seven to periods of imprisonment ranging from ten years to life. The Soviet judge, Major-General Nikitchenko, dissented from all the acquittals and the life sentence for Rudolf Hess. He would have declared all the defendants and organizations guilty, and sentenced Hess to death.²⁴

The judgment of the Tribunal, in addition to its findings on the facts, represented a considerable contribution to international law. The judgment dealt at some length with the defence contention that the prosecution of crimes against peace was contrary to the *nullum crimen sine lege* principle. It engaged in a detailed, if, in the final analysis unconvincing, review of pre-war developments, in particular the 1928 Kellog-Briand Pact.²⁵ It used that treaty (which was not intended to create criminal liability) and a number of non-binding sources to create a case that aggressive war was criminalized by customary international law.²⁶ The Tribunal may have been on more solid ground in relation to positive international law when it asserted that the *nullum crimen* principle was not established as an absolute principle in international law at the time.²⁷ Probably the Tribunal’s most famous holding, however, is its firm affirmation of direct liability under international law, which has become a foundational statement in international criminal law:

crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state.²⁸

²² The Russian judge (Nikitchenko) had also represented his country at the negotiations.

²³ 1 *Trial of Major War Criminals, Nuremberg* (London, 1946) 85. See Matthew Lipmann, ‘Nuremberg Forty-Five Years Later’ (1991) 7 *Connecticut Journal of International Law* 1, 39.

²⁴ 21 *Trial of Major War Criminals, Nuremberg* (London, 1946) 531–47. ²⁵ (1929) UKTS 29.

²⁶ See further, ch. 13, and Sheldon Glueck, *War Criminals: Their Prosecution and Punishment* (New York, 1944); *contra* Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York, 1946). For the tribunal’s views on superior orders, see section 16.8.

²⁷ ‘Nuremberg IMT: Judgment and Sentence’ reprinted in (1947) 41 *AJIL* 172, 217. ²⁸ *Ibid.*, 221.

The ‘principles’ of the IMT’s charter and judgment were quickly affirmed by the General Assembly in its Resolution 95(I).²⁹ Although some aspects of the Tribunal’s decision were controversial in international law,³⁰ others have proved highly influential, especially its holding that the Hague Regulations represented customary international law.³¹

6.3.3 Assessment of the Nuremberg IMT

The Nuremberg IMT is often accused of being an example of ‘victor’s justice’, although it is not always clear precisely what this concept is. It contains a number of linked, but different allegations. These are that the trial itself is not fair, in particular that the judges are biased against the accused,³² that the applicable law is designed to guarantee a conviction, and that similar acts were committed by the prosecuting State(s) but are not being prosecuted (i.e. a plea of *tu quoque*).³³

With respect to the first issue, some aspects of the Nuremberg trial were imperfect. There was, for example a heavy reliance on affidavit evidence,³⁴ and a huge disparity in resources between the prosecution and the defence. However, given the standards applicable to trials at the time, the proceedings were basically fairly run.³⁵ Even so, a reasonable case can be made that the presence of neutral judges, or a judge from Germany, would have increased the legitimacy of the proceedings.³⁶ In relation to the critiques of the law, it is true that the law on crimes against humanity and peace was defined by the Allies in London, with the actions of the Nazis in mind,³⁷ and at least in relation to crimes against peace the charter was, in essence, *ex post facto* legislation. It might be doubted, however, if the Nazis truly thought that their actions were not criminal according to principles of law recognized by the community of nations, especially after the Moscow declaration of 1943.

The final aspect of the victor’s justice critique, that similar acts by the Allies were not prosecuted, has some purchase, although the Allies had not committed mass crimes of the magnitude of the Holocaust. The defence were not permitted to raise the issue of crimes committed by the Allies, although Kranzbüler cleverly raised the *tu quoque* issue as one of law, by alleging that unrestricted submarine warfare was permitted by customary international law, as the US Chief of the Pacific Navy,

²⁹ UN Doc. A/64/Add.1.

³⁰ In addition to the debate about crimes against peace, considerable controversy surrounds the determination of the Tribunal that conspiracy existed as a mode of liability in international criminal law. It is doubtful that it did at the time.

³¹ See, e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 136, para. 89; *Case Concerning Armed Activities On the Territory of the Congo (DRC v. Uganda)* Merits, ICJ Rep (2005); ICJ General List 116, para. 217.

³² Richard H. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (Princeton, 1971) 74–124.

³³ See Cryer, *Prosecuting International Crimes* ch. 4.

³⁴ Lipmann, ‘Nuremberg’, 27. ³⁵ *Ibid.*, 39.

³⁶ But see Arthur Goodhart, ‘Questions and Answers Concerning the Nuremberg Trials’ (1947) 1 *International Law Quarterly* 525, 527.

³⁷ See, e.g. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague, 1999) 9–10.

Chester Nimitz, had admitted that US practice in that sphere was the same as that charged against the naval defendants.³⁸ The judges did not agree with that proposition of law, but because of the Allied practices they refrained from assessing the sentences of Dönitz and Raeder by reference to the war crimes charges relating to submarine warfare. The *tu quoque* argument also had an interesting effect on the indictments. Owing to the devastation visited upon Germany by Allied (in particular UK) bombing, no charges related to the Blitz over the UK were brought.³⁹ Russian conduct in the USSR, Poland and Germany made other charges difficult to bring.

There are criticisms of the Nuremberg IMT which do not relate to allegations of 'victor's justice'. Particular amongst these, is that the prosecution, in particular the US section, saw the trial as being primarily one of aggression, rather than of the Holocaust.⁴⁰ This is supported by the judgment's statement that aggression was the 'supreme international crime'.⁴¹ However, the Tribunal is primarily remembered now as a trial of atrocities rather than of aggression,⁴² and the overall judgment on Nuremberg, and its promised legacy of accountability,⁴³ tends to be quite sanguine.

6.4 The Tokyo International Military Tribunal

6.4.1 The creation of the Tribunal

The Nuremberg IMT's sibling, the International Military Tribunal for the Far East (Tokyo IMT) was set up in January 1946 by a proclamation of General Douglas MacArthur.⁴⁴ MacArthur's actions were authorized by powers granted to him by the allied States as Supreme Commander, Allied Powers, to implement the Potsdam declaration,⁴⁵ principle 10 of which promised 'stern justice' for war criminals. The declaration had been accepted by Japan in its instrument of surrender. The setting up of the Tokyo IMT on the basis of principle 10 led to a challenge to the jurisdiction of the Tribunal relating to crimes against peace, a challenge which was rejected on the basis that the majority judgment found that the Japanese government understood that the term 'war criminals' included those responsible for initiating the war.⁴⁶

³⁸ 18 *Trial of Major War Criminals, Nuremberg* (London, 1948) 26–28.

³⁹ Chris af Jochnik and Roger Normand 'The Legitimation of Violence: A Critical History of the Law of War' (1994) 35 *Harvard International Law Journal* 49, 91–2.

⁴⁰ Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, 1997) 225–6.

⁴¹ Judgment, see (1947) 41 *AJIL* at 186. ⁴² Osiel, *Mass Atrocity*, 225–6.

⁴³ See M. Cherif Bassiouni, 'The Nuremberg Legacy' in M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. III, 195; David Luban, 'The Legacies of Nuremberg' (1987) 54 *Social Research* 779.

⁴⁴ Special proclamation, Establishment of an International Military Tribunal for the Far East, 19 January 1946, TIAS No. 1589, at 3.

⁴⁵ See *Hirota v. MacArthur* 335 US 876; 93 L. Ed. 1903. ⁴⁶ Judgment of the Tokyo IMT, at 48, 440–1.

6.4.2 The Tribunal and the Trial

The Tribunal was made up of eleven judges, nine from the signatory States to the Japanese surrender (Australia, Canada, China, France, New Zealand, the Netherlands, the UK, the US and the USSR), together with one each from India and the Philippines. This unwieldy bench was overseen by the Australian Judge, Sir William Webb, whose conduct of the trial has been criticized.⁴⁷ The US was entitled to appoint the Chief Prosecutor, whilst the other countries were only permitted to appoint associate prosecutors.⁴⁸ The US choice, Joseph Keenan, was unsuited to the task, and his professionalism open to serious challenge.⁴⁹ The defence was undertaken by a number of Japanese and American lawyers, the most well known of whom were Kenzo Takayanagi, a professor of Anglo-American law from Tokyo, and Ichiro Kiyose, a politician and lawyer.

The huge trial began with the submission of the indictment to the Tribunal on 29 April 1946. The indictment, in fifty-five counts, charged the twenty-eight defendants⁵⁰ with crimes against peace and attendant conspiracies, war crimes, and murders, the last on the basis of a prosecution theory that all killings (including those of combatants) in an unlawful war were murders.⁵¹ The trial lasted nearly two and a half years, with the majority judgment being pronounced in November 1948. The judgment found all the accused that remained before the IMT at the time of judgment guilty, although not on all the counts with which they had been charged. It sentenced seven defendants to death, one to twenty years' imprisonment, one to seven years' imprisonment, and the rest to incarceration for life. In addition to this there were three dissenting judgments, one concurring judgment, and one separate opinion.

The majority judgment followed the Nuremberg IMT's opinion on practically all aspects of the law, expressly adopting its reasoning in relation to the binding nature of the Tribunal's charter, the criminality of aggressive war and the abolition of the absolute defence of superior orders.⁵² Perhaps the only major difference was that unlike the Nuremberg IMT, which did not find it necessary to deal with command responsibility, the Tokyo IMT discussed that principle of liability in some detail, and applied it to both military and civilian defendants.⁵³ In relation to the facts, the judgment decided that there was an overarching conspiracy to initiate aggressive wars, and impose Japanese authority over Asia. It also, less controversially, determined

⁴⁷ See, e.g. R. John Pritchard, 'An Overview of the Historical Importance of the Tokyo War Trial' in Chihiro Hosoya, Yasuaki Onuma, Nisuke Ando and Richard Minear (eds.), *The Tokyo Trial: An International Symposium* (Tokyo, 1986) 90, 92.

⁴⁸ Tokyo IMT Charter, Art. 8.

⁴⁹ B. V. A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge, 1992) 16.

⁵⁰ Kenji Dohihara, Koki Hirota, Seishiro Itagaki, Heitaro Kimura, Iwane Matsui, Akira Muto, Hideki Tojo, Sadao Araki, Kingoro Hashimoto, Shunroko Hata, Kiichiro Hiranuma, Naoki Hoshino, Okinori Kaya, Koichi Kido, Kuniaki Koiso, Jiro Minami, Takasumi Oka, Hiroshi Oshima, Kenryo Sato, Shigetaro Shimada, Toshi Shiratori, Teichi Suzuki, Yoshiji Umezu, Shigenori Togo, Mamoru Shigemitsu. Yosuke Matsuoka and Osami Nagano died during the trial. Shumei Okawa was declared mentally unfit to stand trial. See Tokyo IMT Judgment, at 48, 425.

⁵¹ These charges were not decided upon, as they were seen as cumulative to the crimes against peace charges.

⁵² Judgment, 48, 437–9. ⁵³ *Ibid.*, 48, 442–7.

that war crimes were committed both against Allied PoWs and civilians, perhaps most notably in the Rape of Nanking in 1937.

The President of the Tribunal gave a separate opinion, in which he gave his own views on the law, in particular that the criminality of aggressive war could be based on natural law.⁵⁴ Webb also asserted that as the Emperor was responsible for initiating such wars, his absence ought to be reflected in the sentences meted out to the defendants.⁵⁵ Judge Bernard of France also considered that crimes against peace could be based on natural law.⁵⁶ He took a more sophisticated approach to command responsibility than the majority.⁵⁷ Nonetheless, he considered the trial to have progressed in such a manner that he was not able to reach a judgment on the responsibility of the defendants.⁵⁸

The two major dissenting judgments were given by the judges from the Netherlands and from India, Judges Röling and Pal. Judge Röling disagreed with the majority (and with the Nuremberg Tribunal) on the question of crimes against peace, taking the view that there was no individual criminal liability for aggression in international law; he was however of the view that the occupying powers were entitled to imprison those responsible for initiating wars, as they threatened their security.⁵⁹ He supported this view by pointing out that the Tribunal had sentenced no one to death for committing a crime against peace alone.⁶⁰ While that fact does not prove that the majority saw their sentencing practice in that light, he was right to express doubt about the broad way in which the majority derived a criminal conspiracy from the facts (some of which he contested), and the way they applied command responsibility.⁶¹ He argued that a number of the defendants, most notably Shigemitsu and Hirota, should have been acquitted.⁶² He took a stern line on war crimes and would have imposed death sentences on more of the defendants found guilty of those crimes.⁶³

Judge Pal gave the longest and most well-known of the dissenting judgments. He denied that crimes against peace were a part of existing international law and noted that, in the absence of a clear definition, the concept of aggression was open to 'interested interpretation'.⁶⁴ Pal also gave an interpretation of the facts completely at variance with that of the majority, largely accepting defence arguments that Japan's actions were only ever ad hoc reactions to provocations by Western powers or explained by fear of communism in China.⁶⁵ He gave a lengthy critique of the fairness of the trial proceedings⁶⁶ and made clear that he saw the prosecution as hypocritical, owing to the record of many of the prosecuting States in colonialism, and the use of nuclear weapons against Hiroshima and Nagasaki.⁶⁷ As a result, he would have acquitted all the defendants, including of war crimes charges.⁶⁸ His opinion was criticized in Judge Jaranilla's concurring opinion. Jaranilla, the Philippine judge,

⁵⁴ Separate Opinion of the President, at 6. ⁵⁵ *Ibid.*, 19–20. ⁵⁶ Dissenting Opinion of the Member from France, at 10.

⁵⁷ *Ibid.*, 12–18. ⁵⁸ *Ibid.*, 22. ⁵⁹ Dissenting Opinion of the Member from the Netherlands, 10–51.

⁶⁰ *Ibid.*, 48–9. ⁶¹ *Ibid.*, 54–135. ⁶² *Ibid.*, 178–249. ⁶³ *Ibid.*, 178.

⁶⁴ Dissenting Opinion of the Member from India, at 69–153, 227–79. ⁶⁵ *Ibid.*, 349–1,014. ⁶⁶ *Ibid.*, 280–348.

⁶⁷ *Ibid.*, 1, 231–5. ⁶⁸ *Ibid.*, 1, 226.

said that Pal ought to have accepted the charter's provisions on the law, as he accepted an appointment under the charter.⁶⁹ He also asserted that the trial proceedings were fair, and that the atomic bombings were justified, as they brought an end to the war.⁷⁰ Jaranilla's appointment was controversial, as he had been a victim of the Bataan Death march, and he therefore ought not to have sat, on the basis that he might have been biased against the defendants.⁷¹ His view that the sentences imposed were too lenient did little to dispel this suspicion.⁷²

6.4.3 Assessment of the Tribunal

The general view of the Tokyo IMT was summed up by the title of the most well-known book on the trial, Richard Minear's *Victor's Justice*.⁷³ There is much to be said for such a view. Where the Tokyo IMT agreed with its Nuremberg counterpart on the law, the same critiques are applicable to both, although in relation to both conspiracy and command responsibility the Tokyo IMT went further, and in the judgment of some, too far. Its view of the facts was unsubtle, and the idea of 'an all-inclusive seventeen-year criminal conspiracy involving all the accused strained credulity ... [and] ... betrayed an underlying inability to grasp the dynamics of Japanese politics or a misplaced determination to force, after the fact, unrelated and fortuitous events into a preconceived thesis'.⁷⁴

In spite of the efforts of some of the judges, there were considerable flaws in the trial process. Also, not only was the *tu quoque* argument given some purchase by the bombing of Hiroshima and Nagasaki, it was also raised by one of the judges themselves. Cultural misunderstandings and insensitivities affected the trial, and some of the judges appeared to be biased. Evidence of Unit 731, the Japanese chemical and biological weapons unit which engaged in human vivisection, was kept from the Tribunal, as the US had promised its members immunity in return for information about their experiments.⁷⁵ But simple dismissals of the Tokyo IMT as a show trial are unnuanced.⁷⁶ Many of the findings on war crimes were accurate, and many of the heavily criticized delays in the trial were occasioned by the difficulties in translating Japanese to English.⁷⁷

It is unquestionable, however, that politics entered into the indictment process and the release policies for those imprisoned. The Emperor was not indicted, on the ground that his immunity was necessary for Japan's post-war stability, and he was deliberately not mentioned by the prosecution nor (with the exception of one slip) the defence.⁷⁸ Cold War considerations led to the US (whose views were

⁶⁹ Concurring Opinion of the Member from the Philippines, at 28–32. ⁷⁰ *Ibid.*, 24–7.

⁷¹ IMTFE Paper 141, 10 June 1946, Motion Suggesting the Disqualification and Personal Bias of the Philippine Justice of the Tribunal.

⁷² Jaranilla Opinion, 32–5. ⁷³ R. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, 1971).

⁷⁴ John Piccigallo, *The Japanese on Trial* (Austin, 1979) 212. ⁷⁵ Röling and Cassese, *Tokyo Trial*, at 48–50.

⁷⁶ See, e.g. Yasuaki Onuma, 'Beyond Victor's Justice' (1984) 11 *Japan Echo* 63. ⁷⁷ Judgment, 48, 429–30.

⁷⁸ Herbert P. Bix, *Hirohito and the Making of Modern Japan* (London, 2000) ch. 15.

largely determinative on this matter) acquiescing in the release of all those imprisoned by 1955.⁷⁹

In spite of the acceptance of the judgment by the Japanese government in Article 11 of the 1952 Peace Treaty, it has been questioned if its findings were accepted by all parts of the Japanese population. However, the question of memories and views of the Second World War in Japan is a complex and contested one both inside and outside Japan.⁸⁰ In the West the Tribunal is largely ignored, and knowledge of it in Japan is waning as the trial recedes into history. Amongst those with knowledge of the trial, however, there is less support for Japanese actions in the war.⁸¹

6.5 Control Council Law No. 10 trials and military commissions in the Pacific sphere

In addition to the Nuremberg IMT, the Allied powers occupying Germany also engaged in a large-scale policy of prosecuting war crimes in their respective occupation zones. These were undertaken under the authority of Control Council Law No. 10, which provided for domestic prosecutions of war crimes, crimes against humanity and crimes against peace. Twelve major US trials that took place in Nuremberg were known as the 'subsequent proceedings'. These included trials of Nazi doctors and judges, the *Einsatzgruppen* and members of the German High Command. These trials have had a considerable influence on international criminal law.⁸² Proceedings in the British zone of Germany were carried out under the Royal Warrant of 1946.⁸³ There were also proceedings in the French and Soviet Zones of Germany. The trials were guided, to varying degrees, by the findings of the Nuremberg IMT.⁸⁴

In the Pacific sphere a large number of trials were undertaken by the Allies, including the UK, US, Australia, China and the Philippines.⁸⁵ These were on the basis of various domestic war crimes provisions. In the UK, this was the Royal Warrant. The trials are on the whole comparatively less well known than those in the European sphere of the Second World War.⁸⁶ The most famous of the trials is the US prosecution of General Yamashita,⁸⁷ which was an early modern use of the principle of command responsibility. Other interesting trials of the era include the proceedings against Admiral Toyoda before a mixed panel of Allied judges.

⁷⁹ R. John Pritchard, 'The International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia' in Bassiouni, *International Criminal Law*, vol. III, 142.

⁸⁰ See Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York, 1994).

⁸¹ 'Poll Shows Ignorance of Tokyo Tribunal', *Asahi Shimbun*, 5 March 2006.

⁸² See Howard Levie, *Terrorism in War: The Law of War Crimes* (New York, 1992) 72–98; Matthew Lippman, 'The Other Nuremberg, American Prosecutions of Nazi War Criminals in Occupied Germany' (1992) 3 *Indiana International and Comparative Law Review* 1.

⁸³ See Anthony P. V. Rogers, 'War Crimes Trials Under the Royal Warrant, British Practice 1945–1949' (1990) 39 *ICLQ* 780.

⁸⁴ See Adam Basak, 'The Influence of the Nuremberg Judgment on the Practice of the Allied Courts in Germany' (1977–1978) 9 *Polish Yearbook of International Law* 161.

⁸⁵ See Levie, *Terrorism*, 155–83. Piccigallo, *The Japanese*; Robert W. Miller, 'War Crimes Trials at Yokohama' (1948–1949) 15 *Brooklyn Law Review* 19.

⁸⁶ Although some are reported in the Law Reports, Trials of War Criminals series. ⁸⁷ *US v. Yamashita* 327 US 1.

Further reading

- John Appleman, *Military Tribunal and International Crimes* (Indianapolis, 1954).
- Arnold Brackman, *The Other Nuremberg: The Story of the Tokyo War Crimes Trial* (New York, 1987).
- Hans Ehard, 'The Nuremberg Trial Against the Major War Criminals and International Law' (1949) 43 *AJIL* 223.
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- Joseph Keenan and Brendan Brown, *Crimes Against International Law* (Washington DC, 1950).
- Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 *International Law Quarterly* 153.
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- Georg Schwarzenberger, 'The Judgment of Nuremberg' (1947) 21 *Tulane Law Review* 329.
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- Telford Taylor, *The Anatomy of the Nuremberg Trial* (London, 1993).
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- Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41 *AJIL* 37.

The ad hoc International Criminal Tribunals

7.1 Introduction

Until the early 1990s, it seemed unlikely that the progeny of Nuremberg and Tokyo IMTs would appear soon. However, in response to two conflicts in the 1990s (the Yugoslav wars of dissolution and the Rwandan genocide of 1994) the United Nations revived the idea of international criminal tribunals. This chapter will introduce those tribunals, and explain their practice. Although it is too early to come to any final conclusions about the Tribunals, this chapter will also draw out some of the plaudits and criticisms that have attended the operation of the Tribunals so far. This chapter does not, however, attempt to provide a comprehensive analysis of the jurisprudence of the Tribunals, as their output is analysed elsewhere in this book.¹

7.2 The International Criminal Tribunal for Yugoslavia

7.2.1 *The creation of the ICTY*

Although some of the roots of the dissolution of Yugoslavia go back to the Second World War if not further, political developments in what was then the Socialist Federal Republic of Yugoslavia in the 1980s led that country to break up through a number of linked armed conflicts starting in 1991.² The conflicts were characterized by large-scale violations of international criminal law committed especially against civilians, most notably sexual offences and the practice of ‘ethnic cleansing’. Pictures of concentration camps in Bosnia, which evoked memories of the Holocaust, caused public outcry and led to demands that something be done about the situation.

Even before the conflict was formally brought to an end in December 1995, the Security Council had taken action in relation to prosecuting those crimes. The Council approached the Rubicon to prosecution in autumn 1992, with resolution 780 (1992),

¹ The decisions of the Tribunals are regularly noted and explained by Daryl Mundis and Fergal Gaynor, in the ‘Current Developments in the *ad hoc* Tribunals’ section of the *JICJ*. See also Geoffrey Watson, ‘The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ (2002–2003) 37 *New England Law Review* 871; Payam Akhavan, ‘The Crime of Genocide in the ICTR Jurisprudence’ (2005) 3 *JICJ* 989.

² See, e.g. Laura Silber and Alan Little, *The Death of Yugoslavia* (Harmondsworth, 1996).

which created a Commission to investigate allegations of international crimes in Yugoslavia.³ The Commission did not obtain significant State support, materially or financially, so its first Chairman, Frits Kalshoven, resigned. Under its second chairman, M. Cherif Bassiouni, the Commission obtained financing from private sources and engaged in considerable evidence-gathering in former Yugoslavia.⁴ It reported in 1994.⁵

While the Commission was still at work, the Secretary-General consulted States about the creation of a possible future tribunal as a Security Council organ, at that time an entirely novel concept. In response to a request by the Council in resolution 808 (1993), the Secretary-General recommended that it create a tribunal by resolution.⁶ The possibility of creating the tribunal by treaty was canvassed, but rejected on the basis that it would take too long, and there was no guarantee that all the relevant States (in particular those in what was by then former Yugoslavia) would ratify it.⁷ The Report annexed a draft Statute for the Tribunal, modelled in some ways on the Nuremberg IMT's charter, but also creating a cooperation regime which was to be streamlined when compared to inter-State cooperation, and mandatory in nature.⁸ The Security Council adopted the draft Statute in resolution 827 (1993),⁹ although some States and commentators questioned if the Security Council had the power to set up such a tribunal.¹⁰ Although there is no real evidence of overt interference by the Council in the operation of the ICTY,¹¹ the question of the extent to which a political organ such as the Security Council ought to be able to act in this area is a highly controversial one, and one which has also arisen in relation to the ICC.

Resolution 827 (1993) set out the aims of the Security Council in setting up the ICTY, these were that, in the circumstances in Yugoslavia, the Tribunal could 'put an end to such crimes and take effective measures to bring to justice the persons who are responsible for them', and thus 'contribute to the restoration and maintenance of peace'.¹² The Council further asserted that it believed that creating the ICTY would 'contribute to ensuring that such violations are halted and effectively redressed'.¹³ Such goals were certainly broad and optimistic, and perhaps overstated the extent to which criminal punishment, alone, can create international peace and security,

³ 6.10.1992.

⁴ See generally M. Cherif Bassiouni 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780' (1994) 88 *AJIL* 784.

⁵ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, UN Doc. S/1994/674.

⁶ Report of the Secretary General Pursuant to Security Council resolution 808 (1993), UN Doc. S/25704, para. 20.

⁷ *Ibid.* ⁸ See generally Larry D. Johnson, 'Ten Years Later: Reflections on the Drafting' (2004) 2 *JICJ* 368.

⁹ 25 May 1993.

¹⁰ S.PV/3217, 20–2. Alfred P. Rubin, 'An International Criminal Tribunal for Former Yugoslavia' (1994) 6 *Pace International Law Review* 7. Most of these doubts were laid to rest after *Tadić* ICTY A. Ch. 2.10.1995 (hereinafter *Tadić* 2.10.1995).

¹¹ The only possible exception is the completion strategy, see section 7.2.4.

¹² Security Council resolution 827 (1993), preamble.

¹³ *Ibid.* See also Michael Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal' (1999) 49 *DePaul Law Review* 925, 928–33.

although the Council only asserted that the ICTY would contribute to, rather than single-handedly create, reconciliation in former Yugoslavia.

7.2.2 *The structure of the ICTY*

There are three main organs of the ICTY, the Registry, the Office of the Prosecutor and the Chambers. The Registry is responsible for the administrative management of the tribunal, including, for example the victims and witnesses programme, transport of accused, their conditions of detention and public affairs. The Office of the Prosecutor is the organ whose responsibility it is to investigate allegations, issue indictments (which have to be confirmed by a judge) and bring matters to trial. The final organ of the ICTY is the Chambers. There are currently three Trial Chambers, each consisting of a presiding judge and two other judges.¹⁴ The Trial Chambers are subject to the appellate control of the Appeals Chamber. This seven-member chamber (which sits in a panel of five) is headed by the President and is the final authority on matters of law in the Tribunal.¹⁵

7.2.3 *The jurisdiction of the ICTY and its relationship to national courts*

The ICTY has jurisdiction over war crimes, crimes against humanity and genocide committed after 1 January 1999 on the territory of the former Yugoslavia.¹⁶ Article 2 grants the Tribunal jurisdiction over grave breaches of the Geneva Conventions (which only apply in international armed conflicts),¹⁷ whilst Article 3 provides the Tribunal with jurisdiction over a non-exhaustive list of violations of the laws or customs of war. The Tribunal decided in 1995 that this provision covered war crimes in both international and non-international armed conflicts,¹⁸ a decision that paved the way for some of the Tribunal's most innovative jurisprudence.¹⁹ The Tribunal has jurisdiction over genocide and crimes against humanity pursuant to Articles 4 and 5 of its Statute respectively. The open-ended nature of the temporal jurisdiction of the ICTY means that the tribunal has jurisdiction over the later conflicts in Kosovo and the Former Yugoslav Republic of Macedonia,²⁰ and peacekeepers in the area, things not anticipated by the drafters.

The ICTY also has primacy over national courts.²¹ Pursuant to this principle, the Tribunal may require States to defer any proceedings they were contemplating or

¹⁴ ICTY Statute, Art. 11.

¹⁵ The *ratio decidendi* of its decisions bind the Trial Chambers, see *Aleksovski* ICTY A. Ch. 24.3.2000 para. 112. The Appeals Chamber does not bind itself, but will only depart from its previous jurisprudence if there are 'cogent reasons in the interests of justice' to do so, *ibid.*, para. 107. Trial Chambers do not bind one another, *ibid.*, para. 113.

¹⁶ ICTY Statute, Arts. 1, 8. ¹⁷ *Tadić* paras. 2.10.1995 79–8. ¹⁸ *Ibid.*, paras. 86–93. ¹⁹ See ch. 12.

²⁰ See Security Council resolution 1160 (1998), *Mutinovic et al.* ICTY A. Ch. 8.6.2004. *In re: The Republic of Macedonia* ICTY T. Ch. 4.10.2002.

²¹ ICTY Statute, Article 9(1). Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Antwerp, 2002) 81–8.

undertaking to it.²² The situations when deferral is justified are given in Rule 9 of the Rules of Procedure and Evidence. Those situations are when the conduct is not charged as an international crime, where the proceedings are not fair or impartial, or what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the tribunal.²³ The last is a very broad provision, effectively allowing the ICTY to demand transfer of cases at will.

7.2.4 *Milestones in the practice of the ICTY*²⁴

Beginnings and the Tadić case

It is fair to say that the ICTY began slowly. A skeleton staff, beset with funding and cash-flow problems, had to create an international criminal court effectively from nothing.²⁵ Staff had to be appointed, premises for the tribunal had to be found, and this before the legal work, including investigations, could even begin. When they began, investigations were hampered by the continuing armed conflicts in Yugoslavia.²⁶ In the absence of indictments or defendants, there was relatively little for the judges to do other than write and refine the Rules of Procedure and Evidence.²⁷ The first major breakthrough occurred in April 1995, when Germany deferred its own proceedings against a (low ranking) Bosnian Serb accused of various international crimes, Duško Tadić, and transferred him to the ICTY for trial.²⁸

Tadić challenged the ICTY's jurisdiction over him. This led to the seminal Interlocutory Appeal decision of October 1995.²⁹ Tadić had asserted that the Security Council had no authority to set up a criminal court, that the ICTY's primacy over national courts was unlawful, and that anyway the Tribunal had no jurisdiction over the crimes he was alleged to have committed.³⁰

First, Tadić's challenge required the ICTY to decide whether it had the authority to pass on the legality of its own creation, a matter made more sensitive by the fact that the question of judicial review of the actions of the Security Council was an area in which the ICJ had, soon before, feared to tread too heavily.³¹ Given this, and the fact that the ICTY is formally a subsidiary body of the Security Council, it was perhaps unsurprising that the Trial Chamber in the *Tadić* jurisdictional case simply

²² Compare the relationship between the ICC and national courts: section 8.5. ²³ Rule 9(i)-(iii).

²⁴ Detailed statements of the ICTY's practice may be found in the Annual Reports which the ICTY submits to the Security Council.

²⁵ The financial problems arose because of a disagreement between the Security Council and the General Assembly over the appropriate budget from which to fund it. See generally Annual Report of the ICTY 1994, S/1994/1007, paras. 34-6, 143-9.

²⁶ Annual Report of the ICTY 1995, S/1995/728, paras. 4, 194-6.

²⁷ On the Rules, see Annual Report of the ICTY 1994, paras. 52-97, for frustration with the lack of visible progress see Annual Report of the ICTY 1995, paras. 171-8.

²⁸ *Ibid.*, paras. 179-84. ²⁹ *Tadić* 2.10.1995. ³⁰ *Ibid.*, para. 8.

³¹ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US, Libya v. UK)* (1992) ICJ Rep 114.

denied that it had the authority to rule on the legality of its parent's actions, stating that its powers were limited to passing judgment on crimes in former Yugoslavia.³²

The Appeals Chamber, on the contrary, decided that it had the authority to determine the legality of its own creation.³³ It decided this on the basis that it had an inherent power to do so, in order to determine if it could lawfully exercise its primary jurisdiction over criminal cases.³⁴ The Tribunal's claim that it had incidental jurisdiction over something that it could not exercise primary jurisdiction to decide was bold.³⁵

In his Separate Opinion, Judge Sidhwa provided one of the stronger arguments for the Tribunal's decision, noting that unlike the ICJ, the ICTY is a criminal court with mandatory jurisdiction over individuals, and this militated in favour of review.³⁶ Judge Li, on the other hand, took the view that since there was no express power granted to the ICTY to do so, and it did not have the expertise to determine the appropriateness of the Security Council's action, the review was 'worthless both in fact and in law'.³⁷

Judge Li's comments not only relate to the power of the Tribunal, but also to whether the question was a political one which, as a court, the tribunal ought to decline to answer. The majority, on the authority of a number of ICJ decisions, in particular the *Certain Expenses* advisory opinion,³⁸ responded that the notions of 'political questions and non-justiciable disputes' were an anachronism in international adjudication, and that so long as a question has a legal answer, it may be given.³⁹ The majority had a point; the ICJ has shown itself willing to deal with the legal sides of disputes which have considerable political dimensions, including the use of force,⁴⁰ nuclear weapons⁴¹ and aspects of the Middle East situation,⁴² in the face of claims that they were political rather than legal questions.

When reviewing the actions of the Council, the majority in *Tadić* adopted a deferential standard. First, it said that it was clear that the Security Council was entitled to invoke its powers under Chapter VII of the charter, as there was an armed conflict in Yugoslavia at the relevant time.⁴³ This is correct, but it is not clear that the Council based the determination of a threat to the peace in resolution 827 on the armed conflict. That resolution, after expressing its grave alarm at violations of

³² *Tadić* ICTY T.Ch. II 10.8.1995 paras. 8, 16.

³³ *Tadić* 2.10.1995 paras. 14–25. See generally José E. Alvarez, 'Nuremberg Revisited: The *Tadić* Case' (1996) 7 *EJIL* 245.

³⁴ *Tadić* 2.10.1995 para. 20.

³⁵ See Colin Warbrick, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case' (1996) 45 *ICLQ* 691, 691–2.

³⁶ *Tadić* 2.10.1995 Separate Opinion of Judge Sidhwa, para. 34. For discussion, see George Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1993) 90 *AJIL* 64 at 65; Alvarez, 'Nuremberg Revisited' 251, 255.

³⁷ *Tadić* 2.10.1995 Separate and Dissenting Opinion of Judge Li, paras. 2–4.

³⁸ *Certain Expenses of the United Nations* (1962) ICJ Reports 151. ³⁹ *Tadić* 2.10.1995 paras. 24–5.

⁴⁰ See, e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* (1986) ICJ Reports 4.

⁴¹ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, (1996) ICJ Reports 226.

⁴² *Legal Consequences of the Construction of a Wall in Palestinian Territory* ICJ List 131.

⁴³ *Tadić* 2.10.1995 para. 30. Judge Sidhwa agreed, adding that the appraisal of the evidence leading to the determination was 'based on a proper appraisal of the evidence, and was reasonable and fair and not arbitrary or capricious.' Separate Opinion of Judge Sidhwa, para. 61.

humanitarian law, determined that 'this situation' was a threat to peace. Equally, the Council had the right to invoke Chapter VII over such events in any event.

Next the Tribunal determined that the Council could set up a court. It based the authority of the Council to do this on Article 41 of the UN Charter. Although Article 41 does not expressly state that the Council can do so, this did not trouble the Appeals Chamber, as the list of measures it contains is not exhaustive.⁴⁴ The tribunal also rejected the idea that the Council could not create a court as it had no judicial functions to pass to such a body. Its reasoning was that the Council did not purport to do such a thing, but to create a court in the exercise of its functions in relation to peace and security, in an analogous manner to the General Assembly's creation of an administrative tribunal, an action which received the sanction of the ICJ.⁴⁵ Finally, the majority refused to second-guess the Security Council's belief that the establishment of a court could help restore international peace and security as, it said, an *ex post facto* evaluation as to whether or not this belief was correct would be inappropriate.⁴⁶ The question was not if that belief was correct, but whether it was held. On these points, the Chamber was right.

Further, the Tribunal also determined that owing to the membership of the former Yugoslav States in the UN, primacy did not violate the sovereignty of the former Yugoslav States,⁴⁷ or the (non-existent) right of the defendant to be tried before his own domestic courts.⁴⁸ On the former point, all the States emerging out of the Yugoslav wars of dissolution either had been accepted as members of the UN by the time of the creation of the ICTY, or claimed to be successor States to the Socialist Federal Republic of Yugoslavia at the time.⁴⁹

The Chamber also dealt with the suggestion that, under human rights law, the ICTY was not 'established by law'. The Appeals Chamber, rather generously, took the view that although human rights treaties were not directly applicable to the tribunal, the requirement that a tribunal be set up by law was a general principle of law, thus binding on the Tribunal.⁵⁰ With some justification, the Chamber asserted that this principle could not be applied in an unadulterated fashion without respect for the specific situation of an international tribunal. Therefore the Chamber asserted that the principle only required at the international level that the Tribunal be set up with sufficient safeguards for fair trial, which the Tribunal was.⁵¹

Shortly after the decision, at the end of 1995, the Yugoslav wars of dissolution were formally brought to an end by the Dayton Peace Agreement.⁵² This agreement

⁴⁴ *Tadić* 2.10.1995 paras. 34–5.

⁴⁵ *Ibid.*, paras. 37–8, referring to *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) ICJ Reports 47 at 61.

⁴⁶ *Tadić* 2.10.1995 para. 39. ⁴⁷ *Ibid.*, paras. 55–60. ⁴⁸ *Ibid.*, paras. 61–4.

⁴⁹ Although the position on point has since been made more complex by the *sui generis* status of the Federal Republic of Yugoslavia seemingly imputed to it by the ICJ; see *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)* Judgment of 3.2.2003, ICJ General List 122.

⁵⁰ *Tadić* 2.10.1995 para. 42. ⁵¹ *Ibid.*, para. 46. ⁵² (1996) 35 *ILM* 75.

included an obligation on all the former Yugoslav States to cooperate with the ICTY,⁵³ and provided that international forces in former Yugoslavia had the authority to arrest those indicted by the ICTY.⁵⁴ This power was not used immediately, however, although those forces did provide security for the prosecutor to engage in on-site investigations.⁵⁵ Cooperation from the States of former Yugoslavia, other than Bosnia-Herzegovina, was still not forthcoming.⁵⁶

The time of trials

By 1996 its judicial workload led the ICTY to ask for the creation of a second Trial Chamber.⁵⁷ This prospect was boosted when international forces began to arrest indictees in 1997.⁵⁸ The Federal Republic of Yugoslavia remained uncooperative. Croatia transferred one defendant that year.⁵⁹ By 1998 the Tribunal had nineteen people in custody, including three who had voluntarily surrendered themselves for trial.⁶⁰ Owing to the increased violence in Kosovo, the Security Council requested that the prosecutor look into events there.⁶¹ This led, in May 1999, to the ICTY indicting Slobodan Milošević,⁶² for alleged crimes in Kosovo. The prosecutor was assisted in this process by considerable evidence made available to her by western States.⁶³

In 1999 the prosecutor was asked by a number of people and groups to investigate NATO States for alleged war crimes during its air campaign in relation to Kosovo. In response the prosecutor set up a committee to engage in a preliminary assessment of the evidence presented and to advise her on whether or not to initiate a full investigation. Even this action caused consternation in some circles.⁶⁴ The Committee recommended in June 2000 that no full investigation be undertaken.⁶⁵ This recommendation was accepted by the prosecutor and caused considerable controversy.⁶⁶ Whether or not this decision reflected an unwillingness to investigate NATO officials, and whether or not the conclusions reached in the report are sound, aspects of the report's reasoning are certainly open to challenge.⁶⁷

⁵³ Article X, Annex 1-A.

⁵⁴ Article IV(4) Annex IA; see Paula Gaeta, 'Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for former Yugoslavia?' (1998) 9 *EJIL* 174.

⁵⁵ Annual Report of the ICTY 1996, S/1996/665, paras. 75–9. ⁵⁶ *Ibid.*, paras. 167–71. ⁵⁷ *Ibid.*, para. 72.

⁵⁸ Annual Report of the ICTY 1997, S/1997/729, para. 190. Darryl Robinson, 'Trials, Tribulations and Triumphs: Major Developments in 1997 at the International Criminal Tribunal for Yugoslavia' (1997) 35 *Canadian Yearbook of International Law* 179.

⁵⁹ Annual Report of the ICTY 1997 para. 183. ⁶⁰ Annual Report of the ICTY 1998, S/1998/737, paras. 113–14.

⁶¹ Security Council Resolution 1160, Annual Report of the ICTY 1998 para. 118.

⁶² *Prosecutor v. Milošević et al.* Indictment 24.5.1999.

⁶³ Annual Report of the ICTY 1999, S/1999/846, paras. 126, 128.

⁶⁴ See, e.g. Rachel Kerr, *The International Criminal Tribunal for Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford, 2004) 202–3.

⁶⁵ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia 8 June 2000, (2000) 38 *ILM* 1257, para. 90.

⁶⁶ See, in favour of the decision, Kerr, *International Criminal Tribunal*, 199–204. (Strongly) against, see Michael Mandel, 'Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learnt From It' (2001–2002) 25 *Fordham International Law Journal* 95.

⁶⁷ See Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing against the Federal Republic of Yugoslavia' (2001) 12 *EJIL* 503; Michael Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY' (2001) 12 *EJIL* 531.

Moving towards completion

Around 2000 the judges of the ICTY concluded that their work could take them until at least 2016 to complete.⁶⁸ This was considered to be too long. Therefore the ICTY suggested to the Security Council that there be a 'completion strategy'.⁶⁹ This involved a number of steps. The first was the creation of *ad litem* judges, peripatetic judges who would sit for one case.⁷⁰ This was achieved when a set of twenty-seven such judges were authorized by Security Council resolution 1329 (2000).⁷¹ The next step was getting senior lawyers to deal with some pre-trial matters rather than judges.⁷² The third step of the plan was to expand the Appeals Chamber, a move that was also accepted in resolution 1329 (2000).

The visibility and perceived effectiveness of the Tribunal increased considerably in 2001, when the Federal Republic of Yugoslavia began, after considerable economic and political pressure, sporadic cooperation with the tribunal, most notably with the surrender of ex-President Milošević to the ICTY in June 2001. Just over a month later, the ICTY issued its first conviction for genocide, of General Radislav Krstić, for his role in the Srebrenica massacre.⁷³ During this period, the prosecutor undertook a number of initiatives to ensure that investigations would be completed by the end of 2004.⁷⁴ These involved, inter alia, focusing on high-level offenders, as lower level offenders could be tried at the domestic level.⁷⁵ It was hoped that this would permit the tribunal to complete its trial-level work by 2008, although this was contingent on State cooperation in transferring evidence and indictees.⁷⁶

The possibility of the Tribunal living up to its timetable was assisted by three factors. First, increasing numbers of defendants were willing to plead guilty, in particular, in October 2002, Biljana Plavšić, a wartime president of the *Republika Srpska*.⁷⁷ Second, the Federal Republic of Yugoslavia increased its cooperation with the tribunal, although the two highest profile fugitives, Radovan Karadžić and Ratko Mladić remained at liberty.⁷⁸ Finally, more indictees began to surrender voluntarily to the ICTY.⁷⁹ On its side, the ICTY revised Rule of Procedure and Evidence 11*bis*, to permit the ICTY to transfer indictments, and later, cases, after it had considered the appropriateness of doing so, taking into account, inter alia, the gravity of the crime, the role of the accused, and the fair trial guarantees that will be accorded to the accused.⁸⁰

A major development occurred in August 2003, when the Security Council explained its approach to the ICTY's completion strategy in resolution 1503. This

⁶⁸ Annual Report of the ICTY 2000, UN Doc. S/2000/777, para. 336.

⁶⁹ See generally Dominic Raab, 'Evaluating the ICTY and Its Completion Strategy' (2005) 3 *JICJ* 82.

⁷⁰ ICTY 2000 Report, para. 340. ⁷¹ 30 November 2000. The roles of such judges have gradually expanded.

⁷² Annual Report of the ICTY 2001, S/2001/865, para. 4. ⁷³ *Prosecutor v. Krstić*, Judgment T. Ch. I 2 August 2001.

⁷⁴ Annual Report of the ICTY 2002, S/2002/985, para. 7. ⁷⁵ *Ibid.*, para. 218. ⁷⁶ *Ibid.*, para. 328.

⁷⁷ Annual Report of the ICTY 2003, S/2003/829, para. 2. See *Plavšić*, ICTY T. Ch. 23 November 2003.

⁷⁸ Annual Report of the ICTY 2003, para. 8. ⁷⁹ *Ibid.*, para. 232.

⁸⁰ See generally, Michael Bohlander, 'Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11*bis* and the Consequences for the Law of Extradition' (2006) 55 *ICLQ* 219.

suggested that the prosecutor concentrate on high-level offenders, and set out its completion timetable. In addition to the prosecutor completing investigations by 2004, the Trial Chambers were required to complete their business by 2008 and appeals were to end by 2010.⁸¹ Scepticism about the ability of the Tribunal to keep to this timetable was not unfounded.⁸² Nonetheless, the Security Council adopted resolution 1534 (2003), which required the Tribunal's judges to check that any new indictment focused on 'the most senior leaders suspected of being most responsible for crimes' in the Tribunal's jurisdiction, a requirement adopted in Amended Rule of Procedure and Evidence 28(A). Some have questioned whether this is consistent with the requirements of prosecutorial independence.⁸³ Although such critiques are worth taking seriously, it is unlikely that it altered the prosecutor's strategy in a practical way, as she had already been focusing on such offenders for some time.

In 2005, after the prosecutor completed investigations for war crimes,⁸⁴ the tribunal began to refer cases to national jurisdictions, in particular in Bosnia and Croatia, for trial.⁸⁵ As of May 2006, the Tribunal had, of the 161 people charged, forty-eight in custody, seventeen on provisional release, nineteen serving sentences in States that had agreed to take them, seventeen who had completed their sentences and three awaiting appeals against their acquittals. In addition, five had been acquitted. Twenty-eight people had their indictments withdrawn, or died before proceedings began, eight had been transferred to domestic jurisdictions for trial, and one was awaiting transfer. One died whilst serving his sentence, and three died during proceedings.⁸⁶ The death of the most (in)famous of these, Slobodan Milošević, in 2006, robbed the Tribunal of the possibility of completing proceedings against one of the main leaders involved in the wars of 1991–1995.⁸⁷ The number of accused in custody, and the six who have been publicly indicted but are still at large, make it unlikely that the ICTY will be able to keep to the timetable the Security Council has set.⁸⁸

7.2.5 Appraisal of the ICTY

The ICTY itself has set out a number of its achievements.⁸⁹ These are that it has promoted accountability rather than impunity, established the facts of the crimes in former Yugoslavia, brought justice to victims and given them a voice, developed

⁸¹ See Raab, 'Completion Strategy', 85–6. ⁸² *Ibid.*, at 86, 95.

⁸³ Darryl A. Mundis, 'The Judicial Effects of the "Completion Strategies" on the ad hoc International Criminal Tribunals' (2005) 99 *AJIL* 142; Larry D. Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity' (2005) 99 *AJIL* 158.

⁸⁴ 2005 Report, para. 172. ⁸⁵ See Bohlander, 'Referring an Indictment'.

⁸⁶ *Key Figures of ICTY Cases*, available at www.un.org/icty/cases-e/factsheets/procfact-e.htm.

⁸⁷ The leaders of Croatia and Bosnia in the relevant periods, Franjo Tudjman and Alija Izetbegović respectively, died unindicted, if not uninvestigated.

⁸⁸ Annual Report of the ICTY UN Doc. S/2005/532, para. 257.

⁸⁹ Bringing Justice to the Former Yugoslavia: The Tribunal's Core Achievements available at www.un.org/icty/cases-e/factsheets/achieve-e.htm.

international law and strengthened the rule of law.⁹⁰ The Tribunal has, to some extent, fulfilled these goals.

It is true that the creation of the ICTY has contributed to the trend against impunity, not least as its creation and Statute provided a direct precedent for the ICTR, and a slightly less direct one for the ICC.⁹¹ Also the ICTY showed that international prosecutions were possible outside the situation of a complete defeat of one side in a conflict. The Tribunal has taken considerable pains to determine what happened in former Yugoslavia accurately, even if its approach has been criticized.⁹² The Tribunal spent considerable time and resources to attempt to bring (corrective) justice to victims, even if its practice has not always been perfect by the exacting standards of victims' rights advocates.⁹³

It is difficult to doubt the ICTY's impact on international law.⁹⁴ Although the Tribunal has been accused of being too quick to decide that aspects of the law are customary,⁹⁵ and of seeking always to expand its own authority,⁹⁶ most of its decisions are well reasoned, and have not been criticized by States.⁹⁷ Although it might be queried if all of the ICTY's decisions on custom have been irreproachable, it is not clear that they have violated the *nullum crimen sine lege* principle.⁹⁸

On the down side, the ICTY has been charged, with varying degrees of accuracy, of various sins against international law and justice.⁹⁹ Some, such as that it has been systematically biased towards or against one of the sides in the Yugoslav wars of dissolution, are easily dismissable.¹⁰⁰ Other critiques have included that the Tribunal has been too expensive and bureaucratic,¹⁰¹ that its trials are characterized by delay,¹⁰² violate the rights of defendants,¹⁰³ and are far removed from the populations of former Yugoslavia.¹⁰⁴ More generally it has been alleged that the Tribunal was created in place of more effective action to prevent crimes in former Yugoslavia.¹⁰⁵

⁹⁰ *Ibid.* ⁹¹ Ralph Zacklin, 'The Failings of ad hoc International Tribunals' (2004) 2 *JICJ* 541.

⁹² José E. Alvarez, 'Rush to Closure: Lessons of the Tadić Judgment' (1998) 96 *Michigan Law Review* 2031.

⁹³ Marie-Bénédict Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) 15 *EJIL* 151.

⁹⁴ See, e.g. Robert Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Study' (2006) 11 *Journal of Conflict and Security Law* 239.

⁹⁵ See Guénaél Mettraux, *International Crimes and the ad Hoc Tribunals* (Oxford, 2005) 13–18.

⁹⁶ See, e.g. Gregory Lombardi, 'Legitimacy and the Expanding Power of the ICTY' (2002–2003) 37 *New England Law Review* 887. A counterexample would be the *Blaskić* decision, see ch. 19.

⁹⁷ One exception is *Kupreškić et al.* ICTY T.Ch. II 14.1.2000, paras. 521–36, which rather unconvincingly derived the prohibition of practically all reprisals from contradictory practice and a bold interpretation of the Martens clause. See Christopher Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' in Claus Kreß et al. (eds.), *National and International Prosecution of Crimes Under International Law* (Berlin, 2001) 539. As to the 'Martens clause', see Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 *AJIL* 78.

⁹⁸ See generally, Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of the Law?' (2004) 2 *JICJ* 1007.

⁹⁹ On the more general questions about criminal prosecution here, see sections 2.2.7 and 2.2.8.

¹⁰⁰ Although also see nn. 66, 67 and corresponding text on the critiques in relation to the NATO/Kosovo Report.

¹⁰¹ Zacklin, 'Failings', at 543–4.

¹⁰² See, e.g. Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the ICTY' (2000) 11 *EJIL* 569. ¹⁰³ *Ibid.*

¹⁰⁴ Laurel E. Fletcher and Harvey Weinstein, 'A World Unto Itself: The Application of International Criminal Justice in former Yugoslavia' in Eric Stover and Harvey Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge, 2004) 29.

¹⁰⁵ See, e.g. David Forsythe, *Human Rights in International Relations* (Cambridge, 2000) 221.

All of these critiques have some purchase. The ICTY is expensive. Between 1993 and 2007 the official budget of the ICTY has amounted to US\$1,243,157,722. It may simply be that international justice is expensive,¹⁰⁶ although excessive bureaucracy in the UN contributing to both cost and delay is not unprecedented. Trials have taken a long time, although some delays have been referable to attempts to ensure fair trials for defendants. Nonetheless, some of the decisions of the Tribunal have been controversial in relation to fair trial. Notable in this regard has been the use of anonymous witnesses. Although understandable witness protection issues arise in relation to prosecutions of international crimes, the practice of the Trial Chamber in the *Tadić* case of granting witnesses complete anonymity proved very controversial, in particular owing to the false testimony of one such protected witness, Dragan Opacic.¹⁰⁷ The question of distance from the relevant populations is a difficult one, but the ICTY did not initially give such matters sufficient consideration in its early practice, a point the Tribunal has attempted to rectify by setting up various 'outreach' programmes.¹⁰⁸ In addition, the security situation in former Yugoslavia would not have permitted the ICTY to have sat there, at least until very recently. In relation to the final critique mentioned above, that the ICTY was created in place of more effective action to prevent crimes in former Yugoslavia, it raises an important issue, although it is likely that the best available option was to create a tribunal. If it had not been created there would not have been any more effective response to the crimes in former Yugoslavia forthcoming. Equally, a more general issue, that of selectivity, certainly arises whenever an ad hoc tribunal is set up.¹⁰⁹

7.3 The International Criminal Tribunal for Rwanda

7.3.1 The creation of the ICTR

This consideration fed into the decision to create the ICTR. Given the creation of the ICTY for a European conflict, when genocide clearly occurred in Africa, it was considered necessary and appropriate to create an analogous tribunal for crimes committed there.¹¹⁰ The UN and its members (who reduced the number of peacekeepers in Rwanda at the start of the genocide in April 1994),¹¹¹ treated the creation of a tribunal for Rwanda largely as they did for the ICTY, beginning with condemnation, then setting up a Commission of Experts and, before they reported, deciding to set up an international tribunal.¹¹²

¹⁰⁶ See further section 2.2.8. ¹⁰⁷ *Tadić*, ICTY T. Ch. II 7.5.1997, paras. 553–4.

¹⁰⁸ David Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings' (2002) 26(2) *Fletcher Forum of World Affairs* 7, 13–14.

¹⁰⁹ Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry Simpson (eds.), *The Law of War Crimes* (The Hague, 1997) 1 at 8.

¹¹⁰ Payam Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) 90 *AJIL* 501.

¹¹¹ See, Security Council resolution 912 (1994). More generally see, e.g. Gerard Prunier, *The Rwanda Crisis* (London, 1997).

¹¹² Security Council resolutions 935 (1994) (Commission) and 955 (1994) (Court).

Unlike the ICTY Statute, the ICTR statute was drafted by the members of the Security Council, following closely the model of the ICTY Statute. While Rwanda, then a member of the Council, was initially supportive, it did not succeed in including the death penalty, excluding crimes other than genocide from the court's jurisdiction or granting the court jurisdiction before 1994, and it therefore voted against the creation of the ICTR.¹¹³ This does not affect the legality of the creation of the Tribunal, which finds its basis, like the ICTY, in Chapter VII of the UN Charter.¹¹⁴

7.3.2 *The structure of the ICTR*

The structure of the ICTR is very similar to that of the ICTY; it too has an Office of the Prosecutor, a Registry, and three Trial Chambers, which have the same functions as their counterparts in the Hague. To ensure a consistent jurisprudence between the ICTY and ICTR, they share a joint Appeals Chamber (based in the Hague).¹¹⁵ Originally this was staffed only by judges from the ICTY. This gave rise to a feeling that the ICTR was the 'poor cousin' of the ICTY but was rectified in late 2000 when two ICTR judges were appointed to that Chamber. Originally, the ICTY and ICTR shared a prosecutor. However the job was split in 2003 and a separate prosecutor for the ICTR was appointed. The ICTR has always had its own president, of which there have been three.

7.3.3 *The jurisdiction of the ICTR and its relationship to national courts*

The ICTR, like the ICTY, has jurisdiction over war crimes, crimes against humanity and genocide,¹¹⁶ although the definitions of the last two crimes are different from those in the ICTY. In particular the definition of crimes against humanity has an additional requirement of discrimination for all crimes against humanity (Article 3), and the jurisdiction of the ICTR over war crimes is limited to those in non-international armed conflicts (Article 4). The ICTR's jurisdiction over these crimes is limited to where they occurred in Rwanda, or were committed by Rwandans in neighbouring States, between 1 January and 31 December 1994.¹¹⁷ The ICTR has primacy over domestic courts, in the same way as the ICTY.¹¹⁸

7.3.4 *The practice of the ICTR*

Teething troubles

The ICTR began at a snail's pace. Its seat, in Arusha, Tanzania, was only decided upon in February 1995.¹¹⁹ Also, staffing was a problem, recruitment being difficult and

¹¹³ S/PV.3453, 2, 10–12. China abstained on the resolution.

¹¹⁴ The ICTR affirmed the legality of its own creation in *Kanyabashi* ICTR T. Ch. II 18.6.1997. The decision is, however, terse and amounts to little more than a refusal to investigate the legality of Security Council actions.

¹¹⁵ ICTR Statute, Art. 12(2). ¹¹⁶ ICTR Statute, Arts. 2, 3 and 4 respectively. ¹¹⁷ ICTR Statute, Art. 1.

¹¹⁸ ICTR Statute, Art. 8(1). ¹¹⁹ Security Council resolution 977 (1995).

slow.¹²⁰ Even so, the first indictment was confirmed in November 1995.¹²¹ Early cooperation from some African States was quite quick, and proceedings opened against Georges Rutaganda and Jean-Paul Akayesu on 30 May 1996.¹²² Rwanda, however, remained rather lukewarm in its relations with the Tribunal.

Although funding for the Tribunal at the time was inadequate,¹²³ there were also concerns about the extent to which resources, and the tribunal as a whole, were being managed.¹²⁴ These were brought into the open in a highly critical report of the UN Office of Internal Oversight Services of 6 February 1997.¹²⁵ Whilst accepting that sporadic funding for the Tribunal limited its effectiveness,¹²⁶ and deciding that the 'evidence adduced did not confirm allegations of corrupt practices or misuse of funds',¹²⁷ the Report uncovered 'mismanagement in almost all areas of the Tribunal, and frequent violations of United Nations rules and regulations'.¹²⁸ The registry was singled out for very heavy criticism, in particular, for financial irregularities, employing under-qualified staff, and weak asset management.¹²⁹ The Office of the Prosecutor was considered inefficient, and beset by leadership failure by the deputy prosecutor.¹³⁰ Of the three organs, only the Chambers escaped serious critique.¹³¹ As a result of the report, both the registrar's and the deputy prosecutor's resignations were sought, and obtained.¹³² Also, attempts were made to recruit appropriate people to managerial positions and improve financial discipline.¹³³

Moving forwards

The ICTR's fortunes took a turn for the better in May 1998, when Jean Kambanda, the Prime Minister of the government that presided over the genocide, pleaded guilty to genocide. Notwithstanding his guilty plea, which recognized, importantly, that genocide had occurred in Rwanda, he was sentenced to life imprisonment.¹³⁴ In spite of continuing technical, logistical and resourcing problems, the Tribunal moved into a phase of increased trial work, which led the Security Council to increase the number of Trial Chambers to three in April 1998.¹³⁵ The first full trial ended in September 1998, with the conviction of Akayesu for genocide, in a judgment that not only offered the first express application of the Genocide Convention by an international tribunal, but also determined that sexual offences could form the *actus reus* of genocide.¹³⁶

Trials were moving slowly but forward during 1999, when the relationship between the ICTR and Rwanda collapsed. The reason for this was the decision of the Appeals Chamber that the pre-trial detention of Jean-Bosco Barayagwiza, one of the mass

¹²⁰ Annual Report of the ICTR 1996, S/1996/778, para. 12. ¹²¹ *Ibid.*, para. 31. ¹²² *Ibid.*, para. 39.

¹²³ *Ibid.*, para. 77. ¹²⁴ General Assembly Resolution 52/213 C.

¹²⁵ *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, A/51/789.

¹²⁶ *Ibid.*, para. 5. ¹²⁷ *Ibid.*, para. 6. ¹²⁸ *Ibid.* ¹²⁹ *Ibid.*, paras. 11–33. ¹³⁰ *Ibid.*, paras. 55–9.

¹³¹ *Ibid.*, paras 60–63. ¹³² Annual Report of the ICTR 1997, S/1997/868, para. 57. ¹³³ *Ibid.*, para. 57.

¹³⁴ *Prosecutor v. Kambanda*, ICTR T. Ch. I 4.9.1998. Kambanda unsuccessfully appealed; *Kambanda* ICTR A. Ch. 19.10.2000.

¹³⁵ Security Council resolution 1165 (1998). See Annual Report of the ICTR 1999, S/1999/943, paras. 5, 126.

¹³⁶ *Akayesu*, ICTR T. Ch. I 2.9.1998; see section 10.3.1.

media advocates of the genocide, violated his human rights, and so the Tribunal should use its inherent power to decline jurisdiction over him.¹³⁷ Rwanda was outraged, and suspended cooperation with the Tribunal, which owing to the vast majority of evidence and witnesses being located in Rwanda made progress with trials very difficult. The Appeals Chamber quickly revisited its decision on the point and determined that on the basis of further factual submissions by the prosecutor, the Tribunal ought to continue to exercise jurisdiction over him, but he ought to receive a reduction in any sentence he received if he were to be convicted, to take into account his pre-trial predicament.¹³⁸ Although relations between the ICTR and Rwanda improved, many thought that politics, more than law, was involved in the decision.¹³⁹

Nonetheless, the position of the ICTR was improved in 2001 when, pursuant to Security Council Resolution 1329,¹⁴⁰ *ad litem* judges were appointed to assist in trials. By early 2001, it was thought that the prosecutor would complete her investigative work by 2005.¹⁴¹ Trial work remained slow however,¹⁴² and pre-trial detention of suspects was becoming very long.

The completion strategy

As the ICTR began to think in terms of completion, plans were formulated to pass up to forty cases to national jurisdictions (including Rwanda) rather than have them prosecuted by the ICTR.¹⁴³ Thus in July 2002 the ICTR adopted its own Rule 11*bis*, permitting the transfer of cases to national jurisdictions. To assist the ICTR in completing its judicial business (which was still taking a great deal of time) the Security Council adopted Resolution 1431 on 14 August 2002, which set up a pool of eighteen *ad litem* judges.¹⁴⁴ Although the ICTR was assisted by a number of States, relations with Rwanda remained less than friendly.¹⁴⁵

In August 2003, Security Council Resolution 1503 (2003) set out the Security Council's timetable for completion, which was the same as that for the ICTY. This resolution also split the role of the prosecutor in two, creating separate positions of ICTY and ICTY prosecutor on the stated basis that the job was too large for one person and thus Rwanda was being overlooked.¹⁴⁶ The completion strategy was expanded upon by Resolution 1534, which required both Tribunals to review their case-load to determine which cases could be tried at the domestic level.¹⁴⁷ The ICTR

¹³⁷ *Barayagwiza*, ICTR A. Ch. 3.11.1999.

¹³⁸ *Barayagwiza*, ICTR A. Ch. 31.3.2000. In the event, he was convicted, and sentence to thirty-five years' imprisonment, unlike his codefendants, both of whom were sentenced to life. *Nahimana, Barayagwiza and Ngeze*, ICTR T. Ch. I 3.12.2003 paras. 1106–7.

¹³⁹ William A. Schabas, 'Prosecutor v. Barayagwiza' (2000) 94 *AJIL* 563 565.

¹⁴⁰ 5.12.2000. ¹⁴¹ Annual Report of the ICTR 2002, UN Doc. S/2002/733, para. 121. ¹⁴² *Ibid.*, paras. 1–6.

¹⁴³ *Ibid.*, para. 10. The ICTR had, early on in its practice, unsuccessfully attempted such an approach, with respect to Bernard Ntuyuhaga; *Ntuyuhaga*, ICTR T. Ch. I 18.3.1999.

¹⁴⁴ See Annual Report of the ICTR 2003, UN Doc. S/2003/707 paras. 7–8; Annual Report of the ICTR 2005, S/2005/534, para. 5.

¹⁴⁵ *Ibid.*, para. 63.

¹⁴⁶ For a different view see Luc Reydam, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' (2005) 3 *JICJ* 977.

¹⁴⁷ 26.3.2004.

declared its ability to meet the various deadlines (subject to State cooperation) in 2005.¹⁴⁸ Its ability to do so was assisted by negotiations with Rwanda to facilitate transfer of cases from the ICTR to Kigali.¹⁴⁹ The ICTR has nonetheless proved rather unwilling to transfer cases to domestic fora.¹⁵⁰

7.3.5 Appraisal of the ICTR¹⁵¹

While the Tribunal has come in for a great deal of criticism in the past,¹⁵² the picture is not all bad, and has been improving markedly. The ICTR has had notable success in obtaining, and trying, high-level suspects. As of May 2006, the Tribunal had tried twenty-seven people, and was in the process of trying twenty-seven more.¹⁵³ Although it has not obtained all of the ringleaders of the genocide, it has many of them, and they are being prosecuted or have been convicted.¹⁵⁴ Its successes on this point are perhaps greater than those of the ICTY. Also the early *Akayesu* decision has formed an important authoritative determination that genocide had occurred in Rwanda, a point that some in the mid-1990s denied or tried to minimize.¹⁵⁵ Indeed the ICTR now takes juridical notice of the fact that there was genocide in Rwanda in 1994.¹⁵⁶

The Tribunal has assisted in the development of international criminal law, perhaps most notably by its treatment of sexual offences,¹⁵⁷ but also in relation to the responsibility of controllers of mass media for incitement to commit genocide.¹⁵⁸ It is nonetheless true that the quality of the legal reasoning contained in judgments of the ICTR is variable.¹⁵⁹

Trials at the ICTR have taken an extremely long time, and have been subject to manifold delays. These are, in part, because of the difficulties involved in translation from Kinyarwanda to English and French,¹⁶⁰ and the awkward logistics of having the Tribunal based in Arusha, and the Office of the Prosecutor based in Kigali, neither of which are cities with a strong infrastructure.¹⁶¹ Problems relating to repeated changes of defence counsel by the defendants have also contributed to trials' dilatory nature,¹⁶²

¹⁴⁸ S/2005/336. ¹⁴⁹ Annual Report of the ICTR 2005 para. 49. ¹⁵⁰ *Bagaragaza*, ICTR T. Ch. III 19.5.2006.

¹⁵¹ For an early (positive) appraisal see Djiena Wembou, 'The ICTR: Its Role in the African Context' (1997) 321 *International Review of the Red Cross* 685.

¹⁵² See, e.g. Todd Howland and William Calathes, 'The UN's International Criminal Tribunal: Is it Justice or Jingoism for Rwanda? A Call for Transformation' (1998) 39 *Virginia Journal of International Law* 135.

¹⁵³ *The Tribunal at a Glance*, <http://www.un.org/icty/glance-e/index.htm>

¹⁵⁴ Larissa J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (The Hague, 2005) 263.

¹⁵⁵ See Prunier, *The Rwanda Crisis*, 345.

¹⁵⁶ *Prosecutor v. Karemera, Ngirumpatse and Nziroreza*, ICTR A. Ch.16.6.2006.

¹⁵⁷ Kelly Askin, 'Gender Crimes at the ICTR: Positive Developments' (2005) 3 *JICJ* 1007. On other aspects of the ICTR's practice on sexual offences see, Annual Report of the ICTR 2000, UN Doc. S/2000/927, para. 133, Annual Report of the ICTR 2001, UN Doc. S/2001/863, para. 108, Annual Report of the ICTR, 2002 para. 75, Annual Report of the ICTR 2004, UN Doc. S/2004/601, paras. 59–61.

¹⁵⁸ *Nahimana, Barayagwiza and Ngeze*, ICTR T. Ch. 3.12.2003, although see Dina Temple-Raston, *Justice on the Grass* (New York, 2005).

¹⁵⁹ See van den Herik, *The Contribution of the Rwanda Tribunal*, 261.

¹⁶⁰ About which the tribunal has been candid, see e.g. *Akayesu* T. Ch. I 2.9.1998 para. 145.

¹⁶¹ Eric Mose, 'The Main Achievements of the ICTR' (2005) 3 *JICJ* 920 at 923, 927.

¹⁶² Annual Report of the ICTR 2001, para. 14.

but the judges also have not always helped move things along speedily.¹⁶³ Also, attempts to assist victims although laudable,¹⁶⁴ have not always been effective, and treatment of victims by the tribunal has not always lived up to aspirations or basic standards.¹⁶⁵

It has been suggested that the ICTR is both geographically and metaphorically too distant from the people of Rwanda, who remain for the most part uninformed about and unaffected by the tribunal.¹⁶⁶ The Tribunal has created an outreach programme, which includes a visitors' centre in Rwanda, radio broadcasts and recently the creation of a satellite television station,¹⁶⁷ but whether these have proved effective is a matter of controversy,¹⁶⁸ although it may be too early to tell. A linked critique is the cost of the ICTR, which has been high (although less than the ICTY).¹⁶⁹ Some have suggested that the money spent on the ICTR would have been put to better use supporting Rwandan justice efforts.¹⁷⁰ Whether or not that would have been the case, similar levels of funding would not have materialized if a call had gone out for assistance to rebuild the Rwandan justice system.

Further reading

The websites of both Tribunals are very useful. They may be found at www.un.org/icty and www.icttr.org

Useful symposia on the ICTY can be found at (2004) 2 *JICJ* 353–597 and (2002–2003) 37 *New England Law Review* 865–1080. Similarly on the ICTR see (1997) 321 *International Review of the Red Cross* 665–732 and (2005) 3 *JICJ* 801–1033.

M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for Yugoslavia* (Ardsley, 1996).

John O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 77 *AJIL* 639.

John Hagan, *Justice in the Hague: Prosecuting War Crimes in the Balkans* (Chicago, 2003).

Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, James Snyder (trans.) (College Station, Texas, 2004).

Rachel Kerr, *The International Criminal Tribunal for Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford, 2004).

¹⁶³ Alison des Forges and Timothy Longman, 'Legal Responses to the Genocide in Rwanda' in Stover and Weinstein, *My Neighbour, My Enemy*, 49 at 53–5.

¹⁶⁴ See Mose, 'The Main Achievements', 937; also the Annual Report of the ICTR 1999, para. 113.

¹⁶⁵ Göran Sluiter, 'The ICTR and the Protection of Witnesses' (2005) 3 *JICJ* 962.

¹⁶⁶ José E. Alvarez, 'Crimes of Hate/Crimes of State, Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365 at 403–18, 459–62.

¹⁶⁷ See generally Annual Report of the ICTR 1999, para. 1208, Annual Report of the ICTR 2001, paras. 135ff, Annual Report of the ICTR 2004, para. 55, Annual Report of the ICTR 2005, paras. 61–3.

¹⁶⁸ See Timothy Longman *et al.*, 'Connecting Justice to Human Experience: Attitudes Towards Accountability and Reconciliation in Rwanda' in Stover and Weinstein, *My Neighbour, My Enemy*, 206.

¹⁶⁹ The ICTR's annual budget for 2006–07 was \$270 m, the ICTY's \$305 m.

¹⁷⁰ Alvarez, 'Crimes of Hate', 461.

- Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for Former Yugoslavia* (New York, 1995).
- Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (New York, 1998).
- Alfred Rubin, 'An International Criminal Tribunal for Former Yugoslavia' (1994) 6 *Pace International Law Review* 7.
- William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006).
- L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (The Hague, 2005).

8

The International Criminal Court

8.1 Introduction

The creation of a permanent international criminal court with potentially worldwide jurisdiction is one of the most important developments in international criminal law. The Statute of the International Criminal Court not only establishes a new judicial institution to investigate and try international offences, but also sets out a new code of international criminal law. This chapter describes the steps leading to the establishment of the ICC, its principal features, and some of the legal and political responses to it.

8.2 The creation of the ICC

The first serious proposal for an international court was probably that made in 1872 by Gustav Moynier, one of the founders of the International Committee of the Red Cross, who was concerned that national judges would not be able fairly to judge offences committed in wars in which their countries had been involved.¹ Nothing came of this and in spite of the so-called Nuremberg Promise that the trials after the Second World War would set a precedent for others,² there was no early successor to the Nuremberg and Tokyo Tribunals to prosecute international crimes at the international level. A proposal to set up a permanent international criminal court was discussed during the negotiations on the 1948 Genocide Convention, but the Convention as agreed looks only to the possibility of such a court in the future. Article VI provides that persons charged with genocide are to be tried by a court in the territory where the act was committed or 'by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

When it approved the Genocide Convention, the United Nations General Assembly also adopted a resolution which requested the International Law Commission to

¹ Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 57.

² See section 6.3.2.

study the desirability and possibility of establishing an international judicial organ for the prosecution of, inter alia, the crime of genocide.³ This study was to be undertaken by the Commission in parallel with its drafting of the substantive rules of international criminal law. Following a favourable report, a special committee appointed in 1950 by the UN General Assembly produced a draft statute for a permanent court. Although the draft was reviewed by a further committee,⁴ the General Assembly postponed the matter until consideration of the definition of aggression and the draft Code of Offences was complete.⁵ In turn, progress on the draft Code stalled. The concept of a permanent international criminal court had not received universal support, and during the Cold War allegations of the commission of international crimes were usually regarded as largely propagandistic. Indeed, Georg Schwarzenberger went as far as to say 'the chief effects of the [Genocide] Convention have been to enrich the vocabulary of international invective and enable the International Court of Justice . . . to complicate further the law relating to treaty reservations'.⁶ Attention was turned to the development of more effective means of inter-State cooperation in the *national* prosecution of crimes, under treaties providing for extradition or prosecution and for legal assistance from one State to another.

It is ironic that it was a wish by Trinidad and Tobago to secure international prosecutions for drugs offences that finally gave the impetus to the creation of the International Criminal Court: ironic because the court that was finally established does not have any jurisdiction over drugs offences. Trinidad and Tobago proposed in 1989 that the creation of a permanent international criminal court be put back on the agenda of the United Nations; the General Assembly asked the International Law Commission to draft a Statute for such a court, and the Commission responded swiftly, producing a final text⁷ in 1994.

The draft statute proposed by the ILC gave the court jurisdiction over more offences than the ICC has now: as well as the four categories in the ICC Statute, there was a list of 'treaty crimes' which included offences under the multilateral terrorism conventions and a UN drugs convention.⁸ But in most respects the ILC draft was more protective of States' sovereignty than the eventual ICC Statute. Only States Parties and the Security Council could refer situations to the proposed court; the Prosecutor was not able to initiate investigations on his or her own initiative. In respect of most of the crimes,⁹ and in the absence of a referral by the Security Council,

³ GA res. 260(III)B. ⁴ Report of the Committee on International Criminal Jurisdiction, UN Doc. UNGAOR A/2645.

⁵ GA res. 898(IX).

⁶ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (London, 1968), vol. II, 530.

⁷ *Report of the International Law Commission on the work of its forty-sixth session*, UNGAOR 49th session Suppl. No. 10, A/49/10 (1994); included, without commentary, in M. Cherif Bassiouni, *The Statute of the International Criminal Court: A documentary history* (New York, 1998) 657. The drafting of the draft ILC statute is discussed in James Crawford, 'The Making of the Rome Statute' in Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge, 2003) 109.

⁸ The full list of treaty crimes comprised grave breaches of the Geneva Conventions and AP I, and offences under six terrorism instruments, the Apartheid Convention, and the UN Drugs Convention.

⁹ There was worldwide jurisdiction over genocide, provided that a complaint was lodged by a State which was a party both to the court's Statute and to the Genocide Convention.

the court would have jurisdiction only if *both* the State with custody of the alleged offender and the State on whose territory the alleged crime had been committed had accepted the jurisdiction of the court for the purpose of that crime. This was the so-called opt-in provision: States were not required, by becoming parties to the Statute, to accept the jurisdiction of the court for their nationals or for crimes occurring on their territory in respect of any crime except genocide; they were free to opt in for additional specific crimes, or for none at all. The ILC draft also had a provision which precluded the court from taking jurisdiction over a situation which was on the agenda of the Security Council under Chapter VII of the UN Charter, unless the Council agreed. This provision, the precursor to Article 16 of the ICC Statute, would have allowed the Council to prevent court action by putting any matter on its agenda under its peace and security mandate.

The 1994 ILC draft statute was submitted at a fortunate time in international relations: Cold War divisions had thawed, there was enthusiasm for international tribunals, and the international community had embarked on several treaty-based initiatives strengthening human rights and humanitarian law. Scepticism about the prospects for a permanent international criminal court was diminishing. A significant number of States, however, still doubted the wisdom of creating a new court, both on principle and with respect to the specific details of the project. The doubting States were sufficiently strong to prevent the convening of a conference to conclude a treaty immediately. Instead, an ad hoc committee was established to examine the issues more closely.¹⁰ A year later there was enough support to set up a Preparatory Committee¹¹ to prepare a text of a possible draft convention, as the next step towards the holding of a conference. Working on the basis of the ILC draft Articles, the Preparatory Committee began to negotiate texts, collated proposals for alternatives to many of the ILC Articles and, progressing beyond the ILC text, prepared a complete draft statute with hundreds of different alternative proposals. During the Preparatory Committee meetings, a 'Like-Minded Group' of States supportive of a new court emerged, and agreement was reached to hold a conference in Rome in the summer of 1998. The draft statute which had emerged from the Preparatory Committee, with its numerous alternative texts, served as the basis for negotiation at the conference.¹²

8.2.1 The Rome Conference

In the five weeks allocated to the conference to draft the ICC's Statute, there was a cornucopia of controversies, from the highly political, like the role of the Security

¹⁰ The Ad Hoc Committee on the Establishment of an International Criminal Court, convened by GA res. 49/53, met for two sessions in 1995 and produced a report (UNGAOR A/50/22) which records the early discussions on the major features of the court.

¹¹ Convened by GA res. 50/46 and with its mandate reaffirmed in GA res. 51/207 and 52/160, the Preparatory Committee on the Establishment of an International Criminal Court met for six sessions during the years 1995 to 1998; its reports may be found in UNGAOR A/51/22 and in the conference records at UN Doc. A/CONF.183/13 (Vol.III) 5.

¹² UN Doc. A/CONF. 183/13 (Vol.III) 5.

Council, to detailed aspects of criminal procedure negotiated by criminal lawyers from very diverse legal systems. Much of the negotiation of specific texts at the conference was carried out in informal committees. The process was slow since each committee worked without voting and by consensus. Compromises were necessary if agreement was to be reached, even where the issues concerned technical but important subjects such as the general principles of criminal law.

Of the various objectives of the negotiators, two of the strongest were the conflicting aims, often reflected within a single government delegation, of ensuring the prosecution of those responsible for the world's worst atrocities but avoiding undue exposure of national leaders to the new Court. The sixty-strong Like-Minded Group was influential both in driving forward the process as a whole and in seeking specific solutions on some aspects of the text. Other groupings of States such as the European Union, the Southern African Development Community, and the Non-Aligned Movement all met at different times during the conference and formulated coordinated positions on various of the provisions of the Convention.¹³ Non-governmental organizations were represented in large numbers; although they could not take part directly in the negotiations, they were able to present papers and lobby from the margins. It was largely due to these organizations that the impetus for the establishment of the Court was maintained.

By the last week of the conference most of the technical matters had been settled, but a few major questions remained. The most difficult issues related to the jurisdiction of the new Court and, in particular, how broad the jurisdiction of the Court would be and which States would have to agree before its jurisdiction could be exercised. In the absence of agreement and with two days left before the end of the conference, it fell to the Bureau of the Committee of the Whole and associated delegates, under the Chairman, Philippe Kirsch, to propose a compromise on these controversial issues. This proposal, including in particular the texts of Articles 12 and 124, was put forward with the rest of the negotiated treaty on the penultimate day in an attempt to balance the conflicting positions of different delegations.

While most delegations supported the text, some were not prepared to accept it as it stood and chose to put their own amendments to the vote. The delegation of India asked for a vote on its proposals¹⁴ to include a crime related to the use of weapons of mass destruction and to exclude any role for the Security Council. The United States called for a vote on their amendments¹⁵ to the jurisdiction provision, which would have required the consent of the State of nationality of the suspect, the territorial State and, if the suspect was committing official acts which were acknowledged as such by the State concerned, the consent of that State. Only the intervention of a 'no-action motion' on both sets of amendments avoided the text of the Statute being broken apart; this procedural device was a means of allowing delegations to vote against

¹³ Many States belonging to each of these groups were also members of the Like-Minded Group.

¹⁴ A/CONF.183/C.1/L.94 and A/CONF.183/C.1/L.95. ¹⁵ A/CONF.183/C.1/L.70 and A/CONF.183/C.1/L.90.

putting the amendments to the vote, an easier step for many to take than voting against the amendments themselves. The final text of the Statute was adopted by a vote of 120 to 7, with 21 abstentions.¹⁶

Although it is not necessary to revisit in detail the course of the conference in Rome, there are two features of the negotiations which help to explain some aspects of the Statute.

The problem of travaux préparatoires

The Vienna Convention on the Law of Treaties provides that a treaty is to 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. To confirm this meaning, or if the meaning is ambiguous, obscure or manifestly absurd or unreasonable, supplementary means of interpretation may be used, including the preparatory work of the treaty and the circumstances of its conclusion.¹⁷ One result of the informal process of negotiation at Rome is that there are only limited written records of the conference.¹⁸ Another factor is that some of the provisions result from the negotiations during the Preparatory Committee in New York, rather than during the conference. Except for those few provisions which follow the draft prepared by the International Law Commission, therefore, or the history of which is to be found in the formal conference records, there is a marked absence of the *travaux préparatoires* which are usually to be expected in the drafting of a major treaty. The reasoning behind most of the texts which emerged from New York and from Rome is not to be found in the record of the views of delegates who argued for them or in an examination of the written proposals for amendments. The lack of standard *travaux préparatoires* means that those seeking for help with the meaning of a difficult or controversial provision of the Statute will have to place more reliance than would normally be the case on written commentaries and books about the ICC;¹⁹ if these record the recollections of the negotiators at the conference they are the nearest things to *travaux* that we have, although they cannot always be relied upon to be neutral.

Working methods during the negotiations

As indicated above, individual sections of the text of the draft statute were negotiated by different committees and through different processes, and parts of those sections were sometimes remitted to very informal consultation groups for decision if they proved particularly difficult to agree. The methods of work adopted by the conference led to disconnections among some parts of the Statute and to different usages in terminology. Had there been more time, the Drafting Committee would have been

¹⁶ The votes were not recorded, but China, Israel and the United States announced that they had been among those who voted against.

¹⁷ Arts. 31 and 32, which are generally regarded as reflecting customary international law.

¹⁸ For the Official Records see UN Doc. A/CONF. 183/13 (Vols. I to III).

¹⁹ The two most comprehensive of those written immediately after the conference are R. S. Lee, *The International Criminal Court: The Making of the Rome Statute* (The Hague, 1999) and Triffterer, *Observers' Notes*.

able to do the work normally undertaken by such a committee and to draw attention to inconsistencies and ambiguities in the text, rather than simply reconciling some of the linguistic differences.²⁰ But the pressure of time and the fact that some of the major issues were left until the last two days resulted in difficulties in the text which cannot be explained except by an understanding of how the Statute was negotiated.²¹

8.2.2 Preparations for the court

The closing session of the Rome Conference adopted both the text of the Statute and a number of resolutions, one of which set up a Preparatory Commission to prepare the subsidiary documents necessary for the establishment of the Court.

Sixty States were required to become parties to the Statute before it came into force. The pace of ratifications was quicker than expected, and the Statute came into force on 1 July 2002, bringing the Court formally into existence. The Assembly of States Parties, created by the Statute to oversee the administration of the court, then met and adopted the Elements of Crimes, the Rules of Procedure and Evidence and the Agreement on the Privileges and Immunities of the Court,²² all of which had been negotiated by the Preparatory Commission.

8.3 Structure and composition of the ICC

The judges of the Court are divided into Pre-Trial, Trial and Appeals Chambers; the Presidency, composed of the President and two Vice-Presidents and elected by the judges from among their number, is responsible for the administration of the Court, while the Registry provides the ‘non-judicial aspects’ of administration.²³ The inclusion of a Pre-Trials Division is a compromise between the common law prosecutorial system and the French system of *juges d’instruction*, providing a contrast with the largely common law character of the pre-trial stage at the ad hoc Tribunals; this mix of two different systems will need some working through in practice to avoid unprofitable tension between the Pre-Trial Chamber and the Prosecutor’s Office in relation to the conduct of investigations.²⁴ As with the two Tribunals, the Prosecutor’s Office is made an integral part of the Court; care needs to be taken in referring to the ‘Court’ when only the judicial arm is intended.

²⁰ Even the linguistic differences could not all be resolved at the conference, and the final text of the statute had to undergo a large number of more or less technical corrections after it had been signed by a number of States. The official text – in all languages – is slightly different from the one voted on at the conference.

²¹ See Shabtai Rosenne, ‘Poor drafting and imperfect organisation: flaws to overcome in the Rome Statute’ (2000) 41 *Virginia Journal of International Law* 164, which addresses the discrepancy between the wording of Arts. 9 and 21 with regard to the weight to be attached by the court to the Elements of Crimes.

²² These documents may all be found in the Official Records of the first session of the Assembly of States Parties to the Rome Statute of the International Criminal Court on the website of the ICC <http://www.icc-cpi.int/asp.html>

²³ The composition and administration of the court are dealt with in Part 4 of the Statute.

²⁴ The respective roles of these organs in relation to an investigation, together with other aspects of the procedures of the court, are described in ch. 17.

In recognition of the importance for the success of the Court in having judges of the highest possible calibre, the Statute sets out detailed provisions for the qualifications of candidates for the judiciary. Article 36(3) requires candidates to have competence in criminal law or in relevant areas of international law. This requirement for professional qualifications is combined with a duty for States selecting the judges to 'take into account' the need for representation of the principal legal systems of the world, equitable geographical representation and, for the first time in criteria for composition of an international tribunal, the need for a fair representation of female and male judges.²⁵ The complex voting rules used for the first election of the eighteen judges of the Court²⁶ by the Assembly of States Parties took into account all of these provisions except for the representation of the world's legal systems (an exclusion justified on the basis that this criterion would largely be met if geographical representation were equitable). The Statute envisages the possibility of the Assembly establishing an advisory committee on nominations of judges,²⁷ but this approach has not been adopted and so far the standard international practice in elections at the United Nations, which can involve votes being traded among States for reasons other than the personal and professional qualities and attributes of the judges, has been followed.

8.4 Crimes within the jurisdiction of the ICC

The Court has jurisdiction over 'the most serious crimes of international concern': genocide, crimes against humanity, war crimes and aggression (Article 5(1)). The Court cannot however exercise jurisdiction over the crime of aggression until the Statute has been amended by the addition of a definition of that crime and the inclusion of preconditions for the ICC to take jurisdiction (Article 5(2)). The offences are discussed further in Chapters 10 to 13.

Whereas the Statutes of the two ad hoc Tribunals and the ILC draft statute for the ICC do not provide detailed definitions of crimes, the ICC Statute defines war crimes and crimes against humanity in unprecedented detail; the negotiators cited reasons of certainty and the principle of legality, having in mind also that clear definitions would help to limit unexpected exposure to prosecution. They also wanted to avoid judicial creativity of too broad a nature and Article 22(2) therefore provides that the definitions 'shall be strictly construed and shall not be extended by analogy'. The definitions of crimes do not represent the whole picture. They must be read with the general principles of liability in Part 3 of the Statute (see Chapter 15) and are further elaborated in the Elements of Crimes which are to assist the Court in the interpretation and application of the provisions on offences (Articles 9 and 21).

²⁵ Art. 36(8).

²⁶ ICC-ASP/1/Res.2. The judges elected at the first election are listed with their qualifications and countries of origin in William A. Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge, 2004) Appendix 6; the judges currently on the Court may be found on the ICC website.

²⁷ Art. 36(4)(c).

The oft-stated aim of the process of definition was to codify existing customary law for the purpose of the new Court and the definitions are therefore by and large conservative. But in crystallizing and clarifying those provisions which had not been previously expressed as written criminal law the process inevitably moved the law along.²⁸

There are provisions which arguably go beyond a mere codification of existing law as it stood in 1998,²⁹ but some of them have since been referred to as customary law in the jurisprudence. The Rome Statute has thus contributed to the development of customary law.³⁰

On the other hand there are provisions which are arguably not as extensive as customary law allows.³¹ Article 10 attempts to address this point by providing that the Statute does not limit or prejudice existing or developing rules of international law 'for purposes other than this Statute'. This both mitigates the concern that the Statute will in some way freeze the development of customary international law and confirms that so far as the Court is concerned it must apply the provisions in the Statute even if customary law creates wider offences.

The position is perhaps best described by an ICTY Trial Chamber in the *Furundžija* case:

In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.³²

²⁸ For discussion of the process see Leila Sadat, *The International Criminal Court and the Transformation of International Law* (New York, 2002) 12,261–74; Darryl Robinson, 'Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience' in Flavia Lattanzi and William Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (II Sirente, 1999), vol.I, 139 at 140–4.

²⁹ For example, the provision on child soldiers; see Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Lee, *The Making of the Rome Statute*, 79 at 117–18.

³⁰ For example, the Special Court for Sierra Leone decided that recruitment of child soldiers was a crime in customary law (*Prosecutor v. Norman, Lack of Jurisdiction*, SCSL-2004-14-AR72(E) paras. 30–53); but see Justice Robertson's view that 'until the Rome Treaty itself, the rule against child recruitment was a human rights principle and an obligation upon States, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17th July 1988.' (Dissenting opinion at para. 38.)

³¹ For example, the commentary to Rule 156 in Henckaerts & Doswald-Beck, *ICRC Customary Law*, 586 maintains that a list of war crimes not mentioned in the ICC Statute forms part of customary international law. In addition there is no crime regarding the use of biological or chemical weapons in the Statute, not because there were strong views against regarding this as customary law but because there was no agreement for the inclusion of nuclear weapons (see von Hebel and Robinson, 'Crimes within the Jurisdiction' in Lee, *The Making of the Rome Statute*, 113–16).

³² *Furundžija* ICTY T. Ch. II 10.12.1998 para. 227, supported in *Tadić* ICTY A. Ch. 15.7.1999 para. 223 although Judge Shahabuddeen reserved his position on the matter (Separate Opinion of Judge Shahabuddeen, para. 3). See also *Kupreškić* where the Trial Chamber said that 'although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law' (ICTY T. Ch. II 14.1.2000 para. 580); and *Hadžihasanović*, where the Appeals Chamber considered that the fact that the Rome Conference voted for Art. 28, though not legally conclusive of the matter, at least cast doubt on views opposing the law contained in that text, and that the fact that 'the Rome Statute embodied a number of compromises among the States parties that drafted and adopted it hardly undermines its significance. The same is true of most major multilateral conventions.' (ICTY A. Ch. 16.7.2003 para. 53.)

8.4.1 Other crimes

During the negotiations, unsuccessful proposals were made for other crimes to be added to the list.³³ A resolution adopted by the conference at its closing session recommended that the crime of terrorism and drugs crimes be considered at a review conference ‘with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court’. These and any other additional crimes may be added at a review conference if there is sufficiently wide agreement (Article 123). States Parties however do not have to accept the jurisdiction of the Court for any additional crimes in relation to their own nationals or crimes committed on their own territory if they do not wish to do so (Article 121(5)).

8.5 Complementarity

A major feature of the ICC is that the Court cannot exercise its jurisdiction unless there is a failure by a national judicial system. The Court is intended to supplement, not to supplant, national jurisdictions and the preamble to the ICC Statute³⁴ recognizes that every State has a responsibility to exercise its own criminal jurisdiction over international crimes. The principle of complementarity is based not only on respect for the primary jurisdiction of States but also on practical considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. An international court is only one way to enforce international criminal law and it may not in every instance be the best one.³⁵

The concept of complementarity originated in the ILC draft but was substantially remodelled during the negotiations. It was crucial for the success of the negotiations that the complementarity principle be settled at an early stage; before they could agree to support the establishment of a new international court, States which were content with their own administration of justice had to be satisfied that the new court would not be able to take over cases which were being dealt with perfectly well at home. The provision which is now Article 17 was therefore substantially agreed before the conference even began.

A case will be inadmissible, and the Court will not be able to exercise its jurisdiction, if a national authority is investigating or prosecuting the case or has already done so, unless the circumstances indicate that the State is nevertheless unwilling or unable to carry out proceedings genuinely.³⁶ The term ‘genuinely’ was chosen in preference to

³³ Proposals included terrorist offences and drugs offences. See Patrick Robinson, ‘The Missing Crimes’ in Cassese, *Commentary*, 497.

³⁴ Para. 6.

³⁵ The advantages of national judicial systems were described in the course of the negotiations on the Statute: report of the ad hoc Committee on the Establishment of an International Criminal Court (GAOR 50th session Suppl. No 22 (A/50/22)).

³⁶ For further discussion of how the principle will work in practice see the Experts Group Reflection Paper for the Office of the Prosecutor on the principle of complementarity in practice, at <http://www.icc-cpi.int/otp/complementarity.html>

‘effectively’: the latter could have given the impression that a case would be admissible if the national system was, for example, proceeding more slowly (less effectively) than the ICC would or if the ICC could do a better job.³⁷ The case will be admissible only where the national efforts cannot be considered genuine – whether due to unwillingness or lack of capacity.³⁸ It is for the Court itself to decide whether these conditions are met, not the national authorities.

If no proceedings at all are being taken by national authorities, there is no objection to the Court’s exercising its own jurisdiction, provided that all the conditions for jurisdiction are otherwise met. In the first decision by the Court on the complementarity principle, a Pre-Trial Chamber has held that because the DRC was not acting in relation to the specific charge before the Court (conscription of children) it was not exercising its jurisdiction for the purpose of complementarity and the case was therefore admissible.³⁹ This was in spite of the fact that the defendant had been in custody in the DRC for nearly a year on other serious charges. The somewhat strict interpretation of the Statute in this case was probably influenced by the fact that the DRC had itself referred the situation to the Court.⁴⁰

8.5.1 Unwillingness

In determining whether a case is inadmissible by reason of unwillingness the Court must consider whether one of the following factors exists:

- (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;
- (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.⁴¹

The first criterion gives the Court the difficult task of assessing the motives of the national authorities (whether judicial, executive or legislative); the second two more clearly allow inferences to be drawn from objective factors.⁴² All the criteria are based on procedural and institutional factors, not the substantive outcome of a case or an

³⁷ John Holmes, ‘Complementarity: National Courts versus the ICC’ in Cassese, *Commentary*, 667 at 674.

³⁸ At the Rome Conference an alternative approach was suggested by the representative of Mexico who proposed a text which read: ‘The court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.’ (Vol. III of the Official Records of the Conference at p. 28.)

³⁹ *Lubanga Dyilo* ICC-01/04-01/06 Decision on the Prosecutor’s Application for a Warrant of Arrest 10.2.2006 paras. 37–9.

⁴⁰ See below. For criticism of this ruling see William Schabas, ‘First Prosecutions at the International Criminal Court’ (2006) 27 *Human Rights Law Journal* 25 at 35.

⁴¹ Art. 17(2).

⁴² For differing views as to whether the criteria are or are not exhaustive, see Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight

investigation. A case will not be admissible by reason only of the closure of the investigation or an acquittal of an apparently guilty accused.

None of these factors will allow the Court to act as if it were monitoring the human rights standards of domestic authorities. Delay and lack of independence are relevant only in so far as either of them indicates the intention to shield the person concerned from justice.⁴³ There does not appear to be anything in the Statute to make the Court responsible for the protection of the human rights of the accused in the *national* enforcement of international criminal law; the Statute also aims towards an assessment of individual aspects of the proceedings rather than an assessment of the domestic system in general. In taking its decision the Court is to have regard to the principles of due process recognized by international law, and may have before it information submitted by a State showing that its courts meet internationally recognized standards for the prosecution of similar conduct.⁴⁴

8.5.2 *Inability*

The assessment of inability may be easier than that of unwillingness, since the concept depends upon objective criteria which do not demand that motives be inferred. Article 17(3) reads:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The last three criteria (inability to obtain the accused or the evidence and testimony, or other inability to carry out the proceedings) must result from the collapse or unavailability of the legal system, not from any other factor (such as absence of an extradition agreement resulting in difficulties in obtaining the presence of the accused). Absence of the necessary legislation to enable prosecution of the Statute crimes may give rise to 'inability' in the sense of Article 17(3), but if a person is prosecuted only for 'ordinary' crimes, that should be treated, it has been suggested, as a question of unwillingness, with the requirement that shielding from justice be proved, rather than inability.⁴⁵

8.5.3 *Voluntary relinquishment of jurisdiction and uncontested admissibility*

If a State refers to the Court a situation on its territory which its own legal system has the capacity to prosecute, the question is raised as to whether that State may

against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591 at 606; John Holmes, 'Complementarity: National Courts versus the ICC' in Cassese, *Commentary*, 675; and Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *EJIL* 481 at 500.

⁴³ For the extent to which the Court may take into account the fairness of the national proceedings, see Enrique Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"?' (2005) 18 *LJIL* 829.

⁴⁴ Rule 51 RPE. ⁴⁵ Benzing, 'The Complementarity Regime of the International Criminal Court', 591 at 614–16.

voluntarily relinquish its jurisdiction to the Court, or whether it must be established by reference to the criteria in Article 17(2) and (3), before the Court can take jurisdiction, that the national authorities are unable or unwilling to act. Opinions are divided. On the one hand, if national authorities take no proceedings themselves, the wording of Article 17 appears to put no obstacle to the ICC's exercising jurisdiction; it is only where those authorities are engaged or have been engaged in apparent exercise of their own jurisdiction that the question may arise as to whether the criteria for determining inadmissibility are met.⁴⁶ This interpretation of the complementarity principle, which imposes no need for a positive establishment of inability or unwillingness, leaves the decision in the hands of the State and disregards the possible interest of the individual in being tried in his or her national courts.⁴⁷ The alternative view is that the Court must establish whether the criteria in Article 17(2) and (3) are met and may not simply accept concessions of admissibility.⁴⁸ However, while this view would avoid an over-burdening of the ICC, it does not stand up in the light of the wording of Article 17, and was not accepted by the Pre-Trial Chamber in *Lubanga*.⁴⁹

The issue has arisen in the context of the referrals of the situations both in northern Uganda and the DRC.⁵⁰ The Ugandan authorities declared that they did not intend to conduct proceedings against the persons with the greatest responsibility for the relevant crimes.⁵¹ The DRC authorities stated that they were not pursuing investigations when they made the referral⁵² although, as we have seen, Thomas Lubanga Dyilo, the ICC's first arrested suspect, was held on charges for other domestic crimes by the DRC before being transferred to the ICC.

8.5.4 Challenges to admissibility

To make the system of complementarity work effectively, that is, to ensure that national authorities are able to investigate a case where they can properly do so, the Statute provides procedures ensuring that all States which could take jurisdiction themselves will hear of the possibility of ICC proceedings at the earliest opportunity. When deciding to initiate an investigation *proprio motu* or after a State referral, the Prosecutor is required to notify all States Parties and other States which, 'taking into

⁴⁶ This is the view taken in the Experts Group Reflection Paper on the principle of complementarity, paras. 17–18.

⁴⁷ A person may of course have an interest in being prosecuted before the ICC for fear, for example, of the death penalty or unfair trial in national proceedings.

⁴⁸ See, e.g. Mahnouch Arsanjani and Michael Reisman, 'The Law-in-action of the International Criminal Court' (2005) 99 *AJIL* 385 at 395–7; William Schabas, 'First Prosecutions at the International Criminal Court' (2006) 27 *Human Rights Law Journal* 25 at 32.

⁴⁹ *Lubanga* ICC-01/04-01/06 Decision on the Prosecutor's Application for a Warrant of Arrest 10.2.2006 para. 29; see above at text and footnotes 39, 40.

⁵⁰ Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission Of The First State Referral To The International Criminal Court' (2005) 99 *AJIL* 403; William 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) 18 *LJIL* 557 at 567–8. See discussion of 'self-referrals' at section 8.6.2.

⁵¹ Schabas, 'First Prosecutions', 31. ⁵² Letter from President Kabila of 3.3.2004.

account the information available, would normally exercise jurisdiction over the crimes concerned'.⁵³

The admissibility of a case may be challenged by an accused or a person subject to an arrest warrant, a State with jurisdiction if it is investigating or prosecuting the case itself, and any other State from which acceptance of jurisdiction is required under Article 12.⁵⁴ It is not only States Parties to the Statute which have the right to make a challenge; States which are not parties may also do so (but are not under any obligation of cooperation to comply with requests for information and other such matters).⁵⁵ The aim of complementarity is to ensure that some judicial system is dealing with a case; so long as the proceedings are being carried out genuinely it does not matter whether they are in a State Party or not.

8.5.5 *Amnesties and truth and reconciliation commissions*

The Statute does not address the relationship between the jurisdiction of the Court and non-judicial approaches to past atrocities, such as amnesties and truth and reconciliation commissions.⁵⁶ If a State emerging from a bitter internal conflict decides to grant amnesties, will these amnesties preclude the Court from taking jurisdiction? Should they? The Rome Conference did not consider itself able to deal with the issue explicitly⁵⁷ and the issue will therefore be left to the application of the complementary provisions and the powers of the Prosecutor and Chambers.⁵⁸

At first sight the case of a crime covered by an amnesty would clearly be admissible before the Court in that there would have been no national investigation or prosecution or, if there had been, it would have been 'for the purpose of shielding the person concerned from criminal responsibility'.⁵⁹ It has been argued however that if amnesties are accompanied by some form of inquiry (as with the South African Truth and Reconciliation Commission) that would constitute an investigation sufficient to

⁵³ Art. 18(1). The Article also sets out procedures for the deferral of an ICC investigation if relevant national authorities are exercising jurisdiction, subject to appeal by the Prosecutor to the Pre-Trial Chamber. For the negotiating history and the interpretation of the term 'normally exercise jurisdiction', see Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (Leiden, 2005) 72–5.

⁵⁴ Art. 19(2); see section 17.4.

⁵⁵ Unless the non-party State has accepted the court's jurisdiction in accordance with Art. 12(3) or has agreed separately to cooperate.

⁵⁶ Amnesties and truth and reconciliation commissions generally are dealt with in sections 2.3.3 and 2.3.4.

⁵⁷ Questions of amnesties and pardons are addressed at Art. 19 and fn. 47 in the draft statute submitted to the conference (Vol. III, p. 27 of the Official Records; the brief recorded discussion in the Committee of the Whole is at Vol. II, pp. 213–21).

⁵⁸ See generally Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *EJIL* 481; Michael Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507; Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *ICLQ* 91; Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 *Max Planck Yearbook of United Nations Law* 553.

⁵⁹ The power to 'overturn' amnesties has been criticized by some as interfering in democratic decision-making; John Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective' (2000–2001) 41 *Virginia Journal of International Law* 199–200.

render the case inadmissible before the Court.⁶⁰ The counterview is that the wording of Article 17(2)(a) and (c) makes clear that the investigation must be for the purpose of bringing the person concerned to justice. It would only be if the term ‘justice’ could be interpreted so as to include forms of justice alternative to criminal justice that such a case might be inadmissible;⁶¹ in view of the reference to ‘national judicial system’ in Article 17(3) and the wording of the fourth and sixth preambular paragraphs of the Statute, such an interpretation would seem unlikely.

The Prosecutor may however decide, having regard to a particular amnesty, that there would be ‘substantial reasons to believe that an investigation would not serve the interests of justice’, taking into account ‘the gravity of the crime and the interests of victims’.⁶² But if a decision not to initiate an investigation is taken solely on the ground that it would be against the interests of justice, the Prosecutor must inform the Pre-Trial Chamber, which may decide to review the decision.⁶³

8.5.6 Other grounds for inadmissibility

The principle of *ne bis in idem*⁶⁴ protects a person from being tried before the ICC for conduct which has already been tried by the court itself or by other courts in previous proceedings.⁶⁵ The exceptions to the principle with regard to proceedings in other courts are in very similar terms to two of the criteria for ‘unwillingness’ in Article 17(2). A case will be admissible therefore if the purpose of the completed proceedings was to shield the person from criminal responsibility or they were otherwise not independent and were inconsistent with an intent to bring the person to justice.⁶⁶ A difficulty arises with regard to the grant of pardons for purely political reasons, akin to the grant of an amnesty. If such a pardon follows apparently genuine proceedings, the case would not appear to be admissible before the Court, unless an inference can be drawn from all the circumstances that the original proceedings in fact came within the exceptions just mentioned.⁶⁷

A final ground for inadmissibility is that a case ‘is not of sufficient gravity to justify further action by the Court’.⁶⁸ In his letter regarding allegations of crimes committed in Iraq, the Prosecutor has indicated that a key consideration in assessing this ground is the ‘number of victims of particularly serious crimes’.⁶⁹

⁶⁰ Seibert-Fohr, ‘The Relevance of the Rome Statute’, 569; Robinson, ‘Serving the Interests of Justice’, 500.

⁶¹ Carsten Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice: some Interpretative Guidelines for the International Criminal Court’ (2005) 3 *JICJ* 695 at 716.

⁶² Art. 53(1)(c); and note that Art. 53 (2)(c) relating to the initiation of a prosecution is in similar but not identical terms. See Stahn, ‘Complementarity, Amnesties’, 718 for the view that Art. 53 does not allow the Prosecutor the scope to weigh interests of national reconciliation against interests of individual accountability, since the concept of interests of justice under that Article is linked to individual and case-related considerations.

⁶³ Art. 53(1) and (3)(b). ⁶⁴ See section 4.7. ⁶⁵ Art. 20(1) and (3). ⁶⁶ Art. 20(3).

⁶⁷ John Holmes, ‘The Principle of Complementarity’ in Lee, *The Making of the Rome Statute*, 41 at 76, 77.

⁶⁸ Arts. 17(1)(d) and 53(1)(c). ⁶⁹ Letter of 10.2.2006.

8.5.7 Incentive to national legislation

One of the results of the principle of complementarity is that States are encouraged to improve standards of investigations and trials in their own domestic systems. While the assertion that States Parties are *obliged* to introduce the Statute offences into their own law⁷⁰ puts too much weight on the effect of preambular paragraph 6 of the Statute, States do have an *interest* in incorporating the offences if they wish to allow their own nationals to be investigated in their home country rather than by the ICC.⁷¹ The admissibility criteria may also have the effect of encouraging improvement in procedural standards. Such national legislation should not be seen as an inappropriate avoidance scheme since national and international jurisdictions may thus together provide the means of bringing offenders to justice. The frequently cited statement of the first Prosecutor of the Court, while slightly exaggerated in its aspiration for an absence of cases for the court, reflects this view:

The effectiveness of the International Criminal Court should not be measured by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.⁷²

8.6 Initiation of proceedings (the ‘trigger mechanisms’)

There are three means of bringing a matter before the Court:⁷³ a referral by a State Party, a referral by the Security Council acting under Chapter VII of the Charter of the United Nations, and the institution of an investigation by the Prosecutor acting on his own initiative (Article 13). States and the Security Council may only refer a ‘situation’ to the Court: it is for the Prosecutor, not for political bodies, to determine the specific cases and suspects warranting investigation.

8.6.1 Prosecutor’s power to initiate an investigation

The chief point of controversy in the negotiation of the trigger mechanisms related to the power of the Prosecutor to begin investigations *proprio motu* – on his or her own initiative. There were concerns that if a provision to this effect were included in the

⁷⁰ See Jann Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 *JICJ* 86 at 90–4.

⁷¹ See section 4.4.2.

⁷² ‘Paper on some policy issues before the Office of the Prosecutor’, September 2003, on the website of the ICC http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (‘Policy Paper’) 4.

⁷³ For the negotiations at the conference see: on referral by States, Philippe Kirsch and Darryl Robinson, ‘Referral by States Parties’ in Cassese, *Commentary*, 619; on the Prosecutor’s authority, Silvia Fernández de Gurmendi, ‘The Role of the International Prosecutor’ in Lee, *The Making of the Rome Statute*, 175; Morten Bergsmo & Jelena Pejic, ‘Article 15: Prosecutor’ in Triffterer, *Observers’ Notes*, 359; on referral by the Security Council, Lionel Yee, ‘The International Criminal Court and the Security Council: Articles 13(b) and 16’ in Lee, *The Making of the Rome Statute*, 143.

Statute, the Prosecutor might institute politically motivated investigations and would not be subject to the oversight national authorities have of their own prosecutors. As a result of such concerns Article 15 provides that the Prosecutor must seek the authorization of the Pre-Trial Chamber before opening an investigation into a situation where no referral is made by the Security Council or a State. In addition, the procedures for investigation and prosecution which ensure both that the case is a proper one for the Court in terms of evidence and jurisdiction, and that there is not a national court able or willing to try the case, have the effect of restricting the Prosecutor's authority, while not infringing on his independence.⁷⁴ The complex admissibility requirements in particular, including the requirement that the Prosecutor inform all States with jurisdiction before beginning an investigation,⁷⁵ removes any possibility of a hypothetical maverick Prosecutor getting away with pursuing a personal agenda.

8.6.2 'Self-referrals'

The first situations to be dealt with by the Court have been referred by States or the Security Council. As of 2006, all the referrals by States have been made by the States on the territories of which the crimes in question have been committed.⁷⁶ While some commentators doubt whether 'self-referral' is contemplated in the Statute⁷⁷ there is nothing in the text to prevent it, and it can be of benefit to the Court; it may indicate that far from an international investigation being intrusive and infringing on sovereignty it is welcomed and will be supported by full cooperation by the State concerned, including by granting protection to investigators and witnesses. The Prosecutor has indeed expressed his intention to 'seek where possible to make this support [from a State] explicit through a referral'.⁷⁸ There are risks, however.⁷⁹ A government of a divided country may use a referral to seek the court's intervention against its own political opponents⁸⁰ or otherwise to seek to specify the individuals whom the Prosecutor should investigate. The referral by Uganda in 2003 concerned the 'situation concerning the Lord's Resistance Army' and the Prosecutor had to make it clear that this would be interpreted as covering crimes 'within the situation of northern Uganda

⁷⁴ See Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510.

⁷⁵ Art. 18. ⁷⁶ See section 8.11.

⁷⁷ See, e.g. William Schabas, 'First Prosecutions at the International Criminal Court' (2006) 27 *Human Rights Law Journal* 25 at 32.

⁷⁸ Annex to the 'Paper on some policy issues before the Office of the Prosecutor': Referrals and Communications, at section D http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf

⁷⁹ Claus Kress, 'Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy' (2004) 2 *JICJ* 944; Mahnouch Arsanjani and Michael Reisman, 'The Law-in-action of the International Criminal Court' (2005) 99 *AJIL* 385 at 392.

⁸⁰ See also William 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) 18 *LJIL* 557 at 567–8.

by whomever committed'.⁸¹ There is also the risk that States will overburden the court with cases they could handle themselves.⁸² The Prosecutor is not however obliged to initiate an investigation when a referral is made, and may decline to take a case on grounds such as lack of gravity, complementarity and the interests of justice.⁸³

8.7 Jurisdiction: personal, territorial and temporal

The Court has *potentially* worldwide jurisdiction, but this will be fully realized only after all States become parties to its Statute. In the meantime, Article 12(2) provides:

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

Article 12(3) allows a State not party to declare that it accepts the jurisdiction of the court with respect to the crime in question.

The Court also has jurisdiction where a situation has been referred to the court by the Security Council under Chapter VII of the UN Charter.⁸⁴ In the event of referral by the Council, the Court has jurisdiction even if none of the relevant States is a party to the Statute or gives its consent.⁸⁵

The rationale for requiring the consent of the territorial State or the State of nationality is that these are the two most uncontroversial bases for the jurisdiction of States themselves.⁸⁶ The consent of one of these States therefore gives a solid basis for the taking of international jurisdiction. But these are not of course the only bases of State jurisdiction; the crimes listed in the Statute are ones over which universal jurisdiction may be taken by States. Why was a narrower jurisdiction agreed upon for the court? As previously described,⁸⁷ the ILC draft Statute, with which the negotiations on the Court began, made large concessions to State sovereignty. For all crimes except genocide⁸⁸ the ILC model of a court had jurisdiction only if *both* the State with custody of the suspect *and* the territorial State had accepted the jurisdiction of the court *in respect of that category of crime*. During the negotiations, various different

⁸¹ Letter of the Prosecutor of 17 June 2004 attached to the Presidency Decision to assign the situation in Uganda to Pre-Trial Chamber II, at http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Decision_on_Assignment_Uganda_OTP_Annex.pdf

⁸² For discussion of the practical ways of dealing with such a situation see Experts Group Reflection Paper for the Office of the Prosecutor on the principle of complementarity in practice at <http://www.icc-cpi.int/otp/complementarity.html>

⁸³ See section 17.5.

⁸⁴ This is the Chapter of the Charter under which the Council takes decisions, binding on States, to maintain or restore international peace and security; it was under this Chapter that the Council established the two ad hoc Tribunals.

⁸⁵ As in the situation in Darfur, Sudan, referred to the Court by Security Council resolution 1593(2005).

⁸⁶ See ch. 3. ⁸⁷ See section 8.2.

⁸⁸ The ICC had jurisdiction over genocide whenever a complaint was brought by a State Party which was also a party to the Genocide Convention; this was a form of universal jurisdiction.

proposals emerged. The most ambitious was a German proposal⁸⁹ to give unlimited jurisdiction to the Court: wherever the crime was committed, whether or not in the territory of a State Party and of whatever nationality the suspect, the Court would have jurisdiction. Another alternative was a South Korean proposal⁹⁰ to confer jurisdiction on the Court with the acceptance of any one of four States: those with territorial, active nationality or passive nationality jurisdiction, or with custody of the suspect. At the other end of the spectrum, the United States argued that the consent of *both* the territorial and the nationality State ought to be required. The South Korean proposal had a great deal of support, but a compromise text was accepted by the conference and is now reflected in Article 12; it gives a more limited jurisdiction to the Court, but one which was thought to entail a greater likelihood of acceptance by the conference as a whole.⁹¹

Under the ILC draft statute, ratification of the Statute did not entail in itself acceptance of jurisdiction; a State could choose whether to 'opt in' to any crime (except in respect of genocide, for which there was a form of universal jurisdiction). As it became clear during the course of the negotiations that the list of crimes would include only the 'core crimes', the 'opt-in' regime was seen to be less necessary and over time, the great majority of the negotiators came to favour 'automatic jurisdiction', meaning that a State upon ratification signified its acceptance of jurisdiction for all core crimes. During the Rome Conference, a third alternative emerged, which would have permitted a State Party to 'opt out' of war crimes and crimes against humanity for renewable periods of ten years. This alternative was not widely accepted but was the origin of Article 124.

8.7.1 Article 124

The Statute follows the automatic acceptance model, meaning that a State upon ratification accepts jurisdiction over all core crimes, but Article 124 contains an exception which allows a State, upon ratification of the Statute, not to accept the jurisdiction of the ICC over war crimes with regard to its nationals or to crimes committed on its territory for a period of seven years. This provision, which has no justification other than as a concession necessary to secure agreement on the final text of the Statute,⁹² could have created a serious obstacle to the exercise of the court's jurisdiction, but has not proved to be so; of the first 104 States Parties, only two (France and Colombia) took advantage of the opt-out regime. The first Review

⁸⁹ The German proposal, with many other proposals on this issue, was contained in the draft text of the Statute submitted to the conference by the Preparatory Committee (A/CONF.183/13 (Vol.III)).

⁹⁰ A/CONF.183/C.1/L.6.

⁹¹ For the history of the negotiations see Sharon Williams, 'Article 12' in Triffterer, *Observers' Notes*, 329; Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Lee, *The Making of the Rome Statute*, 127.

⁹² For criticism of the French attempt at justification of the provision, see Alain Pellet, 'Entry into force and amendment of the Statute' in Cassese, *Commentary*, 145 at 168–9.

Conference, to be held under Article 123 in 2009 or 2010, will have the opportunity to remove the Article from the Statute altogether.

8.7.2 *'Ad hoc' acceptance of jurisdiction*

An acceptance of the jurisdiction of the Court under Article 12(3) by a State not party to the Statute extends the territorial and personal jurisdiction of the Court. It does not constitute a referral to the Court; indeed States that are not parties may not refer situations to the Court. Following or before the making of the declaration of acceptance, there will therefore need to be either a referral by a State or, more likely, the initiation of an investigation by the Prosecutor under his own powers, before the Court may exercise its jurisdiction.⁹³ The legal effect of a declaration will simply be to put a non-party State on the same jurisdictional basis as a State Party, but in practice the declaration will indicate to the Prosecutor that the State concerned is willing to have the particular situation dealt with by the Court. There is however no obligation on the Prosecutor to begin an investigation.⁹⁴ The cooperation obligations of Part 9 of the Statute will apply to the State making the declaration.

It is important to note that the declaration accepting jurisdiction 'with respect to the crime in question' has as a consequence the acceptance of jurisdiction for *all* the crimes relevant to the situation.⁹⁵ This avoids the possibility of a non-party State consenting to the Court's jurisdiction with regard to enemy nationals, while shielding its own.

8.7.3 *Persons over 18*

The Court's jurisdiction is limited to persons over the age of 18 at the time the alleged offence was committed.⁹⁶ Turning the question of age into a jurisdictional issue avoids having to choose between different national age limits for criminal responsibility.⁹⁷ Prosecuting minors would have required the provision of a special regime and was not a sensible use of the Court's slender resources. This does not of course exclude national jurisdiction over minors for the commission of international crimes.

8.7.4 *Temporal jurisdiction*

The ICC does not have jurisdiction over offences committed before the entry into force of the Statute on 1 July 2002. States were unwilling to allow the ICC to deal with

⁹³ For the procedures applicable to such a declaration, see Carsten Stahn, Mohamed El Zeidy, Héctor Olásolo, 'The International Criminal Court's Ad Hoc Jurisdiction Revisited' (2005) 99 *AJIL* 421.

⁹⁴ For example, Côte d'Ivoire accepted the jurisdiction of the ICC in 2003 but the Prosecutor has not, as at October 2006, opened an investigation.

⁹⁵ Rule 44(2) RPE. ⁹⁶ See Roger Clark and Otto Triffterer, 'Article 26' in Triffterer, *Observers' Notes*, 493.

⁹⁷ Per Saland, 'International Criminal Law Principles' in Lee, *The Making of the Rome Statute*, 189 at 200–202.

past practices. If a State becomes a party to the Statute after its entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the Statute has entered into force for that State (Article 11); the State may however make a declaration under Article 12(3) to fill this temporal gap. Crimes committed before 1 July 2002 may not be tried by the ICC under any circumstance.⁹⁸

8.8 Deferral of investigation or prosecution

Article 16 reads as follows:

No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This Article originates in an even wider restriction on the Court's jurisdiction which was contained in the ILC draft Articles; that provision would have removed jurisdiction over any matter which was being considered by the Security Council unless the Council agreed otherwise. The draft was reversed by the negotiators, who saw it as unacceptably subordinating the ICC to the Security Council.⁹⁹ Thus, instead of requiring a positive Council decision (requiring nine positive votes and no veto by a permanent member) to *allow* the ICC to proceed in such circumstances, Article 16 now requires a positive decision to *defer* a proceeding. The Council will have to act under Chapter VII of the Charter, which applies only where there is a 'threat to the peace, breach of the peace or act of aggression'. The Council request for deferral has effect for twelve months and may be renewed.

The intervention in judicial proceedings of a political organ in this way requires some explanation.¹⁰⁰ The purpose was to allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be only temporary. The subsequent practice of the Council quoting Article 16 would however have surprised those drafting the Statute.¹⁰¹

⁹⁸ Even if the Security Council were minded to refer a situation to the ICC in which the alleged crimes were committed before the entry into force of the Statute, the Court would not be able to exercise its jurisdiction, since it is a creature of the Statute, not of the Security Council, and although the Council's resolutions may override the treaty obligations of States (Art.103 of the Charter) they cannot change the powers of an independent organization.

⁹⁹ Morten Bergsmo and Jelena Pejic, 'On Article 16' in Triffterer, *Observers' Notes*, 371 at 377.

¹⁰⁰ See Franklin Berman, 'The Relationship between the International Criminal Court and the Security Council' in H. von Hebel, J. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court* (The Hague, 1999).

¹⁰¹ The relevant resolutions are discussed at section 8.10.3.

8.9 Enforcement of the ICC's decisions

A national court may rely on local police to arrest suspects for the purpose of trial, and on local detention facilities to imprison them on conviction. The ICC has to rely entirely on the international community for these matters. Part 9 of the Statute requires States Parties to cooperate with the Court in providing various forms of assistance such as the taking of evidence and the tracing of assets. Article 89(1) imposes the all-important obligation to surrender any person found within a State's territory when the Court so requests. The limitations on the Court in making such requests where the person concerned enjoys immunity or where there is a relevant international agreement are laid down in Article 98. International organizations may also be requested to provide information or any other form of assistance to the ICC (Article 87(6)). As regards sentences of imprisonment imposed by the Court, there is no obligation on States to provide prison facilities, and sentences will be served in a State selected by the Court from a list of those that have declared their willingness to accept sentenced persons (Article 103).¹⁰²

If a State Party fails to comply with a request to cooperate from the Court, in breach of its obligations under the Statute, the court may refer the matter to the Assembly of States Parties or, in the case of a referral by the Security Council, to the Council.¹⁰³ Although the Council has the power to impose mandatory requirements on the defaulting State, the Assembly has no powers of enforcement.

The provisions of the Statute enforcing the Court's requests and decisions have been described as 'paltry, at best'.¹⁰⁴ The future success of the ICC in dealing with crimes will depend on the extent to which States are prepared to 'take ownership'¹⁰⁵ of the Court. They will need to lend it their cooperation and support not only through strict and willing compliance with their obligations to the Court, but also by multilateral measures such as enlarging the mandates of Security Council peacekeeping missions and proactively assisting with evidence by incorporating assistance to the court into their intelligence gathering capabilities.

For discussion of cooperation with the ICC and a comparison with the cooperation requirements of the two Tribunals, see Chapter 19. Chapter 20 deals with the way in which the court handles the issue of immunities.

8.10 Opposition to the ICC

The ICC has enjoyed strong support from much of the international community, as may be seen from the speed with which the first sixty ratifications were reached. Nonetheless, some opposition to the court was evident at the time the Statute was

¹⁰² See section 18.7. ¹⁰³ Art. 87(7).

¹⁰⁴ Leila Sadat and Richard Carden, 'The New International Criminal Court: an Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381 at 389.

¹⁰⁵ To use the Prosecutor's phrase; see *Policy Paper*, 6.

adopted and it quickly became clear that the Court in the form that had been agreed would not achieve universal acceptance, at least in the first decade of its existence.¹⁰⁶ The United States is by no means the only State to oppose the creation of the Court.¹⁰⁷ But because it has been the most open and vocal in expressing its opposition and in taking action pursuant to its views, it is largely the practice of the US that is considered here.

The United States, under the Clinton Administration, signed the Statute on 31 December 2001, the last day that it was possible to do so. Its signature may be attributed to the fact that the US at that time was not in principle opposed to the creation of a new court to dispense international criminal justice, and hoped to resolve some of its points of difficulty by means of changes to the rules of procedure and other documents. Signature imposed an obligation on the United States under Article 18 of the Vienna Convention of the Law of Treaties: a signatory State may not 'defeat the object and purpose of a treaty prior to its entry into force' unless it has made clear its intention not to become a party to the treaty. With the advent of the Bush Administration came fiercer opposition to the ICC and, in order to avoid the obligation under Article 18, the US made clear its intention not to ratify the Statute in a communication to the UN Secretariat on 6 May 2002. Israel followed, in respect of its own signature, on 28 August 2002.¹⁰⁸

8.10.1 *Opposition to jurisdiction over nationals of non-party States*

The principal objection made against the ICC on legal grounds is that under Article 12 it may take jurisdiction over nationals of a State not a party to the Statute without that State's consent.¹⁰⁹ The claim that this is contrary to international law is made first by reference to the Vienna Convention on the Law of Treaties, Article 34 of which provides: 'A treaty does not create either obligations or rights for a third State without its consent.' The Statute clearly does not create obligations for States not parties to it. While it undoubtedly affects their interests by giving the Court jurisdiction over their nationals and their agents, that is not a ground for claiming that the Statute is contrary to international law. It is also asserted in this context that there is nothing

¹⁰⁶ See generally Dominic McGoldrick, 'Political and Legal Responses to the International Criminal Court' in McGoldrick *et al.* (eds.), *The Permanent International Criminal Court* 389.

¹⁰⁷ For discussion of the opposition of some other States, see Lu Jianping and Wang Zhixiang, 'China's Attitude towards the ICC' (2005) 3 *JICJ* 608; Bakhtiyar Tuzmukhamedov, 'The ICC and Russian Constitutional Problems' *ibid.* 621; Usha Ramanathan, 'India and the ICC' *ibid.* 627; Hira Abtahi, 'The Islamic Republic of Iran and the ICC' *ibid.* 635.

¹⁰⁸ The communications from the US and Israel may be found on <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty11.asp#N3>

¹⁰⁹ There is an extensive literature on arguments about Article 12; see for example, Eve La Haye, 'The Jurisdiction of the International Criminal Court' (1999) *XLVI Netherlands International Law Review* 1; M. Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law and Contemporary Problems* 98; Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non Party States' (2000) 64 *Law and Contemporary Problems* 131; Frederic Megret, 'Epilogue To An Endless Debate: The International Criminal Court's Third Party Jurisdiction And The Looming Revolution Of International Law' (2001) 12 *EJIL* 247; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *JICJ* 618.

in customary international law to justify the delegation of jurisdiction over the nationals of non-party States to an international court. However, international law does not preclude States from acting collectively by delegating to an international court the jurisdiction which they would be entitled to exercise themselves¹¹⁰ and there is no requirement for a positive rule of international law allowing States to exercise their jurisdiction collectively in this manner. On the contrary, any suggestion that there is such a rule would be contrary to the principle of territorial jurisdiction and generally retrogressive.

8.10.2 Other arguments against the Statute

There are other provisions of the Statute which have given rise to controversy, although the arguments here are less of law than of legitimacy.¹¹¹ Article 124 has been criticized as inequitable in not allowing States not parties to the Statute to opt out of the war crimes jurisdiction of the ICC for seven years; the strange result appears to be that the nationals of a State Party which has made a declaration under Article 124 cannot be tried by the Court whereas the nationals of a State not party, if the other conditions for jurisdiction are met, can.¹¹² Similarly, Article 121(5) allows States Parties to opt out of jurisdiction for their nationals or for crimes committed on their territory if new crimes are added to the Statute by amendment; this possibility is not open to States not parties. Again the Court may have a wider jurisdiction in this respect over the nationals of States not parties than of States Parties.

Other arguments are based on a more general mistrust of the ICC.¹¹³ They include the concern that States with effective legal systems cannot be sure that the Court will not take over the prosecutions of their nationals, because the Statute leaves it to the Court itself to judge whether the national court is 'unable or unwilling' genuinely to deal with a case. On this view the complementarity principle is not a reliable safeguard since the ICC cannot be trusted to apply it without political bias. A further concern is that the Prosecutor, unlike national prosecutors, is accountable to no outside agency or authority in exercising his power of initiating investigations.

The arguments overlook or downplay the various restraints and limits on the Prosecutor's actions which are provided throughout the Statute system, and formal

¹¹⁰ The Nuremberg judgment decided that that trial was justified on the basis that what States could do alone could be done together: '... they 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'. (International Military Tribunal (Nuremberg) Judgement and Sentences, reprinted in (1947) 41 *AJIL* 172 at 216.)

¹¹¹ See, for example, Michael Lohr and William Lietzau, 'One Road Away From Rome: Concerns Regarding the International Criminal Court' (1999) 9 *US Air Force Journal of Legal Studies* 33.

¹¹² For an alternative (but surely incorrect) reading of Article 124, see William Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 *EJIL* 701 at 711.

¹¹³ John R. Bolton, 'The Risks and Weaknesses of the International Criminal Court From an American Perspective' (2000–2001) 41 *Virginia Journal of International Law* 186; David Forsythe, 'The United States and International Criminal Justice' (2002) 24 *Human Rights Quarterly* 974.

and informal methods of securing accountability.¹¹⁴ They also fail to take fully into account the ability of States not parties to the Statute to prosecute Statute crimes themselves and thus to avoid the exercise of the ICC's jurisdiction; although if such States wish to take advantage of the complementarity principle they will have to ensure that their own legislation gives them jurisdiction over all the crimes concerned.¹¹⁵ It is to be hoped that general mistrust of the ICC will be reduced if the Court shows that it is able to operate, as it has been created to do, independently and impartially.

8.10.3 *Challenges to the ICC*

The US opposition to the ICC has led them to make various attempts to prevent the possibility of US nationals being tried by the Court. It is doubtful whether the US believe in the practical likelihood of ICC proceedings in every case in which they seek an impediment to such proceedings. They are however building up precedents for exemptions.¹¹⁶ Their action on the international front has been supported and partially instigated by domestic legislation. The American Servicemembers' Protection Act prohibits various forms of US cooperation with the ICC, provides for the cessation of military and other aid to States Parties which do not sign a non-surrender agreement with the US, and authorizes the use of 'all means necessary, including military force' to release persons arrested by the ICC.¹¹⁷

Security Council resolutions

In the months immediately prior to the entry into force of the ICC Statute, the US looked to the possibility of using a Security Council resolution to exempt US nationals from the Court's jurisdiction. One course of action involved an unexpected use of Article 16 of the Statute. Security Council resolution 1422(2002), promoted and pushed through the Council by the US with the threat of refusal to support a peace-keeping operation, requested the ICC to defer any exercise of its jurisdiction for twelve months 'if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation'. A further resolution asking for suspension for another twelve months was adopted in 2003 (resolution 1487(2003)). The following year, however, support for the US action had dwindled and there

¹¹⁴ See Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510. The arguments on informal means of accountability may however understate the importance of prosecutorial independence.

¹¹⁵ See David Scheffer, 'A Negotiator's Perspective on the International Criminal Court' (2001) 167 *Military Law Review* 1; he points out that the current US criminal code and the Uniform Code of Military Justice are 'simply outdated' and may not be sufficient to allow the US to investigate and prosecute all statute crimes.

¹¹⁶ See statement by the US on adoption of SC resolution 1593(2005) UN Doc. S/PV.5158, at 3.

¹¹⁷ 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, as amended; see Sean Murphy, 'Contemporary Practice of the United States' (2002) 96 *AJIL* 975.

was not the necessary majority in the Security Council to adopt another resolution in the series.

The two resolutions have been controversial and doubts have been expressed as to their compatibility with the UN Charter as well as their effectiveness under the Rome Statute.¹¹⁸ Scepticism was expressed in a Security Council meeting¹¹⁹ as to whether the Council was acting within its powers under Chapter VII of the Charter, since it was not obvious that the decisions of the Council concerned a matter of international peace and security. The Security Council has used its Chapter VII powers too often on purely political grounds, however, for this appeal to the Charter to be, in the final analysis, convincing.¹²⁰ Another argument, based on the Rome Statute, maintains that the resolutions would not be effective to oblige the ICC to accede to the Council's requests. The negotiating history of Article 16 indicates that the intention was that the Council would consider on a case-by-case basis whether the continuation of ICC proceedings would prejudice the maintenance of international peace and security; a request for the suspension of hypothetical proceedings which might arise at some time in the future would not appear to come within the objective of Article 16 even though it fell within its wording.¹²¹ While there has been a great deal of academic debate about the resolutions they have had no practical impact on the Court, no case having arisen in the relevant period. It is to be hoped that they are now of historical interest only.

There are other resolutions however which remain in force. In a further approach to seeking exemption from the ICC's jurisdiction over its personnel, the US promoted the decision in resolution 1497(2003) that personnel from a State which is not a party to the ICC Statute will be subject to the exclusive jurisdiction of that State for all acts related to the multinational force or United Nations force in Liberia.¹²² This was used as a precedent in the resolution referring the situation in Darfur, Sudan, to the ICC.¹²³ Both of these decisions have the aim of shielding a group of persons from any courts save those of their own States. Unlike the requests under Article 16, the resolutions do not have to be renewed every year; they will stay in force as long as the authorized forces remain in existence.

In purporting to set aside the jurisdiction not only of the ICC but also of national courts, the provisions of these two resolutions attempt to interfere with treaties – the

¹¹⁸ See, for example, Aly Moktar, 'The fine-art of arm-twisting: The US, Resolution 1422 and Security Council Deferral Power under the Rome Statute' (2002) 3 *International Criminal Law Review* 295; Neha Jain, 'A Separate Law for Peacekeepers; the Clash between the Security Council and the International Criminal Court' (2005) 16 *EJIL* 239; Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)' (2003) 14 *EJIL* 85; Dominic McGoldrick, 'Political and Legal Responses to the ICC' in McGoldrick *et al.* (eds.), *The Permanent International Criminal Court*, 415–22.

¹¹⁹ See statements by representatives of Canada and Jordan at the first Security Council meeting on 10.7.2002 (S/PV.4568).

¹²⁰ To the contrary, Karl Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 *Max-Planck Yearbook of United Nations Law* 91.

¹²¹ See statement of New Zealand at the Security Council meeting on 10.7.2002 (S/PV.4568).

¹²² Para. 7 of the resolution. Mexico, France and Germany abstained, asserting that the paragraph not only undermined the ICC but also prevented countries from exercising jurisdiction over persons accused of murdering their citizens (S/PV.4803).

¹²³ Res. 1593(2005), para. 6. Brazil explained that this paragraph was one of the reasons for its abstention from the vote (S/PV.5158).

Rome Statute as well as the Geneva Conventions, since the latter require all States to exercise jurisdiction over grave breaches of international humanitarian law wherever they occur. The Charter obligation on States to comply with binding Security Council resolutions and the hierarchy of treaties established by Article 103 of the Charter ensure that the resolutions will be effective to prevent a State from taking jurisdiction over persons covered by their provisions. But the ICC is not a Council organ and is not itself bound by Council resolutions; as the Relationship Agreement between the ICC and the UN recognizes, it is an independent institution with international legal personality. The resolutions would not therefore appear to have any restrictive effect on the jurisdiction of the ICC.¹²⁴

Non-surrender agreements

The US has negotiated bilateral agreements with other States, some of them parties to the Statute, others not, which provide that no nationals, current or former officials, or military personnel of either party may be surrendered or transferred by the other State to the ICC for any purpose.¹²⁵ The US refer to Article 98(2) of the Rome Statute as the basis for these agreements, maintaining that the ICC will not be able to request a State to surrender a US national to the Court, once that State has entered into such an agreement with the US. The agreements will of course only be effective in preventing the Court from making such a request if they are in truth compatible with the Statute.

Article 98(2) precludes the Court from asking for the surrender of a suspect if that would require the requested State ‘to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of the State to the Court’. The provision was inserted in the Statute to address the problem of conflicting obligations where, for example, a State in which foreign military personnel are stationed has agreed under a status of forces agreement (SOFA) to accord the right to the sending State to exercise criminal jurisdiction over its troops for certain kinds of offences. Without Article 98(2), such an agreement would conflict with the obligation in the ICC Statute to surrender suspects to the Court when so requested. Another example of an agreement covered by the provision is an extradition arrangement under which the rule of specialty would normally require the State receiving a suspect extradited from another State to obtain the consent of that State before dealing with the suspect in any other way than prosecuting him for the offence for which his extradition was requested.

¹²⁴ Other (weak) arguments as to the efficacy of para. 6 of res. 1593(2005) in relation to the ICC are that preambular para. 2 has a reference to Art. 16 of the Rome Statute; but this does not turn it into a request to the court to defer investigations under that Article: it is not worded as a request to the ICC and does not seek temporary deferral. Nor can the resolution be regarded as a referral of a situation *minus* the activities of peace-keepers and other personnel: see Robert Cryer, ‘Sudan, Resolution 1593 and International Criminal Justice’ (2006) 19 *LJIL* 1 at 17–8; for reasoning to the contrary see David Scheffer, ‘Staying the Course With the International Criminal Court’ (2001–2) 35 *Cornell International Law Journal* 47 at 90.

¹²⁵ For the text of one example, that with East Timor, see (2003) 97 *AJIL* 201–2.

In assessing the compatibility of the US agreements with the Rome Statute, a preliminary question is whether Article 98(2) covers agreements entered into after the entry into force of the Statute. The natural meaning of the words 'obligations under international agreements' supports the view that Article 98(2) is not limited to agreements existing at the time a State becomes a party to the Statute.¹²⁶

As regards wider questions of compatibility with the Rome Statute, the key to the interpretation of Article 98(2) is in the phrase 'sending State'. There is nothing in the provision to prevent the Court requesting the surrender of a person who has not been 'sent' by one State to another State. But the US agreements cover all US nationals. Tourists and businessmen can by no stretch of the imagination be regarded as persons 'sent' by one State to another.¹²⁷ The agreements entered into by the US therefore do not fall within the terms of Article 98(2) and would not have the effect of preventing the ICC from requesting surrender.¹²⁸ The requested State party will continue to be obliged to cooperate with the ICC by surrendering the person concerned and will have the problem of attempting to reconcile conflicting treaty obligations.

The preamble of Security Council resolution 1593 (2005) takes note 'of the existence of agreements referred to in Article 98(2) of the Rome Statute'. This was no doubt insisted upon in an attempt to provide affirmation and legitimacy for the agreements,¹²⁹ but a preambular reference of this kind cannot change the clear words of the ICC Statute and does not have any impact on the ineffectiveness of the existing bilateral agreements.

8.11 Early developments at the ICC

Perhaps surprisingly, some of the first parties to the Statute were States on whose territories large-scale atrocities were being committed. From the moment of the creation of the Court the Prosecutor has therefore been faced with the difficulty of choosing from among the many situations coming within the ICC's jurisdiction which might warrant investigation. That jurisdiction was expanded by the declaration of acceptance by Côte d'Ivoire under Article 12(3) in 2003. Three referrals have been

¹²⁶ See Opinion by James Crawford SC, Philippe Sands QC and Ralph Wilde on <http://www.iccnw.org/documents/otherissues/impunityart98/SandsCrawfordBIA14June03.pdf>. For an alternative view see Markus Benzing, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' (2004) 8 *Max Planck Yearbook of United Nations Law* 182 at 219; Hans-Peter Kaul and Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 *YIHL* 143 at 165.

¹²⁷ The current US administration's attempt to interpret the reference in Art. 98(2) to a 'sending State' in a manner which allows inclusion of all nationals of that State seeks (misplaced) reliance on the use of that term in the Vienna Convention on Consular Relations 1963; see David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 *JICJ* 333 at 347–50.

¹²⁸ This is the view generally reflected in the guidelines agreed upon by the EU Council, binding upon all EU Member States; EU Council of Ministers 2459th session, GAER Doc 12134/02 30.9.2002; reprinted in McGoldrick *et al.* (eds.), *The Permanent International Criminal Court*, 430–1. On the subject generally see Benzing, 'U.S. Bilateral Non-Surrender Agreements', 182; Herman van der Wilt, 'Bilateral Agreements between the US and States Parties to the Rome Statute' (2005) 18 *LJIL* 93.

¹²⁹ See statement of the US on adoption of the resolution at UN Doc. S/PV.5158, at 4. The representatives of Denmark and Brazil made statements attempting to limit its effect; *ibid.* at 6 and 11 respectively.

made by State Parties – Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic – all related to situations on their own territories.¹³⁰ The situation in Darfur, Sudan was referred to the ICC by the Security Council under resolution 1593(2005), a welcome indication that the US would not block all referrals to the Court, although some provisions of the resolution present serious difficulties.¹³¹

The Prosecutor's published policy paper indicates the guidance he has adopted for himself in the selection of cases and situations to investigate.¹³² The policy includes bringing charges against those bearing the *greatest responsibility* for the crimes within the ICC's jurisdiction¹³³ and taking an approach to complementarity which, rather than competing with States for jurisdiction, will lead to encouragement and facilitation of genuine national proceedings where possible, and a 'consensual division of labour' between national courts and the ICC where appropriate.¹³⁴

A large number of communications have been transmitted to the Prosecutor from individuals and organizations who have wanted him to begin investigations of crimes coming within the ICC's jurisdiction. In relation to allegations of crimes in Iraq and Venezuela, the Prosecutor decided that the requirements for opening investigations had not been met; his letters about those allegations indicate the procedure that is followed at the pre-investigative stage, when the Prosecutor must consider whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court is committed, and, if so, must give consideration to admissibility requirements and to the interests of justice.¹³⁵

While concerns were expressed at the Rome Conference about the possible use to which the *proprio motu* powers of the Prosecutor might be put, none of the investigations initiated during the first four years of the ICC's existence have been on this basis. The first three investigations – in the DRC, in Uganda, and in Darfur, Sudan – have followed referrals by States Parties or the Security Council. The decision by the Prosecutor to await or to seek referrals rather than use his *proprio motu* powers may be a recognition of the inherent conflict between the impact these powers may have on States and the reliance he must have on State support to enable him to carry out his responsibilities.¹³⁶

Within the first three ongoing investigations, the Prosecutor has already encountered some of the difficulties which are inherent in the ICC's system. First, the so-called peace and justice dilemma has arisen in the Uganda case, where the opening of the investigation and the subsequent refusal to withdraw the arrest warrants have been criticized as an impediment to the peace process and to efforts to persuade

¹³⁰ See section 8.7.

¹³¹ See section 8.10.3. For the US insistence that no funding for the referral would come from the UN, and on the resolution generally, see Cryer, 'Sudan, Resolution 1593'.

¹³² Policy paper. ¹³³ *Ibid.*, 7. ¹³⁴ *Ibid.*, 5.

¹³⁵ See Prosecutor's letters of 9 February 2006; that concerning communications about alleged crimes in Iraq is at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

¹³⁶ See Danner, 'Enhancing the Legitimacy', 518.

members of the Lord's Resistance Army (LRA) to defect.¹³⁷ Second, the dependence of the Prosecutor on the international community to ensure cooperation by reluctant States and to implement arrest warrants has led to serious delays where that support is not forthcoming. The Prosecutor has been criticized for not proceeding faster with the Darfur referral¹³⁸ but it may be that full investigations are not possible without international measures such as a Security Council mandate for a peacekeeping mission with authority to assist the ICC. Third, all three investigations are being conducted in situations of ongoing violence or actual conflict where security is a problem, presenting considerable challenges to the investigators and witnesses in the field. (It is notable that the Ugandan indictments were only released after the witness protection programme was started there.) This will be typical of most situations brought before the ICC. The possibilities of collecting evidence may be limited. Although the commission of atrocities may be common knowledge, information about incidents and command structures may be very difficult to obtain: local governments may be unwilling or unable to provide significant assistance; humanitarian organizations in the field may be reluctant to assist so as not to put at risk their continued presence; international peacekeeping missions may not have a wide enough mandate or may wish to avoid prejudicing their neutrality; other governments may not wish to disclose evidence obtained by their intelligence services or may have their own political interests in the region which conflict with their interests in the enforcement of international criminal justice.

The difficulties for the ICC are immense. It is too early to assess whether they are surmountable. In spite of the problems, as this book goes to press the court is beginning to move: the first suspect is in detention in The Hague awaiting trial as a result of the referral from the DRC, and arrest warrants have been issued for the leaders of the LRA in respect of the atrocities in northern Uganda. At the very least, the role played by the ICC will ensure that these international crimes do not get ignored or forgotten.

Further reading

The website of the ICC is useful; it may be found on <http://www.icc-cpi.int/>
Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook on United Nations Law* 591.

Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford, 2003).

¹³⁷ See discussion in Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission Of The First State Referral To The International Criminal Court' (2005) 99 *AJIL* 403, 416–21; Manisuli Ssenyonjo, 'Accountability of non-State actors in Uganda for war crimes and human rights violations: between amnesty and the ICC' (2005) 10 *Journal of Conflict and Security Law* 405.

¹³⁸ Antonio Cassese, 'Is the ICC still having teething problems?' (2006) 4 *JICJ* 434.

- Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*. (Oxford, 2002).
- Herman von Hebel, Johan Lammers, Jolien Schukking (eds.), *Reflections on the International Criminal Court* (The Hague, 1999).
- Roy Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (The Hague, 1999).
- Dominic McGoldrick, Peter Rowe, Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford, 2004).
- Philippe Kirsch and John Holmes, 'The Rome Conference of an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 2.
- Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes against Humanity* (Oxford, 2003).
- Leila Sadat, *The International Criminal Court and the Transformation of International Law* (New York, 2002).
- Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge, 2003) ch. 2 and 4.
- Otto Triffterer (ed.), *The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, 1999).

Other Courts with International Elements

9.1 Introduction

The increased interest in combating impunity for international crimes has resulted not only in the creation of international criminal tribunals and courts, but also in other forms of international assistance to the States concerned. There are various reasons for avoiding the resort to a new international tribunal. International institutions, like the ICTY and ICTR, tend to be large and expensive and subsequent calls for similar tribunals have been unsuccessful. Their capacity is limited to a few cases and they have hitherto been located away from the State in question for security or other reasons. In a number of cases, therefore, an alternative has been preferred; the creation of criminal courts with national and international elements to deal with international crimes.

The models developed for Sierra Leone, Kosovo, East Timor, Cambodia and Bosnia and Herzegovina, are described in this chapter. The special courts in Iraq and Serbia are briefly mentioned, as well as one internationalized court (Lebanon) and one domestic court established for a particular trial (the Lockerbie trial).¹

Each of the models is different, as were their political backgrounds and the legal bases for establishing them. In Sierra Leone and Cambodia, the conflicts were a civil war and persecution by a murderous regime respectively, and the courts result from an agreement between the United Nations and the post-conflict government. East Timor and Kosovo, on the other hand, experienced conflicts of self-determination and the courts were created as a direct result of international intervention and installation of an international transitional administration. The court in Bosnia and Herzegovina was also established by an international agency, mandated by a peace agreement. The special court in Iraq, which was originally created by the occupying powers, and that in Serbia, are purely domestic institutions and the international assistance to them is more limited. Common to the courts is that they are all designed to deal with international crimes, exclusively or at least in part; the Lebanese court and the Lockerbie court being exceptions and included only as examples of yet different approaches.

¹ Another initiative being considered is a special war crimes chamber in the Burundi court system (see UN Doc. S/2005/158 of 11.3.2005 paras. 57–66, and SC res. 1606(2005) of 20.6.2005).

The creation of these institutions is expected to have positive influences on the relevant domestic legal system.² Unlike the ICTY and ICTR (and perhaps the ICC),³ each court will sit in the country in question and, with the exception of Sierra Leone and Lebanon, operate within existing or newly created domestic judicial structures. Some form part of the restoration of the domestic system, and all of them are intended to assist in building local capacity, enhancing respect for the rule of law and providing independent, impartial and fair criminal proceedings for past crimes as well as an example for the future. The domestic impact is debatable, however, and depends on how dedicated the engagement efforts are.

A problem common to all these arrangements, and one that is often criticized, is the shortage of financial and other resources; in all cases, even where funding is provided by a UN mission, the resources consist chiefly of voluntary contributions by States, in money, personnel and equipment.⁴ Indeed, cost-related considerations played a major role when decisions were taken to opt for the various hybrid models instead of international criminal tribunals. Funding difficulties may have a detrimental impact not only on the effectiveness and efficiency of the tribunal concerned, but also on the rights of the accused to a fair trial; the independence and impartiality of the institution may even be questioned, as was (unsuccessfully) argued before the Special Court for Sierra Leone.⁵

9.2 Courts established by agreement between the United Nations and a State

9.2.1 *Special Court for Sierra Leone*

Almost a decade of very violent civil war began in 1991 when a rebel group entered Sierra Leone from neighbouring Liberia, aiming to overthrow the military rulers. The conflict featured all forms of gross human rights violations, the use of child soldiers and widespread mutilation of civilians by amputation of various limbs. In 2000, a UN peace-keeping force, replacing a regional mission, managed to quell the violence.

The Special Court for Sierra Leone (SCSL) was established by treaty between Sierra Leone and the UN. A request from the President of Sierra Leone to the Security Council for the creation of a special court to deal with crimes committed in the civil war, led to a resolution⁶ requesting the Secretary-General to enter into negotiations with Sierra Leone. An agreement between the Government and the UN Secretary-General, attaching the Statute of the Court, was concluded on 16 January 2002.⁷

² See, e.g. Laura Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *EJIL* 295.

³ See Arts. 3 and 62 of the ICC Statute (the ICC may sit elsewhere than at its seat in The Hague). Rule 4 of the ICTY RPE and of the ICTR RPE respectively also allows those Tribunals to exercise their functions away from the seat, but this has rarely happened in practice.

⁴ See, e.g. Thordis Ingadottir in C. Romano *et al.* (eds.), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, 2004) 271–89.

⁵ *Norman SCSL A. Ch. 13.3.2004.* ⁶ SC res. 1315(2000) of 14.8.2000.

⁷ The agreement, and the Statute of the SCSL, are available at the Court's webpage: www.sc-sl.org.

Thereafter, Sierra Leone adopted implementing legislation⁸ and the SCSL began work in July 2002.

The UN Secretary-General has described the SCSL, which follows a model for Cambodia, later abandoned, as ‘a treaty-based sui generis court of mixed jurisdiction and composition’.⁹ The international judges, who are appointed by the UN Secretary-General, form a majority; a minority is appointed by the Government of Sierra Leone. The UN also appoints the Prosecutor and the Registrar, and Sierra Leone a Deputy Prosecutor.

The SCSL is not a subsidiary organ of the UN Security Council but a separate international institution and, as clarified in the Sierra Leonean implementing legislation, it is not part of the domestic legal system. The Court applies its own Statute and Rules of Procedure and Evidence but these make reference to international instruments and some national laws.¹⁰ The Statute provides that the SCSL and national courts of Sierra Leone have concurrent jurisdiction, but the SCSL has primacy.¹¹

The mechanism chosen for the creation of the SCSL has prompted a number of jurisdictional challenges. The court has established its competence to determine its own jurisdiction and has dismissed challenges concerning its creation with claims that the Sierra Leonean government acted in contravention of the Constitution or the Lomé Peace Agreement¹² when agreeing to the Court, and that the Secretary-General did not have the power to enter into the agreement.¹³ The SCSL has also established, in a controversial decision, that it is an international court,¹⁴ and that consequently, by reference to the ICJ *Yerodia* case, State immunity does not bar prosecution of a head of State. Another difficult issue is the amnesty that was granted in the Lomé Peace Agreement, which has the objective of preventing domestic prosecutions and, thus, partially motivated the internationalized solution. The Statute explicitly states that an amnesty does not bar prosecution of international crimes at the SCSL, and this has been confirmed by the Court.¹⁵ A peculiarity of this Court, intended to speed up the process, is that jurisdictional challenges are heard by the Appeals Chamber as the first and last instance.¹⁶

The SCSL has jurisdiction to prosecute persons ‘who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law’

⁸ The Special Court Agreement (2002) Ratification Act, Suppl. to Sierra Leone Official Gazette Vol. CXXX No. 2 of 7.3.2002 (as amended).

⁹ Report by the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 of 4.10.2000 para. 9 (Secretary General’ Report).

¹⁰ Art. 14 of the SCSL Statute (the court is to apply the ICTR RPE which, however, have been substantively amended by the SCSL judges). Moreover, the Appeals Chamber is also to be guided by the decisions of the ICTY and ICTR Appeals Chambers; Art. 20.3.

¹¹ SCSL Statute, Art. 8. See also Art. 9 on *ne bis in idem*.

¹² Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF), signed on 7.7.1999 after a meeting in Lomé, Togo (Lomé Peace Agreement).

¹³ *Kallon, Norman and Kamara* SCSL A. Ch. 13.3.2004; *Kallon and Kamara* SCSL A. Ch. 13.3.2004; *Fofana* SCSL A. Ch. 25.5.2004 (UN competence); and *Gbao* SCSL A. Ch. 25.5.2004.

¹⁴ *Taylor* SCSL A. Ch. 31.5.2004; see also ch. 20. For a commentary, see Micaela Frulli, ‘The Question of Charles Taylor’s Immunity’ (2004) 2 *JICJ* 1118.

¹⁵ Art. 10 of the SCSL Statute; *Kallon and Kamara* SCSL A. Ch. 13.3.2004. Cf. Art. IX of the Lomé Peace Agreement.

¹⁶ Rule 72 of the SCSL RPE.

committed in the territory of Sierra Leone since 30 November 1996.¹⁷ The reference to 'most responsible' was intended as guidance for a prosecutorial policy rather than a formal limitation of jurisdiction;¹⁸ the objective is that the SCSL should target a limited number of perpetrators and have a short period of operation. Offences by peacekeepers and related personnel are, with some exceptions, left to the jurisdiction of the sending State.¹⁹ A very controversial issue was what to do with the many child soldiers who had committed serious crimes during the civil war; the solution finally chosen was to exclude jurisdiction over children under the age of 15 at the time of the crime and to include special provisions about treatment before and after conviction of juvenile offenders (between 15 and 18 years of age).²⁰

Owing to the nature of the conflict, the subject-matter jurisdiction of the SCSL is confined to crimes against humanity and to war crimes committed in a non-international armed conflict.²¹ Genocide and war crimes in an international armed conflict are not included. The Court has decided, however, that the war crimes which fall under its jurisdiction may be prosecuted regardless of whether the armed conflict is international or non-international in nature.²² The Court's jurisdiction also covers some specified crimes under Sierra Leonean law.²³

The definition of crimes against humanity is inspired by, but not identical to, the definition in the ICTR Statute; there is no reference to discriminatory intent as a general requirement for the crime and some of the underlying acts – sexual offences and persecution – have been further developed for the SCSL.²⁴ As to war crimes, Article 3 of the Statute regarding violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, reproduces almost verbatim the war crimes provisions of the ICTR Statute. In addition, however, the SCSL Statute lists certain other serious violations of international humanitarian law, reflecting only some of the equivalent violations included in the ICC Statute. The inclusion of recruitment of child soldiers in the list was challenged as a breach of the principle of legality, but the Court determined that this was a war crime under customary international law before November 1996.²⁵

As of early 2006, thirteen suspects have been indicted (although two indictments have been withdrawn due to the death of the accused). Trials against the nine accused who are in custody were commenced in 2004 and 2005 in three joint trials. One indicted person remains at large, while one, the former President of Liberia, Charles Taylor, was surrendered to the SCSL in March 2006 and, by special arrangement

¹⁷ Art. 1(1) of the SCSL Statute. The date relates to an earlier peace agreement between the Government of Sierra Leone and RUF, signed in Abidjan on 30.11.1996 (Abidjan Peace Agreement).

¹⁸ Secretary-General's Report, para. 30. ¹⁹ Art. 1(2)–(3) of the SCSL Statute. ²⁰ *Ibid.*, Arts. 7, 15(5) and 19(1).

²¹ *Ibid.*, Arts. 2–4. ²² *Fofana* SCSL A. Ch. 25.5.2004 (war crimes). ²³ Art. 5 of the SCSL Statute.

²⁴ The elaboration of the sexual offences and persecution is clearly influenced by the ICC Statute. The definition also departs from the ICTY Statute in that no nexus to an armed conflict is required. See further ch. 10.

²⁵ *Norman* SCSL A. Ch. 31.5.2004; cf. Judge Robertson who, in a dissenting opinion, asserted that non-forcible enlistment had entered international criminal law first with the ICC Statute in 1998.

due to security concerns, will be tried at the premises of the ICC in The Hague.²⁶ According to a Completion Strategy adopted by the Court,²⁷ the present trials, including appeals proceedings, could be finished in 2007. But more time will be required to deal with the accused still at large and any new indictments, as well as the *Taylor* case. In addition, the funding situation, which relies on voluntary contributions, makes any predictions a hostage to fortune.

9.2.2 Cambodia: Extraordinary Chambers

Another approach has been followed to deal with the atrocities committed during the Khmer Rouge rule in Cambodia – then known as Democratic Kampuchea – under Pol Pot, which lasted from 1975 to 1979 when the regime was ousted by invading Vietnamese forces. During these years more than a million people are believed to have died by execution, starvation and forced labour.

The introduction of so-called Extraordinary Chambers in the domestic courts is the culmination of a long process which began by a request from Cambodia to the UN for assistance in bringing Khmer Rouge officials to justice, followed by a UN expert group report recommending the establishment of an ad hoc Tribunal. Cambodia insisted on a domestic solution, however, and negotiations between the Cambodian Government and the UN started in 1999 but broke down in 2002; the UN Secretary-General withdrew from the process concluding that the Cambodian court, as then envisaged, would not guarantee the required independence, impartiality and objectivity, and that Cambodia refused to accept that UN assistance would be governed by a UN-Cambodian agreement. During the negotiations Cambodia had also unilaterally adopted legislation for the Extraordinary Chambers, which raised concerns regarding judicial independence from domestic political interference and shortcomings in the criminal procedures.

Nevertheless, later in 2002 the UN General Assembly adopted a resolution²⁸ requesting the Secretary-General to resume negotiations towards establishing domestic Chambers, with a model based on the criticized Cambodian law. An agreement between the UN and Cambodia was adopted by the General Assembly in May 2003,²⁹ and ratified by the Cambodian National Assembly in October 2004, an international agreement which is subject to the law of treaties and cannot be circumvented by Cambodian legislation.³⁰ The judges and other officials have been sworn in and the Chambers are expected to start work in 2007. The funding is based on voluntary State

²⁶ See SC res. 1688 (2006) of 16.6.2006.

²⁷ Completion Strategy of 18.5.2005; see: Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc. A/59/816-S/2005/350 of 27/5/2005.

²⁸ GA res. 57/228 A of 18.12.2002.

²⁹ GA res. 57/228B of 13.5.2003 (to which the UN-Cambodia Agreement is attached).

³⁰ Arts. 2 and 31 of the UN-Cambodia Agreement. See Ernestine Meijer in Romano *et al.*, *Internationalized Criminal Courts*, 209–11.

contributions, Japan being a major donor. The assumption is that the proceedings will be completed in three years.

Unlike the SCSL, the Extraordinary Chambers will form part of the domestic system of Cambodia and apply municipal law. According to the agreement, the Chambers are to try 'senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia'; the offences include genocide under the 1948 Genocide Convention, crimes against humanity as defined in the ICC Statute, grave breaches of the Geneva Conventions, and certain other crimes under Cambodian law.³¹ War crimes in non-international armed conflicts are not covered; Cambodia was not party to the Additional Protocols before 1980 and there were doubts as to the customary status of these crimes in the 1970s when the crimes were committed.³² The temporal jurisdiction is exclusively retroactive and limited to crimes committed between 17 April 1975 and 6 January 1979. Of course, the death of Pol Pot means that the one person probably most responsible will never stand trial.

A controversial issue was that of amnesties. The agreement includes a commitment by the Cambodian Government not to request amnesties or pardon and leaves to the Chambers to decide the scope of a previously granted pardon.³³ Being part of the domestic court system, the Chambers cannot enter into cooperation agreements with other States and will have to operate under any existing Cambodian scheme for mutual legal assistance and extradition.

The mixed composition of the Chambers and the prosecution was also a matter of dispute. The Cambodian side insisted on supremacy and, therefore, the national judges are in the majority both in the Trial Chamber and in the Supreme Court Chamber; for balance a qualified majority is required for any decision,³⁴ a difficult solution which could result in deadlocks and, arguably, an acquittal even if all the international judges vote for a conviction. Due to the civil law origin of the Cambodian criminal procedures, investigative judges will be responsible for the investigations; one international and one local judge will operate together and disagreements will be resolved by a Pre-Trial Chamber, again with local judges in the majority.³⁵ A similar scheme applies to the two co-prosecutors.³⁶ All the judges and prosecutors will be appointed by the Cambodian Supreme Council of Magistracy, although the international officials are nominated by the UN Secretary-General. These arrangements have resulted in concerns being expressed about the independence, impartiality, and efficiency of the Chambers and their future activities.³⁷

³¹ Arts. 1 and 9 of the UN-Cambodia Agreement.

³² Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850 paras. 72–5.

³³ Art. 11 of the UN-Cambodia Agreement. ³⁴ *Ibid.*, Arts. 3 and 4. ³⁵ *Ibid.*, Arts. 5 and 7. ³⁶ *Ibid.*, Art. 6.

³⁷ See, e.g. Sarah Williams, 'The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?' (2004) 53 *ICLQ* 227.

9.2.3 *Special Tribunal for Lebanon*

Upon the killing of Lebanon's former Prime Minister, Rafiq Hariri in February 2005, the Security Council first established a Commission to assist the Lebanese authorities in their investigation of the assassination, including the links to neighbouring Syria, and subsequently requested the Secretary-General to negotiate an agreement with the Government of Lebanon on a 'tribunal of an international character'.³⁸ After negotiations, the Secretary-General presented a draft agreement and Statute for such a tribunal, which were accepted by the Security Council.³⁹ The Government of Lebanon has thereafter signed the agreement but this has triggered constitutional issues. At the time of writing, the future is uncertain.

Like the Special Court for Sierra Leone, the Tribunal is treaty-based, but will neither be a subsidiary organ of the UN, nor form part of the Lebanese court system. It will sit outside Lebanon and have a majority of international judges, including an international pre-trial judge, an international chief prosecutor and a Lebanese deputy prosecutor, a registry and a defence office. It is established for a specific trial or trials with jurisdiction covering those responsible for the attack on Hariri and other related crimes of a similar nature and gravity committed within a limited time period. Applicable crimes are terrorism and certain other domestic offences, all in accordance with Lebanese criminal law.⁴⁰ The Tribunal will have primacy over national courts in Lebanon.

9.3 Courts established by the United Nations or other international administration

9.3.1 *Kosovo and East Timor: Special Panels*

Both Kosovo and East Timor (Timor-Leste) suffered violence during struggles for self-determination. In Kosovo, the revocation of autonomy, the exclusion from the Dayton peace process, and a government policy aimed at changing the ethnic composition of the province, led to a Kosovar Albanian insurgency and brutal counter-measures by Serbian forces, including ethnic cleansing. In response, a NATO-led bombing campaign was launched against the Federal Republic of Yugoslavia in March–June 1999. As for East Timor, this former Portuguese colony was forcibly annexed by Indonesia in 1975. A referendum in 1999, in which a majority of the East Timorese voted for independence, was accompanied by widespread violence by pro-Indonesian militias, which ended only when UN-authorized forces intervened.

³⁸ SC res. 1664 (2006) of 29.3.2006.

³⁹ See the Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893 of 15.11.2006, and Letter dated 21 November 2006 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2006/911 of 24.11.2006.

⁴⁰ The inclusion of crimes against humanity, to be defined in the Statute, was considered but later rejected due to insufficient support within the Security Council, see the Report, UN Doc. S/2006/893, paras. 23–5.

Following Security Council resolutions in 1999, the UN temporarily assumed the sovereign activities of the previous authorities in East Timor and Kosovo. The UN Mission in Kosovo (UNMIK)⁴¹ was empowered to exercise all executive and legislative authority in that territory, including the administration of justice. The UN Transitional Administration in East Timor (UNTAET)⁴² had similar powers. The essentially State-building mandates to establish law and order, and a credible and fair justice system, included powers to repeal and rewrite all laws and to administer courts, develop legal policy, draft legislation, assess the quality of justice, and address allegations of human rights violations. Questions have been raised as to the legal authority for taking such far-reaching measures and criticisms have been made about the democratic deficiency of the UN administrations.⁴³

The circumstances of each territory were similar in many respects: the destruction of infrastructure, a shortage of qualified lawyers, a compelling security situation, and a history of ethnic discrimination. But since the creation of the special courts had different aims, the institutional solutions differed. In Kosovo, where the ICTY may also exercise jurisdiction,⁴⁴ the main purpose was to support more peaceful relations between different groups in society and to address a broader range of crimes, while the East Timor scheme was intended mainly to prosecute international crimes.

In Kosovo, the plan was initially to establish a transitional court with a mixed composition of international and national judges, and concurrent but primary jurisdiction with other domestic courts – a Kosovo War and Ethnic Crimes Court (KWECC).⁴⁵ But this initiative was both politically sensitive and costly. It was abandoned in favour of a less ambitious scheme with international judges and prosecutors embedded in the ordinary courts of Kosovo, balancing the conflicting interests of local ownership and neutralization of ethnic bias. Since the appointment of new domestic judges and prosecutors did not quell the perception of bias, international judges and prosecutors were introduced,⁴⁶ initially in one troubled district (Mitrovice/Mitrovica) and subsequently in all municipal courts and in the Supreme Court. UNMIK also assumed the power to assign an international prosecutor, an international investigative judge, or a court panel with a majority of international judges – so-called ‘Regulation 64 Panels’ – to a particular case, when this was considered necessary ‘to ensure the independence and impartiality of the judiciary or the proper administration of justice’.⁴⁷ The powers of the international prosecutors have been extended and ‘Regulation 64 Panels’ now try most major or high-profile cases, including war crimes trials against Kosovo Serbs. On review, internationalized panels of the Supreme

⁴¹ SC res. 1244 (1999) of 10.6.1999. ⁴² SC res. 1272 (1999) of 25.10.1999.

⁴³ See, e.g. M. Brand, ‘Institution Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation’ (2001) 70 *Netherlands Journal of International Law* 461; and Carsten Stahn, ‘Justice under Transitional Administration: Contours and Critique of a Paradigm’ (2005) 27 *Houston Journal of International Law* 311.

⁴⁴ Also established in *Milutinović et al.* ICTY T. Ch. III 6.5.2003.

⁴⁵ Proposed by a Technical Advisory Commission on Judiciary and Prosecution Service (UNMIK Reg. 1999/5 of 7.9.1999), composed both international and national experts.

⁴⁶ UNMIK Reg. 2000/6 of 15.2.2000 and Reg. 2000/34 of 29.5.2000 (available at www.unmikonline.org).

⁴⁷ UNMIK Reg. 2000/64 of 15.12.2000 (the time limit for its application has since been extended).

Court have also overturned a number of questionable convictions by lower courts. But while the international presence has improved the appearance of objectivity, the legal quality of their work has been criticized and there are other problems relating to detention, defence representation, witness protection, and sentencing.⁴⁸

The 'Regulation 64 Panels' are domestic courts and apply municipal law. UNMIK initially decided that pre-existing domestic law should apply which, with respect to international crimes, primarily meant the Yugoslav Federal Criminal Code.⁴⁹ Additionally, international human rights law was expressly incorporated into the domestic system. Thereafter, however, UNMIK has increasingly introduced new legislation, including a Provisional Criminal Code of Kosovo⁵⁰ and a Provisional Criminal Procedure Code of Kosovo.⁵¹ The new criminal code includes modern definitions of genocide, crimes against humanity, war crimes, general principles of criminal law and provisions on jurisdiction over crimes committed outside the territory of Kosovo. For older crimes, however, the law in force at the time applies, unless the new law is more favourable to the accused.

In East Timor, a proposal to set up an international criminal tribunal⁵² was rejected in favour of focusing on the domestic legal system. UNTAET began with the creation of a new court system consisting of six district courts and a Court of Appeal, all with jurisdiction in both criminal and civil cases.⁵³ This was soon followed by the establishment of 'Serious Crimes Panels' of the District Court in Dili (the capital) and the Court of Appeal, similar to the abandoned model for Kosovo, with exclusive jurisdiction over certain serious criminal offences and with a mixed composition of East Timorese and international judges.⁵⁴ On each panel, the international judges were in the majority. UNTAET also established a national prosecution service for the prosecution of crimes before the 'Serious Crimes Chambers', with both local and international prosecutors.⁵⁵

The jurisdiction of the 'Serious Crimes Panels' covered genocide, crimes against humanity and war crimes, as well as certain domestic crimes (murder, sexual offences and torture), the international crimes being defined in the UNTAET Regulation together with provisions on general principles of criminal law and penalties.⁵⁶ The jurisdiction covered crimes in East Timor, or elsewhere if committed against an East Timorese citizen, during a limited time period (1 January–25 October 1999).⁵⁷

The 'Serious Crimes Panels' did not apply only UNTAET Regulations but also domestic law and, where appropriate, applicable treaties and recognized principles

⁴⁸ See, e.g. in reports by the OSCE Mission in Kosovo, Legal System Monitoring Section; available at www.osce.org/kosovo

⁴⁹ UNMIK Reg. 1999/1 of 10.6.1999, Reg. 1999/24 of 12.12.1999 and Reg. 2000/59 of 27.10.2000.

⁵⁰ UNMIK Reg. 2003/25 of 6.7.2003 (entering into force 6.4.2004). ⁵¹ UNMIK Reg. 2003/26 of 6.7.2003.

⁵² Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc. A/54/726, S/2002/59 (2000) at 153.

⁵³ UNTAET Reg. 2000/11 of 6.3.2000 (later amended). ⁵⁴ UNTAET Reg. 2000/15 of 5.7.2000.

⁵⁵ UNTAET Reg. 2000/16 of 5.7.2000. A legal aid service, including public defenders, was also created; UNTAET Reg. 2001/24 of 5.9.2001.

⁵⁶ UNTAET Reg. 2000/15 of 5.7.2000, ss. 4–6 (and torture, s. 7) and ss. 10–21. ⁵⁷ *Ibid.*, s. 2(3).

and norms of international law.⁵⁸ A provisional Code of Criminal Procedures was adopted to apply alongside the Indonesian criminal code.⁵⁹ Adding to the complexity, the Court of Appeal has ruled that Indonesian law could not be applied as domestic law, since the Indonesian occupation of East Timor was illegal, applying instead the law of the old colonial power, Portugal;⁶⁰ this turned prior practice on its head and created legal uncertainty. Initially most of the cases were pursued as violations of domestic law, such as murder, and not as international crimes, but subsequently there have been a number of convictions for crimes against humanity, many of them based on guilty pleas. Difficult issues have arisen, but have not always been sufficiently addressed, concerning the characterization of the conflict for the purpose of war crimes, the prerequisites for crimes against humanity, and the legal import of duress and superior orders.⁶¹

On 20 May 2002, after general and presidential elections, the UN handed over its authority to the new democratic institutions of East Timor. UNTAET was replaced by another UN mission, which did not have governmental powers but continued to provide the 'Serious Crimes Panels' with practical support. The UNTAET Regulations continued to apply provisionally and the 'Serious Crimes Panels' functioned under the authority of the new East Timorese Constitution. Gradually the regulations are being replaced and in May 2005 the 'Serious Crimes Panels' suspended operations indefinitely. The international judges and prosecutors have left and ordinary courts will now handle cases involving international crimes.

In both situations, these domestic institutions depend upon the respective home States to secure international cooperation, and this requires accession to international agreements as well as adoption of domestic legislation. Where the administration has been essentially carried out by the UN, the question has been raised concerning to what extent the UN missions are competent to fulfil such tasks and, if competent, whom they represent. In practice, lack of cooperation has frustrated efforts to prosecute. This has been particularly pronounced in East Timor since Indonesia has long refused to cooperate, in spite of a bilateral agreement, and has instead pursued some proceedings before a much criticized ad hoc tribunal in Jakarta.⁶² More recently, however, East Timor and Indonesia have made new attempts and in March 2005 they

⁵⁸ *Ibid.*, s. 3. ⁵⁹ UNTAET Reg. 2000/30 of 25.9.2000 (subsequently amended).

⁶⁰ *Armando Dos Santos*, Court of Appeals, East Timor 15.7.2003; for a critical view see, e.g. Sylvia de Bertodano, 'Current Developments in Internationalized Courts: East Timor – Justice Denied' (2004) 2 *JICJ* 910.

⁶¹ See, e.g. Suzannah Linton, 'Prosecuting Atrocities at the District Court of Dili' (2001) 2 *Melbourne Journal of International Law* 414; Suzannah Linton and Caitlin Reiger, 'The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admission of Guilt, Duress and Superior Orders' (2001) 4 *YIHL* 1; Claus Kress, 'The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes' (2002) 13 *Criminal Law Forum* 409; Kai Ambos and Steffen Wirth, 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000' (2002) 13 *CLF* 1; Guy Cumes, 'Murder as a Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor' (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 40.

⁶² See, e.g. Suzannah Linton, 'Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor' (2004) 17 *LJIL* 303.

agreed on a joint Commission on Truth and Friendship to inquire into certain events, with powers to recommend amnesties.

9.3.2 *Bosnia and Herzegovina: the War Crimes Chamber*

During the demise of the Former Yugoslavia, tens of thousands of people died and perhaps a million people were displaced in Bosnia and Herzegovina. With the 1995 Dayton Peace Agreement, a complex political structure and two 'entities' were created, as well as the Office of the High Representative (OHR) to oversee the civilian aspects of the Agreement on behalf of the international community; the High Representative is appointed by the UN Security Council. In one of the 'entities', the Federation of Bosnia and Herzegovina, the War Crimes Chamber of the State Court, located in Sarajevo, has been established as a domestic institution with international components.⁶³ The Chamber, which began its work in March 2005, stems from a joint initiative of the ICTY and the OHR. Individual States have provided the initial funding.

As well as being part of the reform of the national justice system by the High Representative, the Chamber also forms an essential element of the ICTY completion strategy,⁶⁴ being a domestic court to which the ICTY can refer cases against lower-level perpetrators in accordance with rule 11*bis* of the ICTY RPE.⁶⁵ This rule allows the referral of an indictment against an accused, regardless of whether he is in the ICTY's custody or not, to any State which has jurisdiction and which is willing and adequately prepared to accept such a case. The ICTY will consider the gravity of the crime and the level of responsibility of the perpetrator; it must also be satisfied that the accused would receive a fair trial and that the death penalty would not be imposed. Some cases have been referred, and the accused transferred, to Bosnia and Herzegovina from the ICTY.⁶⁶ A domestic law has been enacted to allow the War Crimes Chamber to receive such referrals.⁶⁷

The Chamber will also try cases initiated locally and the intention is to terminate its international features relatively quickly. The Chamber operates under national law, including new criminal and criminal procedures codes introduced by the OHR,⁶⁸ and deals with the most serious war-related crimes in Bosnia. Other crimes remain with the district or canton courts. The criminal code, *inter alia*, defines genocide, crimes against

⁶³ See, e.g. Human Rights Watch, *Looking for Justice – The War Crimes Chamber in Bosnia and Herzegovina*, February 2006, available at <http://hrw.org/reports/2006/ij0206/ij0206web.pdf>.

⁶⁴ See also SC res. 1503(2003) of 28.8.2003 (on the ICTY and ICTR completion strategy).

⁶⁵ See Michael Bohlander, 'Referring an indictment from the ICTY and ICTR to another court – Rule 11*bis* and the consequences for the law of extradition' (2006) 55 *ICLQ* 219 (also noting that the Tribunals under this scheme may issue an arrest warrant and direct States to surrender the accused to another State).

⁶⁶ See, e.g. *Janković and Stanković* ICTY A. Ch. 1.9.2005.

⁶⁷ Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH, Official Gazette of Bosnia and Herzegovina No. 61/04 (available at www.sudbih.gov.ba).

⁶⁸ Criminal Code of Bosnia and Herzegovina, Official Gazette No. 37/03, and Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette No. 36/03, both of 24.1.2003 (with amendments).

humanity and war crimes, regulates general criminal law principles such as command responsibility and provides for far-reaching criminal jurisdiction. Apart from the international involvement in the establishment of the institution and the adoption of applicable law, the Chamber has international judges at both trial and appeals levels (two international judges and one local judge who presides). The Office of the Prosecutor of the State Court has a Special Department for War Crimes with both international and local prosecutors and other staff, and an organization to suit ICTY referrals. International defence counsel are also provided for. In accordance with a transitional strategy, the international prosecutors and judges will gradually be phased out (by the end of 2007 and 2009 respectively). International legal cooperation will be crucial; a memorandum of understanding has been concluded with the Office of the Prosecutor of ICTY, Bosnia has adhered to certain European cooperation treaties, and efforts to establish regional agreements with neighbouring States are under way.

9.4 Courts established by a State with international support

9.4.1 Iraq: the Iraqi High Tribunal

During Saddam Hussein's authoritarian regime, lasting for over thirty-five years, national groups and communities were violently suppressed and wars were fought against neighbouring Iran and Kuwait. In the wake of his expulsion from power by coalition forces, a specialized court for genocide, crimes against humanity and war crimes was created in Iraq, primarily to deal with crimes of the old regime. The international aspects are distinctly different, and limited, compared with the courts previously mentioned. It originated with the Iraqi Special Tribunal, which was established by the Interim Governing Council (IGC) on 10 December 2003, a special domestic court but outside the existing structure of the domestic system. Three days later Saddam Hussein was captured. This was not a tribunal established by the Security Council, by a UN administration, by treaty, or not even directly by occupying powers like the post-Second World War Tribunals. Instead, the Coalition Provisional Authority (CPA) authorized the IGC, which the CPA had originally appointed, to establish the Special Tribunal with a Statute which had been drawn up with considerable international input,⁶⁹ and the Tribunal was enacted by the IGC on 8 March 2004.

Concerns were raised about the legal basis for the Tribunal, established by order of an occupying power, and its legitimacy.⁷⁰ These were put to rest by a new law, adopted

⁶⁹ Coalition Provisional Authority Order Number 48 of 10.12.2003 (to which the Iraqi Special Tribunal Statute was attached).

⁷⁰ See, e.g. Ilias Bantekas, 'The Iraqi Special Tribunal for Crimes against Humanity' (2004) 54 *ICLQ* 237, and Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal' (2005) 38 *Cornell International Law Journal* 327.

by the Iraqi Transitional National Assembly in 2005,⁷¹ which provides a new Statute for the Tribunal, now called the Iraqi High Tribunal. The Tribunal, now integrated into the domestic judicial system, has jurisdiction over certain crimes committed in Iraq or elsewhere between 16 July 1968 (the Ba'athist *coup d'état*) and 1 May 2003 (the 'end of major combat operations') by Iraqi nationals or residents; members of the coalition are thus excluded, as are juridical persons.⁷² The subject matter jurisdiction covers genocide, crimes against humanity and war crimes, all defined almost exactly as in the ICC Statute but not previously included in Iraqi law,⁷³ and some crimes under domestic law relating to abuse of power.⁷⁴ Interestingly, one of the domestic crimes, 'the pursuit of policies that may lead to the threat of war or use of the armed forces of Iraq against an Arab country', could apply as a kind of crime of aggression.⁷⁵ The Tribunal has concurrent jurisdiction with, but also primacy over, all other Iraqi courts, and it may under certain circumstances try someone who has already been tried by another Iraqi court.⁷⁶

Unlike other courts mentioned in this chapter, the judges and prosecutors of the Iraqi High Tribunal are all Iraqi nationals; the Statute allows the appointment of non-Iraqi judges, appointed by a national authority, but only if one of the plaintiffs in the case is a State.⁷⁷ Nonetheless, international advisers, observers, and defence co-counsel may work in the Tribunal,⁷⁸ and many do. Coalition members are also providing substantial support with regard to funding, training, security and personnel. However, the Tribunal's power to impose the death penalty has had the consequence that many States and international human rights groups will not support or cooperate with it.⁷⁹ The first trial before the Tribunal is of Saddam Hussein and other former top-ranking officials. In the first trial, the Tribunal (first instance) on 5 November 2006 sentenced Saddam Hussein to death for crimes against humanity; he was later hanged. The second trial began in August 2006 and deals with atrocities against Iraqi Kurds in 1988, including charges of genocide (the Anfal campaign).

9.4.2 *Serbia: the War Crimes Chamber*

The War Crimes Chamber of the Belgrade District Court in Serbia is another example of a specialized court for international crimes that was created with international assistance, primarily the OSCE, but which is entirely national in nature.⁸⁰ The

⁷¹ The Law on the Iraqi High Tribunal was signed by the Iraqi President on 11.10.2005, but it is unclear whether the law has actually entered into force. See Charles Garraway, 'The Statute of The Iraqi Special Tribunal' in Susan Breau and Agnieszka Jachec-Neale (eds.), *Testing the Boundaries of International Humanitarian Law* (London, 2006) 155–89.

⁷² Art. 1 of the SICT Statute. ⁷³ See, e.g. Yuval Shany, 'Does One Size Fit All?' (2004) 2 *JICJ* 338.

⁷⁴ Arts. 11–14 of the SICT Statute.

⁷⁵ See Claus Kress, 'The Iraqi Special Tribunal and the Crime of Aggression' (2004) 2 *JICJ* 347. See ch. 13.

⁷⁶ Arts. 29–30 of the SICT Statute. ⁷⁷ *Ibid.*, Arts. 4(3) and 28. ⁷⁸ *Ibid.*, Arts. 7(2)–(3), 8(10), 9(7)–(8) and 18(3).

⁷⁹ See, e.g. Tom Parker, 'Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal' (2005) 38 *Cornell International Law Journal* 899.

⁸⁰ Law on Organization and Competence of Government Authorities in War Crimes Proceedings, Official Gazette of the Republic of Serbia No. 67/2003. See Mark Ellis, 'Coming to Terms with Its Past: Serbia's New Court for the Prosecution of War Crimes' (2004) 22 *Berkeley Journal of International Law* 165.

Chamber and a specialized Prosecutor's Office for War Crimes, both established in 2003, have begun the operations. Jurisdiction extends to crimes committed anywhere in the former Socialist Federative Republic of Yugoslavia, regardless of the citizenship of the perpetrator or victims. ICTY has referred some cases to the Chamber, including crimes in Vukovar (Croatia) and Zvornik (Bosnia and Herzegovina), primarily in cases where no ICTY indictment was issued but more recently also a post-indictment referral under rule 11*bis* of the ICTY RPE.⁸¹

9.5 Lockerbie: an ad hoc solution for a particular incident

Yet another solution, although not for dealing with international crimes, was chosen for the prosecution of two Libyan nationals accused of the 1988 bombing of Pan Am flight 103 over Lockerbie in Scotland. The surrender of the accused from Libya, in return for the suspension of sanctions imposed by the Security Council against Libya under Chapter VII of the UN Charter,⁸² was secured only by coming to a special arrangement for the criminal proceedings. The court, prosecution and applicable law were all Scottish, but the court sat in a neutral venue in the Netherlands rather than in Scotland.

The compromise was worked out by the UN, Libya, the United States and the United Kingdom. Scottish law had to be amended to allow the Scottish High Court of Justiciary to sit abroad without a jury;⁸³ an agreement also had to be concluded between the United Kingdom and the Netherlands.⁸⁴ The indictment was, in the end, confined to charges of murder. Criminal jurisdiction was based on territoriality. On 31 January 2001 the High Court convicted one and acquitted one of the accused,⁸⁵ a verdict that was upheld on appeal on 14 March 2002.⁸⁶ This is not an example of an international court or of international crimes, but an ad hoc arrangement relating to a domestic trial brokered at the international level.

9.6 Relationship to the ICC

An interesting question is how these internationalized courts relate to the ICC. In many of the examples mentioned in this chapter there is no jurisdictional conflict between the internationalized court and the ICC; even where the territorial, personal and subject-matter jurisdictions overlap, the non-retroactive jurisdiction of the ICC prevents it from dealing with many past crimes. But some of the internationalized

⁸¹ See *Vladimir Kovačević* ICTY Referral Bench 17.11.2006.

⁸² SC res. 731(1992) of 21.1.1992, res. 748(1992) of 31.3.1992, res. 883(1993) of 11.11.1993, and res. 1192(1998) of 27.8.1998. See ch. 14.

⁸³ High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998.

⁸⁴ Agreement of 18.9.1998, reprinted in (1999) 38 *ILM* 926.

⁸⁵ *Her Majesty's Advocate v. Al Megrahi* (High Ct. Justiciary at Camp Zeist).

⁸⁶ *Al Megrahi v. HM Advocate* 2002 SCCR 509.

courts, for example those in East Timor and Kosovo, are not confined to dealing with past crimes and other internationalized courts may be established in the future.

Since most of the internationalized courts, so far, form part of the domestic system, the scheme of Article 17 of the ICC Statute (the complementarity principle) will apply to them and the ICC will have only complementary jurisdiction.⁸⁷ An arrangement like the Special Court for Sierra Leone, which is not established within a domestic court system, gives rise to different considerations – although it may be that the ICC would apply the principle of complementarity by analogy. It is to be expected that there would be opposition if the establishment of similar courts were proposed in the future with jurisdiction coinciding with that of the ICC.⁸⁸

Further reading

Kai Ambos and Mohamed Othman (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg i.Br, 2003).

Hervé Ascensio, Elisabeth Lambert-Abdelgawad and Jean-Marc Sorel (eds.), *Les juridictions pénales internationalisées (Cambodge, Kosovo, Sierra Leone, Timor Leste)* (Société de Législation Comparée, 2006).

M. Cherif Bassiouni (ed.), *Post-Conflict Justice* (New York, 2002).

Stuart Beresford and A.S. Muller, 'The Special Court for Sierra Leone: An Initial Comment' (2001) 14 *LJIL* 635.

Marcus Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation' (2001) 70 *Netherland Journal of International Law* 461.

Robert Cryer, 'A "Special Court" for Sierra Leone' (2001) 50 *ICLQ* 435.

Helen Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5 *Melbourne Journal of International Law* 462.

Suzanna Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 *CLF* 414.

Daryl Mundis, 'New Mechanisms for the Enforcement of International Humanitarian Law' (2001) 95 *AJIL* 934.

Cesare Romano, André Nollkaemper and Jann Kleffner (eds.), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, 2004).

Hansjörg Strohmeier, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46.

⁸⁷ See ch. 8. See also, e.g. Benzing and Bergsmo in Romano *et al.*, *Internationalized Criminal Courts*, 407–16, and Carsten Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design' (2005) 18 *LJIL* 425 at 462–5.

⁸⁸ See also the opposition to different alternatives discussed for Darfur prior to the SC referral to the ICC; e.g. Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *LJIL* 195.

PART D

Substantive Law of International Crimes

10

Genocide

10.1 Introduction

10.1.1 Overview

Genocide, as General Assembly resolution 96(1) declared, ‘is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings’. It is a crime simultaneously directed against individual victims, the group to which they belong, and human diversity.

The legal concept of genocide is narrowly circumscribed, the term ‘genocide’ being reserved in law for a particular subset of atrocities which are committed with the special intent to destroy groups, even if colloquially the word is used for any large-scale killings. Most of the crimes committed by the Pol Pot regime in Cambodia in 1975–78 and the instances of ‘ethnic cleansing’ carried out in the countries of former Yugoslavia in the 1990s are examples of atrocities which do not readily fit within the narrow definition, however dreadful the scale of the suffering they caused.¹ A decision that a particular atrocity is not ‘genocide’ does not of course remove the moral or legal guilt for conduct that falls within the definition of other international crimes. Many acts which do not constitute genocide will constitute crimes against humanity.

The special intent that is a necessary element of the crime, that of intending to destroy a group, marks it out from all other international crimes. This explains why genocide has a particular seriousness, and has been referred to as the ‘crime of crimes’.² When the conduct constituting the offence is attributable to a State, genocide, like other international crimes, is not only a crime of individual responsibility: it

¹ W. Schabas, *Genocide in International Law* (Cambridge, 2000) 189–201 and, in relation to Cambodia, Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn, Oxford, 2001) chs. 12–14 although see John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot, 2006) 27–31; Beth Van Schaack, ‘The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot’ (1997) 106 *Yale Law Journal* 2259.

² *Kambanda* ICTR T. Ch. 4.9.1998 para. 16.

also engages State responsibility.³ The seriousness of the crime is underlined by the fact that its prohibition has attained the status of a *ius cogens* norm⁴ and an *erga omnes* obligation on States (thus owed to the international community as a whole).⁵

The standard definition of genocide is contained in Article II of the Genocide Convention,⁶ which is adopted verbatim in the statutes of the ad hoc Tribunals and of the ICC. It is 'any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

Almost every word of this definition has raised interpretative difficulties. It is the purpose of this chapter to explain some of these controversies, and the way in which academics and courts have attempted to deal with them.

10.1.2 Historical development

The identification of genocide as an international crime came as a response to the Holocaust. Massacres with the purpose of exterminating national or ethnic minorities were not a twentieth century novelty, but the term 'genocide' was not coined until 1944 by Raphaël Lemkin, a Polish lawyer.⁷ The indictment of the defendants at Nuremberg accused them of having conducted 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies'.⁸ But genocide as such was not a crime within the jurisdiction of the Nuremberg Tribunal, and the term was not mentioned in its judgment. As the ICTR said many years later: 'The crimes prosecuted by the Nuremberg Tribunal, namely the holocaust of the Jews

³ On which see Payan Akhavan, 'Enforcement of the Genocide Convention through the Advisory Jurisdiction of the I.C.J.' (1991) 12 *Human Rights Law Journal* 285; Nina Jørgensen, 'State Responsibility and the 1948 Genocide Convention' in Guy Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford, 1999) 273; Marko Milanovic, 'State Responsibility for Genocide' (2006) 17 *EJIL* 553.

⁴ *Case concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda)* Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, para. 64, ICJ.

⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion (1951) ICJ Rep 15 at 23.

⁶ The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948.

⁷ Raphaël Lemkin, *'Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress'* (Washington, 1944) 79.

⁸ *The Trial of German Major War Criminals* (London, 1946), part I, 22; Indictment presented to the International Military Tribunal, Cmd 6696, 14. For the development of the concept of genocide in the cases brought under Control Council Law No. 10, see Matthew Lippman, 'The Convention On The Prevention And Punishment Of The Crime Of Genocide: Fifty Years Later' (1998) 15 *Arizona Journal of International and Comparative Law* 415.

or the “Final Solution”, were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later’.⁹

It was not until the adoption of General Assembly resolution 96(1) of 11 December 1946 that genocide was recognized explicitly as a separate international crime. The Genocide Convention, drafted largely by the Sixth Committee of the UN General Assembly, was concluded in 1948 and came into force on 12 January 1951. In the same year, the ICJ declared that the prohibitions contained in the Convention constituted customary international law.¹⁰

Although Article VI refers to the possibility of an international court being available to try cases of genocide, it was not until the establishment of the ad hoc Tribunals in 1993 and 1994 that this became a reality. The first conviction for genocide by an international court was recorded on 2 September 1998 by the ICTR, of Jean-Paul Akayesu, a Rwandan mayor. Two days after that, Jean Kambanda, the former Prime Minister of Rwanda was sentenced to life imprisonment after pleading guilty to genocide, conspiracy, incitement and complicity in genocide, as well as crimes against humanity. The first time the ICTY convicted a person of genocide was on 2 August 2001. This was of General Radislav Krstić for his role in the Srebrenica massacre in 1995.¹¹

10.1.3 Relationship to crimes against humanity

Genocide has obvious similarities to crimes against humanity. As mentioned in section 10.1.2, the Nuremberg defendants were charged with war crimes and crimes against humanity for what would now be prosecuted as genocide. The Genocide Convention makes clear in Article I that genocide can be committed in time of peace as in war and now that there is no longer a nexus between crimes against humanity and conflict¹² it is even clearer that genocide can be, indeed typically is, a form of crimes against humanity.¹³

The chief difference between the two categories of crime is the special intent to destroy the whole or part of a group that is a necessary element of genocide. The interests protected by the law against genocide are narrower than for crimes against humanity. Whilst the law against genocide protects the rights of certain groups to survival, and thus human diversity,¹⁴ the similar crime against humanity, persecution ‘against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as

⁹ *Kambanda* ICTR T. Ch. I 4.9.1998 para. 16.

¹⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion (1951) ICJ Rep 15 at 23.

¹¹ The conviction was later changed to one of aiding and abetting genocide.

¹² See section 11.2.1. ¹³ *Kayishema* ICTR T.Ch. 21.5.1999 para. 89 and Schabas, *Genocide*, 11.

¹⁴ ‘Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.’ *Krstić* ICTY A. Ch. 19.4.2004 para. 36.

impermissible under international law ...' concentrates more on protecting groups from discrimination than elimination.

Unlike crimes against humanity, genocide does not explicitly include any objective requirement of scale. The threshold for a crime against humanity is its connection to a widespread or systematic attack directed against a civilian population, and for a war crime, its commission during an armed conflict. The required elements for the latter two crimes therefore include an objectively existing situation of scale and gravity in which civilians are at risk. In contrast, the gravity of genocide is primarily marked not by an objective circumstantial element but by the subjective *mens rea*, the intent to destroy a national, ethnic, racial or religious group as such.

10.1.4 The nature of genocide

This last aspect raises the question of whether it is 'genocide' where an isolated individual acts with the intent to destroy a group in the absence of any wider plan or context of similar acts. In *Jelisić*, an ICTY Trial Chamber stated that killings committed by a single perpetrator are enough 'to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated'. The Chamber 'did not discount the possibility of a lone individual seeking to destroy a group as such'.¹⁵ Such a view is not supported consistently in the case law, or in the academic writing.¹⁶ William Schabas, for example, described the possibility as 'little more than a sophomoric *hypothèse d'école*'.¹⁷ To include in the scope of genocide an isolated crime, committed in the absence of any attack or genocidal context, even if legally possible, risks overly expanding the concept of genocide, and effacing the profound stigma and mobilizing power of the term. As the ICTY prosecution has warned:

in the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation. Indeed, it should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of humankind and which, therefore, justify the appellation of genocide as the 'ultimate crime'.¹⁸

¹⁵ *Jelisić* ICTY T. Ch. 14.12.1999 para. 400.

¹⁶ Even in *Jelisić* the Trial Chamber went on to say, at para 78: '... the Trial Chamber will have to verify that there was both an intentional attack against a group and an intention on the part of the accused to participate in or carry out this attack'. And see *Kayishema* ICTR T. Ch. II 21.5.1999 paras. 94, 276; Schabas, *Genocide*, 207–9. On both sides of the academic debate, see William Schabas, 'The *Jelisić* Case and the *Mens Rea* of the Crime of Genocide' (2001) 14 *LJIL* 125; Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) 14 *LJIL* 399; J. Quigley: *The Genocide Convention: An International Law Analysis* (Aldershot, 2006) 164–70.

¹⁷ William Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (2005) 18 *LJIL* 871 at 877.

¹⁸ *Karadžić and Mladić* ICTY T.Ch. (transcript of hearing) 27.6.1996 at 15–16.

It is ordinarily assumed therefore that several protagonists are involved in the crime of genocide.¹⁹ Although it is not a formal element of the crime that there be a genocidal plan,²⁰ the Tribunals have noted that it would be difficult to commit genocide without one.²¹

But how is this collective nature of the crime to be reflected in the elements of the offence when a court is assessing the guilt or innocence of one individual accused? The issue may be addressed either in the context of the material elements of the crime or as a requirement of the mental element.²² The first approach is that taken by the Elements of Crimes adopted for the ICC, which add a 'contextual element' to the *actus reus*, requiring that the conduct for which the defendant is on trial takes place in the context of 'a manifest pattern of similar conduct' or is of itself able to destroy the group or part of it. This element does not entirely exclude the possibility of a 'lone *génocidaire*'; it is discussed in more detail at section 10.3.2. The alternative approach, in the context of the special intent requirement, is that there must be an organized and widespread plan to exterminate a group and the perpetrator must act with knowledge that the commission of the individual act would, or would be likely to, further the implementation of the plan.²³ This approach is discussed at section 10.4.4.

10.2 The protected groups

Not all groups of people are protected by the Genocide Convention. The Convention lists only 'national, ethnical, racial and religious' groups, and the list is a closed one. During the negotiation of the Convention attempts were made to include others, such as social and political groups, but these failed.²⁴ Ever since the conclusion of the Convention there have been criticisms of its narrow focus and proposals have been made to expand it, but these have all been unsuccessful.²⁵ It has also been suggested that other groups come within the scope of genocide by virtue of customary international law²⁶ or that the existing terms should be expansively interpreted so as to include other groups within the definition. The highest-profile example of this was by the ICTR Trial Chamber sitting in the *Akayesu* case. On the basis of a (mis)reading of the *travaux préparatoires* the Chamber determined that the drafters of the Convention intended to protect any stable and permanent group, rather than simply

¹⁹ *Krstić* ICTY T. Ch. I 2.8.2001 para. 549. ²⁰ *Jelić* ICTY A. Ch. 5.7.2001 para. 48.

²¹ *Kayishema* ICTR T. Ch. II 21.5.1999 para. 94; *Jelić* ICTY T. Ch. 14.12.1999 para. 101.

²² Schabas, 'The *Jelić* Case', 133–8.

²³ See John R. W. D. Jones, 'Whose Intent is it Anyway?' in Lal Chand Vohrah *et al.* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (The Hague, 2003), 467.

²⁴ UN GAOR, 3rd session, 6th Committee, p. 664; see Schabas, *Genocide*, 130–50.

²⁵ For attempts made during the ICC negotiations, see *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR 50th Sess, Supp. No. 22, A/50/22 (1995) paras. 60–1 and Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN GAOR, 51st Sess., Supp. No. 22, A/51/22 (1996) paras. 59–60.

²⁶ Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 *Yale Law Journal* 2259.

the groups specifically mentioned.²⁷ While stability and permanence were certainly used as criteria by some delegates in the Sixth Committee to argue for or against the inclusion of a particular group in the drafting of the Convention, there is no evidence at all that that was adopted as an open-ended description of protected groups. All the evidence is that the enumerated list of groups was intended to be exhaustive.

The view that *any* 'stable and permanent group' is included within the Convention's protected groups was however followed by the Commission of Inquiry established by the Security Council to investigate violations of international humanitarian law and human rights in Darfur.²⁸ The Commission found indeed that this expansive interpretation has 'become part and parcel of international customary law'.²⁹ But the Commission's finding in this regard, which indicates that the Convention list of groups is not exhaustive, is not supported by case law other than *Akayesu* nor by State practice and *opinio juris*, and cannot be seen as reflective of current law. No other Trial Chamber of the two ad hoc Tribunals has followed the *Akayesu* approach, and the Appeals Chamber has consistently, albeit quietly, kept to the view that the four groups are the exclusive focus of the Genocide Convention.³⁰

There are national jurisdictions that have adopted wider formulations of the protected groups in their domestic law.³¹ At the domestic level, States are entitled to use broader definitions but other States are not required to accept those definitions.³² It has been rightly said that it is precisely because of the rigours of the definition, and because of its focus on crimes aimed at the eradication of particular groups, that genocide is especially stigmatized.³³

10.2.1 National, racial, ethnical and religious groups

Given that these four groups are the exclusive beneficiaries of the protection of the Genocide Convention, it is unfortunate that there is no internationally recognized definition of any of the terms it uses. It is difficult to attribute a distinct meaning to each, since they overlap considerably.³⁴ Indeed, attempts to do so risk missing the wood for the trees. The ICTR Trial Chamber in *Akayesu* sought to give each term its own definition but in so doing ran into difficulties in assessing whether the Tutsi

²⁷ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 516. For critique see Schabas, *Genocide*, 130–3. In support see Diane Marie Amann, 'International decisions: Prosecutor v Akayesu' (1999) 93 *AJIL* 195.

²⁸ Res. 1564 (2004) of 18.9.2004.

²⁹ Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur UN Doc.S/2005/60 para. 501.

³⁰ *Krštić* ICTY A. Ch. 19.4.2004 paras. 6–8; see Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the ad hoc Tribunals' (2000) 49 *ICLQ* 579 at 588–92.

³¹ For example, see the Spanish *Pinochet* case, noted at (1999) 93 *AJIL* 690, especially p. 693.

³² Genocide charges against General Pinochet were not considered in the extradition process in the UK, on the basis that they relied on an interpretation of genocide broader than that in international law; see David Turns, 'Pinochet's Fallout: Jurisdiction and Immunity for Criminal Violations of International Law' (2000) 20 *Legal Studies* 566 at 567–8.

³³ Schabas, *Genocide*, 9.

³⁴ For a powerful argument in favour of identifying separate meanings see Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461.

were a protected group in the context of the widespread massacres in Rwanda.³⁵ Having defined an ethnic group as ‘a group whose members share a common language or culture’,³⁶ the evidence before the Chamber made it clear that it was not thus that the Tutsi were distinguished from the Hutu. The Chamber had to rely on the fact that Rwandans were required to carry identification cards indicating the ethnicity of the bearer as Hutu, Tutsi or Twa and that the Tutsi constituted a group referred to as ‘ethnic’ in official classifications. It was only by virtue of its determination that any ‘stable and permanent’ group was covered by the Convention, and therefore by the ICTR Statute, that the Chamber was able to find that the Tutsi were a protected group.³⁷ As mentioned above, the decision on this point is not legally defensible. That would not however change the outcome in this case, as the Tutsi would be considered an ethnic group on the correct interpretation of the Convention.

The alternative approach, forcefully defended by William Schabas,³⁸ and followed by the *Krštić* Trial Chamber, is to recognize that the list is exhaustive but to accept that the four groups were not given distinct and different meanings in the Convention:

European instruments on human rights use the term ‘national minorities’, while universal instruments more commonly make reference to ‘ethnic, religious or linguistic minorities’; the two expressions appear to embrace the same goals. In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F. Capotorti commented that ‘the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word “racial” by the word “ethnic” in all references to minority groups described by their ethnic origin’. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin’. The preparatory work on the Genocide Convention also reflects that the term ‘ethnic’ was added at a later stage in order to better define the type of groups protected by the Convention and ensure that the term ‘national’ would not be understood as encompassing purely political groups.

The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as ‘national minorities’, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.³⁹

³⁵ For critique of the Chamber’s reasoning, see Payam Akhavan, ‘The Crime of Genocide in the ICTR Jurisprudence’ (2005) 3 *JICJ* 989.

³⁶ *Akayesu* ICTR T. Ch. I 2.9.1998 paras. 512–15 and see *Kayishema* ICTR T. Ch. II 21.5.1999 para. 98.

³⁷ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 702. ³⁸ Schabas, *Genocide*, 109–14.

³⁹ *Krštić* ICTY T. Ch. I 2.8.2001 paras. 555–6 (footnotes not included); and see *Rutaganda* ICTR T. Ch. 6.12.1999 para. 56. See also Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/398 para. 56.

Schabas has suggested that the groups also ‘help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection.’⁴⁰ This ‘four corners’ approach avoids the difficulties of fitting a group such as the Tutsis precisely into one of the listed categories, but ensures that it comes within the area of protection that was intended by the negotiators, while also respecting the negotiators’ intent that the list be a closed one.

10.2.2 Identification of the group

As is clear from the wording of the different parts of the *actus reus* of the offence, the acts must be directed at members of the group. However, determination of membership of groups is not a simple matter; it is certainly more difficult than the drafters of the Convention, working against the presuppositions (and perhaps prejudices) of their era, thought. There are genuine difficulties in deciding if a person is a member of the group, and the difficult question of who ought to be able to make that determination arises.⁴¹ A subjective approach has its attractions: that is, taking the fact that a perpetrator considers the victims to be members of a group he or she is targeting as the criterion for the identification of members of the group. The most significant factor in a particular case may be that the perpetrators have the specific intent to destroy a group identified by themselves. As was said in the *Bagilishema* case:

A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the Chamber as a member of the protected group, for the purposes of genocide.⁴²

It is by no means clear that groups intended to be protected by the Genocide Convention always have an objective existence in the manner which the drafters thought. Groups are often social constructs, rather than scientific facts. This problem was discussed by the Darfur Commission, owing to the fact that, although the US had described the crimes committed in Darfur as ‘genocide’,⁴³ on close analysis, the question of group existence in Darfur was complicated. The Commission found that the people who had been the object of attack did not appear to make up ethnic groups distinct from those to which their attackers belonged. They had the same religion, and

⁴⁰ Schabas, *Genocide*, 111.

⁴¹ In the human rights context, see the decision of the Human Rights Committee in *Lovelace v. Canada* Human Rights Committee (22/47).

⁴² *Bagilishema* ICTR T. Ch. I 7.6.2001 para. 65.

⁴³ House Concurrent Resolution 467, Senate Concurrent Resolution 133, 22.7.2004.

the same language, though the ‘Africans’ spoke their own dialect in addition to Arabic, while the ‘Arabs’ spoke only Arabic. Years of inter-marriage and coexistence had blurred the distinction between the groups. The sedentary or nomadic character of the groups appeared to constitute one of the main distinctions between them.⁴⁴

Thus the Commission relied upon a partially subjective concept of groups:

Those tribes in Darfur who support rebels have increasingly come to be identified as ‘African’ and those supporting the government as the ‘Arabs’ ... The Arab-African divide has also been fanned by the growing insistence on such divide in some circles and in the media. All this has contributed to the consolidation of the contrast and gradually created a marked polarisation in the perception and self-perception of the groups concerned. At least those most affected by the conditions explained above, including those directly affected by the conflict, have come to perceive themselves as either ‘African’ or ‘Arab’.⁴⁵

Although reliance on a purely subjective approach might seem uncomfortable, it may be that with racism there is not always an objective basis: it may be based on imagined distinctions rather than genuine ones.⁴⁶

While the Tribunals have in some cases appeared to use an entirely subjective approach,⁴⁷ the better view is that the group must have some form of objective existence in the first place; otherwise the Convention could be used to protect entirely fictitious national, ethnic, racial or religious groups. It now seems settled that the identification of members of the group cannot be *solely* subjective. To overcome the problems of purely objective and purely subjective approaches, the Tribunals have adopted an approach that blends the two, but with sensitivity to the fact that the idea of a separate group may not have a basis in objective fact, but can be a set of reified beliefs about difference. Thus, whether a group is a protected one should be ‘assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators’.⁴⁸

In addition, it is now well-established that, notwithstanding some case law to the contrary,⁴⁹ a group cannot be defined ‘negatively’, i.e. by identifying persons not sharing the group characteristics of the perpetrators, for example, ‘non-Serbs’.⁵⁰ It is also the case that where a person has a mixed identity, if they are targeted on the basis of membership of the protected group, the person so targeting them may be guilty of genocide. Thus in the *Ndindabahizi* case, the ICTR accepted that a half-Belgian, half-Rwandan man, who was targeted as a Tutsi in the Rwandan genocide, was a Tutsi for the purpose of convicting the defendant of genocide.⁵¹

⁴⁴ Report, UN Doc. S/2005/60 para. 508.

⁴⁵ *Ibid.*, para. 510. ⁴⁶ See Schabas, ‘Darfur and the “Odious Scourge”’, 879.

⁴⁷ *Kayishema* ICTR T. Ch. II 21.5.1999 para. 98; *Jelisić* ICTY T. Ch. 14.12.1999 paras. 69–72.

⁴⁸ *Semanza* ICTR T Ch. 15.5. 2003 para. 317.

⁴⁹ *Jelisić* ICTY T. Ch. 14.12.1999 paras. 70, 71; and see Judge Shahabudeen’s powerful dissent in *Stakić* ICTY A. Ch. 22.3.2006 paras. 8–18.

⁵⁰ *Stakić* ICTY T. Ch. II 31.7.2003 para. 512; A. Ch. 22.3.2006 para. 19.

⁵¹ *Ndindabahizi*, ICTR T. Ch. 15.7.2004, paras. 467–9.

10.3 Material elements

10.3.1 *The prohibited acts*

Not every act committed with the intention to destroy, in whole or in part, a protected group will lead to a conviction for genocide. Only those which are mentioned in Article II of the Genocide Convention may form the *actus reus* of genocide. Although all of the underlying crimes are defined by reference to victims in the plural, the ICC elements state that even one victim suffices, if the relevant act is committed with the necessary intent. This is a controversial conclusion in relation to subparagraph (c) of Article II, which refers to inflicting conditions of life on the ‘group’.

Killing

Article II(a) covers what is the paradigmatic conduct that amounts to genocide: killing members of the group. However, there are certain interpretative problems which have had to be resolved. The English term ‘killing’ (which the ICC Elements of Crimes state is interchangeable with ‘caused death’) is neutral as to whether the killing is intentional, or whether reckless (or perhaps even negligent) causing of death suffices. The term used in the French version of the Genocide Convention, ‘*meurtre*’, is more precise. In *Kayishema*, the Appeal Chamber confirmed the Trial Chamber’s view that there is virtually no difference between the terms in the English and French versions *in the context* of genocidal intent.⁵² The act must be intentional but not necessarily premeditated.⁵³ Owing to the operation of Article 30 of the Rome Statute, genocidal killings must be intentional in proceedings before the ICC. If there is doubt about the intention to kill, rather than the intention to cause serious harm, it is of course possible to charge the defendant pursuant to Article II(b) of the Convention for the conduct that led to the death.

Causing serious bodily or mental harm to members of the group

In spite of the popular understanding of genocide as being confined to conduct causing death, the drafters of the Genocide Convention were not so limited in their understanding of the crime. Article II(b) of the Convention also criminalizes the causing of serious bodily or mental harm to victims. In the *Eichmann* case, the District Court of Jerusalem said that serious bodily and mental harm could be caused ‘by the enslavement, starvation, deportation and persecution of people . . . and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture’.⁵⁴ The ICTR in the *Akayesu* case broke new ground in deciding that acts of sexual violence and rape can

⁵² *Kayishema* ICTR A. Ch. I.6.2001 para. 151; for a critique see David Nersessian, ‘The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals’ (2002) 37 *Texas International Law Journal* 231.

⁵³ See, e.g. *Stakić* ICTY T. Ch. II 31.7.2003 para. 515. ⁵⁴ *A-G of Israel v. Eichmann* (1968) 36 ILR 5 (DC) 340.

constitute genocide; sexual violence was found to be an integral part of the process of destruction in the Rwanda genocide.⁵⁵ The ICC Elements follow this approach.⁵⁶

It is perhaps surprising to see serious *mental* harm as a genocidal act. The reason for its inclusion was Chinese insistence that policies of deliberate creation of drug addiction such as those of Japan in occupied China could be prosecuted as genocide.⁵⁷ Owing to its concerns about the possible breadth of this aspect of genocide, the US entered an 'understanding' to the Convention on ratifying, which stated that the term 'means permanent impairment of mental faculties through drugs, torture or similar techniques'. Serious mental harm does mean more than minor or temporary impairment of mental faculties,⁵⁸ but neither mental nor physical harm need be permanent or irremediable.⁵⁹ Obviously, as the term 'serious' is one which involves a value judgment, there will be differing views on what treatment is included. In *Kayishema*, it was decided that decisions on what is meant by serious bodily or mental harm should be made on a case-by-case basis.⁶⁰

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

This category of prohibited acts comprises methods of destruction whereby the perpetrator does not immediately kill the members of the group, but which seek to bring about their physical destruction in the end.⁶¹ The ICC Elements of Crimes interpret the term 'conditions of life' as including but 'not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'.⁶² Unlike the two previous categories, this is not a result-based form of the crime⁶³ but it requires that the conditions are 'calculated' to achieve the result.⁶⁴

The question of the forced migration of people, commonly known by the ugly neologism 'ethnic cleansing', has been considered under the head of deliberate infliction of conditions of life. This practice, when committed by the Serbs to eliminate the Muslim presence in large parts of Bosnia-Herzegovina, was regarded by ad hoc Judge Lauterpacht in the ICJ provisional measures ruling of 13 September 1993 as constituting genocide.⁶⁵ Ethnic cleansing has also been considered genocide by the ICTY in the decision confirming the second indictment in *Karadžić and Mladić*.⁶⁶ As seen

⁵⁵ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 731. ⁵⁶ ICC EOC, Art. 6(b), n. 3. ⁵⁷ Schabas, *Genocide*, 159–60.

⁵⁸ *Semanza* ICTR T. Ch. 15.5.2003 para. 321.

⁵⁹ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 502. The *Kayishema* Trial Chamber gave perhaps a narrower interpretation as 'harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses'; *Kayishema* ICTR T. Ch. II 21.5.1999 para. 109.

⁶⁰ *Ibid.*, para. 110. ⁶¹ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 505.

⁶² ICC EOC, Art. 6(c) n. 4. ⁶³ See e.g. *Stakić* ICTY T. Ch. II 31.7.2003 para. 517.

⁶⁴ As pointed out in Kreß, 'The Crime of Genocide', 481–3, 'calculated' and 'physical destruction' are difficult concepts.

⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* [1993] ICJ Rep. 325 at 431–2.

⁶⁶ Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence ICTY T. Ch. I 11.7.1996 para. 94.

above, the ICC elements give ‘systematic expulsion from homes’ as one of the illustrations of this category of prohibited act.

But ethnic cleansing does not necessarily constitute genocide. In the case of *Eichmann* the District Court of Jerusalem found that, before 1941, Nazi persecution of the Jews was aimed at persuading them to leave Germany. Only later did the policy develop into one for their destruction. Since the court doubted that there was a specific intent to exterminate before 1941, Eichmann was acquitted of genocide for acts before that date.⁶⁷

Eichmann is authority for the proposition that if and in so far as the objective of a forced migration is ‘only’ to remove a group or part of it from a territory, it differs from that of genocide. In *Brđanin* for example, the Trial Chamber found a ‘consistent, coherent and criminal strategy of cleansing the Bosnian Krajina’ but determined that the crimes had been committed with ‘the sole purpose of driving people away’.⁶⁸ There was no evidence that they had been committed with the intent required for genocide.⁶⁹ The fact of forced migration alone is not enough for a court to deduce the special intent of destruction of the group.

Imposing measures intended to prevent births within the group

This provision (Article II(d) of the Genocide Convention) was inspired by the Nazis’ practice of forced sterilization before and during the Second World War. Examples of these measures given by the ICTR Trial Chamber in *Akayesu* are sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriages.⁷⁰ The Trial Chamber added:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped subsequently refuses to procreate, in the same way that members can be led, through threats or trauma, not to procreate.⁷¹

While this may stray into the separate crime of forced impregnation, it is not overbroad, given that both genocidal intent, and the intent to prevent births within the group must also be proved.

⁶⁷ *A-G of Israel v. Eichmann* (1968) 36 ILR 5 (DC). See Schabas, *Genocide*, 875.

⁶⁸ *Brđanin* ICTY T. Ch. II 1.9.2004 at para. 118.

⁶⁹ *Ibid.*, at para. 989. See also *Stakić* ICTY T. Ch. II 31.7.2003 paras. 519, 557; *Stakić* ICTY A. Ch. 22.3.2006 paras. 46–8.

⁷⁰ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 507. ⁷¹ *Ibid.*, paras. 507–8.

Forcibly transferring children of the group to another group

This is the form of genocide which has received the least judicial consideration.⁷² Probably the most authoritative interpretative source on the point is to be found in the ICC Elements of Crimes, defining children as being those below 18 and noting that '[t]he term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment'.

The provision (Article II(e)) was included in the Genocide Convention as a compromise for the exclusion of cultural genocide. In 1997, the Australian Human Rights and Equal Opportunities Commission controversially decided that the forcible transfer of Aboriginal children to non-indigenous institutions and families constituted genocide.⁷³ The wording of the Commission's findings indicated however that it was 'cultural genocide' that was in mind, since the objective of the transfers was to assimilate the children into non-Aboriginal society. Cultural genocide is not within the scope of the Convention,⁷⁴ nor in customary law,⁷⁵ although this particular form of genocide is close to accepting such a concept.⁷⁶

10.3.2 The 'contextual element'

The ICC Elements have an additional material element, which has no reflection in the Convention itself and was introduced to avoid the view expressed in the *Jelisić* case that genocide could be committed by a single individual.⁷⁷ In relation to each prohibited act the element requires that:

[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁷⁸

The first branch of this element reflects the more likely situation, where the individual accused is acting within a broader context in which others are also committing acts of genocide against the targeted group. The adjective 'manifest', included at the insistence of the US, means that the pattern must be a clear one and not one of a few isolated crimes occurring over a period of years.⁷⁹ The second branch applies where the conduct in question 'could itself effect such destruction'. Although by far the less likely, this could occur where a group is particularly small or where the accused has access to powerful means of destruction (such as the use of a nuclear or biological

⁷² Although see *Akayesu* ICTR T. Ch. I 2.9.1998 para. 509.

⁷³ Cited in Schabas, *Genocide*, 178. ⁷⁴ See section 10.4.1.

⁷⁵ *Krštić* ICTY T. Ch. I 2.8.2001 para. 580, *Krštić* ICTY A. Ch. 19.4.2004 para. 25.

⁷⁶ Schabas, *Genocide*, 175. ⁷⁷ See section 10.1.4.

⁷⁸ See Valerie Oosterveld and Charles Garraway, 'The Elements of Genocide' in Roy Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York, 2001) 41 at 44, 45.

⁷⁹ *Ibid.*, at 47.

weapon) with genocidal intent. In such a case there is no need for a pattern of similar conduct, since the accused is in a position to pose a real threat to a protected group. The provision would be relevant for prosecutions of ringleaders and instigators. It would also capture those who had the means to destroy a group but for whatever reason managed to cause only a single death or a few deaths, such that there would be no objective 'pattern'.⁸⁰

The Elements of Crime are equivocal on the mental element attaching to this element:

Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.⁸¹

The pedigree of the 'contextual element' is not well-founded, being based very loosely on two passages in the *Akayesu* trial judgment.⁸² The Trial Chamber in *Krštić* incorporated it, however, requiring that 'acts of genocide must be committed in the context of a manifest pattern of similar conduct, or themselves constitute a conduct that could in itself effect the destruction of the group, in whole or in part'.⁸³ The ICTY Appeals Chamber was hostile to the Trial Chamber's view:

The Trial Chamber relied on the definition of genocide in the Elements of Crimes adopted by the ICC. This definition, stated the Trial Chamber, 'indicates clearly that genocide requires that "the conduct took place in the context of a manifest pattern of similar conduct."' The Trial Chamber's reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite ... the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention and was not mandated by customary international law. Because the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time *Krštić* committed his crimes, it cannot be used to support the Trial Chamber's conclusion.⁸⁴

The ICC judges will give consideration to the contextual provision in the Elements and be guided by it,⁸⁵ unless they are convinced that it is inconsistent with the Statute.⁸⁶ If genocide is to be seen as a particularly serious crime, some threshold of objective 'scale and gravity'⁸⁷ must be maintained and the ICC Elements provision offers a formulation which has been accepted and adopted by consensus by the international

⁸⁰ Wiebke Rückert and Georg Witschel, 'Genocide and Crimes Against Humanity in the Elements of Crimes' in H. Fischer, C. Kreß and S. R. Lüder (eds.), *International and National Prosecution of Crimes under International Law* (Berlin, 2000) 66.

⁸¹ Para. 3 of introduction to EOC for Art. 6. ⁸² *Akayesu* ICTR T. Ch. I 2.9.1998 paras. 520 and 523.

⁸³ *Krštić* ICTY T. Ch. I 2.8.2001 para. 682. ⁸⁴ *Krštić* ICTY A. Ch. 19.4.04 para. 224.

⁸⁵ ICC Statute Arts. 9(1) and 21(1)(a).

⁸⁶ ICC Statute, Art. 9(3). See also Herman von Hebel, 'The Making of the Elements of Crimes' in Lee, *Elements and Rules*, 7–8.

⁸⁷ *Krštić* ICTY T. Ch. I 2.8.2001 para. 549.

community. But after *Krštić* the Tribunals will not be accepting the provision within their own jurisprudence.

10.4 Mental elements

The mental elements of genocide comprise both the requisite intention to commit the underlying prohibited act (such as killing) and the intent special to genocide. It is the special intent 'to destroy in whole or in part [a protected group] as such' that distinguishes genocide from other crimes.⁸⁸ But the meaning to be attributed to this intent requirement is a matter of some difficulty. There are four aspects to be considered, and they are interconnected. Does every perpetrator have to have a specific intent to destroy or is it sufficient, either for all, or at least for non-leaders, that they have knowledge of a collective plan and foresee that their conduct will further it? Is motive relevant? What is the 'whole' or 'part' of a group? What is the meaning of 'destroy' for the purpose of the special intent? These four issues will be considered in reverse order.

10.4.1 'to destroy'

The destruction specified here is physical or biological, although the means of causing the destruction of the group may be by acts short of causing the death of individuals.⁸⁹ Other forms of destruction, for example, the social assimilation of a group into another, or attacks on cultural characteristics which give a group its own identity, do not constitute genocide if they are not related to physical or biological destruction. While the preamble to GA resolution 96(1) stated that genocide 'results in great losses to humanity in the form of cultural and other contributions represented by these human groups', this did not suggest that cultural loss, in the absence of physical destruction, can amount to genocide. The *travaux préparatoires* of the Convention indicate that the inclusion of cultural genocide was hotly debated and eventually rejected.⁹⁰

Some national jurisdictions have extended the meaning of genocide to cover other forms of destruction within their own law.⁹¹ But, as the Trial Chamber in *Krštić* (which was quoted approvingly on appeal) put it:

despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking only the cultural or sociological characteristics of a human group in order to

⁸⁸ *Kambanda* ICTR T. Ch. I 4.9.1998 para. 16; *Kayishema* ICTR T. Ch. II 21.5.1999 para. 91.

⁸⁹ *Ibid.*, para. 95. ⁹⁰ Summarized in Schabas, *Genocide*, 179–85.

⁹¹ See, e.g. the decision of the German Federal Constitutional Court 2BvR 290/99, 12.12.2000 para. III(4)(a)(aa).

annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.⁹²

The Trial Chamber in the later case of *Blagojević* appears to have departed from this in finding that ‘the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group was’. It emphasized ‘that its reasoning and conclusion are not an argument for cultural genocide, but rather an attempt to clarify the meaning of physical and biological destruction’⁹³ but this looks like an attempt to square the circle. The issue may be decided in the ICJ in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.⁹⁴

10.4.2 ‘in whole or in part’

This aspect of the intention⁹⁵ is one which has caused considerable controversy. This is because the ambit of the protections granted by the prohibition of genocide is quite heavily dependent on how broadly or narrowly the relevant group is conceptualized, and what a part of that group is. To take an example from a clear case of genocide – Rwanda – the Hutu *génocidaires* did not appear to want to destroy all Tutsis everywhere, but only in Rwanda.⁹⁶ The relevant group could be conceived of as Tutsis everywhere, in which case Rwandan Tutsis were protected only as a ‘part’ of that group. Or it could be thought that the relevant group was the Rwandan Tutsis. This difference matters, as in the latter instance, an intention to destroy all the Tutsis in part of Rwanda could fulfil this aspect of the mental element of genocide. In the former, it could not. It is also relevant that it is not genocide if the intention is to target a part which is less than ‘substantial’.⁹⁷

The findings in *Krštić* illustrate the difficulties of determining both the whole and the substantial part of the group for the purpose of assessing whether the special intent is present. The Trial Chamber determined that the Bosnian Muslims constituted the protected group and ‘the Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group’.⁹⁸ This finding was affirmed by the Appeal Chamber, which also pointed out that, in determining what a ‘substantial’ part was, the prominence of the targeted individuals within the group as well as the number targeted (in absolute and in relative terms) could also be relevant; hence, both qualitative and quantitative criteria should be considered. ‘If a specific

⁹² *Krštić* ICTY T. Ch. I 2.8.2001 para. 580; *Krštić* ICTY A. Ch. 19.4.2004 para. 25.

⁹³ *Blagojević and Jokić* ICTY T. Ch. 17.1.2005 para. 666.

⁹⁴ Proceedings instituted 20.3.1993 (judgment not yet issued).

⁹⁵ It is worth emphasizing that this part of the offence is a part of the mental element, not the material elements of genocide – it is not necessary to establish whether all or part of a group was actually destroyed to prove genocide.

⁹⁶ *Krštić* ICTY A. Ch. 19.4.2004 para. 13.

⁹⁷ *Kayishema* ICTR T. Ch. II 21.5.1999 para. 96; *Bagilishema* ICTR T. Ch. I 7.6.2001 para. 64; *Semanza* ICTR T. Ch. 15.5.2003 para. 316.

⁹⁸ *Krštić* ICTY T. Ch. I 2.8.2001 para. 560.

part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.⁹⁹ Here the fate of the Srebrenica Muslims was emblematic of that of all Bosnian Muslims.

The decision has been criticized as having set too low a threshold for the scale of genocide.¹⁰⁰ The killings were of 7,000–8,000 men, and it therefore appeared that the people targeted formed a part of a part of a group. However the Chamber also took into account the fact that women and children were transferred from the area, to argue that the ‘part’ of the group was the Bosnian Muslims of Srebrenica. The prosecution had urged the ICTY to take the view that the Bosnian Muslims of Srebrenica were the relevant whole group.¹⁰¹ If the Chamber had accepted this, it would have made proving genocide considerably simpler for the prosecution, as the Bosnian Muslim men of military age could have been seen as a substantial part of the group. This would however have diluted the concept of genocide considerably.

10.4.3 ‘as such’

During the negotiation of the Convention there were those who wanted to include motive as a necessary element of genocide. Others did not. The compromise which allowed agreement to be reached was to exclude any explicit reference to motive, but to include the words ‘as such’.¹⁰² While these words are therefore relied upon by some as evidence for the need for motive¹⁰³ the *travaux préparatoires* disclose that that was not the meaning that all the negotiators attached to the words.

The motive for which a crime is committed, as opposed to the intention with which it is committed, is ordinarily irrelevant to guilt in criminal law. But the discriminatory nature of genocide seems to require a motive: the victims are singled out not by reason of their individual identity but *because of* their membership of a national, ethnic, racial or religious group.¹⁰⁴ It is not surprising therefore that decisions by the ad hoc Tribunals have sometimes used the language of motive, referring to the need for the accused to ‘seek’ or ‘aim at’ the destruction of the group.¹⁰⁵ If it is possible to untangle the sometimes apparently conflicting case law of the Tribunals, it can be said that the Tribunals do distinguish between motive and genocidal intent;¹⁰⁶ personal motivation (such as a wish to profit financially from the genocide) for the perpetrator’s

⁹⁹ Krštić ICTY A. Ch. 19.4.2004 para. 12.

¹⁰⁰ William Schabas, ‘Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia’ (2002) 25 *Fordham International Law Journal* 23 at 45–7: ‘categorising [the atrocities] as “genocide” seems to distort the definition unreasonably’. And see Katherine Southwick, ‘Srebrenica As Genocide? The Krštić Decision And The Language Of The Unspeakable’ (2005) 8 *Yale Human Rights and Development Law Journal* 188 at 206–11.

¹⁰¹ Krštić ICTY T. Ch. I 2.8.2001 para. 545.

¹⁰² The negotiations are well summarized in A. Greenwalt, ‘Rethinking Genocidal Intent: The case for a Knowledge-Based Interpretation’ (1999) 99 *Columbia Law Review* 2259 at 2274–9 and Schabas, *Genocide*, 246–51.

¹⁰³ See the discussion in Quigley, *The Genocide Convention*, 120–6.

¹⁰⁴ *Niyitegeka* ICTR A. Ch. 9.7.2004 para. 53; *Musema* ICTR A. Ch. 16.11.2001 para. 165.

¹⁰⁵ See, e.g. *Jelišić* ICTY A. Ch. 5.7.2001 para. 46; *Rutaganda* ICTR A. Ch. 26.5.2003 para. 524.

¹⁰⁶ *Krštić* ICTY T. Ch. I 2.8.2001 para. 545; *Krštić* ICTY A. Ch. 19.4.2004 para. 45; *Kayishema and Ruzindana* ICTR A. Ch. 1.6.2001 para. 161; *Stakić* ICTY A. Ch. 22.3.2006 para. 45; *Jelišić* ICTY A. Ch. 5.7.2001 para. 49.

participation in the crime is not relevant, but that having a discriminatory purpose for the crime is intrinsic to the special intent.¹⁰⁷ Further, in cases where a set of facts and their consequences may have different explanations it may be that a consideration of motive may be relevant in assessing intent, even though it will not itself be decisive.¹⁰⁸

10.4.4 Intent

It is worth noting that, unlike the crime of aggression, genocide is not a crime that may be committed only by those who lead and plan the campaign of destruction. The rank and file may also be principal perpetrators of genocide, provided they have the requisite intent.¹⁰⁹ The special intent required for genocide necessitates each individual perpetrator, whether leader or foot soldier, having the intention to destroy the group or part of it when committing any of the prohibited acts.¹¹⁰ It differs from the 'normal' intent in criminal law, as exemplified in Article 30 of the ICC Statute. That Article provides that in relation to conduct, the individual must mean to engage in the conduct, and in relation to a consequence, the individual must mean to cause that consequence 'or is aware that it will occur in the ordinary course of events'. That is a less stringent requirement than what is now regarded as constituting the special intent for genocide and, subject to what is said below, the intent requirement of Article 30 will therefore not be applicable in the ICC to genocide cases (but will apply to some other forms of liability in relation to genocide).¹¹¹

The findings of the ICTY in the *Krštić* case and of the Commission of Inquiry on Darfur provide a useful illustration. The defence in *Krštić* argued that the purpose of the killings in Srebrenica was not to destroy the group as such; it was to remove a military threat and this was evidenced by the fact that men of military age had been targeted. The Trial Chamber held, however, as affirmed by the Appeals Chamber, that the killings did constitute genocide.¹¹² Its reasoning, which was upheld on appeal,¹¹³ deserves setting out in detail:

the Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a

¹⁰⁷ *Krštić* ICTY T. Ch. I 2.8.2001 para. 561; and see *Tadić* ICTY A. Ch. 15.7.1999 paras 269, 270.

¹⁰⁸ See criticism of the *Krštić* case on the ground that the Trial Chamber did not take any account of motive, in Katherine Southwick, 'Srebrenica as Genocide? The *Krštić* Decision and the Language of the Unspeakable' (2005) *Yale Human Rights & Development Law Journal* 188.

¹⁰⁹ *Kayishema* ICTR A. Ch. 1.6.2001 para. 170.

¹¹⁰ See, e.g. *Akayesu* ICTR T. Ch. I 2.9.1998 para. 498; *Kayishema* ICTR T.Ch. II 21.5.1999 para. 91; *Musema* ICTR T. Ch. I 27.1.2000 para.164.

¹¹¹ See section 15.4.

¹¹² General *Krštić* was himself acquitted of genocide, as lacking the specific intent to destroy, but he was convicted of aiding and abetting acts of genocide.

¹¹³ *Krštić* ICTY A. Ch. 19.4.2004 paras. 24–38.

traditionally patriarchal society ... The Bosnian Serb forces knew by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potocari and the principal mosque in Srebrenica soon after the attack. Finally, there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies mutilated and reburied in other mass graves ... By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica and eliminated all likelihood that it could ever re-establish itself on that territory.¹¹⁴

On the other hand, General Krštić himself, the Appeals Chamber decided, did not have a genocidal intent.

His own particular intent was directed to a forcible displacement. Some other members of the VRS Main Staff harboured the same intent to carry out forcible displacement, but viewed this displacement as a step in the accomplishment of their genocidal objective. ... [A]ll that the evidence can establish is that Krštić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krštić possessed the genocidal intent. Krštić, therefore, is not guilty of genocide as a principal perpetrator.¹¹⁵

In the same direction, the Darfur Commission decided that the policy of attacking, killing and forcibly displacing members of some tribes in Darfur did not show the special intent of genocide, but rather the intent 'to drive the victims from their homes, primarily for purposes of counter-insurgency warfare'.¹¹⁶ The material elements of genocide – the killing and other prohibited acts, and the existence of a protected group – were present, but not the special intent and the Commission therefore found that the Government of Sudan had not pursued a policy of genocide.¹¹⁷

How is the special intent to be proved? Direct evidence of genocidal intent may not be available. In the absence of such, the Tribunals have been prepared to deduce intent from circumstantial evidence including the actions and words of the perpetrator. Less

¹¹⁴ *Krštić* ICTY T. Ch. I 2.8.2001 paras. 595–7.

¹¹⁵ *Krštić* ICTY A. Ch. 19.4.2004 paras. 133, 134. See also *Stakić* ICTY A. Ch. 22.3.2006 para. 47: no genocidal intent existed when the defendant's 'intention was only to displace the Bosnian Muslim population and not to destroy it'.

¹¹⁶ Report, UN Doc. S/2005/60 para. 518.

¹¹⁷ This finding is not of course binding on the ICC, which may also have to consider the same facts. For a useful comment on the Commission's report see Schabas, 'Darfur and the "Odious Scourge"': see also Kreß, 'The Crime of Genocide'.

reasonably, the ICTR has also stated that intent may be deduced from the behaviour of *others*; it may be deduced, the *Akayesu* Trial Chamber said, from:

the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.¹¹⁸

This was somewhat tempered by the Appeals Chamber in *Stakić*, which noted that the Trial Chamber in that case ‘considered whether the apparent intentions of others . . . could provide indirect evidence of the Appellant’s own intentions when he agreed with those others to undertake criminal plans’.¹¹⁹ As the Appeals Chamber also noted, all the evidence (such as the type of attacks, discriminatory animus, the use of derogatory slurs, attacks on religious sites and ‘targeting of . . . leaders for death or slander’)¹²⁰ must be taken together when determining intent since, looking at each piece individually rather than cumulatively, as the Trial Chamber did, ‘obscured the proper inquiry’.¹²¹ In spite of this error, however, the Appeals Chamber did not consider that the prosecution had shown that the Trial Chamber had such evidence before it that it was obliged to find genocidal intent.¹²²

The interpretation of the special intent element given above has been criticized. It is said that simple foot soldiers will normally follow orders without necessarily having an intent to destroy a whole group¹²³ and that it would not be realistic to look for an intent from one individual to destroy the group through his own conduct. In relation to an accused who participated in a genocidal campaign, courts may therefore face the difficult choice between acquittal for lack of evidence of the special intent as normally defined and ‘squeezing ambiguous fact patterns into the specific intent paradigm’.¹²⁴ Courts will be tempted to ease the requirements of evidence by drawing wide deductions from the facts, as indicated above, thus establishing the special intent ‘by the evidentiary backdoor’.¹²⁵ These difficulties have led commentators to propose alternative formulations of the intent necessary for genocide. In particular Greenwalt has suggested:

In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.¹²⁶

¹¹⁸ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 523. ¹¹⁹ *Stakić* ICTY A. Ch. 22.3.2006 para. 40.

¹²⁰ *Ibid.*, para. 53. ¹²¹ *Ibid.*, para. 55. ¹²² *Ibid.*, para. 56.

¹²³ Harmen van der Wilt, ‘Complicity in Genocide and International v. Domestic Jurisdiction’ (2006) 4 *JICJ* 242.

¹²⁴ Alexander Greenwalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’ (1999) 99 *Columbia Law Review* 2265 at 2281.

¹²⁵ Claus Kress, ‘The Darfur Report and Genocidal Intent’ (2005) 3 *JICJ* 565 at 572.

¹²⁶ Greenwalt, ‘Rethinking Genocidal Intent’, 2288; and see Alicia Gil Gil, *Derecho penal internacional. Especial consideración del delito de genocidio* (Madrid, 1999); Kress, ‘The Darfur Report’, 577.

This so-called knowledge-based approach, in distinction to the conventional purpose-based approach, is closer to that described in Article 30 of the ICC Statute. Commentators argue that the current purpose-based approach goes beyond what is envisaged in the Genocide Convention.¹²⁷ They distinguish between the collective intent manifested in the overall genocidal plan or campaign, and the individual intent which, in their view, should involve only knowledge of the plan by the individual perpetrator together with foresight or recklessness as to the occurrence of the planned destruction.¹²⁸

As indicated above¹²⁹ such an approach would be one way of reflecting the nature of genocide as a collective crime. It was illustrated in *Kayishema* where the Trial Chamber first found that there was a genocidal plan and went on to say:

The killers had the common intent to exterminate the ethnic group and Kayishema was instrumental in the realisation of that intent.¹³⁰

In *Krštić*, however, the Appeals Chamber, while noting that the intent to destroy must be discernible in the joint participation of the crime itself, held that individual participators must each have the necessary intent.¹³¹ This insistence on the special intent for each individual perpetrator remains the standard required for the crime of genocide by the case law and may be seen as correctly reflecting the need to reserve genocide convictions only for those who have the highest degree of criminal intent. In practice, however, the approach of the Tribunals to principles of liability which do not require a special intent, such as aiding and abetting and joint criminal enterprise, has led to a blurring of the lines.¹³²

10.5 Other acts

The ‘other acts’ of participation in genocide listed in Article III of the Convention, conspiracy, ‘direct and public incitement’, attempt and complicity, are expressly incorporated in the Statutes of the ad hoc Tribunals. The ICC, on the other hand, relies on the general principles of law in Part 3 of its Statute, which apply to all of the crimes within the jurisdiction of the Court, for all these forms of liability. The exception is incitement to genocide, for which specific provision was made in Article 25(3)(e) of the ICC Statute. For the ICC, the omission of conspiracy, due to hesitations of civil law countries, has left a gap, although the Statute provision on contribution to a common purpose may largely fill it. Further discussion of these other acts and of command responsibility in relation to genocide may be found in Chapter 15.

¹²⁷ Otto Triffterer, ‘Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such’ (2001) 14 *LJIL* 399; Jones, ‘Whose Intent?’, 478.

¹²⁸ See Jones, ‘Whose Intent?’, Kress, ‘The Darfur Report’ 576–7. ¹²⁹ See section 10.1.4.

¹³⁰ *Kayishema* ICTR T. Ch. II 21.5.1999 paras. 533, 535.

¹³¹ *Krštić* ICTY A. Ch. 19.4.2004 para. 549. ¹³² See section 15.4.

Further reading

- Antonio Cassese, 'Genocide' in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court* (Oxford, 2002) 335.
- Alexander Greenwalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259.
- Nina Jørgensen, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice' (2001) 1 *International Criminal Law Review* 285.
- Claus Kress, 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461.
- Laurence J. Le Blanc, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding' (1984) 78 *AJIL* 369.
- Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, 1944).
- Raphael Lemkin, 'Genocide as a Crime Under International Law' (1947) 41 *AJIL* 145.
- Matthew Lippman, 'The Convention On The Prevention And Punishment Of The Crime Of Genocide: Fifty Years Later' (1998) 15 *Arizona Journal of International and Comparative Law* 415.
- Guénaél Mettraux, *International Crimes and the ad Hoc Tribunals* (Oxford, 2005) ch. 6.
- John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot, 2006).
- William Schabas, *Genocide in International Law* (Cambridge, 2000).
- Malcolm Shaw, 'Genocide in International Law' in Yoram Dinstein (ed.), *International Law at a Time of Perplexity* (Dordrecht, 1989) 797.
- Dinah Shelton (ed.), *The Encyclopaedia of Genocide and Crimes Against Humanity* (Farmington Mills, 2005), vols. I–III.

11

Crimes Against Humanity

11.1 Introduction

11.1.1 Overview

Crimes against humanity are as old as humanity itself.¹ However, it is only in the last six decades that the international legal prohibition on crimes against humanity has emerged, and it is only in the last ten years that the precise contours of the crime have been clarified.

Whereas genocide and war crimes have been codified in conventions with widely accepted definitions, crimes against humanity have appeared in a series of instruments with somewhat inconsistent definitions. The law of crimes against humanity was initially created to fill certain gaps in the law of war crimes, but many parameters were left undefined. The recent increase in the application of international criminal law has produced a fruitful interplay between international instruments, jurisprudence and commentaries, leading to a more coherent picture of the scope and definition of crimes against humanity today.

A crime against humanity involves the commission of certain inhumane acts, such as murder, torture, rape, sexual slavery, persecution and other inhumane acts, in a certain *context*: they must be part of a widespread or systematic attack directed against a civilian population. It is this context that elevates crimes that might otherwise fall exclusively under national jurisdiction to crimes of concern to the international community as a whole. An individual may be liable for crimes against humanity if he or she commits one or more inhumane acts within that broader context. It is not required that the individual be a ringleader or architect of the broader campaign.

11.1.2 Historical development

The most significant early reference to ‘crimes against humanity’ as a legal concept was a joint declaration by France, Great Britain and Russia in 1915. Responding to

¹ Jean Graven, ‘Les Crimes Contre l’Humanité’ (1950) 76 *Hague Recueil* 427 at 433.

the massacre of Armenians by Turkey, the joint declaration denounced 'crimes against humanity and civilization' and warned of personal accountability.² After the First World War, an international war crimes commission recommended the creation of an international tribunal to try not only war crimes but also 'violations of the laws of humanity'. However, the US representative objected to the references to the laws of humanity on the grounds that these were not yet precise enough for criminal law, and the concept was not pursued at that time.³

In the wake of the events of the Second World War, the drafters of the Nuremberg Charter were confronted with the question of how to respond to the Holocaust and the massive crimes committed by the Nazi regime. The classic definition of war crimes did not include crimes committed by a government against its own citizens. The drafters therefore included 'crimes against humanity', defined in Article 6(c) as:

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.

Three major features may be noted. First, the reference to 'any' civilian population meant that even crimes committed against a country's own population were included. This was a major advancement, given that at that time, prior to the advent of the human rights movement, international law generally regulated conduct *between* States and said little about a government's treatment of its own citizens. Second, the requirement of connection to war crimes or the crime of aggression meant in effect that crimes against humanity could occur only with some 'nexus' to armed conflict.⁴ Third, the reference to 'population' was understood to create some requirement of scale, but the precise threshold was specified neither in the Charter nor in the Nuremberg Judgment.⁵

It remains controversial whether the Nuremberg Charter created new law, or whether it recognized an existing crime.⁶ Among those concluding that it was a new crime, many argued that the principle of non-retroactivity had to give way to the overriding need for accountability for large-scale murder and atrocities recognized as

² For more information on these historical developments, see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948); Roger Clark, 'Crimes Against Humanity', in George Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trials and International Law* (Dordrecht/Boston/London, 1990); Egon Schwelb, 'Crimes Against Humanity' (1946) 23 *BYBIL* 178.

³ War Crimes Commission, *History*.

⁴ The text as originally adopted contained a semi-colon following the word 'war', which would give rise to the interpretation that the connection requirement applied only to persecution. This was promptly amended by the Berlin Protocol of 6 October 1945, which replaced the semi-colon with a comma, thereby supporting the interpretation that the connection requirement applied to all crimes against humanity. See Clark, 'Crimes', 190–2.

⁵ War Crimes Commission, *History*, 192–3.

⁶ See, e.g. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague, 1999) 123–76.

criminal by all nations.⁷ Perhaps because of this uncertainty in the status of crimes against humanity, the Nuremberg Judgment tended to blur discussion of crimes against humanity and war crimes and provided very little guidance on the particular elements of the crime.⁸

The Tokyo Charter included a similar definition with some modifications.⁹ The Allied Control Council, creating law for occupied Germany, adopted Law No. 10 with a similar definition, except that it added rape, imprisonment and torture to the list of inhumane acts, and did not require a connection to war crimes or aggression.

The concept of crimes against humanity was promptly endorsed by the UN General Assembly,¹⁰ but in the decades that followed there was only a limited body of national cases¹¹ as well as a few treaties and instruments recognizing enforced disappearance and apartheid as crimes against humanity.¹² The International Law Commission also developed several drafts of an international code of crimes.

A major advance occurred when the Security Council created the ICTY and ICTR in response to mass crimes in the former Yugoslavia and in Rwanda. The statute of each contained a list of acts based on the Allied Control Council Law No. 10 list. The ICTY Statute (Article 5) defined the contextual threshold as ‘when committed in armed conflict, whether international or internal in character, and directed against any civilian population’. The Tribunal itself, referring to the Report to the Secretary-General and other authorities, interpreted this threshold as requiring a ‘widespread or systematic attack’.¹³ The ICTR Statute (Article 3) defined the context as ‘when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’. Thus, the definitions are similar, except that the ICTY Statute requires armed conflict and the ICTR Statute requires discriminatory grounds.

The ICC Statute contains the same list of acts but adds forced transfer of population, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization,

⁷ Hans Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’ (1947) 1 *International Law Quarterly* 153 esp. at 165; see also E. Schwelb, ‘Crimes’ Against Humanity’ (1946) 23 *BYBIL* 178; and see treatment of the question in *R v. Finta* [1994] 1 SCR 701; *Polyukhovic* [1991] HCA 32; (1991) 172 CLR 501 at 661–2, HCA; *Eichmann* 36 ILR 277 at 283, SC.

⁸ Nuremberg Judgment, reproduced (1947) 41 *AJIL* 172 esp. at 248–9.

⁹ Tokyo Charter, Art. 5(c), included the same definition with the omission of racial and religious persecution, on the grounds that such crimes had not occurred in that theatre of conflict. The term ‘any civilian population’ was also deleted, on which basis the prosecution argued that all killing during an aggressive war was murder. Such arguments were rejected at Nuremberg and Tokyo, as they would undermine the distinction between the law governing *justification* of conflict and the *conduct* of conflict. See ch. 12.

¹⁰ UNGA Res. 95(I), UN Doc A/64/Add.1 (1946).

¹¹ Including cases in France, the Netherlands, Israel, Canada and Australia, as discussed at section 11.2.3. See also Joseph Rikhof, ‘Crimes Against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda’ (1995) 6 *National Journal of Constitutional Law* 231; Matthew Lippman, ‘Crimes Against Humanity’ (1997) 17 *Boston College Third World Law Journal* 171; Leila Sadat Wexler, ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’ (1994) 32 *Columbia Journal of Transnational Law* 289.

¹² Examples include the Convention on the Non-Applicability of Statutory Limitations 1968, the Apartheid Convention 1973, the Inter-American Convention on Enforced Disappearance 1994, and the UN Declaration on Enforced Disappearance 1992.

¹³ *Tadić* ICTY T. Ch. II 07.05.1997 para. 644; *Tadić* ICTY A. Ch. 15.07.1999 para. 248.

sexual violence, enforced disappearance and the crime of apartheid.¹⁴ The ICC Statute rejects both the armed conflict requirement and the requirement of discriminatory grounds. The contextual threshold in Article 7 of the ICC Statute is ‘when committed as part of a widespread or systematic attack directed against any civilian population’. The ICC Statute includes supplementary definitions in Article 7(2), some of which have been generally welcomed as helpful clarifications and others of which have been controversial, as will be discussed further in this chapter.

Additional sources on the definition of crimes against humanity may now be found in Tribunal jurisprudence, the ICC Elements of Crimes, and instruments of other tribunals (Sierra Leone, Iraq). Each of these includes a comparable list of acts as well as the now-standard requirement of widespread or systematic attack directed against any civilian population.

11.1.3 Relationship to other crimes

War crimes and crimes against humanity can and do frequently overlap. For example, a mass killing of civilians during an armed conflict could constitute both types of crimes. There are however significant differences. First, unlike war crimes, crimes against humanity may occur even in the absence of armed conflict. Second, crimes against humanity require a context of widespread or systematic commission, whereas war crimes do not; a single isolated incident can constitute a war crime. Third, war crimes law was originally based on reciprocal promises between parties to conflict, and hence primarily focuses on protecting ‘enemy’ nationals or persons affiliated with the other party to the conflict. The law of crimes against humanity protects victims regardless of their nationality or affiliation. Fourth, war crimes law regulates conduct even on the battlefield and against military objectives,¹⁵ whereas the law of crimes against humanity concerns actions directed primarily against civilian populations.¹⁶

Thus, for war crimes, the international interest arises from the armed conflict; for crimes against humanity, the international interest arises from the attack on a civilian population. Cumulatively, the two bodies of law, working together, penalize atrocities committed during armed conflict or committed on a widespread or systematic basis. Isolated crimes occurring in the absence of armed conflict continue to be governed by national criminal law.

Genocide was initially regarded as a particularly odious form of crime against humanity,¹⁷ in that it was a crime against humanity committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Over time, however, the definitions of the two crimes have evolved and pose differing requirements. Therefore it is no longer useful to describe genocide as a subset of

¹⁴ See Art. 7 ICC Statute. ¹⁵ See ch. 12. ¹⁶ See section 11.2.2. ¹⁷ UN War Crimes Commission, *History*, 196–7.

crimes against humanity. Nonetheless, almost any conceivable example of genocide would also satisfy the requirements of crimes against humanity.¹⁸

11.2 Common elements (the contextual threshold)

As already noted, a crime against humanity entails the commission of a listed inhumane act, in a certain context: a widespread or systematic attack directed against a civilian population.

11.2.1 Aspects not required

No nexus to armed conflict

The Nuremberg and Tokyo Charters both required a connection to war crimes or to aggression, in effect requiring some nexus to armed conflict.¹⁹ On the other hand, Allied Control Council Law No. 10 did not include such a requirement. Subsequent case law of military tribunals split over whether such a nexus must be read in to the definition, or was not required. For example, the *Flick* and *Weizsäcker* cases imported the requirement from the Nuremberg Charter, whereas the *Ohlendorf* and *Altstötter* decisions concluded that it was unnecessary.²⁰

Subsequent international conventions – including the Genocide Convention, the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968, the Apartheid Convention 1973 and the Inter-American Convention on Enforced Disappearance 1994 – indicated that a nexus to armed conflict was not required. However, the ICTY Statute, adopted in 1993 by the Security Council, restricted crimes against humanity to those ‘committed in armed conflict, whether international or internal in character’ (Article 5). The Security Council promptly reversed this position in 1994, when it adopted the ICTR Statute without such a requirement (Article 3). Finally, after extensive debates at the 1998 Rome Conference, agreement was reached on a definition of crimes against humanity rejecting any such requirement (Article 7).²¹

Today, it seems well settled that a nexus to armed conflict is not required. The majority of instruments and precedents oppose such a requirement. The limitation in the Nuremberg Charter is generally seen as a jurisdictional limitation only,²² and the ICTY Statute definition appears to be the anomaly. Indeed, the jurisprudence of the ICTY itself concludes that the requirement is a deviation from customary law.²³ This view is also supported by national case law, international bodies of experts, and

¹⁸ See section 10.1.3. ¹⁹ See, e.g. Bassiouni, *Crimes*, 60–9.

²⁰ *United States v. Ohlendorf et al.* 4 TWC 411; *United States v. Altstötter et al.* (the ‘Justice Trial’) VI LRTWC 1; *United States v. Flick* IX LRTWC 1; *United States v. Weizsäcker*, (the ‘Ministries Trial’) 14 TWC 1.

²¹ Darryl Robinson, ‘Defining Crimes Against Humanity at the Rome Conference’ (1999) 93 *AJIL* 43.

²² War Crimes Commission, *History*, 192–3; see also Clark, ‘Crimes’, 196; Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *Yale Law Journal* 2537 at 2588–90.

²³ *Tadić* ICTY T. Ch. II 07.05.1997 para. 627; *Tadić* ICTY A. Ch. 15.07.1999 para. 282–8.

the writings of commentators.²⁴ No requirement of a situation of armed conflict has appeared in subsequent definitions of crimes against humanity (Sierra Leone, Iraq).

No requirement of discriminatory animus

The ICTR Statute, Article 3, requires that crimes against humanity be committed on 'national, ethnic, racial or religious grounds'. Such a requirement was supported by a few sparse authorities, but did not appear in most precedents.²⁵

Although an early ICTY case reluctantly adopted the 'discriminatory grounds' requirement for the purposes of consistency, it explicitly noted that it was not supported in previous authorities, and the ICTY Appeals Chamber subsequently ruled that discrimination is not a requirement.²⁶ The ICC Statute, adopted in 1998, rejected a discrimination requirement. It appears reasonably well settled today that discriminatory animus is not a requirement, and it has not been included in subsequent instruments (Sierra Leone, Iraq). The ICTR Appeals Chamber has held that the restriction in the ICTR Statute relates only to the Tribunal, and also that the requirement relates to the attack as a whole; thus discriminatory intent of the perpetrator is not required.²⁷

Thus, apart from the ICTR, it would appear that discriminatory grounds are not required, with the exception of the crime of persecution, discussed in section 11.3.9.

11.2.2 'Any civilian population'

The word 'any' highlights the central innovation and *raison d'être* of crimes against humanity. The law of crimes against humanity not only protects enemy nationals, it also covers, for example, crimes by a State against its own subjects.²⁸ The nationality or affiliation of the victim is irrelevant.

The term 'civilian population' connotes crimes directed against civilians rather than combatants, while the term 'population' indicates that 'a larger body of victims is visualized', and that 'single or isolated acts against individuals' fall outside the scope of the concept.²⁹ The reference to population implies 'crimes of a collective nature' but does not require that the entire population be targeted.³⁰

Antonio Cassese has put forward a significant argument that in customary international law the crime is not restricted to 'civilian' populations, relying on certain Second World War cases that identify crimes against military personnel as crimes

²⁴ *Eichmann* (1968) 36 ILR 5 at 49, DC; *Barbie* (1990) 78 ILR 124 at 136, Cour de Cassation; ILC Report 1996, UN Doc A/51/10 (1996) p. 96; Orentlicher, 'Settling Accounts' 2588–90; Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 554; Beth van Schack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 *Columbia Journal of Transnational Law* 787.

²⁵ Some French cases, including *Barbie* (1990) 78 ILR 124, Cour de Cassation and *Touvier* 100 ILR 338, Cour d'Appel, suggested that a policy of discrimination is required.

²⁶ *Tadić* ICTY T. Ch. II 07.05.1997 para. 652; *Tadić* ICTY A. Ch. 15.07.1999 paras. 282–305.

²⁷ *Akayesu* ICTR T. Ch. I 02.09.1998 paras. 461–9. ²⁸ War Crimes Commission, *History*, 193.

²⁹ *Ibid.* ³⁰ *Tadić* ICTY T. Ch. II 07.05.1997 para. 644; *Kunarac*, ICTY T. Ch. II 22.2.2001 para. 425.

against humanity.³¹ On the one hand, it is important to scrutinize limitations to determine whether they are arbitrary or rational, and whether they are indeed supported by customary law. On the other hand, the major precedents – including the seminal Nuremberg Charter as well as the ICTY, ICTR, ICC and SCSL Statutes and the great majority of case law – not only include ‘civilian population’ but regard it as a defining feature of crimes against humanity. It is questionable whether customary law could have evolved independently in a manner departing from the major precedents. Moreover, current international law clearly *permits* widespread and systematic attacks directed against military targets, in accordance with humanitarian law, even if it involves killing and injury.

Is it possible to address persecution of military personnel without rejecting the ‘time-honoured’³² hallmark requirement of ‘civilian population’? The answer to this question would appear to be positive, as the trend in the jurisprudence is to give the term an expansive interpretation. First, the population need only be ‘*predominantly* civilian in nature’; the ‘presence of certain non-civilians in their midst does not change the character of the population’.³³ Second, the term ‘civilian’ has been interpreted broadly to include all those no longer taking part in hostilities at the time the crimes were committed. This includes former combatants who had decommissioned, as well as combatants placed *hors de combat* by being wounded or detained.³⁴

Examining these cases, it is possible to form a hypothesis that the ‘civilian’ reference serves a rational purpose, which is simply to *exclude military actions against legitimate military objectives in accordance with international humanitarian law*. This would provide a coherent underlying rationale for the requirement: given that the laws of war are a special regime in which killing, wounding and destruction can be allowed, attacks on military targets are more appropriately assessed under that law.

If this hypothesis is correct, the ‘civilian’ requirement can be given a narrow and functional interpretation: that it serves to exclude attacks directed against military objectives and personnel in accordance with international humanitarian law. The jurisprudence seems already to be moving toward this underlying proposition. First, the interpretations already described seek to extend protection to all but current combatants.³⁵ Second, Tribunal jurisprudence also requires that the civilian population be the ‘primary object’ of the attack.³⁶ This excludes attacks that appear to be directed primarily at military targets, so that such activities are therefore preserved to be assessed under the more appropriate *lex specialis* of the laws of war. Third,

³¹ Cassese, ‘Crimes Against Humanity’ in Cassese, *Commentary*, 375; Antonio Cassese, *International Criminal Law* (Oxford, 2003) 85–91.

³² Yoram Dinstein, ‘Crimes Against Humanity After Tadić’ (2000) 13 *LJIL* 273 at 381–2.

³³ Tadić ICTY T. Ch. II 07.05.1997 para. 638; see also Kordić ICTY T. Ch. 26.02.2001, para. 180.

³⁴ Tadić ICTY T. Ch. II 07.05.1997 para. 643; Kordić, ICTY T. Ch. 26.02.2001 para. 180. Note that a current member of an armed force or organization remains a combatant even in moments when he or she is not armed or in combat, and thus may be lawfully attacked by an enemy party to the conflict. See, e.g. Blaškić ICTY A. Ch. 29.07.2004 para. 114.

³⁵ See also Kai Ambos and Steffen Wirth, ‘The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000’ (2002) 13 *CLF* 1 at 22–6.

³⁶ Kunarac ICTY A. Ch. 12.06.2002 para. 91.

Tribunal jurisprudence now considers compliance with the laws of war as an indicator of whether there was an attack against a civilian population.³⁷ Thus, lawful military action would be excluded, whereas actions targeting civilians would be covered. Even patterns of indiscriminate or clearly excessive attacks would be covered if they were found in reality to be attacks primarily directed against a civilian population.

Military personnel, on this interpretation, would therefore not be excluded from all protection by virtue of wearing a uniform. Military personnel who are victims of crimes outside the context of battle, such as persecution or political denunciation, would be covered. Most forms of crime against humanity other than killing, extermination or wounding (which could be an inhumane act), cannot be committed unless the victim is first overcome, and hence reduced to protected person status, at which point they would no longer be military objectives and would fall within the broad definition of civilian. Killing or wounding of combatants, on the other hand, is lawful. The suggested interpretation is also consistent with the Second World War cases, since the harm befalling the military personnel in those cases was not in the course of lawful military action.

11.2.3 *Widespread or systematic attack*

Widespread or systematic

Since the 1990s, the concept of ‘widespread or systematic attack directed against any civilian population’ has emerged as the accepted formulation, thus contributing to clarity and consistency in this area of law. Nonetheless, some aspects of the definition of these terms remain to be resolved.

The widespread or systematic test is disjunctive;³⁸ a prosecutor need only satisfy one or the other threshold. As discussed below, however, in addition to ‘widespread or systematic’, there must also be an ‘attack’, and some authorities indicate that an ‘attack directed against a civilian population’ necessarily entails at least some modest degree of scale and organization. This would mean that, while the rigorous thresholds of ‘widespread’ or ‘systematic’ are disjunctive, the ‘attack’ requires at least some minimal aspect of each.

The term ‘widespread’ has been defined in various ways, and generally connotes the large-scale nature of the attack and the number of victims.³⁹ No numerical limit has been set; the issue must be decided on the facts. While ‘widespread’ typically refers to

³⁷ *Ibid.* See also Guénaél Mettraux, ‘Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2002) 43 *Harvard International Law Journal* 237 at 245–50.

³⁸ The French version of the ICTR Statute referred to the requirements conjunctively (*généralisée et systématique*), but this was held to be a simple error: *Akayesu* ICTR T. Ch. I 02.09.1998 para. 579.

³⁹ *Tadić* ICTY T. Ch. II 07.05.1997 para. 206, *Kunarac* ICTY T. Ch. II 22.02.2001 para. 428. Definitions vary slightly from case to case. A rather stringent standard, which is probably excessively high, is set out in *Akayesu* and other cases: ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims’: *Akayesu* ICTR T. Ch. I 02.09.1998 para. 580; *Musema* ICTR T. Ch. I 27.01.2000 para. 204.

the cumulative effect of numerous inhumane acts, it could also be satisfied by a singular massive act of extraordinary magnitude.⁴⁰

The term 'systematic' has also been defined in various ways. In *Akayesu* it was defined as (1) thoroughly organized, (2) following a regular pattern, (3) on the basis of a common policy and (4) involving substantial public or private resources.⁴¹ In *Blaškić*, it was defined as requiring (1) a plan or objective, (2) large-scale or continuous commission of linked crimes, (3) significant resources, and (4) implication of high-level authorities.⁴² It is understandable to pose a significant threshold, especially given that non-widespread crimes should not lightly be labelled as a crime against humanity, but these definitions may set the bar too high.⁴³ Other cases referred more simply to 'pattern or methodical plan', 'organized nature' or 'organized pattern of conduct'.⁴⁴ Consistent with the ordinary meaning of the term, it may be that the hallmark of 'systematic' is the high degree of organization, and that features such as patterns, continuous commission, use of resources, planning, and political objectives are important factors.

Attack

The term 'attack' is not used in the same sense as in the law of war crimes. An 'attack' need not involve the use of armed force, and can encompass mistreatment of the civilian population.⁴⁵ It refers to the broader course of conduct, involving prohibited acts, of which the acts of the accused form part.⁴⁶

The ICC Statute and Tribunal jurisprudence indicate there must at least be multiple acts or multiple victims in order to warrant the label 'attack directed against a civilian population'.⁴⁷ These acts may be all of the same type or of different types, for example murder, rape and deportation.⁴⁸ This requirement of 'multiple acts' does not mean that 'widespread' is a requirement in all cases. Both terms measure scale, but 'multiple' is a low threshold and 'widespread' is a high threshold.

'Attack directed' and the controversy concerning the policy element

Crime, even on a 'widespread' basis – for example, a crime wave, or anarchy following a natural disaster – does not by itself constitute a crime against humanity. The random acts of individuals are not sufficient; some thread of connection between acts is needed so that they can accurately be described collectively as an *attack directed* against a civilian population. Some authorities seek to make this proposition explicit by

⁴⁰ *Kordić* ICTY T. Ch. 26.02.2001 para. 176; *Blaškić* ICTY T. Ch. I 03.03.2000, para. 206; ILC Draft Code, pp. 94–5.

⁴¹ *Akayesu* ICTR T. Ch. I 02.09.1998 para. 580. ⁴² *Blaškić* ICTY T. Ch. 03.03.00 para. 203.

⁴³ See also Ambos and Wirth, 'The Current Law' 18–20.

⁴⁴ *Tadić* ICTY T. Ch. II 07.05.1997 para. 648; *Kunarac* ICTY T. Ch. II 22.02.2001 para. 429; *Ntakirutimana* ICTR T. Ch. I 21.02.2003 para. 804.

⁴⁵ ICC Elements, Crimes Against Humanity Introduction para. 3; *Kunarac* ICTY A. Ch. 12.06.2002 para. 86; *Akayesu* ICTR T. Ch. I 02.09.1998 para. 581.

⁴⁶ Art. 7(2)(a) of the ICC Statute; *Tadić* ICTY T. Ch. 07.05.1997 para. 644; *Akayesu* ICTR T. Ch. I 02.09.1998 para. 205.

⁴⁷ Art. 7(2)(a) of the ICC Statute; *Kunarac* ICTY T. Ch. II 22.02.2001 para. 415; *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 54.

⁴⁸ *Kayishema* ICTR T. Ch. II 21.5.1999 para. 122.

indicating that there must be an underlying governmental or organizational policy that directs, instigates or encourages the crimes. Other authorities reject any requirement of plan or policy. It is therefore controversial whether the policy element is a necessary component of crimes against humanity. Related to this is uncertainty about what the element means, for example, whether it requires proof of a secret plan, or may be inferred from circumstances, or even inferred from inaction.

The divide in the authorities

National jurisprudence on crimes against humanity has frequently indicated that governmental policy was a requirement.⁴⁹ In the 1990s, the very same authorities that established the ‘widespread or systematic’ test also coupled this with a requirement of policy or of direction, instigation or encouragement by a State or organization.⁵⁰ Early Tribunal cases tended to follow this approach.⁵¹

At the Rome Conference, there was strong opposition to an unqualified disjunctive ‘widespread or systematic’ test, on the grounds that it would incorrectly include widespread but unconnected crimes, such as a crime wave. It was argued in response that the customary law concept of an ‘attack’ excluded random crimes. Agreement was reached on the disjunctive ‘widespread or systematic’ test, provided that the definition of ‘attack’ included this clarification. Article 7(2)(a) therefore defines attack and includes the policy element, based on contemporary authorities. Delegations were comforted that the policy element did not negate the disjunctive test, since it was understood that ‘systematic’ was a high threshold and policy was a low threshold, which can be inferred from the manner in which the acts occur.⁵² The definition followed more recent authorities indicating that the policy need not be that of a government, but could also be that of an organization.⁵³

Strong concerns were already growing about the policy element, both in Tribunal jurisprudence and the ICC negotiations. The major concerns were that it imposed a novel burden, that it would be difficult to prove, and that it contradicted the disjunctive test.⁵⁴ Tribunal cases began to split, with some supporting, then some

⁴⁹ Examples include: *Alistötter* VI LRTWC 1; *Brandt (The Doctors' Trial)* IV LRTWC 91 (US Military Tribunal); *Barbie*, Court of Cassation, 6 December 1983, 78 ILR 124 (France); *Menten* 75 ILR 362–63 (Netherlands); *Finta* [1994] 1 SCR 701 at 814 (Canada); *Polyukhovic* 172 CLR 501 (Australia); *Pinochet (No. 3)*, [1999] 2 All ER 97 (United Kingdom) (Lord Hope, Lord Millet; but see *contra* Lord Browne-Wilkinson).

⁵⁰ Commission of Experts (former Yugoslavia), *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674 at 23; Commission of Experts (Rwanda), *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. G/SO 214 at para. 135; ILC, *Report on the work of its forty-eighth session* (ILC draft Code), UN Doc A/51/10 at 93 and 95–6; and see *Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, UN Doc. E/CN.4/Sub.2/1992/13 (1998).

⁵¹ *Tadić* ICTY T. Ch. II 07.05.1997 para. 644; *Bagilishema* ICTR T. Ch. I 07.06.2001 para. 78.

⁵² *Tadić* ICTY T. Ch. II 07.05.1997 paras. 653–5; Robinson, ‘Defining Crimes Against Humanity’ at 50–1; Timothy H. L. McCormack, ‘Crimes Against Humanity’ in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford, 2004) 186–9.

⁵³ Bassiouni, *Crimes* 243ff.

⁵⁴ See Margaret McAuliffe de Guzman, ‘The Road From Rome: The Developing Law of Crimes Against Humanity’ (2000) 22 *Human Rights Quarterly* 335; Phyllis Hwang, ‘Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court’ (1998) 22 *Fordham International Law Journal* 457.

declining to take a position, and then some expressing doubt.⁵⁵ Finally, in *Kunarac*, the ICTY Appeals Chamber held, rather succinctly, that ‘nothing in the Statute or in customary international law . . . required proof of the existence of a plan or policy to commit these crimes’.⁵⁶ Whereas decisions on other issues of customary law have tended to involve an extensive review of precedents, the Appeals Chamber resolved this major controversy with reasoning appearing only in a single footnote, and declining to address (or acknowledge) most of the contrary authorities.

Thus, the main indicators of customary law are now divided. On one hand, the ICC Statute indicates that policy is required. The statute was adopted by a great number of States purporting to codify existing customary law, and hence it is a strong indicator of customary law. A similar requirement appears in much national jurisprudence, and in legislation based on the ICC Statute definitions, which will also shape State practice. On the other hand, Tribunal jurisprudence, which also purports to reflect customary law, and which is also a strong indicator, rejects the policy element. In addition, Article 10 of the ICC Statute indicates that its definitions ‘shall not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’.

In order for international criminal law to become a clear and credible edifice of law, it will be desirable to resolve such issues in a consistent and coherent manner. How are these authorities to be interpreted? For jurisdictions applying customary law, which approach should be followed? For jurisdictions where the policy element is required (ICC and many national systems), does the rejection by the ICTY imply that the policy element must be an onerous element? Is the gulf as great as it seems or can these authorities be reconciled?

Interpretation of the authorities

Despite the apparent gulf, it remains possible to read the authorities in a harmonized manner, advancing the consistency of international criminal law. The controversy over whether the policy element is required may in fact be a product of disagreement about what the element *means*.⁵⁷ If that is the case, then the split authorities seem to reflect two routes (in form) to the same destination (in substance). On one route, the term ‘policy’ is rejected, but it is implicit that random criminality of individuals does not amount to an ‘attack’.⁵⁸ On the other route, the policy element *is* a requirement, but as noted by various commentators, it stands for the very same proposition:⁵⁹

⁵⁵ *Kupreškić*, ICTY, T. Ch. II 14.01.2000 paras. 554–5; *Kunarac* ICTY, T. Ch. II 22.02.2001 para. 432; *Kordić* ICTY, T. Ch. 26.02.2001 paras. 181–2; *Krnjelac* ICTY, T. Ch. II 15.03.2002 para. 58.

⁵⁶ *Kunarac* ICTY, A. Ch. 12.06.2002 para. 98. The reasoning of the Chamber appears strikingly similar to that in Mettraux, ‘Crimes’, 270–82.

⁵⁷ See, e.g. Mettraux, ‘Crimes’, 275, rejecting some authorities as precedent for a policy element because all they meant is to exclude isolated crimes. See also Hwang, ‘Defining Crimes’, 502–3, fearing that ‘policy’ might be misinterpreted as more stringent than ‘systematic’.

⁵⁸ Mettraux, ‘Crimes’, 254, 273 and 275.

⁵⁹ Rodney Dixon, ‘Article 7’ in Triffterer, *Observers’ Notes*, 43; Dinstein, ‘Crimes’, 389; Simon Chesterman, ‘An Altogether Different Order: Defining the Elements of Crimes Against Humanity’ (2000) *Duke Journal of Comparative & International Law* 283 at 316.

indeed, the necessary logical corollary of excluding isolated individual acts is to require some instigation or encouragement by something *other than* individuals, namely a State or organization.

For those jurisdictions that apply a policy element, this harmonization would require that the policy element be appropriately interpreted as a minimalist threshold excluding random action, in accordance with the previous jurisprudence.⁶⁰ First, and most importantly, the term cannot be understood in its oft-used sense of a formally adopted position; as noted in jurisprudence, a 'policy' need not be formally adopted, nor expressly declared, nor even stated clearly and precisely.⁶¹ Thus, it must be given an ordinary meaning such as 'a course of action adopted as advantageous or expedient'.⁶² Second, the element may be satisfied by inference from the manner in which the acts occur;⁶³ it is sufficient to show the improbability of random occurrence. It is not required to show *action* by a State or organization; case law indicates that the requirement is satisfied by 'explicit or implicit approval or endorsement' or that the conduct is 'clearly encouraged' or 'clearly fits within' a general policy.⁶⁴ Thus, inaction designed to encourage the crimes would also suffice.⁶⁵

Conversely, for those jurisdictions that have rejected the term 'policy', it remains essential not to lose sight of the principle that unconnected random acts cannot constitute an 'attack'.⁶⁶ Tribunal jurisprudence may already partially achieve this result in its requirement to examine the manner in which individuals were 'targeted' and the extent to which the civilian population was the 'primary object',⁶⁷ all of which imply some direction. Tribunal jurisprudence has struck upon the aspect of 'improbability of random occurrence', but only in the context of 'systematic';⁶⁸ this aspect must however apply to all attacks, or else crime waves become included. In the absence of such clarification, a literal and mechanistic application of Tribunal definitions would encompass widespread but random crimes of individuals, which reflects either a failure to describe the crime accurately, or else a loss of the basic conceptual foundation for crimes against humanity.⁶⁹

⁶⁰ McAuliffe de Guzman, 'Road From Rome', 374.

⁶¹ *Tadić* ICTY T. Ch. II 07.05.1997 para. 653; *Blaskić* ICTY T. Ch. I 03.03.2000 paras. 204–5.

⁶² *Oxford English Dictionary* (2nd edn, Oxford, 1989), vol. XII, 27 provides this as the 'chief living sense'.

⁶³ *Tadić* ICTY T. Ch. II 07.05.1997 para. 653; *Blaskić* ICTY T. Ch. I 03.03.2000 para. 204.

⁶⁴ *Kupreškić* ICTY T. Ch. II 14.01.2000 paras. 554–5.

⁶⁵ Commission of Experts (former Yugoslavia), *Final Report*, 23. The ICC Elements, footnote 6, reaches this result but in a particularly tortured manner, twice emphasizing a need for action, before acknowledging, in a restrictive manner, the possibility of passive encouragement. The ICC Elements also add that inaction alone is not enough to infer a policy; this should not be interpreted as repudiating the previous sentence, but rather as acknowledging that there may be other reasons for inaction (lack of knowledge of crimes, lack of ability), so policy should not be inferred without considering alternative explanations.

⁶⁶ *Kunarac* ICTY T. Ch. II 22.02.2001 para. 422. ⁶⁷ See for example, *Kunarac* ICTY A. Ch. 12.06.2002 paras. 90–2.

⁶⁸ *Kunarac* ICTY T. Ch. II 22.02.2001 para. 429, *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 57.

⁶⁹ See, e.g. David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Law Journal* 85; Ambos and Wirth, 'The Current Law', 30–1; Bassiouni, *Crimes*, 245–7; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London, 1999) 311 and 314.

11.2.4 *The link between the accused and the attack*

The rigorous requirements relating to the attack must be distinguished from the requirements relating to the accused. With respect to the individual accused, what is required is that the accused committed a prohibited act, that the act objectively falls within the broader attack, and that the accused was aware of this broader context.⁷⁰

Only the attack, not the acts of the individual accused, must be widespread or systematic.⁷¹ A single act by the accused may constitute a crime against humanity if it forms part of the attack.⁷² The act of the accused may also in itself *constitute* the attack, if it is of great magnitude, for example, the use of a biological weapon against a civilian population.⁷³

The accused need not be an architect of the attack, need not be involved in the formation of any policy, and need not be affiliated with any State or organization nor even share in the ideological goals of the attack.⁷⁴ For those jurisdictions in which there is a policy element requirement, or a requirement that the attack be directed, instigated or actively or passively encouraged by a State or organization, such requirement applies to the acts forming the attack in general; it need not be shown that the *acts of the accused* were directed, instigated or encouraged.⁷⁵

The acts of the accused need not be of the same type as other acts committed during the attack. For example, if a group launches a killing campaign, and a person commits sexual violence in the execution of that campaign, the person is guilty of the crime against humanity of sexual violence. It is irrelevant whether the State or organization encouraged sexual violence, since the necessary contextual element is already satisfied because of the attack based on killing.⁷⁶

11.2.5 *Mental element*

In addition to the requisite mental elements for his or her particular offences, the accused must also be aware of the ‘broader context in which his actions occur’, namely the attack directed against a civilian population.⁷⁷ It is the context of a widespread or systematic attack against a civilian population that makes an act a crime against humanity, and hence knowledge of this context is necessary in order to be

⁷⁰ *Tadić* ICTY A. Ch. 15.7.1999 para. 271. To determine if an act is ‘part of’ an attack, one may consider its characteristics, aims, nature or consequence: *Semanza* ICTR T. Ch 15.05.2003 para. 326. A crime may be committed several months after, or several kilometres away from, the main attack, and still, if sufficiently connected, be part of the attack: *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 127.

⁷¹ *Kunarac* ICTY A. Ch. 12.06.2002, para. 96; *Blaskić* ICTY A. Ch. 29.07.2004 para. 101.

⁷² *Kunarac* ICTY A. Ch. 12.06.2002 para. 96; *Blaskić* ICTY A. Ch. 29.07.2004 para. 101.

⁷³ *Blaskić* ICTY T. Ch. I 03.03.2000 para. 206. ⁷⁴ See the denunciation cases at section 11.2.5.

⁷⁵ See ICC Statute Art. 7(2)(a), see also Chesterman, ‘Altogether Different Order’, 320. The exception may be the crime of enforced disappearance, see section 11.3.10.

⁷⁶ Art. 7(2)(a) of the ICC Statute.

⁷⁷ *Tadić* ICTY, A. Ch. 15.07.1999 para. 248; *Kupreškić* ICTY T. Ch. II 14.01.2000 para. 134.

culpable for a crime against humanity as opposed to an ordinary crime or a war crime.⁷⁸

Tribunal cases indicate that awareness, wilful blindness, or knowingly taking the risk that one's act is part of an attack, will suffice.⁷⁹ It is less clear if the ICC will take a similar approach, because of the different wording of Article 30 of the ICC Statute (mental element), but the ICC Elements of Crimes suggest that the mental element required for 'contextual elements' is lower.⁸⁰ It is not required that the perpetrator had detailed knowledge of the attack or its characteristics.⁸¹ In most conceivable circumstances, the existence of a widespread or systematic attack would be notorious and knowledge could not credibly be denied. Thus, knowledge may be inferred from the relevant facts and circumstances.⁸²

The perpetrator need not share in the purpose or goals of the overall attack.⁸³ The mental requirement relates to knowledge of the context, not motive.⁸⁴ After the Second World War, several cases dealt with instances where individuals had denounced others to the Nazi regime, for personal opportunistic reasons. Such persons were held liable for crimes against humanity, because even though they acted out of personal motives, their actions were objectively part of the persecutory system, and they acted with knowledge of the system and the likely consequences.⁸⁵

11.3 Prohibited acts

11.3.1 The list of prohibited acts

The definition of crime against humanity includes certain prohibited acts when committed in the necessary context (widespread or systematic attack). The list of prohibited acts has gradually evolved over the decades.

The first list, appearing in the Nuremberg Charter, comprised murder, extermination, enslavement, deportation, persecution and other inhumane acts. Shortly thereafter, Control Council Law No. 10 added rape, imprisonment and torture. The ICTY and ICTR Statutes follow the same expanded list.

In 1998, the ICC Statute added sexual slavery, enforced prostitution, forced pregnancy, other sexual violence, enforced disappearance and apartheid. At first glance,

⁷⁸ *Tadić* ICTY T. Ch. II 07.05.1997 para. 656; *Kupreskić* ICTY T. Ch. II 14.01.2000 para. 138; *Semanza* ICTR T. Ch. 15.05.2003 para. 332; and see also *R. v. Finta* [1994] 1 SCR 701 at 819: 'the mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity'.

⁷⁹ *Tadić* ICTY T. Ch. II 07.05.1997 para. 657; *Kunarac* ICTY A. Ch. 12.06.2002 para. 102; *Blaskić* ICTY T. Ch. I 03.03.2000 para. 251; *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 59; see also *Finta* [1994] 1 SCR 701 at 819.

⁸⁰ See, e.g. Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crimes' in Lee, *Elements and Rules*, 34–5.

⁸¹ ICC Elements, Crimes Against Humanity Introduction, para. 2, states that it is not required that the perpetrator 'had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization'; see also *Blaskić* ICTY T. Ch. I 03.03.2000 para. 251; *Kunarac* ICTY A. Ch. 12.06.2002 para. 102.

⁸² ICC Elements, General Introduction, para. 3. ⁸³ *Kunarac* ICTY A. Ch. II 22.02.2001, para. 103.

⁸⁴ *Tadić* ICTY A. Ch. 15.07.1999 paras. 271–2, overturning a suggestion to the contrary by the Trial Chamber.

⁸⁵ See cases discussed in *Tadić* ICTY A. Ch. 15.07.1999 paras. 255–69.

this may seem to be an expansion on existing customary law. However, the list of prohibited acts in the previous precedents ended with the residual clause ‘or other inhumane acts’. If sexual slavery and these other acts were inhumane acts, Article 7 simply codified explicitly what was already contained implicitly in the residual clause. The view that these acts were already inhumane acts is supported by the following considerations. First, each of these acts was already recognized as an inhumane act or crime against humanity in previous international instruments. Second, the agreed objective of States at the Rome Conference was to reflect, not to expand, existing customary law, and thus Article 7 reflects a simultaneous statement of *opinio juris* by 120 States. Third, their status has been supported in subsequent jurisprudence and instruments.⁸⁶

For each of the following crimes, where no specific observations are made about the mental element, the normal mental element applies: the relevant conduct must be committed intentionally and with knowledge of the relevant circumstances.⁸⁷ With respect to legal requirements (for example ‘unlawful’) or other normative requirements (for example ‘inhumane’, ‘severe’), it is not required that the perpetrator personally considered the conduct inhumane or severe; it is sufficient that the perpetrator was aware of the underlying facts.⁸⁸

11.3.2 Murder

The crime of murder is well known to all legal systems and is an archetypal form of crime against humanity. There is general conformity between Tribunal jurisprudence and the ICC Elements that murder refers to unlawfully and intentionally causing the death of a human being.⁸⁹

Tribunal jurisprudence, consistent with jurisprudence in many national systems, indicates that the mental element is satisfied if the perpetrator intends to kill, or intends to inflict grievous bodily harm likely to cause death and is reckless as to whether death ensues.⁹⁰ It is unclear whether the ICC will be able to adopt the same approach, in light of the different wording of Article 30 of the ICC Statute (mental element), although it may be possible to interpret the statute consistently with previous authorities.⁹¹

⁸⁶ See, e.g. *Kvočka* ICTY T. Ch. I 02.11.2001 para. 208, and *Kupreškić* ICTY T. Ch. II 14.01.2000 para. 566, recognizing enforced disappearance, sexual violence, forced prostitution, forced transfer of populations. Article 2 of the SCSL Statute recognizes the sexual violence offences, and the Iraq Special Tribunal Statute includes each of the ICC Statute crimes other than *apartheid* and enforced sterilization.

⁸⁷ See, e.g. Art. 30 of the ICC Statute.

⁸⁸ See, e.g. Art. 32(2) of the ICC Statute; ICC Elements, General Introduction, para. 4.

⁸⁹ ICC Elements, Art. 7(1)(a); *Akayesu* ICTR T. Ch. I 02.09.1998 para. 589; *Jelišić* ICTY T. Ch. 14.12.1999 para. 35; *Kupreškić* ICTY T. Ch. II 14.01.2000 paras. 560–1.

⁹⁰ See, e.g. *Čelebići* ICTY T. Ch. II 16.11.1998 para. 439; *Akayesu* ICTR T. Ch. I 02.09.1998 para. 589; *Kordić* ICTY T. Ch. 26.02.2001 para. 236.

⁹¹ M. Boot, R. Dixon and C. K. Hall, ‘Article 7’ in Triffterer, *Observers’ Notes*, 14–15.

The conduct element of murder (crime against humanity) and wilful killing (war crime) is the same; the difference is the contextual element. The distinction between murder and extermination is discussed in section 11.3.3.

11.3.3 Extermination

The issue of how to define extermination is inextricably linked to the question of how to distinguish it from the crime against humanity of murder. Both involve killing, but 'extermination' connotes killing on a large scale. Is extermination distinct from murder on the basis that the perpetrator must carry out killing on a large scale, or is there another way to distinguish between the two? Rather than requiring that the accused personally carried out or directed large-scale killing, both Tribunal jurisprudence and the ICC Elements indicate that extermination involves killing by the accused *within a context* of mass killing.⁹²

Thus, the first and major difference between murder and extermination is that extermination requires a surrounding circumstance of mass killing.⁹³ The perpetrator need not carry out the mass killing personally; he only needs to know of the context of mass killing.

A second difference is that extermination expressly includes indirect means of causing death. This distinction was recognized as early as the 1948 UN War Crimes Commission, which included 'implication in the policy of extermination without any direct connection with actual acts of murder'.⁹⁴ Tribunal jurisprudence also includes indirect means of causing death,⁹⁵ as does the ICC Statute. Article 7(2)(b) of the ICC Statute expressly includes 'inflicting conditions of life ... calculated to bring about the destruction of part of a population', a phrase adapted from the Genocide Convention.⁹⁶

A third issue is whether the crime of extermination requires that the accused personally be responsible for a substantial number of deaths. Some cases have held that 'responsibility for one or for a limited number of killings is insufficient'.⁹⁷ Other cases indicate that a single killing is sufficient provided that the accused is aware of the necessary context of mass killing.⁹⁸ The ICC Elements of Crimes also follow the latter interpretation.⁹⁹

There are also significant overlaps between extermination and the crime of genocide. Indeed, the concepts of killing or inflicting conditions of life calculated to bring about the destruction of part of a population are common to both extermination and genocide. The major difference between the two crimes is the requisite special intent

⁹² ICC Elements, Art. 7(1)(b); *Kayishema* ICTR T. Ch. 21.05.1999 para. 147.

⁹³ Whereas the crime against humanity of murder can occur on the basis of a single killing, committed in the context of a widespread or systematic attack based on other crimes.

⁹⁴ UN War Crimes Commission, *History*, 194.

⁹⁵ *Rutaganda* ICTR T. Ch. 06.12.1999 para. 81; *Kayishema* ICTR T. Ch. 21.05.1999 para. 146.

⁹⁶ Art. 2(c) of the Genocide Convention 1948. ⁹⁷ *Vasiljević* ICTY T. Ch. I 29.11.2002 para. 228.

⁹⁸ *Kayishema* ICTR T. Ch. 21.05.1999 para. 147. ⁹⁹ ICC Elements, Art. 7(1)(b), element 1.

for the crime of genocide (the intent to destroy a group as such). Moreover, genocide can only be committed with an intent to target one of four types of groups (national, ethnical, racial or religious).¹⁰⁰

11.3.4 Enslavement

The accepted definition of enslavement is ‘exercising the powers attaching to the right of ownership’ over one or more persons. This definition is drawn from the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention, and has been adopted in the ICC Statute (Article 7(2)(c)) and in Tribunal jurisprudence.¹⁰¹

Enslavement may take various forms. It includes the traditional concept of ‘chattel slavery’, that is to say the treatment of persons as chattel, as in the slave trade. It also includes other practices, which are not limited to these ‘transactional’ or ‘chattel slavery’ examples, but which also involve exercising powers attaching to the right of ownership.¹⁰²

First, with respect to ‘chattel slavery’, the Slavery Convention definition of ‘slave trade’ refers to the capture, acquisition, sale, exchange, transport or disposal of persons with intent to reduce them to slavery or to sell or exchange them.¹⁰³ The ICC Elements of Crimes also list, as examples, such transactions as ‘purchasing, selling, lending or bartering’.

Second, the ICC Statute explicitly mentions the example of trafficking in persons, in particular, women and children (Article 7(2)(c)).¹⁰⁴

Third, as noted in the ICC Elements of Crimes, enslavement also includes ‘reducing a person to a servile status’ as defined in the 1956 Supplementary Slavery Convention. This includes practices of debt bondage, serfdom, forced marriage and child exploitation, as defined in that Convention.¹⁰⁵

Fourth, forced labour can also constitute enslavement.¹⁰⁶ In determining whether labour is ‘forced’ as prohibited under customary law, regard may be had to instruments such as the Geneva Convention III 1949 (Articles 49–57), the ICCPR (Article 8(3)(c)) and the Forced or Compulsory Labour Convention 1930. In general, these instruments prohibit forced or compulsory labour, with various recognized exceptions, such as military and national service, normal civic obligations, hard labour as lawful punishment for crime, and certain forms of labour for prisoners of war.¹⁰⁷ In *Krnjelac*, the Appeals Chamber held that severely overcrowded conditions, deplorable sanitation, insufficient food, locked doors, frequent beatings, psychological

¹⁰⁰ See ch. 9.

¹⁰¹ 1926 Slavery Convention, Art. 1; 1956 Supplementary Slavery Convention; *Kunarac* ICTY T. Ch. II 22.02.2001. para. 539; *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 353.

¹⁰² Valerie Oosterveld, ‘Sexual Slavery and the International Criminal Court: Advancing International Criminal Law’ (2003) 25 *Michigan Journal of International Law* 605 at 643.

¹⁰³ 1926 Slavery Convention, Art. 1(2).

¹⁰⁴ See also Tom Obokata, ‘Trafficking of Human Beings as a Crime Against Humanity’ (2005) 54 *ICLQ* 445.

¹⁰⁵ ICC Elements, footnote 11; Art. 1 of the 1956 Supplementary Slavery Convention. ¹⁰⁶ ICC Elements, footnote 11.

¹⁰⁷ See, e.g. Geneva Convention III 1949, Arts. 49–57; Art. 8(3) of the ICCPR.

abuse, and brutal living conditions rendered it impossible for detainees to consent to work and that their labour was indeed forced.¹⁰⁸

Fifth, other activities may also amount to enslavement. The ICTY Appeals Chamber in the *Kunarac* decision indicated that relevant factors include ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’.¹⁰⁹

A specific form of enslavement, namely sexual slavery, is discussed in section 11.3.8.

In *Kunarac*,¹¹⁰ the victims were kept in an abandoned house for approximately six months, where they were raped and sexually assaulted whenever the soldiers returned to the house. The Chamber found that they were constantly and continuously raped, forced to do household chores and obey all demands. Although at some point they were given the keys to the house, they had nowhere to go or to hide and hence:

no realistic option whatsoever to flee the house ... or to escape their assailants. They were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape [the victim] for 100 Deutschmark if he so wished ... The two women were treated as ... personal property ...

The two men responsible were found guilty of enslavement.

11.3.5 Deportation or forcible transfer

Deportation and forcible transfer of population is another frequent occurrence during crimes against humanity, particularly in contexts of ethnic cleansing. The terms refer to forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

‘Deportation’ is generally regarded as referring to displacement across a border, whereas ‘forcible transfer’ is generally regarded as referring to internal displacement.¹¹¹ The reference to ‘forcible transfer of population’ in the ICC Statute should be read in this light. Most Tribunal cases follow this distinction between the terms, although at least one Trial Chamber decision suggests that deportation can occur within a State’s boundary.¹¹²

Deportation or transfer must be *forced* in order to be a crime against humanity.¹¹³ This does not require actual physical force, but may also include the threat of force or coercion, psychological oppression, or other means of rendering displacement

¹⁰⁸ *Krnjelac* ICTY T. Ch. II 15.03.2002 paras. 193–5.

¹⁰⁹ *Kunarac* ICTY A. Ch. 12.06.2002 para. 119.

¹¹⁰ *Kunarac* ICTY T. Ch. II 22.02.2001 paras. 732–42.

¹¹¹ ILC draft Code, 1996, p. 100.

¹¹² See, e.g. *Krstić* ICTY T. Ch. I 02.08.2001 para. 521, *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 474, following the normal distinction; but see *Stakić* ICTY T. Ch. II 31.07.2003 paras. 677–8 rejecting a requirement of crossing international borders. This may have been an attempt to overcome the fact that the ICTY Statute does not expressly include ‘forcible transfer’. However, even maintaining the distinction, forcible transfer could still be covered under the ICTY Statute as an ‘inhumane act’: *Kupreskić* ICTY T. Ch. II 14.1.2000 para. 566.

¹¹³ ICC Statute, Art. 7(2)(d); *Krstić* ICTY T. Ch. I 02.08.2001 para. 528; *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 475.

involuntary.¹¹⁴ Thus, if a group flees of its own genuine volition, for example to escape a conflict zone, that would not be forced displacement.¹¹⁵ On the other hand, if a group flees to escape deliberate violence and persecution, they would not be exercising a genuine choice.¹¹⁶

The forced displacement must also be *unlawful* under international law. Most or all States carry out legitimate acts of deportation on a frequent basis. Deportation of aliens not lawfully present in the territory is an established practice of States.¹¹⁷ International humanitarian law, for example, allows transfers when the security of the population or imperative military reasons so demand; such transfers must meet certain stringent conditions and humanitarian safeguards.¹¹⁸

11.3.6 Imprisonment

Although imprisonment did not appear in the Nuremberg or Tokyo Charters, it was listed in Allied Control Council Law No. 10 and subsequent definitions. The term ‘imprisonment’ is broadly construed, capturing not only detention in prison-like conditions but other serious forms of confinement and detention. Out of an abundance of caution, the ICC Statute added ‘or other severe deprivation of physical liberty’ to ensure that a narrow definition was not applied, and that situations such as house arrest were included.¹¹⁹ It remains to be determined precisely how restrictive or how long a confinement must be in order to constitute imprisonment or severe deprivation of physical liberty.

Imprisonment must be arbitrary to constitute a crime against humanity. After all, there are many contexts in which persons may be lawfully detained, including following lawful arrest, conviction following trial, lawful deportation or extradition procedures, quarantine, and, during armed conflict, assigned residence, internment on security grounds and internment of prisoners of war.¹²⁰ Tribunal jurisprudence refers to imprisonment without due process of law.¹²¹ Article 7(1)(e) of the ICC Statute refers to deprivation ‘in violation of fundamental rules of international law’.

The requirement that the imprisonment be ‘arbitrary’ (and similarly, in violation of ‘fundamental rules’) does not mean that a minor procedural defect would expose the authorities involved to international prosecution; significant failings are required. The ICC Elements refer to the ‘gravity of the conduct’ being such as to violate fundamental

¹¹⁴ ICC Elements, Art. 7(1)(d); *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 475, *Kumarac* ICTY T. Ch. II 22.02.2001 para. 129.

¹¹⁵ Jean Pictet, *Commentary on Geneva Convention IV* (ICRC, Geneva, 1960) 279.

¹¹⁶ *Kršić* ICTY T. Ch. I 02.08.2001 para. 530.

¹¹⁷ The question whether an individual was ‘lawfully’ present would probably be assessed under international as well as national law. For example, a government could not circumvent the definition of this crime through an arbitrary legislative act declaring members of a group not lawfully present.

¹¹⁸ Art. 49 of the Geneva Convention IV 1949; Art. 87 of the AP I. ¹¹⁹ Hall, in Triffterer, *Observers’ Notes*, 22.

¹²⁰ Arts. 5, 42 and 43 of the Geneva Convention IV 1949; Arts. 21–32 of the Geneva Convention III 1949.

¹²¹ *Kordić* ICTY T. Ch. 26.02.2001 para. 302, *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 113.

rules of international law.¹²² Tribunal jurisprudence states that deprivation will be arbitrary and unlawful ‘if no legal basis can be called upon to justify the initial deprivation of liberty’.¹²³ Even where the initial detention was justified, imprisonment will become arbitrary if the legal basis ceases to apply and the person remains imprisoned.¹²⁴

While caution must always be used when relying on human rights standards in a criminal law context, the three categories suggested by the UN Working Group on Arbitrary Detention seem to capture the forms of this crime admirably: (1) absence of any legal basis for the deprivation of liberty, (2) deprivation of liberty resulting from exercise of specified rights and freedoms (that is to say political prisoners), and (3) ‘when the total or partial non-observance of the international human rights norms relating to the right to a fair trial ... is of such gravity as to give the deprivation of imprisonment an arbitrary character’.¹²⁵

The material elements of arbitrary imprisonment are comparable to the material elements for unlawful confinement (war crime); the difference between the two is the contextual element (armed conflict or widespread or systematic attack).

11.3.7 Torture

The crime of torture appeared in Allied Control Council Law No. 10 and subsequent definitions of crimes against humanity. The prohibition against torture is well established in numerous conventions and instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter of Human and Peoples’ Rights, the Convention Against Torture, the Inter-American Convention to Prevent and Punish Torture, and the Geneva Conventions and the Additional Protocols thereto. It is well recognized as a norm of customary law and amounts to *jus cogens*.¹²⁶

Much of the definition in the Convention Against Torture (CAT) 1984 is also accepted as the core definition for torture as a crime against humanity or war crime: the intentional infliction of severe pain or suffering, whether physical or mental, upon a person.¹²⁷

There are however some open questions. The first is the question of official capacity. The CAT definition requires that the pain or suffering be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.¹²⁸ Early Tribunal cases adopted the requirement of

¹²² ICC Elements, Art. 7(1)(e), element 2. ¹²³ *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 114.

¹²⁴ For example, if the procedural safeguards of Art. 43 of the Geneva Convention IV 1949 for internment of civilians are disregarded: *Kordić* ICTY T. Ch. 26.02.2001 para. 286; *Čelebići* ICTY T. Ch. II 16.11.1998 para. 579.

¹²⁵ Report of the UN Working Group on Arbitrary Detention, UN Doc. E/CN.4/1998/44 para. 8.

¹²⁶ *Čelebići* ICTY T. Ch. II 16.11.1998 para. 454. For discussion of the crime of torture under the Convention Against Torture, see section 14.3.

¹²⁷ Art. 1 of the CAT. ¹²⁸ *Ibid.*

official instigation or acquiescence.¹²⁹ However, in *Kunarac*, the Trial Chamber departed from this approach, noting structural differences between international criminal law and human rights law.¹³⁰ Human rights law focuses on the State because it regulates State treatment of human beings. International criminal law holds individuals accountable for crimes, and applies to everyone whether or not affiliated with a State. Similarly, the ICC Statute and the ICC Elements do not require a linkage between the act of torture and a public official.¹³¹ Thus, torture by rebel groups, paramilitaries and others is included.

The second is the ‘purpose’ element. The CAT definition requires a specific purpose, such as ‘obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind’.¹³² It is not yet settled whether the customary law crime against humanity of torture requires the act to be committed with a specific purpose.

Many authorities, including the CAT and related international instruments, as well as Tribunal jurisprudence, regard the purpose element as a defining feature of torture.¹³³ On this approach, the presence of prohibited purpose distinguishes torture from inhuman treatment.¹³⁴ The purpose need not be the sole or predominant purpose, but must be part of the motivation.¹³⁵ The list is illustrative and some cases suggest the addition of ‘humiliation’ as a prohibited purpose.¹³⁶

In other authorities, such as jurisprudence of the European Court of Human Rights, the difference between torture and lesser violations, such as inhuman treatment, is *severity*: the special stigma of torture requires infliction of ‘very serious and cruel suffering’.¹³⁷ Article 7 of the ICC Statute followed this approach, and did not include a purpose element.

Further adding to the uncertainty, the ICC Elements of Crimes adopted the ‘purpose’ requirement with respect to the war crime of torture but not with respect to crimes against humanity. Delegates followed Tribunal precedents with respect to war crimes, but they did not do so for crimes against humanity, out of fidelity to the decision taken at the Rome Conference not to require such an element for the crime

¹²⁹ *Akayesu* ICTR T. Ch. I 02.09.1998 para. 594; *Furundžija* ICTY T. Ch. II 10.12.1998 para. 162.

¹³⁰ *Kunarac* ICTY T. Ch. II 22.02.2001 paras. 387–91.

¹³¹ Article 7(2)(e) of the ICC Statute; but see Art. 7(2)(a) which appears to require some sort of linkage between a State or organization and the attack as a whole, albeit not the particular crimes of the accused.

¹³² Article 7(2)(e) of the ICC Statute.

¹³³ *Akayesu* ICTR T. Ch. I 02.09.1998 paras. 593–5; *Čelebići* ICTY T. Ch. II 16.11.1998 para. 459; *Furundžija* ICTY T. Ch. II 10.12.1998 para. 161; *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 180.

¹³⁴ *Čelebići* ICTY T. Ch. II 16.11.1998 para. 469; *Krštić* ICTY T. Ch. I 02.08.2001 para. 516.

¹³⁵ *Kunarac* ICTY A. Ch. 12.06.2002 para. 155; *Kvočka* ICTY T. Ch. I 02.11.2001 para. 153; *Čelebići* ICTY T. Ch. II 16.11.1998 para. 470.

¹³⁶ *Furundžija* ICTY T. Ch. II 10.12.1998 para. 162, but see *Krnjelac* ICTY T. Ch. II 15.03.2002 para. 186, doubting the customary law status of this extension.

¹³⁷ *Ireland v. United Kingdom*, 18 January 1978, Series A 25, (1978) ECHR 1 para. 167; *Selmouni v. France*, 28 July 1999, ECHR Appl. No. 25803/94 (1999) 29 EHRR 403 para. 105; *Aydın v. Turkey* (1998) 25 EHRR 251 para. 82.

against humanity of torture. Footnote 14 of the ICC Elements therefore specifies that no purpose element is required.

Thus, for future efforts to harmonize the authorities, there appear to be two major options: either to consider the interpretation in the ICC Elements of Crimes as an anomaly, or to articulate a distinction between crimes against humanity and war crimes, such that purpose is required for torture as a war crime but not as a crime against humanity.

The ICC Statute, while dropping any requirements of purpose or link to an official, adds a requirement that the victim be in the 'custody or control' of the perpetrator. The requirement should not be onerous to prove since, as a practical matter, torture entails such custody or control. Various explanations have been offered for this addition, including establishing a link of power or control given the deletion of link to public official, or excluding the use of force against military objectives during armed conflict.¹³⁸

It should also be noted that most definitions of torture, including the CAT and the ICC Statute, expressly exclude 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions'. 'Lawful' in this context would appear to mean lawful in accordance with national law, provided however that the national law is not in violation of international law.¹³⁹

Tribunal jurisprudence and regional human rights bodies have recognized that rape can constitute a form of torture.¹⁴⁰ Rape causes severe pain and suffering, both physical and psychological. In *Furundžija*, the accused was convicted of torture for acts during an interrogation, including sexual threats, rapes and forced nudity, inflicted on the victim for purposes of intimidation, humiliation and extracting confession.¹⁴¹

11.3.8 Sexual violence

The crime of rape appeared in Allied Control Council Law No. 10 and subsequent instruments, including the ICTY and ICTR Statutes. The 1996 draft Code of Crimes prepared by the International Law Commission proposed that the definition be updated by adding enforced prostitution and other forms of sexual abuse.¹⁴² The ICC Statute took up the idea of modernizing the definition, by including 'rape, sexual slavery, forced pregnancy, enforced sterilization, or any other form of sexual violence

¹³⁸ Darryl Robinson, 'Elements of Crimes Against Humanity' in Lee, *Elements and Rules* 90; Hall, in Triffterer, *Observers' Notes*, 48.

¹³⁹ Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/1988/17, para. 42.

¹⁴⁰ *Akayesu* ICTR T. Ch I 02.09.1998 para. 597; *Kunarac* ICTY A. Ch. 12.06.2002 para. 150, *Semanza* ICTR T. Ch. 15.05.2003 para. 482, *Čelebići* ICTY T. Ch. II 16.11.1998 para. 495; *Fernando and Racquel Meiji v. Peru*, Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10 970, 1 March 1996; *Aydın v. Turkey* (1998) 25 EHRR 251, para. 86.

¹⁴¹ *Furundžija* ICTY T. Ch. II 10.12.1998 para. 267.

¹⁴² Report of the International Law Commission on the work of its forty-eighth session, 1996, UN GAOR 51st Sess, Supp. No 10 (A/51/10) at 102–3.

of comparable gravity' (Article 7(1)(g)).¹⁴³ The inclusion was seen not as an expansion but rather as an acknowledgement that these acts, which have persisted in history, including during the violence in the former Yugoslavia and Rwanda, are inhumane acts falling within the definition of crimes against humanity.

The same definitions apply both in crimes against humanity and in war crimes, so the relevant issues for both war crimes and crimes against humanity will be discussed here.

Rape

The crime of rape has two components. The first is a physical invasion of a sexual nature. The second component is, according to some authorities, the presence of coercive circumstances, and according to other authorities, the absence of consent.

The first component, the conduct element, was first described in *Akayesu*, the first case defining the crime against humanity of rape. The ICTR Trial Chamber held that rape 'is a form of aggression and . . . cannot be captured in a mechanical description of objects and body parts', which led it to the definition 'a physical invasion of a sexual nature, committed on a person in circumstances which are coercive'.¹⁴⁴ A slight rift emerged in Tribunal jurisprudence, however, when a subsequent decision of an ICTY Trial Chamber (*Furundžija*) concluded that greater clarity was needed, and defined the physical element (rather mechanically) as: the sexual penetration, however slight, of (a) the vagina or anus of the victim by the penis of the perpetrator or any other object, or (b) the mouth of the victim by the penis of the perpetrator.¹⁴⁵ This definition was subsequently endorsed by the Appeals Chamber in *Kunarac*.¹⁴⁶

The ICC Elements of Crimes falls in between the two definitions:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.¹⁴⁷

This definition is closer to the later Tribunal jurisprudence, in that it is comparably specific, yet it is slightly broader and gender neutral.

The second component is less settled. Early Tribunal jurisprudence required coercive circumstances, that is to say coercion or force or threat of force against the victim or a third person.¹⁴⁸ This approach was followed in the ICC Elements of Crimes, albeit significantly expanded:

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such

¹⁴³ See, e.g. Vienna Declaration, World Conference on Human Rights, UN Doc. A/CONF.157/24 (1993) Part I, para. 28 and Part II, para. 38; Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), Chapter II, paras. 114–15 *bis*.

¹⁴⁴ *Akayesu* ICTR T. Ch. I 02.09.1998 paras. 597–8. ¹⁴⁵ *Furundžija* ICTY T. Ch. II 10.12.1998 para. 185.

¹⁴⁶ *Kunarac* ICTY T. Ch. II 22.02.2001 para. 127. ¹⁴⁷ ICC Elements, Art. 7(1)(g)–1, element 1.

¹⁴⁸ *Akayesu* ICTR T. Ch. I 02.09.1998 para. 598; *Furundžija* ICTY T. Ch. II 10.12.1998 para. 185.

person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁴⁹

This definition was a step forward from previous Tribunal jurisprudence, in that it more thoroughly encompasses the situations that can constitute rape. However, it still appears to be misguided in its focus, since the element required in most or all national legal systems is far simpler: lack of consent of the victim.

Indeed, in *Kunarac*, the Trial Chamber analysed various legal systems and concluded that the correct element was lack of consent of the victim. This was the true common denominator and reflected the basic principle of penalizing violations of sexual autonomy.¹⁵⁰ The Appeals Chamber confirmed this approach, and held that force or threat of force may be relevant, in providing clear evidence of non-consent, but force is not an element *per se* of rape.¹⁵¹

The ICC Elements are intended to guide the judges, and should be given appropriate weight as a consensus instrument, but this may be one of the instances where the ICC judges may find that the elements do not reflect the correct reading of the Statute. In this it could be borne in mind that the elements were adopted prior to the new line of cases, that the new line of cases better reflects national legal systems and indeed the underlying principle of sexual autonomy,¹⁵² and that the newer interpretation is also more compatible with the ICC Rules of Procedure and Evidence.¹⁵³

War crimes and crimes against humanity of sexual violence are almost invariably committed in coercive circumstances where reasonable belief in consent is simply not a credible possibility. Like national jurisdictions, international jurisdictions have adopted approaches that are consistent with respect for sexual autonomy and that prevent spurious lines of questioning; see section 17.10.

Sexual slavery

Sexual slavery is a particularly serious form of enslavement.¹⁵⁴ The first element of sexual slavery is therefore identical to enslavement.¹⁵⁵ The additional requirement is that perpetrator caused the victim to engage in one or more acts of a sexual nature.¹⁵⁶ Particularly egregious examples include the ‘comfort stations’ maintained by the Japanese in the Second World War and the ‘rape camps’ in the former Yugoslavia.¹⁵⁷ The examples of enslavement from the Tribunal cases discussed above,¹⁵⁸ would clearly qualify as sexual slavery.

¹⁴⁹ ICC Elements, Art. 7(1)(g)–1, element 2. ¹⁵⁰ *Kunarac* ICTY T. Ch. II 22.02.2001 paras. 440–60.

¹⁵¹ *Kunarac* ICTY A. Ch. 12.06.2002 para. 129.

¹⁵² Kristen Boon, ‘Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent’ (2001) 32 *Columbia Human Rights Law Review* 625.

¹⁵³ The ICC RPE contain rules on evidence of consent in cases of sexual violence, and yet the current elements do not refer to consent as a significant factor.

¹⁵⁴ *Final Report of Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 30.

¹⁵⁵ ICC Elements, Art. 7(1)(g)–2, element 1. ¹⁵⁶ ICC Elements, Art. 7(1)(g)–2, element 2.

¹⁵⁷ Special Rapporteur on Systematic Rape, *Final Report*, para. 30. ¹⁵⁸ See section 11.3.4.

Sexual slavery includes many acts that in the past would have been categorized as 'enforced prostitution'.¹⁵⁹ The latter concept is however problematic in that it muffles the violence involved, it is rooted in chastity and family honour, and it degrades the victim; thus 'sexual slavery' is generally preferred as properly reflecting the nature and seriousness of the crime.¹⁶⁰

Enforced prostitution

Enforced prostitution is prohibited in the Geneva Convention IV 1949, but as an example of an attack upon a woman's honour; in Additional Protocol I it is prohibited as an outrage upon personal dignity.¹⁶¹ The ICC Statute lists it as a crime against humanity and war crime in its own right, removing the outdated linkage to 'honour'.

The ICC Elements of Crimes refer to (1) causing one or more persons to engage in one more acts of a sexual nature, (2) by force or by threat of force (or under the coercive circumstances as noted above in the discussion of rape).¹⁶² In addition, pursuant to a US proposal, it is required that (3) 'the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for in or in connection with the acts of a sexual nature'.¹⁶³ There were considerable misgivings among some delegations concerning the paucity of precedent for this element. In the end, however, it was adopted, in order to create some distinction from sexual slavery and in light of the ordinary meaning of the term 'prostitution'. In the absence of such anticipated advantage, the relevant conduct could still be prosecuted as sexual slavery or sexual violence.

Forced pregnancy

The inclusion of 'forced pregnancy' was the subject of intense debate in the negotiation of the ICC Statute.¹⁶⁴ It had previously been recognized in instruments such as the Vienna Declaration and Programme of Action and the Beijing Declaration and Platform for Action.¹⁶⁵ The inclusion recognized a particular harm inflicted on women, including during the conflicts in the former Yugoslavia, where captors indicated that they tried to impregnate women and hold them until it was too late to obtain an abortion.¹⁶⁶

However, some delegations were concerned that the concept would be used to criminalize national systems that did not provide a right to abortion, which would

¹⁵⁹ Special Rapporteur on Systematic Rape, *Final Report*, para. 31.

¹⁶⁰ Oosterveld, 'Sexual Slavery'; Kelly D. Askin, 'Women and International Humanitarian Law' in Kelly D. Askin and Doreen M. Koenig (eds.), *Women and International Human Rights Law* (1999), vol. I, 48; Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law' (1994) 5 *Hastings Law Journal* 243.

¹⁶¹ Art. 27 of GC IV 1949: 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'

¹⁶² ICC Elements, Art. 7(1)(g)-3, element 1. ¹⁶³ ICC Elements, Art. 7(1)(g)-3, element 2.

¹⁶⁴ Cate Steatins, 'Gender Issues' in Lee, *The Making of the Rome Statute*, 363-9.

¹⁶⁵ Vienna Declaration, World Conference on Human Rights, UN Doc. A/CONF.157/24 (1993) Part II, para. 38; Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) Chapter II, para. 115.

¹⁶⁶ Commission of Experts (Former Yugoslavia), *Report*, paras. 248-50.

conflict with their religious convictions and their constitutional provisions. It was agreed that discussion of the right to abortion will continue in a human rights context but was not part of the crimes against humanity debate. Agreement was reached on the following definition: (1) unlawful confinement (2) of a woman forcibly made pregnant (3) with the intent of affecting the ethnic composition of a population or carrying out other grave violations of international law.¹⁶⁷ The reference to grave violations of international law includes, for example, biological experiments. For greater clarity, Article 7(2)(f) states that '[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy'.

Enforced sterilization

The ICC Statute is the first treaty expressly recognizing enforced sterilization as a crime against humanity and war crime. The conduct has however been prosecuted before, in the context of unlawful medical experiments such as were seen in the Second World War.¹⁶⁸ The ICC Elements of Crimes is the first instrument to define this particular crime. The elements are that (1) the perpetrator deprived one or more persons of biological reproductive capacity and (2) that the conduct was neither justified by the medical or hospital treatment of the persons concerned nor carried out with their genuine consent.¹⁶⁹ This definition is not restricted to medical operations, but could also include an intentional use of chemicals for this effect.¹⁷⁰ The concept of 'genuine consent' excludes consent obtained by deception.¹⁷¹

Enforced sterilization can also satisfy the conduct requirements of genocide (Article 6(e) of the ICC Statute) and can amount to genocide where genocidal intent is present.

Other sexual violence

The ICC Statute also includes 'other sexual violence of comparable gravity'. The ICC Elements document elaborates the following elements: (1) the perpetrator committed an act of a sexual nature against one or more persons *or* caused one or more persons to engage in an act of a sexual nature, (2) by force or threat of force or coercion¹⁷² and (3) the gravity of the conduct was comparable to the other offences in Article 7(1)(g).¹⁷³

The first element covers both acts against the victim as well as forcing the victim to perform sexual acts. It is not restricted to cases of assault, and therefore can include examples of forced nudity.¹⁷⁴ The second element, coercive circumstances, is discussed above in the context of rape. The third element creates a threshold of seriousness, so that the acts warrant being described as crimes against humanity.¹⁷⁵

¹⁶⁷ Art. 7(2)(f) of the ICC Statute. ¹⁶⁸ *Brandt (The Doctors' Trial)* IV LRTWC 91.

¹⁶⁹ ICC Elements, Art. 7(1)(g)–5, elements 1 and 2.

¹⁷⁰ Eve la Haye, in Lee, *Elements and Rules*, 195. The ICC Elements exclude 'birth control measures with a non-permanent effect'.

¹⁷¹ ICC Elements, footnote 55. ¹⁷² With the same list of coercive circumstances discussed above in the context of rape.

¹⁷³ ICC Elements, Art. 7(1)(g)–6, elements 1 and 2.

¹⁷⁴ Eve La Haye, in Lee, *Elements and Rules*, 198; Special Rapporteur on Systematic Rape, *Report*, paras. 21–2.

¹⁷⁵ In the context of war crimes, the requirement refers to gravity comparable to a grave breach (or Common Article 3 in the case of internal armed conflicts) of the Geneva Conventions.

The UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices observed that sexual violence includes:

any violence, physical or psychological, carried out by sexual means or targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals or slicing off a woman's breasts. Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner.¹⁷⁶

11.3.9 Persecution

Persecution involves the intentional and severe deprivation of fundamental rights, against an identifiable group or collectivity on prohibited discriminatory grounds. In addition, the ICC Statute indicates that persecution must be committed in connection with another crime or at least one inhumane act.

Severe deprivation of fundamental rights

Until recently, the crime of persecution was not well defined, and the need for adequate precision was highlighted both in Tribunal jurisprudence and in the drafting of the ICC Statute.¹⁷⁷ The test developed in Tribunal jurisprudence requires (1) a gross or blatant denial, (2) on discriminatory grounds, (3) of a fundamental right, laid down in international customary or treaty law, (4) reaching the same level of gravity as other crimes against humanity.¹⁷⁸ Although there is some different terminology, this is generally compatible with the ICC definition, which refers to intentional and severe deprivation of fundamental rights, on specified discriminatory grounds.

The emergent definition, with the notions of fundamental rights and severe deprivation, or gross or blatant denial and similar gravity, as well as discriminatory grounds, provides the needed precision for criminal law. Nonetheless, the test necessarily remains somewhat open with respect to the particular *acts* that may constitute persecution, as it is impossible to anticipate all future examples. Tribunal jurisprudence has noted that:

neither international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems. [Thus] the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen sine lege*.¹⁷⁹

¹⁷⁶ Special Rapporteur on Systematic Rape, *Report*, paras. 21–2.

¹⁷⁷ *Kupreškić* ICTY T. Ch. II 14.01.2000 para. 618: 'However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.'

¹⁷⁸ See, e.g. *Kupreškić* ICTY T. Ch. II 14.01.2000 para. 621.

¹⁷⁹ *Kordić* ICTY T. Ch. 26.02.2001 para. 694.

Gravity or severity

Tribunal jurisprudence indicates that persecution requires a gravity comparable to other crimes against humanity;¹⁸⁰ in the ICC definition this requirement may be subsumed in the requirements of 'severe' deprivation and the requirement of 'connection' to other acts.

Discriminatory grounds

The fundamental feature of persecution is that it be committed on discriminatory grounds. The ICTY and ICTR Statutes refer to persecution on political, racial or religious grounds.¹⁸¹ The ICC Statute contains an updated and more inclusive list of prohibited grounds: political, racial, national, ethnic, cultural, religious, or gender.¹⁸² In addition, the ICC list is cautiously open-ended in referring to 'other grounds that are universally recognized as impermissible under international law'.¹⁸³ The standard of 'universal' recognition is a high one, but a high standard was considered necessary in order to satisfy the principle of legality.

Connection to other acts

The ICC Statute requires that persecution be committed in connection with (a) any crime within the jurisdiction of the Court or (b) any other act listed in Article 7(1). This requirement was included because of the concern of several States about the possible elasticity of the concept of persecution. The fear was that any practices of discrimination, more suitably addressed by human rights bodies, would be labelled as 'persecution' giving rise to international prosecutions. The connection requirement was inserted to ensure at least a context of more recognized forms of criminality. Although the original proposal was to require a link to another crime within the jurisdiction of the court, this was widened to include a link to any other act referred to in Article 7(1).

The customary law status of this requirement is open to doubt. Such a requirement is not applied in Tribunal jurisprudence; in *Kupreskić*, an ICTY Trial Chamber found that 'although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law'.¹⁸⁴ In any event, the requirement should not pose a restriction for legitimate prosecutions of persecution, since it is satisfied by a linkage to even *one* other recognized act (a killing or other inhumane act), which one would expect to find in a situation warranting international prosecution. In so far as such an element exists, it is purely an objective

¹⁸⁰ See, e.g. *Kupreskić*, ICTY T. Ch. II 14.01.2000 paras. 619 and 621; *Kvočka* ICTY T. Ch. I 02.11.2001 para. 185; *Ruggiu* ICTR T. Ch. 01.06.2000 para. 21.

¹⁸¹ Art. 5(h) of the ICTY Statute; Art. 3(h) of the ICTR Statute. ¹⁸² Art. 7(1)(h) of the ICC Statute. ¹⁸³ *Ibid.*

¹⁸⁴ *Kupreskić* T. Ch. II 14.1.2000 para. 580. Antonio Cassese argues persuasively that the requirement is inconsistent with the elimination of the general nexus requirement in the Nuremberg Charter and therefore is a restriction on customary law: Cassese, 'Crimes' in Cassese, *Commentary*, 376.

element to ensure the seriousness of the situation, and does not require any mental element.¹⁸⁵

Civilian population?

There is also a question whether persecution, unlike other crimes against humanity, need not be directed against a civilian population. On the one hand, the Nuremberg definition dealt separately with persecution, such that it was not linked to civilian population, and post-war cases have dealt with persecution of military personnel.¹⁸⁶ On the other hand, the Nuremberg approach may be overtaken by current practice, since all modern instruments unify the prohibited acts under a single chapeau, a move that was welcomed as rationalizing the structure and eliminating the ‘awkward bifurcation’.¹⁸⁷ Concerns about protective coverage for military personnel may be addressed if a broad interpretation of ‘civilian population’ is adopted, as discussed in section 11.2.2.¹⁸⁸

Mental element

In addition to the normal mental element relating to the conduct and the broader context, persecution requires a particular intent to target a person or group on prohibited grounds of discrimination.¹⁸⁹ Tribunal jurisprudence indicates that a particular *intent* to discriminate is required, not simply a *knowledge* that one is acting in a discriminatory way.¹⁹⁰ With respect to the requirement in the ICC Statute of a ‘connection’ to other crimes or prohibited acts, this requirement is purely objective and no mental element is required.¹⁹¹

Relationship to other crimes

Persecution and genocide each require a particular discriminatory intent. In the case of genocide, however, the intent is more specific; it must be an intent to destroy a group as such, and the target must be a national, ethnical, racial or religious group. Genocide can only be based on the listed acts (see, for example Article 6 of the ICC Statute) whereas the conduct potentially amounting to persecution is broader.

Acts amounting to other crimes against humanity can constitute persecution if the additional aggravating element of discriminatory intent is present. Acts amounting to war crimes can also constitute persecution if the contextual elements for crimes against humanity are satisfied, as well as the particular intent for persecution.

¹⁸⁵ ICC Elements, footnote 22. ¹⁸⁶ Cassese, *International Criminal Law*, 89–90.

¹⁸⁷ Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford, 2001) 59.

¹⁸⁸ If the provision excludes only battlefield action against legitimate military objectives then there would be no gap in coverage. Protection would apply in all circumstances where military personnel could feasibly be victims of persecution – during peacetime, in their civilian lives, when captured or rendered *hors de combat*.

¹⁸⁹ ICC Elements, Art. 7(1)(h), element 3; *Kordić* ICTY T. Ch. 26.02.2001 para. 212.

¹⁹⁰ *Krnjelac* ICTY T.Ch. II 15.03.2002 para. 435; *Kordić* ICTY T. Ch. 26.02.2001 para. 212.

¹⁹¹ ICC Elements, footnote 22.

Examples of persecutory acts

Persecutory acts include the prohibited acts already listed in the definition of crimes against humanity, when committed with discriminatory intent.¹⁹² Examples that have been prosecuted include murder, extermination, imprisonment, deportation, transfer of populations, torture, enslavement and beatings (inhumane acts).¹⁹³ In addition, they can include other conduct that severely deprives political, civil, social or economic rights. Examples include the passing of discriminatory laws, restriction of movement and seclusion in ghettos, the exclusion of members of an ethnic or religious group from aspects of social, political and economic life, including exclusion from professions, business, educational institutions, public service and inter-marriage.¹⁹⁴ It also includes overt violence such as burning of homes and terrorization.¹⁹⁵

Attacks on property can constitute persecution. This includes ‘systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group’,¹⁹⁶ and destruction of homes and means of livelihood.¹⁹⁷ The *Tadić* decision noted doubts whether attacks on purely industrial property would suffice, but economic measures with personal effects, including deprivation of livelihood, would suffice.¹⁹⁸ The *Blaskić* decision affirmed that persecution includes ‘targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community’.¹⁹⁹ This may be seen in destruction of private dwellings, businesses, symbolic buildings, looting and plunder of businesses and private property, boycott of businesses and shops, and forcing the group out of economic life.²⁰⁰

11.3.10 Enforced disappearance

The ICC Statute expressly includes enforced disappearance as a crime against humanity. Enforced disappearance has however been previously recognized as an international crime and indeed as a crime against humanity. It was exemplified in the ‘Night and Fog Decree’ issued by the Nazis, to execute people and to provide no information to the families as to their whereabouts or fate.²⁰¹ It was also a prevalent feature under military regimes in Latin America in the 1980s, and is still practised today in various regimes around the world. Enforced disappearance is expressly recognized as a crime against humanity in the 1992 UN Declaration on the Protection of All Persons from

¹⁹² *Kupreskić* ICTY T. Ch. II 14.01.2000 paras. 593–607.

¹⁹³ *Tadić* ICTY T. Ch. II 07.05.1997 paras. 704–10; *Kupreskić* ICTY T. Ch. II 14.01.2000 para. 594.

¹⁹⁴ *Kupreskić* ICTY T. Ch. II 14.01.2000 paras. 608–15. ¹⁹⁵ *Krštić* ICTY T. Ch. I 02.08.2001, para. 537.

¹⁹⁶ ILC Report, 1991, p. 268. ¹⁹⁷ *Kordić* ICTY T. Ch. 26.02.2001 para. 205.

¹⁹⁸ *Tadić* ICTY T. Ch. II 07.05.1997 para. 707. ¹⁹⁹ *Blaskić* ICTY T. Ch. I 03.03.2000 para. 233.

²⁰⁰ *Ibid.* paras. 220–33. ²⁰¹ *Nuremberg Judgment*, reproduced (1947) 41 AJIL 172 at 230.

Enforced Disappearance, the 1994 Inter-American Convention on the Forced Disappearance of Persons and, more recently, in the 2005 International Convention on the Protection of All Persons from Enforced Disappearance.²⁰²

The definition in the ICC Statute is based on the UN Declaration and the Inter-American Convention,²⁰³ and refers to the ‘arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of law for a prolonged period of time’.²⁰⁴

A welcome development in the negotiation of the ICC Elements was the realization that there are various ways in which an *individual* may be liable for this crime. Previous definitions described the whole system of enforced disappearance, but it is unlikely that a single individual would be involved in the arrest, detention or abduction phase, as well as the refusal to acknowledge the deprivation or to provide information. Enforced disappearance typically involves many actors. Therefore, the ICC Elements recognize that the crime may be committed (a) by arresting, detaining or abducting a person, with knowledge that a refusal to acknowledge or give information would be likely to follow in the ordinary course of events, or (b) by refusing to acknowledge the deprivation of freedom or to provide information on the fate or whereabouts, with knowledge that such deprivation may well have occurred.²⁰⁵

Previous instruments required commission, authorization, support or acquiescence from the State. The ICC Statute expanded this to refer as well to ‘political organizations’, consistent with the fundamental proposition that crimes against humanity may be committed by non-State actors. The terms ‘authorization, support or acquiescence’ may provide helpful guidance in interpreting Article 7(2)(a) of the ICC Statute. However, whereas Article 7(2)(a) does not require authorization of, support for or acquiescence in relation to *the particular acts of the accused*, in the case of enforced disappearance, a more direct linkage appears to be required.

Those arresting, detaining or abducting a person must know that a refusal to acknowledge or give information would be likely to follow in the ordinary course of events. Those refusing to acknowledge the deprivation of freedom or to provide information on the fate or whereabouts must know that such deprivation may well have occurred. In addition, the crime of enforced disappearance requires a particular intention, to remove a person from the protection of the law.

²⁰² Preamble paras. 4, 6 and 5 of the respective instruments.

²⁰³ Preamble para. 3 of the UN Declaration and Art. 2 of the Inter-American Convention.

²⁰⁴ Art. 7(2)(i) of the ICC Statute.

²⁰⁵ Georg Witschel and Wiebke Rückert, ‘Crime Against Humanity of Enforced Disappearance of Persons’ in Lee, *Elements and Rules*, 98–103.

Enforced disappearance may involve other crimes such as killing, torture or arbitrary imprisonment. The essence of the crime, however, is that the friends and families of the direct victims do not know whether the persons concerned are alive or dead. It is this uncertainty that is the hallmark of enforced disappearance, and indeed the friends and families of the direct victims are also the special victims of this crime.

11.3.11 *Apartheid*

The ICC Statute includes the crime of apartheid as a crime against humanity. Apartheid was recognized as a crime against humanity in instruments such as the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the 1973 Apartheid Convention.²⁰⁶

The definition was adjusted in order to refer not only to the situation which had prevailed in South Africa, but also any similar situations in the future. The ICC Statute, Article 7(2)(h), defines it as ‘inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized racial regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime’.

The definition of crimes against humanity always included a residual clause encompassing other inhumane acts of a similar character. Thus, by requiring in the crime of apartheid definition that the inhumane acts be ‘of a character similar to those referred to in paragraph 1’, the drafters ensured that they did not exceed existing law. What the ICC Statute provides is simply an express affirmation and recognition of the crime of apartheid where inhumane acts are committed in the context of an institutionalized racial regime of systematic oppression and domination.

Most or all of the acts listed in the Apartheid Convention are captured by the ICC definition. The requirement of ‘similar character’ naturally covers acts of *identical* character,²⁰⁷ and hence the examples in the Apartheid Convention of murder, torture, arbitrary imprisonment and persecution are clearly included. In addition, inflicting conditions calculated to cause physical destruction of a group; legislative measures to prevent a racial group from participation in political, social, economic and cultural life; legislative measures to divide the population through ghettos, prohibiting mixed marriage, and expropriating property; and forced labour, appear to be of character similar to ‘persecution’ and ‘other inhumane acts’ and therefore would be covered. The significant difference between the two definitions is that the ICC Statute specifies that the crime must be committed ‘in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups’.

²⁰⁶ Art. 1(b) of the Convention on Statutory Limitations, quoted in Apartheid Convention, Preamble, para. 5.

²⁰⁷ A point clarified in the ICC Elements, Art. 7(1)(j), element 2.

To constitute the crime of apartheid, the conduct must be committed with the particular intent of maintaining the regime.

11.3.12 Other inhumane acts

All definitions of crimes against humanity close with the general residual clause ‘or other inhumane acts’. A residual clause remains necessary because:

[h]owever much care were taken in establishing all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.²⁰⁸

Jurists have however been aware that any such residual clause must be infused with adequate precision to satisfy the criminal law principle of legality. The ICC Statute provides the necessary threshold by requiring that the inhumane acts (1) be of a similar character to other prohibited acts and (2) that they cause great suffering or serious injury to body or to mental or physical health.²⁰⁹ Tribunal jurisprudence provides the threshold by requiring ‘similar gravity and seriousness’ to other prohibited acts.²¹⁰

The accused must carry out the conduct intentionally. It is not required that the accused considered his or her actions ‘inhumane’, it is sufficient that the accused was aware of the factual circumstances that established the character of the act.²¹¹ The accused must intend to inflict serious bodily or mental harm.²¹²

Tribunals have held the conduct element of ‘inhumane acts’ to be synonymous with the conduct element of the war crime of ‘cruel treatment’.²¹³

The Tribunal Statutes, unlike the ICC Statute, do not expressly include forced disappearance, sexual violence, forced prostitution, forced transfer of populations in their list of prohibited acts, and hence Tribunal jurisprudence has found that each of these are encompassed in the Tribunal Statutes under ‘other inhumane acts’.²¹⁴ Other acts that have been characterized as inhumane acts include mutilation, severe bodily harm, beatings, serious physical and mental injury, inhumane or degrading treatment falling short of the definition of torture, imposing inhumane conditions in concentration camps, and forced nudity.²¹⁵

²⁰⁸ *Blaškić* ICTY T. Ch. I 03.03.2000 para. 237, referring to Jean Pictet, *Commentary on Geneva Convention IV* (ICRC, Geneva, 1960) 54.

²⁰⁹ Art. 7(1)(k) of the ICC Statute. ²¹⁰ See, e.g. *Kayishema* ICTR A. Ch. 01.06.2001 para. 583.

²¹¹ ICC Elements, Art. 7(1)(k), element 3; *Čelebići* ICTY T. Ch. II 16.11.1998 para. 543.

²¹² ICC Elements, Art. 7(1)(k); *Blaškić* ICTY T. Ch. I 03.03.2000 para. 243.

²¹³ *Jelić* ICTY T. Ch. 14.12.1999 para. 52. The ICC Elements use different terms for the two crimes, so it remains to be seen whether the ICC will adopt the same approach.

²¹⁴ *Kvočka* ICTY T. Ch. I 02.11.2001 para. 208; *Kupreškić* ICTY T. Ch. II 14.01.2000 para. 566.

²¹⁵ *Akayesu* ICTR T. Ch. I 02.09.1998 paras. 685–97; *Tadić* ICTY T. Ch. II 07.05.1997 para. 730; *Blaškić* ICTY T. Ch. I 03.03.2000 para. 239; *Kvočka* ICTY T. Ch. I 02.11.2001 para. 209; *Čelebići* ICTY T. Ch. II 16.11.1998 paras. 554–8.

Further reading

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12

War Crimes

12.1 Introduction

12.1.1 Overview

A war crime is a serious violation of the laws and customs applicable in armed conflict (also known as international humanitarian law), giving rise to individual criminal responsibility under international law. Because the law of war crimes is based on international humanitarian law, section 12.1 will explain the relevant underlying principles of international humanitarian law, and then the development of war crimes law. Section 12.2 will review issues common to all war crimes, namely the existence of armed conflict, the nexus between the conduct and the armed conflict, and the role of the perpetrator and victim. Section 12.3 will survey the specific offences constituting war crimes.

Unlike crimes against humanity, war crimes have no requirement of widespread or systematic commission. A single isolated act can constitute a war crime. For war crimes law, it is the situation of armed conflict that justifies international concern.

12.1.2 A brief history of humanitarian law

Laws and customs regulating warfare may be traced back to ancient times. While such norms have varied between civilizations and centuries, and were often shockingly lax by modern standards, it is significant that diverse cultures around the globe have recorded agreements, religious edicts, and military instructions laying out some rudimentary ground rules for military conflict. In recent centuries, military codes – such as the Lieber Code promulgated during the American Civil War – have refined and developed these customs.¹

Codification and progressive development at the international level was spurred in part by the efforts of one individual. In 1859, Henri Dunant, a businessman from

¹ See, e.g. Leslie Green, *The Contemporary Law of Armed Conflict* (Manchester, 2000) 20–53; Christopher Greenwood, ‘Historical Development and Legal Basis’ in Dieter Fleck, *Handbook of Humanitarian Law in Armed Conflict* (Oxford, 1995); M. Sassoli and A. Bouvier, *How Does Law Protect in War* (Geneva, 1999) 97–104.

Geneva, witnessed the aftermath of the Battle of Solferino, and was shocked by the horrors of wounded soldiers left to die on the battlefield. He published a poignant and evocative account of the carnage, urging measures to reduce such unnecessary suffering.² This appeal led promptly to the creation of the International Committee of the Red Cross in 1863 and the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864.

Since then, there have been many treaties developing international humanitarian law (IHL). These are sometimes divided into 'Geneva law', which primarily focuses on protecting civilians and others who are not active combatants (such as the sick and wounded), and 'Hague law', which regulates specific means and methods of warfare, with a view to reducing unnecessary destruction and suffering. Among the most significant in the latter category are the 1907 Hague Regulations, which recognized that 'the right of belligerents to adopt means of injuring the enemy is not unlimited', and laid down many provisions on the means and methods of warfare that are now recognized as customary law. The four Geneva Conventions of 1949, adopted in response to the inhumanities of the Second World War, considerably added to and updated previous Geneva Conventions. The 1949 Conventions deal with sick and wounded in the field ('GC I'), the wounded, sick and shipwrecked at sea ('GC II'), prisoners of war ('GC III') and civilians ('GC IV'). In 1977, these rules were again updated by two Additional Protocols, the first concerning international armed conflicts ('AP I') and the second, non-international (hereafter, for the sake of brevity, 'internal') armed conflicts ('AP II'). AP I combines elements of Hague law and Geneva law, making this traditional distinction less relevant.

Other significant treaty developments have strengthened the protection of cultural property,³ the prohibition or regulation of certain weapons (such as biological and chemical weapons and anti-personnel mines),⁴ and the prohibition on the use of child soldiers.⁵ One of the most significant developments in recent decades is the gradual expansion of the principles applicable in international armed conflicts to internal armed conflicts, which will be discussed in this chapter.

The provisions of the 1907 Hague Regulations as well as much of the 1949 Geneva Conventions have come to be recognized as customary law; hence they apply regardless of whether parties to the conflicts have ratified those conventions.⁶ Some, but

² Henri Dunant, *Un Souvenir de Solferino* (Geneva, 1862).

³ 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, 14 May 1954; and two protocols thereto, the 1954 First Hague Protocol, 24 May 1954, and the 1999 Second Hague Protocol, 29 March 1999.

⁴ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to Be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980; four protocols thereto including Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

⁵ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000.

⁶ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford 1999) 41–62.

not all, provisions of the Additional Protocols have obtained recognition as customary law.⁷

12.1.3 Key principles of humanitarian law

The resulting principles may be summarized in different ways, but key elements include:

- non-combatants are to be spared from various forms of harm; this category includes not only civilians but also former combatants, such as prisoners of war and fighters rendered *hors de combat* because they are wounded, sick, shipwrecked or have surrendered;
- combatants must distinguish between military objectives and the civilian population, and attack only military objectives (the principle of distinction);
- in attacking military objectives, combatants must take measures to avoid or minimize collateral civilian damage and refrain from attacks that would cause excessive civilian damage (the principle of proportionality);
- there are restrictions on the means and methods of war, to reduce unnecessary suffering and to maintain respect for humanitarian principles.

IHL is triggered by the outbreak of armed conflict and seeks to regulate the conduct of such conflict. The goal of abolishing warfare⁸ altogether is left to other legal and political domains.⁹

Indeed, a fundamental principle of IHL is the complete separation of the *ius ad bellum* (the law regarding resort to armed conflict) and the *ius in bello* (the law governing conduct during the armed conflict). In previous centuries, some scholars had suggested that the party fighting a ‘just’ war should benefit from more permissive IHL provisions.¹⁰ The obvious difficulty with this proposition is that both sides claim to be fighting with just cause, leading to confusion and obfuscation as to the applicable rules. Moreover, the victims of armed conflict still need protection regardless of the purpose of the conflict. In order to advance the fundamental humanitarian aims of IHL, it is now a clearly established principle that IHL applies equally and uniformly, irrespective of the origins of or reasons for the conflict.¹¹ *Ius ad bellum* considerations

⁷ See, e.g. *Hamdan v. Rumsfeld* 126 S ct 2749 (2006) (re Art. 75 API); *Strugar* ICTY A. Ch. 22.11.2002 para. 9 (re Arts. 51 and 52 AP I); Meron, *Customary Law*, 62–78.

⁸ The term ‘war’ or ‘warfare’ will be used in this chapter, but as is explained in section 12.2.1, there is no longer a need for a formal declaration of war in order to constitute an armed conflict.

⁹ See, e.g. Preamble, Arts. 1 and 2 of the Hague Regulations: ‘Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert; Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization ...’

¹⁰ See, e.g. Hugo Grotius, *De Jure Belli ac Pacis* (1625); Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983) 597–612.

¹¹ See, e.g. Preamble, para. 5 of AP I: ‘provisions ... must be fully applied in all circumstances ... without any adverse distinctions based on the nature or origin of the conflict or on the causes espoused by or attributed to the parties to the conflict’; and see Sassoli and Bouvier, *How Does Law Protect*, 83–8 and at 681–2; *US v. List (Hostages Case)* VIII LRTWC at 59; François Bugnion, ‘Guerre juste, guerre d’agression et droit international humanitaire’ (2002) 84 *Revue Internationale de la Croix-Rouge* 523. See however discussion of Art. 1(4) AP I in section 12.2.2.

have no bearing on the interpretation or application of IHL in a conflict, and hence it cannot be argued, for example, that a war was unjustified and therefore that all killings of combatants were war crimes or that all attacks were disproportionate.¹² The question whether resorting to force was legal or illegal is addressed under other law such as the UN Charter (and some day, perhaps, the crime of aggression).¹³

12.1.4 The challenge of regulating warfare

The effort to regulate the exceptional situation of armed conflict is rife with difficulty. Indeed, war in many ways seems to be the antithesis of law, leading to the mistaken saying that *silent enim leges inter arma* (law is silent in war). Normal rules – including the fundamental legal and moral prohibitions on killing and destruction – are largely displaced in armed conflict, and combatants cannot be punished for lawful acts of war. Nonetheless, the eruption of armed conflict does not create a legal vacuum. Militaries are still subject to discipline, and compliance with IHL norms is required. However, enforcement of international norms, which can be challenging in the best of circumstances, is all the more difficult in the context of a struggle for dominance among armed groups. International criminal justice is one means of deterring violations and educating people that some basic laws apply in all circumstances.

Permeating the development and interpretation of IHL and war crimes law is the tension between military and humanitarian considerations. Combatants may put too great a weight on military imperatives at the expense of humanitarian considerations. Conversely, those fortunate enough not to have been involved in conflict may discount or neglect military considerations when making assertions about IHL and war crimes law. Either oversight would hinder appreciation and understanding of the law.

When appraising war crimes law, it is important to consider the chaotic situations faced in armed conflict and the requirements of military strategy and tactics. In war, parties are permitted to apply decisive force in order to overcome their enemies as rapidly and efficiently as possible and with as few losses as possible. Destruction and death will occur even in lawfully conducted conflict. Mistakes may occur, with tragic consequences, without necessarily amounting to war crimes. Soldiers and commanders operating in circumstances of fatigue, stress, the chaos of combat and continuous fear of death are entitled to clear and practical rules.

While IHL involves a balancing of military and humanitarian considerations, it is also clear that the weight assigned to these considerations has been shifting over the years in a progressive direction. This process has been aptly referred to as ‘the humanization of humanitarian law’.¹⁴ Many factors have contributed to this process, including the increasing emphasis in international law and international relations on protecting human beings as opposed to an exclusive focus on State interests. The result

¹² See, e.g. Sassoli and Bouvier, *How Does Law Protect*, 665; *Altstötter (Justice Trial)* VI LRTWC 1 at 52.

¹³ See ch. 13. ¹⁴ Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *AJIL* 239.

has been stricter rules of conduct, protecting more classes of victims and applying in more circumstances, including during internal armed conflicts.

In addition, while egregious violations remain common in many conflicts, the practice among many States has been to place greater and greater weight on humanitarian considerations. The phenomena of mass media, democratization and globalization mean that images of civilian suffering are more readily available (although censorship and propaganda remain ubiquitous). Technological advances have raised expectations about precision attacks.¹⁵ Those who plan operations know that incidents causing significant civilian casualties can erode support from domestic populations, coalition partners and the international community. Anecdotal evidence also indicates that awareness of international criminal justice institutions is inducing greater compliance among military leaders. Conversely, the difficulties of 'asymmetric' warfare against non-State actors with no regard for humanitarian law have led some governments to seek to deny or restrict the application of IHL, creating new points of tension.¹⁶

12.1.5 *The relationship between war crimes and IHL*

War crimes law is, in effect, a set of secondary rules that criminalize a subset of the primary rules found in IHL.¹⁷ The major question is which of the rules of IHL constitutes a criminal offence when violated.

Some treaties, such as the Geneva Conventions, expressly criminalize violations of identified fundamental provisions.¹⁸ War crimes may also be found in customary law even in the absence of a treaty provision criminalizing the norm. For example, the Nuremberg Tribunal held that key provisions of the 1907 Hague Regulations reflected customary law and that violations amounted to crimes, even though the Hague Regulations did not expressly criminalize such violations.¹⁹

In the seminal *Tadić* decision on jurisdiction, the Appeals Chamber interpreted the ICTY Statute provision on 'violations of the laws or customs of war', giving guidance on how to identify the content of war crimes law. The decision confirmed that not every IHL violation amounts to a war crime.²⁰ Such a conclusion is clearly correct, since IHL includes a great many technical regulations that would be quite inappropriate for criminalization.²¹ For example, GC III requires that prisoners of war have a canteen where they may purchase foodstuffs, soap and tobacco at local market prices,

¹⁵ Michael N. Schmitt, 'Precision Attack and International Humanitarian Law' (2005) 87 *International Review of the Red Cross* 445.

¹⁶ Toni Pfanner, 'Asymmetric Warfare from the Perspective of Humanitarian Law and Humanitarian Action' (2005) 87 *IRRC* 149; Luisa Vierucci, 'Prisoners of War or Protected Persons *qua* Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled' (2003) 1 *JICJ* 284.

¹⁷ M. Bothe, 'War Crimes' in Cassese, *Commentary*, 387–8. ¹⁸ See section 12.1.6.

¹⁹ *Nuremberg Judgment* (1947) 41 *AJIL* at 218 and 248–9; *United States v. von Leeb*, XII LRTWC 1 at 61–2 and 86–92.

²⁰ *Tadić* ICTY A. Ch. 2.10.1995 para. 94.

²¹ See, e.g. Henckaerts and Doswald-Beck, *ICRC Customary Law*, 568; and Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *BYBIL* 58 at 78–9.

and that they be given a specific monthly advance of pay depending on rank;²² an unavailability of tobacco, or providing goods slightly above market rates, or providing slightly less pay would be a breach of IHL but would certainly not amount to a war crime.

The Appeals Chamber stated the following requirements for a war crime within the jurisdiction of the Tribunal: (1) the violation must infringe a rule of IHL, (2) that rule must be found in customary law or applicable treaty law, (3) the violation must be 'serious', in that the rule protects important values and the breach involves grave consequences for the victim, and (4) the violation must entail individual criminal responsibility.²³

This test has been usefully applied in subsequent Tribunal cases.²⁴ Questions have been raised as to whether the fourth requirement is in reality redundant, since the evidence presented of criminalization has typically been sparse, and it may simply be that all serious violations are criminalized.²⁵ It has also been noted though, that simply applying the adjective 'serious' is question-begging and is not operational as a distinguishing criterion;²⁶ hence more may be needed to elaborate upon the requirement. In an article presaging the *Tadić* decision, Theodor Meron referred to factors such as whether the norm is directed to individuals, whether it is unequivocal in character, the gravity of the act and the interests of the international community.²⁷ In any event, the approach of recognizing serious violations of IHL as war crimes largely inspired the selection of crimes in the ICC Statute.²⁸

Since war crimes are serious violations of IHL, it is often necessary to refer to the relevant principles of IHL to interpret international criminal law in this area.²⁹ This is why the chapeau of Article 8(2)(a) of the ICC Statute refers to the provisions of the relevant Geneva Conventions, and the chapeau of Article 8(2)(b) refers to 'the established framework of international law'. Some uncertainties have been expressed as to the interpretation of the latter provision,³⁰ but it is simply a *renvoi* to the relevant rules of IHL to aid in the interpretation of the various provisions.³¹

²² Arts. 28 and 60 GC III. ²³ *Tadić* ICTY A. Ch. 2.10.1995 para. 94.

²⁴ See, e.g. *Galić* ICTY T. Ch. 5.12.2003 paras. 13–32.

²⁵ Robert Cryer, 'Prosecutor v. *Galić* and the War Crime of Terror Bombing' (2005–2006) 2 *Israel Defence Forces Law Review* 73 at 91–5.

²⁶ Georges Abi-Saab, 'The Concept of War Crimes' in Sienho Yee and Wang Tieya (eds.), *International Law and the Post-Cold War World: Essays in Memory of Li Haopei* (London, Routledge) 112.

²⁷ Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 554 at 562.

²⁸ Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Lee, *The Making of the Rome Statute*, 103–5.

²⁹ Peter Rowe, 'War Crimes' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford, 2004) 217–19.

³⁰ W. J. Fenrick *et al.*, 'Article 8' in Triffterer, *Observers' Notes*. 185 considers the provision 'unclear'; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 149 150–2 expresses concern that it may require proof of customary law status, while preferring an interpretation that it reflects the drafters' view that the crimes are already customary law; and see Machteld Boot, *Genocide, Crimes Against Humanity and War Crimes* (Oxford, 2002) 564–6.

³¹ This understanding is now confirmed in ICC Elements, Introduction to War Crimes, para. 2, and dovetails with Art. 21(1)(b) ICC Statute. The ICC Elements also make clear that this encompasses the law of armed conflict at sea where relevant.

IHL and war crimes law have similar aims but very different scope and consequences. IHL is addressed to governments and other parties to a conflict; it sets out standards expected in armed conflict, and violations can culminate in compensation or other satisfaction. War crimes law is addressed to individuals, and sets out offences amounting to the most serious crimes of concern to the international community as a whole, and can culminate in imprisonment as a war criminal. For these reasons, similar provisions may warrant a more restrictive interpretation in the context of war crimes law, consistent with the seriousness of war crimes law and general principles of criminal law (strict construction). For example, IHL requires that, before any sentencing of protected persons, a party must provide a fair trial affording all indispensable judicial guarantees.³² A minor breach of even one such right would fall below this standard and violate IHL, requiring an appropriate remedy. However, it would be incorrect to say that as a consequence all involved in the trial are thereby rendered war criminals. For the purpose of war crimes law, it is necessary to look at the cumulative effect of shortcomings to see whether there was a deprivation of fair trial amounting to a war crime.³³ Similarly, as noted by Lauterpacht, there may be acts of warfare for which the state of international law is uncertain or controversial, yet criminal proceedings would be a questionable method for resolving unsettled questions of *bona fide* controversy.³⁴ Instead, adjudication under IHL and compensation is the more appropriate avenue to settle such controversies.³⁵

12.1.6 *A brief history of the law of war crimes*

War crimes law deals with the *criminal responsibility of individuals* for serious violations of international humanitarian law. National laws have long provided for prosecution of war crimes.³⁶ For example, the Lieber Code recognized criminal liability of individuals for violations, and similar provisions are in military manuals of many countries.³⁷ Following some prominent historical examples of war crimes prosecutions,³⁸ and after abortive efforts to conduct international trials at the end of the First World War,³⁹ the Nuremberg Charter gave form to the international law of war crimes. Article 6(b) of the Charter included:

War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity . . .

³² Common Article 3 to the Geneva Conventions. ³³ ICC Elements, footnote 59.

³⁴ Lauterpacht, 'Law of Nations', 74–5. ³⁵ *Ibid.*, 75.

³⁶ Timothy L. H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes* (The Hague, 1997); Leslie Green, *The Contemporary Law of Armed Conflict* (Manchester, 2000) 286–90.

³⁷ Instructions for the Government Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

³⁸ For example, the 1474 trial of Peter von Hagenbach for crimes during the siege of Breisach. ³⁹ See ch. 6.

Within the scope of 'war crimes' the Nuremberg Tribunal included key provisions of the Hague Regulations, which it held gave rise to individual criminal responsibility under customary law.⁴⁰

The four Geneva Conventions of 1949 included 'grave breach' provisions, expressly recognizing certain violations as crimes subject to universal jurisdiction.⁴¹ These provisions have come to be regarded as reflective of customary international law.⁴² Additional Protocol I to those Conventions ('AP I'), adopted in 1977, introduced additional 'grave breaches', although not all of these have attained recognition as customary law.⁴³

The ICTY Statute included grave breaches of the Geneva Conventions (Article 2 of the ICTY Statute) as well as violations of other laws or customs of war, featuring an open-ended list with five examples.⁴⁴ The ICTR Statute, designed to deal with an internal armed conflict, included serious violations of common Article 3 and Additional Protocol II of 1977 ('AP II'), featuring an open-ended list with eight examples.⁴⁵

The ICC Statute, adopted a few years later in 1998, contains the longest and most comprehensive list of war crimes of any of the tribunal statutes. Unlike previous lists, the list in Article 8 is exhaustive. Some States, such as the United States, which had been quite content to impose an open-ended list upon others (Nuremberg, ICTY, ICTR) had a notable change of heart when confronted with a permanent court that could potentially apply to their own forces.⁴⁶ There may also have been a concern to avoid the initiatives of judge-made law within the ad hoc Tribunals.⁴⁷ In any event, despite the seeming double standards, an exhaustive list is certainly more consistent with criminal law principles, particularly the principle *nullum crimen sine lege*.

The ICC Statute contains an extensive list of fifty offences, including grave breaches of the Geneva Conventions, serious violations of common Article 3 and other serious violations drawn from various sources. Since the goal of the drafters was to reflect customary law rather than to create new law, many provisions from previous instruments were excluded because of a lack of consensus on their customary law status. The ICC list, while lengthy, does not include all war crimes recognized in customary law; an example often cited is the prohibition on the use of chemical or biological

⁴⁰ Nuremberg Judgment, reproduced (1947) 41 *AJIL* 172 at 218; *von Leeb* XII LRTWC 1 at 86–92.

⁴¹ Art. 49 GC I, Art. 51 GC II, Art. 130 GC III, Art. 147 GC IV. See ch. 3 for a discussion of whether these provisions confer universal jurisdiction strictly so called.

⁴² See Art. 2 ICTY Statute, Art. 8(2)(a) ICC Statute, and ICJ, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226, 257 (8 July 1996) at paras. 79 and 82.

⁴³ Art. 85 AP I. But see the study of customary law undertaken under ICRC auspices: Henckaerts & Doswald-Beck, *ICRC Customary Law*.

⁴⁴ Art. 3 ICTY Statute. The list included use of poisonous weapons or weapons calculated to cause unnecessary suffering; wanton destruction; attack of undefended places; seizure or destruction of historic monuments, works of art, or institutions dedicated to certain purposes; and plunder.

⁴⁵ Art. 4 ICTR Statute. The list included murder, cruel treatment, torture, mutilation, collective punishments, hostage taking, terrorism, outrages on dignity, including rape, enforced prostitution and indecent assault, pillage and passing sentences without proper trial.

⁴⁶ See Robert Cryer, *Prosecuting International Crimes* (CUP, 2005) 263–9.

⁴⁷ See William Schabas, *Introduction to the International Criminal Court* (Cambridge, 2001) 54.

weapons.⁴⁸ As expressly noted in Article 10 of the ICC Statute, the absence of a provision in the ICC Statute list does not affect its status as existing or developing international law.

The SCSL Statute and the Iraq Special Tribunal Statute have included some of the key provisions in the ICC list. Article 14 of the Iraq Special Tribunal Statute copies the ICC Statute definitions, providing another instance of State practice confirming those definitions. The statute of the Special Court for Sierra Leone includes violations of common Article 3 and a short list of other serious violations, reflecting certain crimes from the ICC Statute, namely attacks directed against civilians, attacks on humanitarian aid workers and child conscription.⁴⁹

In addition to the extensive list of war crimes in the ICC Statute, other war crimes may be identified in customary law and treaty law. As mentioned above, the ICC Statute is not a complete codification of all crimes in customary law, and hence other provisions may be identified applying the *Tadić* test, described in section 12.1.5. Moreover, war crimes may be established under treaty law – for example, among parties to AP I, the entire set of grave breaches in that Protocol is applicable as a matter of treaty law, regardless of whether they are also customary law.

12.1.7 War crimes in internal armed conflicts

Traditionally, neither IHL nor war crimes law applied in non-international armed conflicts. Before the advent of human rights law, States were regarded as entitled to deal with their own citizens more or less as they pleased, including in situations of rebellion and insurrection. This was an ‘internal affair’, in which other States should have no say. States sought to preserve latitude in putting down rebels, and they did not wish to bestow any possible recognition on rebel groups. Exceptionally, States involved in intense internal conflicts occasionally recognized a situation of ‘belligerency’, in which case IHL was applied to the conflict.⁵⁰

During the negotiation of the four Geneva Conventions of 1949, several delegations pressed for recognition of rules in internal conflicts, a proposal strongly opposed by others.⁵¹ After intense discussions, agreement was reached to include in each Convention a common Article – Article 3 – laying out some very basic norms recognized to apply even in internal armed conflicts. Even this very modest provision was an achievement.

Regulation of internal armed conflict was expanded significantly in AP II of 1977. Again, the negotiation was difficult, with many States opposing regulation. Agreement was reached on a short list of provisions, expanding upon and developing

⁴⁸ See section 12.3.7. ⁴⁹ Arts. 3 and 4 SCSL Statute.

⁵⁰ See, e.g. Eric David, *Principes de Droit des Conflits Armés* (2nd edn, Brussels, 1999) 124–7; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, 2002) at 3–21.

⁵¹ Jean Pictet, *Commentary to I Geneva Convention* (Geneva, 1952) 38–48.

those rules in common Article 3 but still falling far short of that applicable to international armed conflict.⁵²

Significantly, common Article 3 and AP II contained no grave breaches provisions, leading to the conclusion that violations of those provisions were not criminalized. As of 1990, it was widely accepted that the law of war crimes did not apply in internal armed conflict.⁵³

By the 1990s, the gap in coverage had become increasingly problematic, and several factors converged to precipitate a necessary legal evolution. First, internal conflicts had increased in magnitude and duration, causing vastly more civilian deaths than in previous centuries.⁵⁴ Second, internal conflicts had become more prevalent than international conflicts,⁵⁵ making change necessary if war crimes law was to have relevance for victims of conflict. Third, the increasing interdependence of States meant that internal conflicts had greater consequences for surrounding regions, increasing the urgency of regulating the conflicts. Fourth, the increased prioritization of human rights and human security meant that States were more willing to insist on extending protection even in contexts previously considered an 'internal affair'.⁵⁶

The UN Security Council took the first major step forward when it adopted the ICTR Statute. Because the conflict in Rwanda was internal, the Council was confronted with the question of war crimes in internal conflict. The Council included in the statute serious violations of common Article 3 and core provisions of AP II, thus expressly recognizing a criminalization of these prohibitions.

The *Tadić* decision on jurisdiction by the ICTY Appeals Chamber had a considerable impact on the development of the law in this area.⁵⁷ The decision reviewed State practice, resolutions of the League of Nations, General Assembly, Security Council and European Union, ICJ decisions, military codes of conduct, and agreements and understandings, and concluded that the traditional stark dichotomy between international and internal conflicts was becoming blurred, and that some war crimes provisions were now applicable in internal armed conflicts. The Chamber held that there had not been a wholesale transposition or a complete convergence, but rather that 'only a number of rules and principles . . . have gradually been extended to apply to internal conflicts'.⁵⁸ Moreover, 'this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general

⁵² Howard S. Levie, *The Law of Non-International Armed Conflict* (Dordrecht, 1987) 27–90; Michael Bothe, *New Rules for Victims of Armed Conflict* (The Hague, 1982) 605–8; Yves Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977* (Geneva, 1987) 1336.

⁵³ '[A]ccording to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict'; ICRC DDM/JUR442 b, 25 March 1993, para. 4 (cited in the Separate Opinion of Judge Li, *Tadić* ICTY A. Ch. 02.10.1995 para. 7); Denise Plattner, 'The Penal Repression of Violation of International Humanitarian Law' (1990) 30 *International Review of the Red Cross* 409.

⁵⁴ UN Development Programme, *Human Development Report 2005* (UNDP, 2005) 153–61.

⁵⁵ Human Security Centre, *Human Security Report 2005* (Oxford, 2005) 22–5.

⁵⁶ *Tadić* ICTY A. Ch. 2.10.1995 paras. 94–6; and see discussion in, e.g. Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 554; Darryl Robinson and Herman von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute' (1999) 2 *YIHL* 193.

⁵⁷ *Tadić* ICTY A. Ch. 2.10.1995. ⁵⁸ *Ibid.*, para. 126.

essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts'.⁵⁹ To determine whether a norm also applies in internal armed conflict, one must consider: whether there is clear and unequivocal recognition of the norm, state practice indicating an intention to criminalize the norm, the gravity of the acts, and the interest of the international community in their prohibition.⁶⁰

The decision was seen as groundbreaking at the time,⁶¹ but it was rapidly digested by the international community. The approach was followed soon afterward by the ICTR,⁶² and more significantly, it received a remarkable level of State acceptance during the negotiation of the ICC Statute.⁶³ Although a determined minority in Rome strongly opposed the inclusion of war crimes in internal conflicts, a clear majority was equally strongly committed to their inclusion. Opposition gave way to acceptance of common Article 3 and a limited list of other fundamental provisions in the Statute. Significantly, the approach taken by the Rome Conference largely followed that of *Tadić*: identifying fundamental prohibitions and transposing them to internal conflicts.⁶⁴

In the result, roughly half of the provisions from international conflicts were transplanted to internal conflicts in the ICC Statute. For other provisions, there was not consensus that they were so fundamental that customary law at that point recognized them in internal conflicts. While the recognition of half of the provisions was a remarkable achievement in 1998, there is good reason to believe that the list of war crimes in Article 8(2)(e) falls short of the list that the *Tadić* test would permit. For example, the prohibition of starvation as a means of warfare, the use of chemical weapons, attacking civilian objects, and launching disproportionate attacks, are all fundamental provisions with long recognition in the laws and customs of war, and hence merit recognition in internal conflicts.⁶⁵ Indeed, the incompleteness of the list in Article 8(2)(b)(e) produces a number of strange consequences.⁶⁶ As noted above, Article 10 affirms that nothing in the ICC Statute limits or prejudices the development of other international law.

It has been suggested that the ICC Statute is 'retrograde' in that it did not abolish completely the international-internal distinction.⁶⁷ However, while the trend certainly favours continued convergence, State practice and *opinio juris* do not currently support the view that the two regimes have become identical. Indeed, even the high-water

⁵⁹ *Ibid.* ⁶⁰ *Ibid.*, paras. 128 and 129.

⁶¹ See, e.g. Christopher Greenwood, 'International Humanitarian Law and the *Tadić* Case' (1996) 7 *EJIL* 265; George Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 *AJIL* 64; Geoffrey Watson, 'The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v. Tadić*' (1996) 36 *Virginia Journal of International Law* 687.

⁶² *Kanyabashi* ICTR T. Ch. II 18.06.1997 para. 8.

⁶³ In effect, the assimilation theory was put to the international community: Claus Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel Yearbook on Human Rights* 1 at 5; Moir, *Law of Internal*, 160–7.

⁶⁴ Robinson and von Hebel, 'War Crimes', 197–200. ⁶⁵ Kress, 'War Crimes', 37, 39. ⁶⁶ *Ibid.*

⁶⁷ Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 149 150.

mark of the *Tadić* decision did not assert that there had been a full and mechanical transplant of rules from international conflicts to their internal counterparts, but rather that the essence of some of the most important rules was applicable. Moreover, some provisions from international armed conflict simply would not make sense in internal conflict, particularly provisions concerning occupied territory, prisoners of war, and transfer of the civilian population into occupied territory.

The law does however continue to progress.⁶⁸ Given the convergence already recognized, it would already be useful in any future catalogues of war crimes to consolidate those provisions that are common to both internal and international conflicts. The bifurcated structure in current statutes can create unnecessary complications, because it requires a determination of the character of an armed conflict in order to know which provisions to charge (for example Art. 8(2)(b) or 8(2)(e)), even where the provisions are similar or identical. It may be necessary to collect evidence and litigate on complex issues, such as the role of third States,⁶⁹ when ultimately this has no bearing on the role and liability of the perpetrator. The ICTY has partially side-stepped this issue by relying heavily on common Article 3 and other provisions applicable in internal conflicts.⁷⁰ In any future catalogue of war crimes it would be more efficient to establish one list of crimes applicable in both international and internal conflicts, and a short list of those crimes applicable only in international conflict.⁷¹ Such a list would not entail any change in customary law, but simply a clearer presentation of the existing legal situation.

12.2 Common issues

12.2.1 Armed conflict

The essential element for any war crime is the nexus with armed conflict. It is the insecure and volatile situation of armed conflict that warrants international interest and gives rise to international jurisdiction over the crime. Whereas early IHL depended on a declaration of a state of war, this was problematic in that parties to conflict might raise formalistic arguments denying a state of war.⁷² Current IHL and war crimes law focus on the objective existence of armed conflict, even if one or both of the parties deny the state of war.⁷³

In the case of internal conflict, a certain threshold of intensity and organization must be met, in order to distinguish armed conflict from mere internal disturbances

⁶⁸ See, e.g. the study of customary law undertaken under ICRC auspices: Henckaerts and Doswald-Beck, *ICRC Customary Law*.

⁶⁹ See section 12.2.2.

⁷⁰ S. Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts' (2000) 13 *LJIL* 619.

⁷¹ As a model, see the German Code of Crimes Against International Law, reproduced in, e.g. Gerhard Werle, *Principles of International Criminal Law* (The Hague, 2005) 428–33.

⁷² Pictet, *Commentary to I Geneva Convention*, 32–3.

⁷³ See, e.g. Art. 2 common to the Geneva Conventions of 1949.

and riots, as is discussed below.⁷⁴ It is not entirely settled whether there is an intensity requirement with respect to international armed conflict. Most authorities indicate that in the case of State-to-State conflict, *any* resort to force involving military forces amounts to armed conflict.⁷⁵ However, some authorities indicate that a certain level of intensity is needed.⁷⁶ A policy argument in favour of the latter position is to avoid the activation of the law of armed conflict in minor incidents. A (perhaps stronger) policy argument in favour of the former position is to avoid technical arguments about whether the law of armed conflict applies, which after all was the purpose of moving from 'war' to the objective concept of 'armed conflict'.

In any event, the concept of armed conflict includes not only the application of force between armed forces, but also an invasion that meets no resistance,⁷⁷ aerial bombing, or an unauthorized border crossing by armed forces.

The state of armed conflict does not end with each particular ceasefire; rather, it continues until the 'general close of military operations'.⁷⁸ According to Tribunal jurisprudence, the state of armed conflict extends 'until a general conclusion of peace is reached, or in the case of internal armed conflict, until a peaceful settlement is achieved'.⁷⁹ The state of conflict may also be ended by a decisive close of military operations even without an agreement.⁸⁰ The state of armed conflict also applies during occupation, that is to say when territory is placed under the authority of a hostile army.⁸¹

12.2.2 Distinguishing between international and internal conflicts

The paradigmatic situation of international armed conflict is the resort to force between the military forces of States. Complex issues arise outside this paradigm, with respect to wars of national liberation, UN enforcement operations and foreign intervention through proxy forces.⁸²

⁷⁴ See section 12.2.3.

⁷⁵ Tribunal jurisprudence requires 'protracted' violence for internal conflict but not for State to State conflict: *Tadić* ICTY A. Ch. 2.10.1995 para. 70. According to the ICRC commentary on the Geneva Conventions, the concept of armed conflict includes 'any difference arising between two States and leading to the intervention of members of the armed forces': Pictet, *Commentary to I Geneva Convention* 20; and see discussion in Claus Kress, 'The 1999 Crisis in East Timor and the Threshold of the Law of War Crimes' (2002) 13 *CLF* 409 at 412–13.

⁷⁶ See declaration made by the United Kingdom upon signature of AP I (the 'term armed conflict of itself and in its context implies a certain level of intensity of military operations').

⁷⁷ Art. 2 GC I. ⁷⁸ Art. 6 GC IV.

⁷⁹ *Tadić* ICTY A. Ch. 2.10.1995 para. 70. In addition, '[u]ntil that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under control of a party, whether or not actual combat takes place there'.

⁸⁰ Art. 6 GC IV; Christopher Greenwood, 'The Scope of Application of Humanitarian Law' in Fleck, *Handbook*, 54 and 63; see also UN Security Council Resolution 95, finding an interdiction by Egypt to be contrary to an armistice agreement (even without a general peace treaty): UN Doc. S/RES/95 (1951), 1 Sept. 1951.

⁸¹ See, e.g. Art. 52 Hague Regulations; Art. 6 GC IV; ICC Elements, footnote 34; *Naleitić* ICTY T. Ch. I 31.03.2003 paras. 214–17.

⁸² The complexities of these distinctions have further strengthened calls for a single body of IHL applicable in all conflicts: James Stewart, 'Toward a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 *IRRC* 313.

Wars of national liberation

According to Article 1(4) of AP I, the concept of international armed conflict also includes conflicts in which ‘peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’. This definition applies, as a matter of treaty law, to any prosecutions based on the grave breaches regime of AP I.⁸³

The more difficult question is whether this expansion of the concept of international armed conflict also applies in the general law of war crimes.⁸⁴ On the one hand, if the question is answered in the negative, parties to AP I would be simultaneously subject to two regimes: an international conflict regime under AP I and an internal conflict regime under (for example) the ICC Statute, which would seem an undesirable result. On the other hand, if the question is answered in the affirmative, the AP I definition might be applied in conflicts where the parties had not ratified AP I, which would also seem undesirable.

The answer to the question seems to hinge on whether the AP I definition can be regarded as customary law. The scant State practice makes it prudent to avoid any hasty pronouncements on that question in the abstract. Moreover, different fact patterns may make it easier or harder to characterize a conflict as international. A conflict involving a people with a clear national identity resisting colonial domination can be more readily seen as ‘international’. On the other hand, a conflict involving local oppressed groups fighting against a racist regime, without foreign intervention, may well be a worthy cause but it would seem counterfactual to describe it as ‘international’.⁸⁵

UN forces

Another interesting question is the legal effect of intervention by UN enforcement operations. The first question is whether IHL applies at all to such forces; after all, the UN is an international organization and hence not party per se to the Geneva Conventions and other IHL treaties. It is now recognized that the law of armed conflict applies to the operations of UN forces;⁸⁶ national governments of the participating forces are bound by IHL and the UN applies to the forces the fundamental principles and rules of IHL.⁸⁷ Participants in a conflict cannot be exempted from basic principles of IHL because they are fighting in a just cause (maintenance of international peace and security); victims of conflict are entitled to protection of IHL in all conflicts. Experience shows, regrettably, that even peacekeeping forces may be involved in IHL violations and war crimes.

⁸³ Art. 85 AP I. ⁸⁴ See, e.g. discussion in Andreas Zimmerman, ‘Article 8’ in Triffterer, *Observers’ Notes*, 266–7.

⁸⁵ On the fundamental separation between ‘just cause’ doctrine and IHL, see section 12.1.3.

⁸⁶ Ray Murphy, ‘United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?’ (2003) 14 *CLF* 153.

⁸⁷ Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, UN Doc. ST/SGB/1999/13.

The remaining question is whether the intervention of UN forces – whether operations under UN flag or simply approved by the UN – can render a previously internal conflict an international one. The law on this point does not appear to be settled. To regard UN forces as being ‘parties to a conflict’ may seem inimical to the role of the UN, and one could argue that an otherwise internal conflict remains internal.⁸⁸ However, this may be blurring the issue of the justness of the cause with the issue of whether forces are in fact engaged in armed conflict. When enforcement actions (whether under UN flag or with UN authorization) involve a significant application of force, the objective fact remains that foreign forces are thereby engaged in conflict. The practice on this question is ambiguous.⁸⁹

Proxy forces

Finally, a seemingly internal conflict may be rendered international where it is found that local armed groups are in fact acting on behalf of an external State. For example, in the *Tadić* case, the determination of whether the grave breaches provision applied depended on whether the conflict was international, which in turn depended on whether acts of certain forces (the VRS) were attributable to the Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia (FRY) had purported to withdraw its forces (the JNA) from Bosnia, but left behind the VRS, composed of former JNA soldiers of Bosnian origin, with the same officers, the same weapons, the same equipment, the same suppliers and the same objectives, with funding still coming from the FRY.

The majority of the Trial Chamber referred to the International Court of Justice *Nicaragua* decision, which had adopted a stringent ‘effective control’ test to determine whether an armed band could be regarded as a de facto organ of a State.⁹⁰ The majority in the Trial Chamber found that while the FRY had the capacity to direct operations, there was no evidence of specific orders or that the FRY had actually directed operations.⁹¹ The decision was criticized in a powerful dissent and in commentary for not reflecting the reality of the situation.⁹²

The Appeals Chamber clarified that for individuals, or for groups not militarily organized, instructions or ex post facto endorsement or approval from a third State may be required; however, with respect to armed groups, the Chamber departed from the ICJ approach and replaced the test of ‘effective control’ by that of ‘overall control’.⁹³ Under the ‘overall control’ test, it is not necessary to produce evidence of

⁸⁸ See, e.g. Dietrich Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) 163 *Hague Recueil* 121 at 151.

⁸⁹ Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 3 *Yearbook of International Humanitarian Law* 3.

⁹⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* (Merits) [1986] ICJ Rep 14 para. 115.

⁹¹ *Tadić* ICTY T. Ch. II 07.05.1997 paras. 588–607.

⁹² McDonald, Dissent in *Tadić* ICTY T. Ch. II 07.05.1997; see, e.g. Theodor Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua*’s Fallout’ (1998) 92 *AJIL* 236.

⁹³ *Tadić* ICTY A. Ch. 15.07.1999 para. 137.

specific orders or instructions relating to particular military actions.⁹⁴ It is sufficient to establish ‘overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations’.⁹⁵

12.2.3 *Distinguishing internal conflict from riots and disturbances*

Section 12.2.2 discussed the line between international and internal armed conflict. There is also a lower threshold, dividing situations of sufficient intensity to be called ‘armed conflict’ from lesser situations of riots and disturbances which are insufficient to activate IHL and the law of war crimes. It is sometimes difficult to determine the point at which mere civil strife crosses the threshold to amount to internal armed conflict.

Further complicating this task is the fact that different authorities appear to suggest slightly different thresholds, leading to the prospect of different thresholds for different purposes. Common Article 3 says nothing about the threshold defining armed conflict, whereas AP II poses a very high threshold, so that it applies only to armed conflicts:

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.⁹⁶

The question arises whether the customary law of war crimes also involves different thresholds for different crimes (for example common Article 3 and AP II crimes). Tribunal jurisprudence does not indicate different thresholds for different crimes in internal conflict. While there are many different ways to interpret the differing authorities,⁹⁷ we suggest that war crimes law applies a single threshold for all crimes in internal armed conflict. This conclusion is based on four straightforward propositions.

The first proposition is that ‘armed conflict’ entails a certain intensity of fighting and level of organization of the parties. The widely accepted test articulated by the ICTY Appeals Chamber in the *Tadić* case states that ‘armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and *organized armed groups* or between such groups within a State’.⁹⁸ This test has been interpreted as involving two criteria: intensity of the

⁹⁴ *Ibid.*, para. 145. ⁹⁵ *Ibid.*

⁹⁶ Art. 1(1) AP II. Green, *Contemporary*, 67 regards the test as ‘so high that it would exclude most revolutions and rebellions’.

⁹⁷ For a more detailed study, see Bahia Tahzib-Lie and Olivia Swaak-Goldman, ‘Determining the Threshold for the Application of International Humanitarian Law’ in L. Lijnzaad *et al.* (eds.), *Making the Voice of Humanity Heard* (Netherlands, 2004).

⁹⁸ *Tadić* ICTY A. Ch. 2.10.1995 para. 70 (emphasis added).

conflict and organization of the parties.⁹⁹ This standard was also applied by the ICTR in *Akayesu*.¹⁰⁰

The second proposition is that the statement in AP II and in Article 8(2)(d) and (f) of the ICC Statute that ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’ do not constitute armed conflicts, is also implicit in the concept of armed conflict. Indeed, the statement is simply the corollary of the requirements of intensity and organization.¹⁰¹

The third proposition is that the additional restrictions appearing in AP II have not been absorbed into the general law of war crimes. For example, AP II requires that one party to the conflict be a government, whereas Tribunal jurisprudence and the ICC Statute recognize armed conflict entirely between armed groups.¹⁰² In addition, control of territory was rejected as a requirement in Tribunal jurisprudence and the ICC Statute, although it has been recognized as an important *indicative factor* as to the existence of an armed conflict.¹⁰³ Thus, these restrictions may continue to limit the applicability of AP II as a matter of treaty law, but they do not affect the interpretation of the concept of ‘armed conflict’ for other purposes, including the customary law of war crimes.¹⁰⁴

The fourth proposition is that the thresholds in the ICC Statute can be interpreted consistently with Tribunal jurisprudence.¹⁰⁵ While the requirement of ‘protracted’ violence appears only in Article 8(2)(f) (other serious violations),¹⁰⁶ the requirement is inherent in the concept of armed conflict and hence applicable to all war crimes in internal conflict.¹⁰⁷ Thus, it should not be interpreted as creating different thresholds for different crimes, but as a clarification to facilitate acceptance of the controversial Article 8(2)(e).¹⁰⁸ Moreover, while Article 8(2)(f) refers to ‘protracted armed *conflict*’ rather than ‘armed *violence*’, this appears to have been a straightforward drafting error, since the intent was to incorporate the threshold from *Tadić*, not to exclude a class of armed conflicts.¹⁰⁹ The French version of the statute supports the view that the

⁹⁹ *Tadić* ICTY T. Ch. II 07.05.1997 para. 562. The Inter-American Commission appears to have applied a rather lower threshold for the ‘protracted’ nature of the conflict. An attack by forty-two persons on military barracks, resulting in a military response to retake the barracks, lasting around thirty hours and resulting in the deaths of twenty-nine attackers and several State agents, was found sufficient to constitute an armed conflict: *La Tablada*, IACHR Report No. 55/97, Case No. 11.137, Argentina; OEA/L/V/II.97, Doc. 38, 20 Oct. 1997. One may doubt whether such an episode would satisfy the ‘protracted’ standard under Tribunal jurisprudence and the ICC Statute.

¹⁰⁰ *Akayesu* ICTR T. Ch. I 2.9.1998 paras. 619–20. The *Akayesu* decision also noted with approval a series of factors suggested in ICRC commentary, including: whether the government was obliged to have recourse to the regular military forces; recognition by the government of a state of belligerency; and inclusion of the situation on the agenda of the Security Council or General Assembly.

¹⁰¹ A conclusion confirmed in *Tadić* ICTY T. Ch. II 07.05.1997 para. 562 and *Akayesu* ICTR T. Ch. I 2.9.1998 para. 620.

¹⁰² Art. 8(2)(f) ICC Statute; *Tadić* ICTY A. Ch. 02.10.1995 para. 70.

¹⁰³ Art. 8(2)(f) ICC Statute; *Akayesu* ICTR T. Ch. I 02.09.98 paras. 619–20.

¹⁰⁴ As discussed in cases such as *Tadić* and *Akayesu*.

¹⁰⁵ Indeed, *Limaj* ICTY T. Ch. II 30.11.2005 paras. 83–174, made reference to the ICC Statute and found that it was consistent with the *Tadić* test.

¹⁰⁶ Art. 8(2)(f): ‘Paragraph 2(e) applies ... to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized groups or between such groups’.

¹⁰⁷ *Tadić* ICTY A. Ch. 2.10.1995 para. 70. ¹⁰⁸ Kress, ‘War Crimes’, 15–17; Meron, ‘Humanization’, 260.

¹⁰⁹ Kress, ‘War Crimes’, 15–17.

intent was to refer to the established concept of 'protracted violence' and not to create a new standard.

If these four propositions are correct, then both Tribunal jurisprudence and the ICC Statute posit a single, consistent threshold for war crimes in internal armed conflicts.

12.2.4 *Nexus between crime and conflict*

In order to constitute a war crime, conduct must be linked to an armed conflict. For example, the ICC Elements of Crimes require that the conduct be committed 'in the context of and associated with' an armed conflict.¹¹⁰

The term 'in the context of' refers to the temporal and geographic context in a broad sense: the conduct occurred during an armed conflict and on a territory in which there is an armed conflict.¹¹¹ This requirement is very general, since a state of armed conflict is recognized throughout the territory, beyond the time and place of the hostilities.¹¹² There is no need for military activities at the time and place of the crime; crimes can be temporally and geographically remote from the actual fighting.¹¹³

The term 'associated with' refers to the specific nexus between the conduct of the perpetrator and the conflict, and matches the ICTY requirement that the conduct be 'closely related to' the conflict.¹¹⁴ Not all criminal activity on a territory experiencing armed conflict amounts to a war crime. For example, if a person kills a neighbour purely out of jealousy or because of a private dispute over land, and this happens to occur during an armed conflict, that is not a war crime.¹¹⁵

In the *Kunarac* judgment, the ICTY Appeals Chamber provided a helpful elaboration of this test, focusing on whether the existence of conflict played a substantial part in the perpetrator's *ability* to commit a crime, his *decision* to commit it, the *manner* in which it was committed or the *purpose* for which it was committed.¹¹⁶ Hence, it is sufficient that perpetrator acted in furtherance of or under the guise of the armed conflict.¹¹⁷ In assessing these questions, one may take into account *inter alia* the following factors: the status of perpetrator (for example combatant); the status of the victim (for example non-combatant, member of opposing party); whether the act serves a goal of a military campaign; and whether it was committed in the context of perpetrator's official duties.¹¹⁸

¹¹⁰ See, e.g. ICC Elements Art. 8(2)(a)–1. The test was referenced by the ICTR in *Kayishema* ICTR T.Ch. II 21.05.1999 para. 187, although the Chamber ultimately declined to articulate a legal test: *ibid.*, para. 188.

¹¹¹ Knut Dörmann, Eve La Haye and Herman von Hebel, 'War Crimes' in Lee, *Elements and Rules*, 120–1.

¹¹² *Tadić* ICTY A. Ch. 02.10.1995 para. 70. ¹¹³ *Kunarac* ICTY A. Ch. 12.06.2002 para. 57.

¹¹⁴ *Tadić* ICTY A. Ch. 02.10.1995 para. 70. While some nexus is needed, the crime need not be committed during combat, nor need it be part of a policy or practice or in the interests of a party to the conflict: *Tadić* ICTY T. Ch. II 07.05.1997 paras. 572–3.

¹¹⁵ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge, 2003) 19–20.

¹¹⁶ *Kunarac* ICTY A. Ch. 12.06.2002 para. 58. ¹¹⁷ *Ibid.*

¹¹⁸ *Kunarac* ICTY A. Ch. 12.06.2002 para. 59; *Rutaganda* ICTR A. Ch. 26.05.2003 para. 569.

12.2.5 The perpetrator

The law of war crimes does not govern only members of armed forces or groups and their leaders. The fact that a perpetrator is a member of an armed force does help to establish the nexus to armed conflict, but it is not a requirement.¹¹⁹ The conduct of civilians can be a war crime even if it is not imputable to a party to the conflict, provided that the nexus requirement is met.¹²⁰

A more difficult question is whether the perpetrator must have some awareness of the armed conflict. This depends on whether the existence of armed conflict is seen as a purely jurisdictional matter (triggering international jurisdiction but not an element of the crime) or as a mixed jurisdictional/substantive requirement.¹²¹ Tribunal jurisprudence has not traditionally inquired into knowledge of the conflict,¹²² which suggests that they saw the existence of the conflict as a purely jurisdictional matter or that they saw the knowledge as obvious. The Appeals Chamber in *Kordić* indicated that the knowledge of the accused of the fact of armed conflict was indeed relevant.¹²³

Some national jurisprudence,¹²⁴ as well as the ICC Elements of Crimes,¹²⁵ indicate that a person cannot be convicted as a 'war criminal' unless he or she has the necessary awareness of the factual circumstances that make the conduct a war crime. The final element for each war crime requires that the perpetrator was 'aware of factual circumstances that established the existence of an armed conflict'.¹²⁶ This requirement is then clarified or attenuated by several features of the ICC Elements. First, the Introduction to War Crimes clarifies that no *legal* evaluation by the perpetrator is required, either of the existence of the conflict or its character as international or internal.¹²⁷ Second, the Introduction clarifies that there is no requirement of awareness of the *factual circumstances establishing the character* of the conflict as international or internal.¹²⁸ Third, and most remarkably, the Introduction states that:

There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.

The result is not a model of legislative clarity, but it appears to require only sufficient factual awareness so that the crime may be said objectively to meet the 'associated with' or 'closely related' test.¹²⁹ The judges are left ample room to clarify based on

¹¹⁹ *Akayesu* ICTR A. Ch. 01.06.2001 paras. 444–5.

¹²⁰ See, e.g. *Essen Lynching Trial*, I LRTWC 88; *Tesch* (The Zyklon B Case) I LRTWC 93. ¹²¹ Kress, 'War Crimes', 24.

¹²² *Tadić* ICTY T. Ch. II 07.05.1997 para. 572.

¹²³ *Kordić* ICTY A. Ch. 17.12.2004 para. 311: 'The *nullum crimen sine lege* principle does not require that an accused knew the specific *legal* definition of each element of a crime he committed. It suffices that he was aware of the *factual* circumstances, e.g. that a foreign state was involved in the armed conflict.' Interestingly, this test is more onerous than that in the ICC Elements, where knowledge of the international character of the conflict is not required: ICC Elements, Introduction to war crimes, para. 3.

¹²⁴ This is the approach taken by the Supreme Court of Canada in *R v. Finta* [1994] 1 SCR 701 at 820.

¹²⁵ Dörmann, La Haye and von Hebel, 'War Crimes' in Lee, *Elements and Rules*, 121–3.

¹²⁶ See, e.g. ICC Elements Art. 8(2)(a)(i), element 5. ¹²⁷ ICC Elements, Introduction to War Crimes, para. 3.

¹²⁸ *Ibid.* ¹²⁹ See section 12.2.4.

relevant facts. In any event, the issue seems to be of theoretical interest rather than practical importance, since it is difficult to conceive of situations where a perpetrator's conduct could satisfy the nexus to conflict, while the perpetrator was somehow unaware of the armed conflict going on around him or her.

12.2.6 *The victim or object of the crime*

The definitions of many war crimes include certain criteria with respect to the victim (or object) of the crime. For example, for grave breaches of the Geneva Conventions, the crime must affect 'protected persons or objects'.¹³⁰ Protected persons include civilians, prisoners of war and combatants who are no longer able to fight because they are sick, wounded or shipwrecked.¹³¹ Similarly, common Article 3 protects 'persons no longer taking active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or other cause'. These restrictions are necessary because some acts, such as wilful killing, are not a crime when committed against a combatant.

Other war crimes specify a particular victim or object of the crime (for example civilian population, civilian objects, persons involved in humanitarian assistance, undefended towns, etc.).¹³² Some war crimes regulate battlefield conduct, to reduce unnecessary suffering of combatants, and hence even combatants are protected as victims of the crime.¹³³

Because IHL originally developed as a series of reciprocal promises between parties to a conflict, most of IHL regulates conduct towards those affiliated with the 'enemy'.¹³⁴ For this reason, many war crimes require that the victim be 'in the hands of'¹³⁵ or 'in the power of'¹³⁶ an adverse party.¹³⁷ Some of the most important protections for civilians arise in GC IV, which protects persons 'who find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.¹³⁸ This provision was drafted bearing in mind a classic State to State international armed conflict.

However, recent history has shown that conflicts can be far more complex. The armed conflict in Bosnia was international in character, due to the involvement of neighbouring States, yet it was also predominantly an ethnic conflict. Persons were frequently

¹³⁰ See, e.g. Art. 147 GC IV, Art. 8(2)(a) ICC Statute, Art. 2 ICTY Statute.

¹³¹ See, e.g. Arts. 12 and 13 GC I, Arts. 12 and 13 GC II, Art. 4 GC III, Art. 4 GC IV.

¹³² Art. 8(2)(i)–(v) ICC Statute. ¹³³ See, e.g. Art. 8(2)(b)(vi), (vii), (xi), (xii), (xvii)–(xx).

¹³⁴ There are exceptions; for example, Art. 75 AP I protects *all* persons in the hands of a party to conflict; and see section 12.3.8 concerning child soldiers. As the emphasis has shifted to the duty of any party toward victims of conflict, the role of reciprocity is diminishing in IHL, although it is still significant: see René Provost, *International Human Rights and Humanitarian Law* (Cambridge, 2002) 121–238.

¹³⁵ Art. 4 GC IV. ¹³⁶ See, e.g. Art. 4 GC III; ICC Elements Art. 8(2)(b)(x)–1, element 4.

¹³⁷ It has been suggested that the requirement of 'in the hands of' or 'in the power of' is also needed to distinguish Geneva-type provisions from provisions regulating methods and means of combat. For example, it might be anticipated that an aerial bombing of a military target will cause a civilian death, but this is not a 'wilful killing' since the civilian is not 'in the hands' of the attacking party. On this view a comparable requirement should be imported into internal conflicts: Kress, 'War Crimes'.

¹³⁸ Art. 4 GC IV.

detained by, and abused by, persons of another ethnic group, that is to say a different party to the conflict, yet they were all of the same nationality. Applying the Geneva Conventions literally, these persons would not be entitled to protection, because all concerned held the same passport, even though they were in fact hostile forces.

In the *Tadić* decision, the ICTY Appeals Chamber held that the crucial test is allegiance, and that ethnicity rather than nationality may become the ground of allegiance.¹³⁹ Thus, the Chamber chose to look at the substance of the relations rather than formalities.¹⁴⁰

12.2.7 The jurisdictional threshold in the ICC Statute

Article 8(1) of the ICC Statute provides that the ICC ‘shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’. It must be emphasized that this is not an element of a war crime; unlike crimes against humanity, even a single isolated act can constitute a war crime. Article 8(1) is rather an indicator to the ICC as to how it ought to exercise its jurisdiction; namely to focus its resources not on isolated war crimes but on the most serious situations. The term ‘large-scale’ is either synonymous with, or less demanding than, the ‘widespread’ element of crimes against humanity, and ‘plan or policy’ is less demanding than ‘systematic’, corresponding instead to the lower threshold in Article 7(2)(a).¹⁴¹ The words ‘in particular’ indicate that this is a guide rather than a requirement. Thus the ICC may still act with respect to isolated war crimes which are of sufficient gravity to warrant action, such as crimes with a particularly grave impact.¹⁴²

12.3 Specific offences

12.3.1 The lists of war crimes in the statutes of the Tribunals and the ICC

Section 12.3 examines the specific offences constituting war crimes. This examination will start with some observations on the lists of war crimes in the relevant instruments.

The ICTY Statute lists grave breaches of the Geneva Conventions (Article 2), and other violations of the laws and customs of war, drawing on other customary law sources (Article 3).¹⁴³ The ICTR Statute lists only serious violations of common Article 3 and AP I (Article 4). The ICC Statute follows the same approach of listing by source, and is the most elaborate. It features four lists: grave breaches of the Geneva Conventions (Article 8(2)(a)), other serious violations of the laws and customs applicable in international armed conflict (Article 8(2)(b)), serious violations of

¹³⁹ *Tadić* ICTY A. Ch. 2.10.1995 para. 166. ¹⁴⁰ *Ibid.*, para. 168. ¹⁴¹ Chapter 11.

¹⁴² Art. 8(1) is discussed in the ICC Office of the Prosecutor Response to Communications Concerning the Situation in Iraq, 10 February 2006, available at www.icc-cpi.int/organs/otp/otp_com.html

¹⁴³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993, UN Doc. S/25704.

common Article 3 (Article 8(2)(c)), and other serious violations of the laws and customs applicable in non-international armed conflict (Article 8(2)(e)). The ‘other serious violations’ lists in Article 8(2)(b) and (e) are drawn from various sources that were accepted as customary law, including provisions from Geneva law,¹⁴⁴ Hague law and other sources.

Because of the desire to adhere to customary law, and to reach agreement, the drafters of the ICC Statute relied on provisions from well-accepted instruments. Even when there was overlap, provisions were often included to avoid missing any customary norms. The drafters also declined to attempt to consolidate overlapping provisions, as this would have been seen as legislating. As a result of this reliance on various sources, there is considerable duplication. Furthermore, the order of the provisions in Article 8(2)(b) and (e) largely reflects the original instruments and the process of negotiations, and the dynamics of reaching agreement did not allow for technical review and resequencing. The list has been described as ‘unwieldy’,¹⁴⁵ a ‘hodge-podge’,¹⁴⁶ lacking ‘a clear and analytically convincing structure’,¹⁴⁷ and not readily comprehensible to commanders.¹⁴⁸

While there are many possible ways to group and order the specific war crimes, this chapter will present them in the following order, regardless of the original source of the norm. First, we examine provisions protecting non-combatants (section 12.3.2) and then two provisions governing attacks by combatants: the principle of distinction (section 12.3.3) and proportionality (section 12.3.4). We will then examine prohibitions relating to property (section 12.3.5), which reflect some of the overlaps in these principles (protecting rights of non-combatants, the principles of distinction and proportionality). This will be followed by an explanation of provisions regulating the means (section 12.3.6) and methods (section 12.3.7) of warfare. Finally, there are two significant war crimes provisions that do not fall neatly into the above categories, as they protect other interests (section 12.3.8).

12.3.2 Crimes against non-combatants

Violence and mistreatment

At the heart of war crimes law is a series of prohibitions of violence against and mistreatment of non-combatants (including civilians, prisoners of war and wounded or sick former combatants). These prohibitions are derived from the basic principle

¹⁴⁴ Including some grave breaches from AP I and some other provisions of the Geneva Conventions not listed as grave breaches.

¹⁴⁵ M. Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (1999) 32 *Cornell International Law Journal* 462.

¹⁴⁶ Bothe, ‘War Crimes’ in Cassese, *Commentary*, 396. ¹⁴⁷ Kress, ‘War Crimes’, 29.

¹⁴⁸ While recognizing that sticking to traditional text made Art. 8 acceptable, Sunga notes that it would have been desirable to consolidate the provisions and build coherence, rather than following *lex lata* so literally, and that the result makes the list less comprehensible to commanders, thereby hindering compliance among even the most cooperative: Lyal Sunga, ‘The Crimes Within the Jurisdiction of the International Criminal Court’ (1998) 6/4 *European Journal of Crime, Criminal Law and Criminal Justice* 377 at 393–4.

that non-combatants must be treated humanely. While these provisions are legally and conceptually straightforward, they are frequently violated in armed conflict, sometimes as practice or policy and sometimes as acts of individual soldiers. Deliberate and blatant violations of these provisions make up the majority of war crimes charges that have been brought in national and international jurisdictions.

The war crime of murdering or wilfully killing protected persons is well-recognized in international and internal armed conflict.¹⁴⁹ Killing of *combatants* is of course permitted in lawfully conducted operations; moreover, civilians may also die as a consequence of military actions against military objectives, and such deaths must be assessed using the more specific tools of the prohibition on disproportionate collateral damage. While the international armed conflict provisions refer to 'wilful killing' and the internal armed conflict provisions refer to 'murder', the basic elements of the crime are the same, and correspond to those for the crime against humanity of murder, as already discussed.¹⁵⁰

Torture, inhuman treatment, mutilation, and biological, medical or scientific experiments are also prohibited in any armed conflict.¹⁵¹ Different instruments present the crimes with different structures, but the basic prohibitions are the same.¹⁵²

The elements of torture and inhuman treatment have been discussed, in relation to crimes against humanity. However, unlike in the context of crimes against humanity,¹⁵³ the war crime of torture has a *purpose requirement* – that the perpetrator inflicted pain or suffering 'for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind'.¹⁵⁴ In the absence of such prohibited purpose, the conduct could amount to inhuman treatment.

Various forms of experimentation are prohibited in different instruments.¹⁵⁵ The prohibitions contain comparable requirements of endangering the physical or mental health or integrity of persons, not being justified by medical reasons (the treatment of the person) and not being carried out in the person's interest.¹⁵⁶

The war crime of wilfully causing great suffering or serious injury to body or health arises from the GC grave breach provisions.¹⁵⁷ It can include actions deliberately causing long-lasting and serious harm without satisfying the elements of torture.¹⁵⁸

¹⁴⁹ Art. 8(2)(a)(i), 8(2)(c)(i) ICC Statute; Art. 2(a) ICTY Statute; Art. 4(a) ICTR Statute; Art. 147 GC IV; common Article 3 to the GCs.

¹⁵⁰ See ch. 11.

¹⁵¹ Art. 8(2)(a)(ii), 8(2)(b)(x), 8(2)(c)(i), 8(2)(e)(xi) ICC Statute; Art. 2(b) ICTY Statute, reflecting the grave breach provisions (e.g. Art. 147 GC IV), common Article 3, and Art. 11 AP I.

¹⁵² Compare ICC Statute Art. 8(2)(a)(ii) (grave breach), 8(2)(b)(x) (AP I), 8(2)(c)(i) (common Article 3), 8(2)(e)(xi) (AP I).

¹⁵³ See ch. 11.

¹⁵⁴ See ICC Elements Art. 8(2)(a)(ii)–1, element 2; *Delalić* ICTY T. Ch. II 16.11.1998 para. 459; and *Kunarac* ICTY T. Ch. II 22.2.2001 para. 485.

¹⁵⁵ Biological experiments appear in the GC grave breach provisions and medical or scientific experiments appear in AP I.

¹⁵⁶ See, e.g. ICC Elements Art. 8(2)(a)(ii)–3 and 8(2)(b)(x)–2.

¹⁵⁷ See, e.g. Art. 8(2)(a)(iii) ICC Statute; Art. 2(c) ICTY Statute; Art. 147 GC IV. Under the ICC Statute, the provision applies only in international armed conflict.

¹⁵⁸ *Delalić* ICTY T. Ch. II 16.11.1998 paras. 508–11; *Akayesu* ICTR T. Ch. I 02.09.1998 para. 502; *Blaskić* ICTY T. Ch. I 03.03.2000 para. 156; *Kordić* ICTY T. Ch. 26.02.2001 para. 245.

The war crime of committing outrages upon personal dignity, in particular humiliating and degrading treatment, is drawn from common Article 3 and the Additional Protocols,¹⁵⁹ and therefore applies in any armed conflict. The prohibition is broader than the previous prohibitions, in that it also covers acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or forcing them to perform degrading acts.¹⁶⁰ The conduct must meet a certain objective level of seriousness to be considered an outrage upon personal dignity. Indignities against corpses can fall within the prohibition, as can deliberately debasing prisoners by forcing them to violate religious requirements.¹⁶¹

The most important development in this area is the recognition that various forms of sexual violence amount to war crimes. In the past, international law did not deal adequately with the sexual abuses routinely committed against women.¹⁶² Historically, in most or many military cultures, licence to rape was seen as a reward for troops, an expected occurrence after the taking of a city or village, and a means of terrorizing and demoralizing the enemy.¹⁶³ In such a climate, sexual violence has been pervasive in armed conflicts.¹⁶⁴ While IHL has criminalized rape for centuries, this was not always explicit, and it was rarely prosecuted. IHL treaties, negotiated by men, tended to reflect the perspectives and concerns of men, and thus did not explicitly recognize sexual violence as a form of war crime.¹⁶⁵ Article 27 of GC IV stipulated that women should be protected against rape, but did not make rape a grave breach. Sexual violence was mentioned again in the Additional Protocols I and II, but not as a crime.¹⁶⁶ Moreover, it was listed as an example of 'outrages upon personal dignity', which treated rape as an attack on 'honour', trivializing the nature of the violation.

The ICTY Statute did not list rape as a war crime (although it was listed as a crime against humanity). This lacuna triggered the efforts to establish that rape could fall within the definition of grave breaches, such as 'torture' or 'inhuman treatment'.¹⁶⁷ It also reinforced the need to establish that rape is a war crime per se.¹⁶⁸ The ICTR

¹⁵⁹ Common Article 3 to the GCs; Art. 95 GC IV; Arts. 75(2)(b) and 85(4)(c) AP I; Art. 4(2)(e) AP II; Art. 8(2)(b)(xxi), Art. 8(2)(c)(ii) ICC Statute.

¹⁶⁰ J. Pictet *et al.*, *Commentary to Additional Protocol I* (Geneva, 1987) 873; *Aleksovski* ICTY T. Ch. 25.06.1999 para. 56; *Kunarac* ICTY T. Ch. II 22.02.2001 paras. 501–4.

¹⁶¹ See, e.g. ICC Elements, footnote 49.

¹⁶² Elizabeth Odio-Benito, 'Sexual Violence as a War Crime' in Pablo Antonio Fernández-Sánchez, *The New Challenges of Humanitarian Law in Armed Conflict* (The Hague, 2005).

¹⁶³ See, e.g. Kelly Askin, *War Crimes Against Women: Prosecution in International Tribunals* (The Hague, 1997) esp. at 12–42.

¹⁶⁴ See, e.g. Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York, 1975); Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 EJIL 1.

¹⁶⁵ Some military codes did recognize sexual violence as a punishable war crime; for example, the Lieber Code provided the death penalty for rape.

¹⁶⁶ Art. 4(2)(e) AP II, referring to rape, enforced prostitution and indecent assault; Art. 75(2)(b) AP I, referring to enforced prostitution and indecent assault.

¹⁶⁷ Patricia Viseur Sellers and Kaoru Okuizumi, 'International prosecution of Sexual Assaults' (1997) 7 *Transnational Legal and Contemporary Problems* 45; see *Akayesu* ICTR T. Ch. I 02.09.1998 para. 731 (rape and sexual violence can constitute the actus reus of other crimes); *Delalić* ICTY T. Ch. II 16.11.1998 paras. 475–96 (rape can constitute torture where the elements of torture are satisfied).

¹⁶⁸ Theodor Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 *AJIL* 424.

Statute was an improvement, in that its war crimes provision expressly included rape, enforced prostitution and other forms of sexual violence.¹⁶⁹ However, mirroring the language of Additional Protocol II, these were included as ‘outrages upon personal dignity’, thus maintaining the patriarchal perspective of rape as an assault on family honour. The ICC Statute took the further step, explicitly recognizing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other sexual violence as war crimes.¹⁷⁰ The ICC Statute also confirms that sexual violence can amount to grave breaches of the Geneva Conventions.¹⁷¹ For the elements of these offences, see the discussion in Chapter 11.

Further compounding the historical lack of legal recognition of crimes of sexual violence, an additional problem was that prosecutors shied away from bringing charges of sexual violence even when applicable law did recognize the crime. For example, in the Nuremberg proceedings, where there was ample evidence of widespread use of rape as a weapon of war, the French prosecutor simply submitted a dossier and asked forgiveness ‘if I avoid citing the atrocious details’ – even though many atrocious details were scrutinized thoroughly in relation to other charges.¹⁷² As a result there were no convictions for sexual violence in Nuremberg proceedings. The record of the Tokyo Tribunal was somewhat better, as there were war crimes convictions of leaders for rapes and sexual violence, including in relation to the ‘Rape of Nanking’, in which Japanese soldiers raped approximately 20,000 women and children.¹⁷³ The sexual slavery of women as ‘comfort women’ by the Japanese military was however overlooked.¹⁷⁴ In response to these experiences, many NGOs, academics and lawyers have successfully engaged with the ICTY and ICTR to ensure that crimes of sexual violence are diligently investigated and prosecuted.¹⁷⁵ These efforts have culminated in rules of procedure sensitive to victims, gender advisers on staff, and several landmark decisions. In the same spirit, the ICC Statute has a number of provisions to ensure the effective investigation and prosecution of such crimes, while preserving the safety, dignity and privacy of victims and witnesses.¹⁷⁶

Other legal interests of protected persons

In addition to prohibiting violence against and mistreatment of protected persons, war crimes law also protects other rights of persons. For example, several provisions protect liberty and mobility rights. In international conflicts, the unlawful deportation,

¹⁶⁹ Art. 4(e) ICTR Statute. ¹⁷⁰ Art. 8(2)(b)(xxii) ICC Statute. ¹⁷¹ Art. 8(2)(b)(xxii) ICC Statute.

¹⁷² Gabrielle Kirk McDonald, ‘Crimes of Sexual Violence: The Experience of the International Criminal Tribunal’ (2000) 39 *Columbia Journal of Transnational Law* 1 at 10.

¹⁷³ *Ibid.* ¹⁷⁴ *Ibid.*

¹⁷⁵ Christine Chinkin, ‘Women: The Forgotten Victims of Armed Conflict’ in Helen Durham and Timothy L. H. McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague, 1999).

¹⁷⁶ Arts. 36(8)(b) (judges with expertise in violence against women and children), 42(6) (advisers on sexual and gender violence and violence against children), 44(2) (staff with such expertise), 54(1)(b) (prosecutor to respect interests of victims and witnesses and take into account sexual violence, gender violence and violence against children), 68 (protection of victims and witnesses and participation in proceedings). See, e.g. Valerie Oosterveld, ‘The Making of a Gender-Sensitive International Criminal Court’ (1999) 1 *International Law FORUM du droit international* 38.

transfer or confinement of civilians is a grave breach.¹⁷⁷ In internal conflicts, there is a more modest prohibition, on displacement of the civilian population for reasons unrelated to the conflict.¹⁷⁸ Since IHL permits the transfer and/or confinement of civilians under certain conditions, it is necessary to refer to IHL to determine whether a particular act is unlawful.¹⁷⁹

The taking of hostages is a war crime in international or internal conflicts.¹⁸⁰ Tribunal jurisprudence requires an unlawful deprivation of freedom perpetrated in order to obtain a concession or to gain an advantage,¹⁸¹ and the ICC Elements contain a comparable but more detailed definition drawing on the Hostages Convention 1979.¹⁸²

Unjustified delay in the repatriation of prisoners of war and civilians is identified as a grave breach in AP I,¹⁸³ which therefore applies as a matter of treaty law for parties to that protocol. The provision was not included in the ICC Statute, due to lack of agreement on the customary law status of the provision. This lack of agreement at the Rome Conference is not conclusive as to the customary status of the provision for jurisdictions other than the ICC.¹⁸⁴

Other provisions protect the legal rights of persons. Punishment of protected persons without a regular trial is a grave breach (international conflict) and a serious violation of common Article 3 (internal conflict).¹⁸⁵ In international conflict, it is also a war crime to declare abolished, suspended or inadmissible the rights and actions of nationals of a hostile party.¹⁸⁶

Two closely related provisions, one from Geneva law, the other from Hague law, protect persons from being compelled to fight against their own side during international conflicts. It is a grave breach to compel a prisoner of war or civilian to serve in the forces of a hostile power,¹⁸⁷ and it is also a war crime to compel persons to participate in operations of war against their own country.¹⁸⁸ The two provisions overlap but have some different scope of application; one focuses on conscription into forces (fighting against any party) and the other focuses on the forced breach of loyalty in fighting one's own country (whether or not as part of military forces).¹⁸⁹

¹⁷⁷ See Art. 8(2)(a)(vii) ICC Statute; Art. 2(g) ICTY; Art. 147 GC IV. Significantly, this provision appears only in GC IV, allowing the conclusion that only civilians may be victims of this offence.

¹⁷⁸ See Art. 8(2)(e)(viii) ICC Statute; Art. 17(1) AP II. ¹⁷⁹ See, e.g. Arts. 41–3, 68, 78 and 79–141 GC IV.

¹⁸⁰ See, e.g. Art. 8(2)(a)(viii) and 8(2)(c)(iii) ICC Statute; Arts. 34(4) and 147 GC IV; Art. 75(2)(c) AP I; Art. 4(2)(c) AP II. See also *Altstötter (the Justice Trial)* VI LRTWC 1.

¹⁸¹ *Blaskić* ICTY T. Ch. I 03.03.2000 para. 158.

¹⁸² Article 8(2)(a)(viii) ICC Elements: The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of [the detained persons].

¹⁸³ Art. 85(4)(b) AP I. ¹⁸⁴ Art. 10 ICC Statute.

¹⁸⁵ Art. 8(2)(a)(vi) and 8(2)(c)(iv) ICC Statute; Art. 2(f) ICTY Statute; Art. 3(g) ICTR Statute; Art. 130 GC III; Art. 147 GC IV; common Article 3(1)(d). See *Hamdan v. Rumsfeld*, 126 S ct 2749 (2006), finding that military tribunals established by the Administration, allowing the exclusion of the accused from his own trial, did not meet the common Article 3 standard.

¹⁸⁶ Art. 8(2)(b)(xiv) ICC Statute; Art. 23(h) Hague Regulations. On the ambiguous drafting of the Hague Regulations, see Michael Cottier, 'Article 8' in Triffterer, *Observers' Notes*, 232–5.

¹⁸⁷ Art. 8(2)(a)(v) ICC Statute; Art. 130 GC III; Art. 147 GC IV.

¹⁸⁸ Art. 8(2)(b)(xv) ICC Statute; Art. 23(h) Hague Regulations.

¹⁸⁹ The ICC Elements combine both aspects in the elements of Art. 8(2)(a)(v).

Slavery and forced labour, while not listed as war crimes in the ICC Statute, have been recognized as war crimes in Tribunal jurisprudence.¹⁹⁰ It is necessary to make reference to IHL, which permits parties to require prisoners of war to carry out work under certain conditions, to determine the ambit of these prohibitions.¹⁹¹

12.3.3 Attacks on prohibited targets

With respect to the conduct of military operations, perhaps the most fundamental principle is the principle of distinction: belligerents are required to distinguish between military objectives and the population and objects, and to 'direct their operations only against military objectives'.¹⁹² As already explained, this is a cardinal principle of IHL.¹⁹³

The relevant IHL instruments provide guidance on the differences between civilians, civilian population and objects, and military objectives. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.¹⁹⁴ With respect to 'civilian population', '[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'.¹⁹⁵ The population must be of a 'predominantly civilian nature'.¹⁹⁶ Civilian objects are 'all objects which are not military objectives'.¹⁹⁷

Military objectives include combatants (whether on or off duty) and objects:

which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹⁹⁸

The war crimes of directing attacks against civilians or the civilian population,¹⁹⁹ or against civilian objects,²⁰⁰ are the most elementary and straightforward expression of these principles.²⁰¹

¹⁹⁰ *Krnjelac* ICTY T. Ch. II 15.03.2002 paras. 350–60; *Naletelic* ICTY T. Ch. 31.03.2003 paras. 250–61.

¹⁹¹ See Arts. 49–57 GC III on authorized work and working conditions.

¹⁹² Art. 48 AP I; see also Art. 51 AP I and Art. 13 AP II. For a discussion on the law of targeting, see Michael N. Schmitt, 'Fault Lines in the Law of Attack' in Susan C. Breau and Agnieszka Jachec-Neale (eds.), *Testing the Boundaries of International Humanitarian Law* (London, 2006) 277–92.

¹⁹³ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (1996) 1 ICJ Rep 226, 257 (8 July 1996) para. 78.

¹⁹⁴ Art. 50(1) AP I. ¹⁹⁵ Art. 50(3) AP I.

¹⁹⁶ *Tadić* ICTY T. Ch. II 07.05.1997 para. 638; *Blaškić* ICTY T. Ch. I 03.03.2000 para. 214; *Strugar* ICTY T. Ch. II 31.01.2005 para. 282.

¹⁹⁷ Art. 50(3) AP I; also *Blaškić* ICTY T. Ch. I 03.03.2000 para. 180; *Kordić* ICTY T. Ch. 26.02.2001 para. 53; *Strugar* ICTY T. Ch. II 31.01.2005 para. 282.

¹⁹⁸ This definition, found in Art. 52(2) AP I, is widely accepted as reflecting customary law. For further discussion of this two-part test, see, e.g. Yoram Dinstein, *Legitimate Military Objectives Under The Current Jus In Bello*, in Andru E. Wall (ed.), 'Legal and Ethical Lessons of NATO's Kosovo Campaign' (2002) 78 *US Naval War College International Law Studies*; Pictet *et al.*, *Commentary to AP I*, notes 2014–18, pp. 635–7. The definition can still give rise to disagreement as to its application; see for example the controversial analysis of attacks on TV stations in the ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing, 13 June 2000, available at www.un.org/icty/pressreal/nato061300.htm

¹⁹⁹ Art. 8(2)(b)(i) and 8(2)(e)(i) ICC Statute; Art. 51(2) AP I; Art. 13(2) AP II.

²⁰⁰ Art. 8(2)(b)(ii) ICC Statute; Art. 62(1) AP I.

²⁰¹ In internal armed conflicts, the ICC Statute recognizes the prohibition on attacking civilians but not civilian objects; thus attacks on civilian objects are covered only if they are specially protected objects (buildings dedicated to certain purposes, or objects under the Geneva Conventions symbols or a humanitarian mission).

The other ‘prohibited target’ provisions are, in effect, simply examples of this prohibition, focusing on certain specially protected objects or interests. These include: attacking or bombarding undefended towns, villages, dwellings or buildings which are not military objectives;²⁰² intentionally directing attacks against buildings dedicated to ‘religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives’;²⁰³ and directing attacks against buildings, transport and personnel using the distinctive emblems of the Geneva Conventions.²⁰⁴ The first two examples are early illustrations recognized in Hague law and reproduced in the ICTY, ICTR and ICC Statutes. The third arises from the Geneva Conventions, which have particular provisions emphasizing the protection to be accorded to these distinctive emblems, so that personnel of these organizations may carry out their work of ameliorating the suffering of victims of warfare.²⁰⁵

The ICC Statute also specifically prohibits attacks on personnel, installations and vehicles involved in a humanitarian assistance mission or peacekeeping mission in accordance with the UN Charter.²⁰⁶ This provision may, at first glance, appear to extend beyond existing customary law; however, since it only protects those ‘entitled to the protection given to civilians’ it is evident that it is simply a specific illustration of the undisputed prohibition on attacking civilians.²⁰⁷ The inclusion of this provision was inspired by the same considerations that led to the Convention on Safety of UN and Associated Personnel 1994²⁰⁸ and is intended specifically to condemn attacks on those who risk their lives to bring humanitarian aid. Such attacks may cause the failure of or withdrawal of humanitarian missions, with grave repercussions for the affected population.

Two other prohibitions flow from the principle of sparing the civilian population. First, it is prohibited to use the starvation of civilians as a method of war, including wilfully impeding relief supplies.²⁰⁹ Second, under Tribunal jurisprudence, it is a war crime to commit acts of violence primarily intended to spread terror among the civilian population.²¹⁰

²⁰² Art. 8(2)(b)(v) ICC Statute; Art. 3(c) ICTY; Art. 25 Hague Regulations; Art. 59(1) AP I.

²⁰³ Art. 8(2)(b)(ix) and 8(2)(e)(iv) ICC Statute; Arts. 27 and 56 Hague Regulations; and see 1954 Hague Convention on Cultural Property and 1999 Second Hague Protocol.

²⁰⁴ Art. 8(2)(b)(xxiv) and 8(2)(e)(ii) ICC Statute. ²⁰⁵ Arts. 38–44 GC I; Arts. 41–45 GC II.

²⁰⁶ Art. 8(2)(b)(iii) and 8(2)(e)(iii) ICC Statute; see also Art. 4(b) SCSL Statute.

²⁰⁷ The restriction to those with civilian status means that peacekeepers engaged in military operations under Chapter VII are not protected. This is a necessary outcome consistent with general principles of IHL; otherwise for one side of the conflict, killing combatants would be a crime.

²⁰⁸ 2051 UNTS (1999) 391.

²⁰⁹ Art. 8(2)(b)(xxv) ICC Statute; Art. 54 AP I; see also, on the general duty not to impede relief, Arts. 10, 23, 59–63 and 108–111 GC IV and Arts. 70–1 AP I. Under the ICC Statute the provision is recognized only in international conflicts, although it would appear to meet the *Tadić* test; see also Art. 14 AP I.

²¹⁰ *Galić* ICTY T. Ch. 05.12.2003 paras. 87–138; see Art. 51(2) AP I and Art. 13(2) AP II: ‘Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.’; Robert Cryer, ‘Prosecutor v. *Galić* and the War Crime of Terror Bombing’ (2005–2006) 2 *Israel Defence Force Law Review* 73. For further discussion of the crime of terrorism, see ch. 14.

12.3.4 Attacks inflicting excessive civilian damage

The principle of proportionality

The companion to the principle of distinction is the principle of proportionality: even where an attack is directed against a military objective, the anticipated incidental civilian damage must not be disproportionate to the anticipated military advantage.²¹¹ This principle is well established as customary law.²¹²

No other principle of IHL illustrates so clearly the tension between military and humanitarian considerations. The prohibitions on mistreatment of civilians are important but they are legally and conceptually straightforward, whereas the prohibition on disproportionate attacks poses problems of interpretation even for – indeed, *particularly* for – military forces striving to comply fully with IHL. Even with precision weapons and sophisticated intelligence, military strikes often result in significant civilian casualties, injuries and property damage. As the prohibition on disproportionate attacks brings to the fore many complex and sensitive questions, this chapter will examine it in some detail.

The prohibition is criminalized in Article 85(3)(b) of AP I and in Article 8(2)(b)(iv) of the ICC Statute. Article 8(2)(b)(iv) criminalizes:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly²¹³ excessive in relation to the concrete and direct overall military advantage anticipated.

The application of this test therefore requires an assessment of:

- (a) the anticipated civilian damage or injury;
- (b) the anticipated military advantage; and
- (c) whether (a) was excessive in relation to (b).

Article 8(2)(b)(iv) requires the launching of such an attack, with the requisite knowledge, but does not appear to require that any particular *result* occur;²¹⁴ whereas the Geneva Conventions and Tribunal jurisprudence require that the attack actually results in harm.²¹⁵ The ICC Statute lists this provision only in the context of international conflicts; however, the prohibition relates to one of the most fundamental

²¹¹ Art. 51(5)(b) AP I.

²¹² Henckaerts & Doswald-Beck, *ICRC Customary Law*, 46–50; Kupreškić ICTY T. Ch. II 14.01.2000 paras. 522–6; Schmitt, ‘Fault Lines’, 292.

²¹³ The AP I standard is ‘excessive’ whereas the ICC Statute standard is ‘clearly excessive’. On the one hand, the adjective seems to raise the standard required under AP I. On the other hand, the difference may not be significant in practice since prosecution would not be viable or appropriate except in clear cases, see below.

²¹⁴ The chapeau of Art. 85(3) AP I requires that the attack must have caused death or serious injury to body or health; this requirement could arguably be incorporated by virtue of the chapeau of Art. 8(2) (‘within the established framework of international law’). However, during the negotiation of the Elements of Crimes, the decision was reached not to include a result requirement. Daniel Frank, ‘Article 8(2)(b)(i)’ in Lee, *Elements and Rules*, 141.

²¹⁵ *Kordić* ICTY A. Ch. 17.12.2004 paras. 55–68. An attack that was excessive based on the available information, but which unexpectedly caused no harm, could however still be prosecuted as an attempt.

principles of IHL and hence would appear to meet the *Tadić* test for customary law war crimes in internal armed conflicts.²¹⁶

First side of the equation: harm to civilians, civilian objects and the environment

The terms ‘civilian’, ‘civilian population’ and ‘civilian object’ are discussed in section 12.3.3.

Article 8(2)(b)(iv) of the ICC Statute differs from Article 85(3)(b) of AP I in that it also includes damage to the environment in the assessment. The terminology is drawn from Article 35(3) of AP I, which prohibits attacks causing ‘widespread, long-term and severe damage to the natural environment’.²¹⁷ The ICC Statute has been criticized on the grounds that it is more restrictive than Article 35(3) of AP I, since the damage must satisfy not only the ‘widespread, long-term and severe’ requirement but also the disproportionality test.²¹⁸ This overlooks however that the prohibition in Article 35(3), while absolute, was not criminalized in AP I, and it is unclear if the prohibition can be criminalized to the extent that it goes further than the prohibition of wanton devastation or disproportionate attacks. The ICC Statute recognizes individual criminal liability, but in connection with the well-established principle of proportionality. The inclusion of environmental considerations in the proportionality assessment is consistent with other authorities.²¹⁹ The dual threshold in Article 8(2)(b)(iv) does however mean that environmental damage will only be considered in the criminal law context where it is both widespread, long-term and severe *and* disproportionate to the military advantage.

Second side of the equation: military advantage

Military objectives include combatants²²⁰ and objects which are military objectives, as defined above.²²¹ Article 8(2)(b)(iv) also requires an assessment of the ‘concrete and direct overall military advantage anticipated’.²²² The evident tension between these modifiers (‘concrete and direct’, ‘overall’) is addressed in footnote 36 of the Elements of Crimes:

²¹⁶ The *Tadić* decision refers specifically to proportionality in relation to internal armed conflicts: *Tadić* ICTY A. Ch. 2.10.1995 para. 111. See also *Kupreškić* ICTY T. Ch. II 14.01.2000, paras. 521 et seq.

²¹⁷ On these terms, see ILC, GAOR, 46th Sess, Supp. No. 10 (A/46/10) 276 and Dörmann, *Elements of War Crimes under the Rome Statute*, 175. More generally see Jay E. Austin and Carl E. Bruch, *The Environmental Consequences of War* (Cambridge, 2000); Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (The Hague, 2004).

²¹⁸ Cassese describes the environmental provision as ‘a huge leap backwards’: Antonio Cassese, *International Criminal Law* (Oxford, 2003) 61.

²¹⁹ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons Case* (1996) 1 ICJ Rep 226 (8 July 1996 para. 30; ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing, para. 15).

²²⁰ Arts. 43, 48, 51(3) AP I. This includes combatants at all times unless they have surrendered or are sick or wounded and have ceased to take part in hostilities.

²²¹ See section 12.3.4.

²²² On ‘concrete and direct’, see Jean Pictet, *Commentary on the Additional Protocols* (ICRC, Geneva, 1987) para. 2209. On ‘overall’ see Statements of understanding of Belgium, Canada, Germany, Italy, Netherlands, New Zealand, Switzerland and the United Kingdom available in A. Roberts and R. Guelff (eds.), *Documents of the Laws of War* (3rd edn, Oxford, 2000) 499–512.

The expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.²²³

One example of an anticipated advantage that is specific and foreseeable, yet not temporally or geographically linked to the target, could be a feint. For example, in the Second World War, the Allies attacked military targets in the Pas de Calais, but the greater intended contribution was to deceive the Germans into believing that the amphibious assault would take place in the Pas de Calais rather than at Normandy.²²⁴

Comparing the two sides of the equation: the proportionality test

It is comparatively simple to state the proportionality test in the abstract, yet it is profoundly difficult to assess compliance with it in practice, given that: (1) assessing the anticipated civilian damage is a difficult task, requiring a prediction of consequences based on variables and probabilities, relying on available information under circumstances of urgency; (2) assessing the anticipated military advantage involves the same problems of variables and uncertainties, taking into account the broader military strategy and possible future ramifications of the action; and (3) comparing the two is even more challenging, given that they are entirely unlike properties with no common unit of measurement.²²⁵

Because of these difficulties, it is generally recognized that decision makers must be allowed a ‘considerable margin of appreciation’.²²⁶ During the negotiation of the Rome Statute, many States were concerned about the inclusion of Article 8(2)(b)(iv), on the grounds that the officials and judges of the ICC would not be likely to have military experience and hence would apply an incorrectly onerous standard, and that the court would be reviewing decisions *ex post facto* with the benefit of hindsight, failing to take into account the ‘fog of war’ (incomplete information, urgency, confusion, limited time for critical decisions).²²⁷

To address these concerns, and to reflect the concept of a margin of appreciation, the term ‘clearly’ was inserted, so that the ICC will act only with respect to cases that are ‘clearly excessive’.²²⁸ This may well be seen as an unwarranted restriction on the standard in API, a view bolstered by the fact that Tribunal jurisprudence has not as of this point endorsed the ‘clearly excessive’ standard.²²⁹ Alternatively, it may be seen as an appropriate clarification given that the Statute deals not with the basic ground rules

²²³ ICC Elements, footnote 36. The footnote was the subject of intense negotiations.

²²⁴ Dörmann, *Elements of War Crimes under the Rome Statute*, 171.

²²⁵ Michael Bothe, ‘War Crimes’ in Cassese, *Commentary*, 398; see also ICTY Final Report, para. 48; W.J. Fenrick, ‘Targeting and Proportionality During the NATO Bombing Campaign against Yugoslavia’ (2001) 12 *EJIL* 489 at 499; Schmitt, ‘Fault Lines’, 292–8.

²²⁶ Stefan Oeter ‘Methods and Means of Combat’ in Fleck, *Handbook*, 178–9; see also Fenrick, ‘Targeting and Proportionality’, 499.

²²⁷ The provision has therefore been highlighted as creating undue exposure. See for example, David Scheffer, Statement in the 6th Committee of the General Assembly, 21 October 1998, US Mission to the UN, Press Release No. 179; Cassandra Jeu, ‘A Successful Permanent International Criminal Court – Isn’t It Pretty To Think So?’ (2004) 26 *Houston Journal of International Law* 411.

²²⁸ von Hebel and Robinson, ‘Crimes’ in Lee, *The Making of the Rome Statute*, 111. ²²⁹ Cryer, *Prosecuting*, 277–9.

for parties to conflict, but rather with the criminalization of individual behaviour.²³⁰ Some commentators, including the ICRC study on customary law and the ICTY report on NATO bombing, have concluded that inclusion of the word 'clearly' does not entail a significant new hurdle, since prosecution would in any event be viable only in cases where the proportionality requirement was clearly breached.²³¹

Some authorities indicate that proportionality must be assessed from the point of view of a 'reasonable military commander'²³² or 'a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him'.²³³ However, even such points of reference do not provide measurable ratios of military advantage and civilian damage that would be considered disproportionate.²³⁴ A review of State practice, even among States with traditions of IHL compliance and political incentive to minimize collateral damage, suggests that significant numbers of casualties can be inflicted in pursuit of military advantages without falling foul of the prohibition. Further clarity, through State practice or jurisprudence, would help give valuable content to the prohibition. To assess compliance, it may also be useful to examine the actual *conduct* of the parties: were target selections reviewed; were decision makers advised by military lawyers; were efforts taken to reduce incidental damage; were precautionary measures taken; and were precision weapons used when targets required? Despite the present difficulties in measuring compliance with this provision, it does allow a criminal law response to the more glaringly disproportionate attacks.²³⁵

The mental element

A critical element is the knowledge of the perpetrator at the time of launching the attack.²³⁶ The Elements of Crimes clarify that the information available to the perpetrator at the time is central.²³⁷ This is consistent with general principles of criminal law²³⁸ and with State practice.²³⁹

²³⁰ D. Pfirter, 'Article 8(2)(b)(iv)' in Lee, *Elements and Rules*, 148.

²³¹ W. J. Fenrick *et al.*, 'Article 8' in Triffterer, *Observers' Notes*, 197; Henckaerts & Doswald-Beck, *ICRC Customary Law*, 576–7; ICTY Final Report on NATO Bombing para. 21.

²³² ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 13 June 2000, para. 50. See comments on this standard in Paolo Benvenuti, 'The ICTY Prosecutor and the Preview of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12 *EJIL* 503 at 517 and Michael Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY' (2001) 12 *EJIL* 531 at 535.

²³³ *Galić* ICTY T. Ch. 5.12.2003 para. 8.

²³⁴ One of the few relevant cases is *Galić*, where shells were fired in the midst of a football tournament. The Trial Chamber noted the presence of some soldiers at the game, but found that an attack on a crowd of approximately 200 people, including numerous children, was excessive in relation to military advantage anticipated: *Galić* ICTY T. Ch. 5.12.2003 para. 387.

²³⁵ See, e.g. *Galić* ICTY T. Ch. 5.12.2003 para. 387; ICTY Final Report on NATO Bombing para. 21. The Report of the International Commission of Inquiry on Darfur, 25 January 2005 at para. 260 observes that the principle of proportionality 'remains a largely subjective standard' but it 'nevertheless plays an important role, first of all it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians'.

²³⁶ ICC Elements, Art. 8(2)(b)(iv) para. 3. ²³⁷ ICC Elements, footnote 37, second sentence.

²³⁸ Art. 30 (mental element) and Art. 32 (mistake of fact) of the ICC Statute.

²³⁹ See, e.g. declarations by Algeria, Australia, Belgium, Canada, Egypt, Germany, Ireland, the Netherlands, New Zealand, Spain and the UK that what is relevant is 'the information available to them at the relevant time'.

It is clear that a perpetrator must have awareness of the extent of the anticipated harm and military advantage. The more difficult issue is whether the perpetrator must also consider the former clearly excessive in relation to the latter, or whether that determination is to be made by the ICC on an objective basis.²⁴⁰ Footnote 37 of the ICC Elements indicates that this crime requires that the perpetrator personally completes a particular value judgment.²⁴¹ As the ICC Elements reflect a consensus statement by the international community as to the content of the crimes, their provisions should not lightly be disregarded. Nonetheless, this particular footnote was included at the last minute of the negotiations, without discussion in the working group, and there are grave reasons to doubt its compatibility with general principles and hence the ICC Statute.²⁴² Commentators have expressed reservations about this footnote, including that it seems to make the ‘perpetrator, in a way, the judge in his own cause’.²⁴³ Other commentators have suggested that the provision should be interpreted as reflecting the need for a margin of appreciation, but not as insulating reckless or incredible assessments.²⁴⁴

12.3.5 War crimes against property

Several war crimes provisions address crimes involving property, namely the destruction, appropriation, seizure and pillage of property.²⁴⁵ These provisions flow from different instruments, and protect slightly different interests, but in practice they overlap considerably. The ICC Statute includes destruction, appropriation, seizure and pillage in international conflict, but in internal conflict it includes only the long-established prohibition on pillage.

The grave breach regime includes ‘extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.²⁴⁶ The Hague Regulations prohibit ‘destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war’.²⁴⁷ These two provisions are similar in scope, although they arise from different interests. The Geneva provisions protect property from the vantage point of upholding the rights of protected persons (including their property), and the Hague provisions protect property from the vantage point of the proper conduct of hostilities – military force should be applied for military aims and with minimal impact on the civilian population and objects. The Hague law provision simply requires an

²⁴⁰ Didier Pforrer, ‘Article 8(2)(b)(iv)’ in Lee, *Elements and Rules*, 151.

²⁴¹ ICC Elements, footnote 37. This is a departure from the principle in the General Introduction, para. 4, that value judgments of the perpetrator are not relevant; it is sufficient that a perpetrator is aware of the relevant facts.

²⁴² Art 9 ICC Statute, requires that ICC Elements be consistent with the ICC Statute.

²⁴³ Bothe, ‘War Crimes’ in Cassese, *Commentary*, 400.

²⁴⁴ Pforrer, ‘War Crimes’ in Lee, *Elements and Rules*, 151; see also Dörmann, *Elements of War Crimes under the Rome Statute*, 165.

²⁴⁵ See, e.g. Art. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii), 8(2)(b)(xvi) and 8(2)(e)(v) ICC Statute.

²⁴⁶ See, e.g. Art. 8(2)(a)(iv) ICC Statute; Art. 2(d) ICTY Statute.

²⁴⁷ See, e.g. Art. 8(2)(b)(xiii) ICC Statute; Art 23(g) Hague Regulations 1907.

assessment of military necessity, whereas the Geneva law provision contains additional elements of ‘excessive’ and ‘wanton’. The ICC Statute includes both provisions, since the Hague provision is more inclusive and hence more useful, whereas excluding the Geneva provision would have meant an incomplete list of grave breaches of the Geneva Conventions.

In addition, *pillage* of property is also a war crime.²⁴⁸ Pillage is distinct from appropriation or seizure because it refers to taking for private or personal use²⁴⁹ as opposed to taking for military purposes. It is more akin to the domestic crime of theft. This is why for appropriation or seizure, one must consider excessiveness and military necessity, whereas for pillage there is no ‘balancing’ test, since the property is not taken for military reasons. Tribunal jurisprudence indicates that to be criminalized, pillage must be serious; hence for example, the theft of a single loaf of bread would not be considered a war crime.²⁵⁰

The result is a set of overlapping provisions. The *destruction* of property may be examined under the above-mentioned Article 8(2)(a)(iv) or 8(2)(b)(xii), which require a review of military necessity, or under the generic provision on disproportionate attacks (Article 8(2)(b)(iv)) or, where an attack is deliberately directed against civilian property without any military purpose, it can be assessed simply as an attack on a prohibited target (for example Article 8(2)(b)(ii)). Where property is *appropriated* or *seized* for military purposes, then it must be assessed under Article 8(2)(a)(iv) or 8(2)(b)(xiii). Where property is taken for personal or private use, it is pillage, which is a war crime (Article 8(2)(b)(xvi)).

12.3.6 Prohibited means of warfare (weapons)

Each of the foregoing provisions was aimed primarily at sparing *non-combatants* and their property as far as possible from the effects of war. War crimes law also contains provisions regulating the methods and means of conducting hostilities. These provisions are distinct in that *combatants* are also beneficiaries of the protections granted.

This section examines prohibited means of warfare, that is to say prohibited weapons.²⁵¹ The prohibition on certain weapons flows from two rationales. One is to protect civilians: some weapons are *inherently indiscriminate* – that is to say they cannot be used in a manner distinguishing civilian and military. The other is to protect combatants: some weapons are of a nature to cause superfluous injury or *unnecessary suffering*.²⁵²

²⁴⁸ Art. 8(2)(b)(xvi), 8(2)(e)(v) ICC Statute; Art. 4(f) ICTR Statute; Art. 3(e) ICTY Statute (plunder being synonymous with pillage); Art. 28 Hague Regulations; Art. 33 GC IV.

²⁴⁹ ICC Elements Art. 8(2)(b)(xvi), element 2. ²⁵⁰ *Tadić* ICTY A. Ch. 02.10.1995 para. 94.

²⁵¹ Art. 8(2)(b)(xvi)–(xix) ICC Statute; Art. 3(a) ICTY Statute.

²⁵² Note here the underlying peculiarity of IHL and war crimes law. It is accepted that one may kill combatants, and that combat operations may inflict great suffering on combatants, so the rather modest objective is to reduce *superfluous* injury or *unnecessary* suffering. In regulating weapons, States therefore examine the military efficacy of a particular weapon as well as its consequences to determine if it inflicts *unnecessary* suffering, which can be a rather fine question.

Whereas the ICC Statute contains war crimes provisions on prohibited weapons only in the context of international conflicts, there is ample support for the recognition of such war crimes in internal conflict as well.²⁵³

Weapons which have been banned from the battlefield on the grounds of unnecessary suffering include poison and poisoned weapons,²⁵⁴ asphyxiating or poisonous gases and analogous liquids, materials or devices,²⁵⁵ and 'dum dum' bullets (bullets which expand or flatten easily upon impact).²⁵⁶

Equally prohibited under the customary law of war crimes are chemical weapons and biological and toxic weapons.²⁵⁷ Significantly, however, even though the customary law status of these crimes was not disputed at the Rome Conference, these crimes were excluded from the ICC Statute due to a standoff with respect to nuclear weapons. At the conference, some delegations, most notably India, insisted on the inclusion of nuclear weapons in the list of prohibited weapons.²⁵⁸ However, nuclear weapons could not be included because there was no agreement that such weapons were prohibited per se under customary law. Indeed, the International Court of Justice had specifically found that nuclear weapons are not prohibited per se.²⁵⁹ A large number of delegations then insisted that it was unfair to exclude nuclear weapons – 'the rich man's weapons of mass destruction' – but to include biological and chemical weapons – 'the poor man's weapons of mass destruction'.²⁶⁰ When no breakthrough could be found for this impasse, the drafters deferred the whole issue: no such weapons were included in Article 8 but a placeholder was inserted, inviting review of the question once the statute is open for amendment at a future review conference.²⁶¹

While chemical,²⁶² biological and nuclear weapons are not prohibited per se in the ICC Statute, their use can still constitute a war crime if they are employed in a manner contravening other provisions (such as Article 8(2)(b)(i) or (iv)). With respect to

²⁵³ See, e.g. *Tadić* ICTY A. Ch. 02.10.1995 paras. 119–24 (specifically finding weapons prohibitions applicable in internal conflicts).

²⁵⁴ Art. 8(2)(b)(xvii) ICC Statute; Art. 23(a) Hague Regulations.

²⁵⁵ Art. 8(2)(b)(xviii) ICC Statute; Geneva Chemical Weapons Protocol, 17 June 1925.

²⁵⁶ Art. 8(2)(b)(xix) ICC Statute; Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body, 29 July 1899.

²⁵⁷ See, e.g. Henckaerts & Doswald-Beck, *ICRC Customary Law*, 1607–1770; Bacteriological and Toxin Weapons Convention 1972; Chemical Weapons Convention 1993.

²⁵⁸ Explanation Of Vote By Mr. Dilip Lahiri, Head Of Delegation Of India, On The Adoption Of The Statute Of The International Court, 17 July 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June–17 July 1998, Official Records*, vol. II, 122.

²⁵⁹ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (1996) 1 ICJ Rep 226 (8 July 1996) paras. 52 and 74.

²⁶⁰ von Hebel and Robinson, 'Crimes' in Lee, *The Making of the Rome Statute* at 113–16; for detailed discussion of the history and its implications see Roger S. Clark, 'The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or which are Inherently Indiscriminate' in John Carey, William V. Dunlap and P. John Pritchard (eds.), *International Humanitarian Law: Challenges* (Ardsey NY, 2003).

²⁶¹ Arts. 8(2)(b)(xx), 121 and 123 ICC Statute.

²⁶² Some chemical weapons would fall within the definition of Art. 8(2)(b)(xviii) and hence would be prohibited under the ICC Statute.

nuclear weapons, as noted by the ICJ, in most imaginable circumstances the use of such weapons would be likely to fall foul of one of the existing prohibitions.²⁶³

Other weapons are frequently mentioned as candidates for a comprehensive prohibition. Perhaps the closest to achieving a status as a war crime is the use of anti-personnel mines (APMs). APMs cannot distinguish between combatants and civilians, and remain long after conflict, causing a great toll of suffering for civilians. APMs are the subject of a widely ratified Convention²⁶⁴ and therefore the use of such weapons may be on its way to becoming a customary law war crime. However, it is highly doubtful that the prohibition has achieved customary status at this moment, given the large number of States that have not accepted the norm, and the contrary State practice among major military powers.

Strong concerns are often raised about the use of cluster bombs²⁶⁵ and depleted uranium projectiles,²⁶⁶ but no treaty prohibits these weapons, and State practice does not at this time indicate a customary prohibition on their use, let alone a criminalization of their use.²⁶⁷

12.3.7 *Prohibited methods of warfare*

In addition to the prohibition on certain *means* of warfare (weapons), war crimes law also prohibits certain *methods* of warfare. Many of these provisions find their origin in traditions of chivalry, namely codes of fair conduct to be respected even among combatants. Such rules are based not only on notions of honour and humanity, but also on preventing deliberate abuse of the rules of IHL to obtain advantage over the enemy, since this would rapidly undermine compliance with IHL.

It is a war crime to kill or wound a combatant who has surrendered or is otherwise *hors de combat*,²⁶⁸ a prohibition which is drawn from the Hague Regulations and AP I.²⁶⁹ The provision ensures there is no gap in protection between the moment of becoming *hors de combat* and the moment of being taken into custody as a prisoner of war.²⁷⁰ Compliance with this norm not only shows respect for IHL and the humanity of the surrendering combatant, but also helps to encourage surrender rather than fights to the death.

²⁶³ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (1996) 1 ICJ Rep 226 (8 July 1996), held that the use of nuclear weapons would be illegal if they were used in contravention of specific rules, such as the principle of proportionality. The ICJ indicated that in most conceivable circumstances, the use of nuclear weapons would contravene a rule of IHL (para. 95), but it did not rule out the possibility of a legal use (para. 97).

²⁶⁴ 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 241.

²⁶⁵ Cluster bombs drop numerous bomblets and hence are valued by the military for attacking soft targets over a certain area (e.g. vehicles). However, because of their area effect, they can cause significant incidental damage. In addition, some bomblets fail to detonate on impact, remaining behind as a continuing hazard to civilians.

²⁶⁶ Depleted uranium projectiles are particularly dense and hence are effective in penetrating armour. However, there are concerns about radioactive dust created upon impact as well as the effects of spent projectiles remaining in the soil.

²⁶⁷ See ICTY Final Report on NATO Bombing paras. 26 and 27.

²⁶⁸ Art. 8(2)(b)(vi) ICC Statute, as clarified in the ICC Elements.

²⁶⁹ Art. 23(c) Hague Regulations; Arts. 41 and 42 AP I. ²⁷⁰ Pictet *et al.*, *Commentary to Additional Protocol I*, 481–2.

The war crime of ‘declaring that no quarter will be given’ refers to orders or announcements that no prisoners will be taken and that there will be no survivors.²⁷¹ Such orders violate the duty to spare persons who are *hors de combat* or who are civilians. It is a crime whether the declaration is made publicly, that is to say to threaten the enemy, or as a private order, namely to conduct hostilities on the basis that there be no survivors.²⁷²

The war crime of ‘killing or wounding treacherously a combatant adversary’ is drawn from the Hague Regulations.²⁷³ This antiquated language raises the question, what is killing ‘treacherously’ during combat, when enemy forces are making all efforts to deceive and kill each other? The answer is found in the concept of perfidy, that is to say ‘inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord protection’ under the rules of IHL, with intent to betray that confidence.²⁷⁴ Thus, it is not deception per se that makes an act perfidious. Deception and ruses are a sound aspect of military strategy and tactics. Ruses – such as the use of camouflage, decoys, mock operations and misinformation – mislead the adversary but do not invite confidence of the adversary with respect to the protection of IHL.²⁷⁵

Perfidy, however, involves a false promise to bestow protection, or an invitation to accord protection with an intent to betray that confidence. Examples of perfidy include feigning an intent to negotiate under a flag of truce, feigning an intent to surrender, feigning incapacitation by wounds or sickness, feigning civilian or non-combatant status, and feigning protected status by use of signs or emblems of the United Nations, neutral states, or the recognized emblems of the Geneva Conventions.²⁷⁶ Thus, to pretend to surrender in order to attack the enemy off-guard is a war crime, as is promising to take persons prisoner in order to massacre them once they relinquish their weapons. Perfidy not only breaches a code of honour, it also undermines compliance with IHL, as adversaries learn that compliance with IHL will be used against them, with grave consequences for efforts to reduce suffering in war.

The war crime of ‘making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury’ also addresses the problem of perfidy.²⁷⁷ Whereas ‘treacherous killing’ focuses on the *result* (wounding or killing by any perfidious means), the ‘improper use’ offences focus on a particular *means* – using particular symbols, emblems or uniforms.

²⁷¹ Art. 8(2)(b)(xii) and (e)(x) ICC Statute; Art. 23(d) Hague Regulations; see also Art. 40 AP I.

²⁷² ICC Elements Art. 8(2)(b)(xii); Art. 40 AP I.

²⁷³ Art. 8(2)(b)(xi) and (e)(ix) ICC Statute; Art. 23(b) Hague Regulations; see also Art. 37 AP I.

²⁷⁴ ICC Elements Art. 8(2)(b)(xi) elements 1 and 2; Art. 37 AP I.

²⁷⁵ Art. 37(2) AP I.

²⁷⁶ Arts. 23(c), 23(f), 24, 33, 34, 35, 40 and 41 Hague Regulations; Arts. 37, 38, 39, 85(3)(f) AP I.

²⁷⁷ Art. 8(2)(b)(vii) ICC Statute; Art 23(f) Hague Regulations, adding also UN insignia in accordance with Arts. 37 and 38 AP I.

For example, the laws of war require combatants not to attack or disrupt those working under the emblem of the ICRC, so that they can inter alia help to deliver relief supplies and check on detainees.²⁷⁸ The protective force of these symbols would be greatly eroded if combatants were to use those symbols to conceal military operations, leading the adversary to distrust such symbols or to respect them at their own peril. On permissible and impermissible uses of such symbols, flags, emblems and uniforms, one must refer to relevant IHL rules. The regimes may be open to interpretation,²⁷⁹ giving rise to questions about when it is fair to hold persons criminally accountable for misuse, and indeed the ICC Elements suggest a certain hesitation on the part of the drafters to hold persons criminally accountable when the relevant regime on the use of certain symbols and emblems may be unclear.²⁸⁰

Finally, it is a war crime to use 'human shields, that is to say to utilize 'the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations'.²⁸¹ The Geneva Conventions do not expressly criminalize this conduct, but it was recognized as criminal in the ICC Statute on the grounds that it satisfies the *Tadić* test for identifying war crimes, due to its seriousness. It has been recognized as a war crime in Tribunal jurisprudence.²⁸² The use of human shields improperly abuses the adversary's respect for IHL, including the principle of proportionality, to frustrate attacks on legitimate targets. The prohibition covers both bringing civilians to the military targets and bringing military targets to civilians.²⁸³ The fact that an adversary is illegally using human shields does not relieve the attacking force from the duty not to launch attacks causing excessive incidental harm.²⁸⁴

The ICC Statute recognizes each of the above crimes in international armed conflict, whereas in internal armed conflict it recognizes treacherous killing and declaring no quarter but not killing a combatant *hors de combat*,²⁸⁵ improper use of flags and symbols, and use of human shields.

12.3.8 War crime provisions protecting other values

Finally, there are two war crimes provisions that may be characterized as protecting interests and values other than those listed above.

²⁷⁸ See, e.g. Art. 8(2)(b)(iii) and (xxiv).

²⁷⁹ See, e.g. Art. 39(2) AP I: enemy uniforms may not be worn while engaged in attack, but might be used in other circumstances, such as espionage.

²⁸⁰ ICC Elements, footnotes 39, 40 and 41 requiring knowledge (or constructive knowledge) of the prohibited nature of the use, and actual knowledge of the prohibited nature of the use with respect to UN flags because of the variable and regulatory nature of the prohibition. While mistake of law is not a defence under the ICC Statute, the Statute does permit some scope where a mistake as to another body of law negates the mental element for a crime: see Art. 32(2) ICC Statute and ch. 15. See also C. H. B. Garraway, 'War Crimes' in Lee, *Elements and Rules* at 157–9. Bothe suggests that a solution is to focus on perfidy and perfidious intent: Bothe, 'War Crimes' in Cassese, *Commentary*, 404–5.

²⁸¹ Art. 8(2)(b)(xxiii) ICC Statute, drawing from Art. 23(1) GC III, Art. 28 GC IV 28 and Arts. 51(7) and 58 AP I.

²⁸² See, e.g. *Blaskić* ICTY T. Ch. I 3.3.2000 paras. 742–3. ²⁸³ Art. 51(7) AP I. ²⁸⁴ Art. 51(8) AP I.

²⁸⁵ Although killing a combatant *hors de combat* would most likely be captured anyway under Art. 8(2)(c)(i).

Transfer of population into occupied territory

It is a war crime for an occupying power to transfer parts of its own civilian population into the territory it occupies.²⁸⁶ This provision protects an interest or value distinct from the other ‘transfer’ crimes because it is not aimed at protecting enemy civilians who have fallen under a party’s power; it refers to transfer of a party’s own nationals, and does not require that the transfer be forcible. The purpose of this provision is to ensure respect for the temporary nature of occupation, and to prevent an occupying power from changing the demographic composition of a territory in order to make the occupation permanent.

The inclusion of this provision was controversial during the Rome Conference, with Israel voicing strong opposition.²⁸⁷ It is undoubtedly true that some of the Arab delegations insisting on inclusion of the provision were seeking to highlight activities by Israel in its occupied territories. However, the majority of delegations agreed to its inclusion because the *legal* basis for the provision was well-established: the provision was based on Article 85(4)(a) of AP I, which in turn was based on Article 49 of GC IV.

A particular point of controversy related to the departure from the wording of the Geneva Convention provision by the insertion of ‘directly or indirectly’ in Article 8, with some arguing it was inherent in the definition and others arguing that it expanded the definition. This controversy was put to rest when a footnote was added to the Elements of Crimes, clarifying that the term ‘transfer’ is to be interpreted in accordance with existing IHL,²⁸⁸ enabling the ICC Elements to be adopted by consensus.

Child soldiers

A (relatively) recent addition to the corpus of war crimes law is the use of child soldiers, namely ‘conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’.²⁸⁹

The proliferation of inexpensive and light weapons, which can be carried and wielded by children, has led to a great increase in the use of child soldiers, who are seen as cheap, malleable and expendable. Of ongoing or recently-ended conflicts,

²⁸⁶ Art. 8(2)(b)(viii) ICC Statute; Art. 85(4)(a) API; Art. 49 GC IV. The second variation of this war crime, transferring ‘all or parts of the population of the occupied territory within or outside this territory’ is more akin to the other transfer-related war crimes, since it protects the original population, although this provision also has for a purpose the prevention of ethnic cleansing.

²⁸⁷ Statement by the Head of the Delegation of Israel Judge Eli Nathan, 17 July 1998, *Rome Conference Official Report*, vol. II, 122.

²⁸⁸ ICC Elements footnote 44; von Hebel in Lee, *Elements and Rules*, 158–62.

²⁸⁹ Art. 8(2)(e)(vii), 8(2)(b)(xxvi) ICC Statute; Art. 4(c) SCSL Statute. Art. 8(2)(b)(xxvi) contains an additional restriction, so that it applies only to recruitment into ‘national’ armed forces, and thus presumably not armed groups. This restriction is not found in any other instruments and seems rather inconsonant with general principles of humanitarian law, and there is therefore reason to doubt its applicability for other jurisdictions: Art. 10 ICC Statute.

80 per cent include fighters under the age of fifteen. Child soldiers are often used for the most dangerous missions and for tasks such as detecting land mines.²⁹⁰ The use of child soldiers was included in the first indictments of the SCSL and in the first arrest warrant of the ICC with regard to the situation in the Democratic Republic of the Congo.

This provision serves a distinct interest and value, because it is not aimed solely at protecting enemy civilians who have fallen under a party's power; its primary purpose is to protect all children. The prohibition on the use of child soldiers is a norm of both IHL and human rights law.²⁹¹

The recognition of this crime was initially somewhat controversial during the negotiations of the ICC Statute, because it had not previously been recognized expressly as a criminalized prohibition. However, agreement was reached to include it in the ICC Statute because it was a well-established prohibition (appearing in Article 77(2) of AP I, Article 4(3)(c) of AP II and Article 38(3) of the Convention on the Rights of the Child) and it was a serious violation protecting important values and warranting criminalization. The crime was also recognized in Article 4(c) of SCSL Statute, and the Special Court for Sierra Leone has held (albeit not unanimously) that the provision was already customary international law prior to the adoption of the ICC Statute in 1998; that is to say that the ICC Statute codified an existing customary norm rather than forming a new one.²⁹²

In 2000 an Optional Protocol to the Convention on the Rights of the Child was adopted, raising the minimum ages for conscription and for participation in hostilities to 18.²⁹³ However, the *criminal* prohibition continues to deal with those using child soldiers under fifteen years of age, since the new limits are conventional law and have not developed into customary law, let alone customary criminal law.

The ICC Elements apply a modified mental element for this crime, namely that the perpetrator 'knew or should have known' that the persons were under the age of 15 years. Because the term 'should have known' is widely used to refer to negligence, this provision has understandably been criticized as importing a negligence standard into a criminal law provision.²⁹⁴ It appears however that the ICC Elements in some places use the term 'should have known' in the same sense in which it has been used in ICTR

²⁹⁰ P. W. Singer, *Children at War* (New York, 2005); *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/60/335, 7 September 2005; *Children and Armed Conflict, Report of the Secretary-General*, UN Doc. A/59/695 – S/2000/572, 9 February 2005; Human Security Centre, *Human Security Report 2005* (Oxford, 2005); Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004*, available <http://www.child-soldiers.org/resources/global-reports>.

²⁹¹ Art. 4(3)(c) AP II and Art. 38(3) of the Convention on the Rights of the Child 1989.

²⁹² *Norman SCSL A. Ch. 31.05.2004*. See also the dissent of Judge Robertson.

²⁹³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. The age for voluntary recruitment may be set at any age above fifteen, but specified conditions are to be followed.

²⁹⁴ Bothe, 'War Crimes' in Cassese, *Commentary*, 117–18.

jurisprudence, as referring to concepts such as recklessness or wilful blindness.²⁹⁵ The term appears to reflect the idea that parties to conflict have a positive duty to seek to verify the age of children; thus one cannot escape criminal liability by wilfully closing one's eyes to the facts.²⁹⁶

Further reading

- Kelly Askin, *War Crimes Against Women: Prosecution in International Tribunals* (The Hague, 1997).
- Machteld Boot, *Genocide, Crimes Against Humanity and War Crimes* (Oxford, 2002).
- Michael Bothe, 'War Crimes' in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002).
- Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge, 2003).
- Knut Dörmann, Daniel Frank *et al.*, 'War Crimes' in Lee, *Elements and Rules*.
- William J. Fenrick, Michael Cottier, Andreas Zimmermann and Patricia Viseur Sellers, 'Article 8' in Triffterer, *Observers' Notes*, 266–7.
- Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, 1995).
- Leslie Green, *The Contemporary Law of Armed Conflict* (Manchester, 2000).
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- Howard M. Hense (ed.), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Aldershot, 2005).
- Claus Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel Yearbook on Human Rights* 1.
- Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes* (The Hague, 1997).
- Theodor Meron, *War Crimes Law Comes of Age* (Oxford, 1998).
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- Anthony Rogers, *Law on the Battlefield* (2nd edn, Manchester, 2004).
- Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?* (Geneva, 1999) 97–104.
- UK Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford, 2005).

²⁹⁵ Akayesu ICTR T. Ch. I 2.9.1998 para. 520.

²⁹⁶ Charles Garraway, 'War Crimes' in Lee, *Elements and Rules*, 207.

13

Aggression

13.1 Introduction

13.1.1 Overview

Aggression is widely regarded as a crime under customary international law, although at present there is no universally agreed definition and no international court or tribunal in existence which can try offenders. It is formally within the jurisdiction of the ICC but the Court cannot exercise its jurisdiction unless and until the parties to the ICC Statute have agreed both a definition of the crime and the conditions under which the court may exercise its jurisdiction.¹

This is a crime which differs from all others within the scope of this book in being inextricably connected with an unlawful act of a State: the crime of aggression comprises the participation by a State's leaders and policy-makers in certain aggressive acts by a State. To understand the crime, therefore, it is necessary to understand the rules of international law on the responsibility of States for the unlawful use of force; these are discussed in brief at section 13.2.

13.1.2 Historical development

Leaving aside historical curiosities,² the first international trial for aggression, under the name of 'crimes against peace', was before the Nuremberg International Military Tribunal following the Second World War.³ The closest, though imperfect, precedent for this trial was the provision in the 1919 Treaty of Versailles after the First World War for the establishment of a special tribunal to try Kaiser Wilhelm. The intention was to try him not for aggression, but for 'a supreme offence against international morality and the sanctity of treaties',⁴ a provision that was explained as having 'not a juridical character as regards its substance, but only in its form. The ex-Emperor is

¹ Art.5(2) ICC Statute.

² E.g. the trial of Conradin von Hofenstafen in 1268 for waging aggressive war.

³ See further section 6.3.

⁴ Art. 227. See section 6.2.

arraigned as a matter of high international policy . . .'.⁵ The Kaiser took refuge in the Netherlands and was never put on trial.

After the Second World War the discussions in the United Nations War Commission and elsewhere which preceded the drafting of the London Charter made clear that it was by no means a widely held view that there existed a crime of aggression under international law as it then stood.⁶ Nevertheless Article 6(a) of the Charter gave the Nuremberg IMT jurisdiction over 'crimes against peace' defined as the 'planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. The equivalent provisions in the Charter for the Tokyo IMT and in Control Council Law No. 10 were very similar.⁷

The Nuremberg IMT had to deal with the objection of the accused that the Charter created new law and that the Tribunal applied law *ex post facto*. It dismissed this claim by ruling that ever since the 1928 Kellogg-Briand Pact, aggressive war had been a crime under international law:

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.⁸

This reasoning was followed in the judgment of the Tokyo Tribunal, although Judges Röling and Pal in their dissenting judgments disagreed with it.⁹ Indeed the 1928 Pact had not intended to give rise to individual criminal responsibility.¹⁰ But whatever the merits of the decisions by the two Tribunals as to the status of the crime after the Second World War, it is widely accepted that there is now a crime of aggression under customary international law.¹¹

⁵ *Reply of the Allied and Associated Powers to the Observations of the German Delegation and the Conditions of Peace* (HMSO Misc. No. 4 1919).

⁶ See I. Brownlie, *International Law and the Use of Force by States* (Oxford, 1963) 159–66; William Schabas, 'The Unfinished Work of Defining Aggression: How Many Times must the Cannonballs Fly, Before they are Forever Banned?' in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court* (Oxford and Oregon, 2004) 124.

⁷ The Charter for the Tokyo IMT defined crimes against peace as 'the planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances . . .'; Control Council Law No.10 Art. II(a) began: 'Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning . . . ' (as in the London Charter).

⁸ International Military Tribunal (Nuremberg) Judgment and Sentences, reprinted in (1947) 41 *AJIL* 172 (hereafter 'Judgment') at 218.

⁹ Judgment of the Tokyo IMT 48, 437–9. Judge Röling did however agree that the occupiers were entitled to prosecute for the initiation of wars on the basis that they threatened their security. See section 6.4.2.

¹⁰ See further section 6.3.2.

¹¹ See Brownlie, *International Law and the Use of Force*, 185–94; Y. Dinstein *War, Aggression and Self-Defence* (4th edn, Cambridge, 2005) 121. That was not however the universal view in 1950 when the Nuremberg principles were discussed in the Sixth Committee of the GA (UNGAOR 5th Session, 6th Committee, 231st meeting); and see Christian Tomuschat, 'Crimes against the Peace and Security of Mankind and the Recalcitrant Third State' (1995) 24 *Israel Yearbook on Human Rights* 41 at 53. In the UK case of *R v. Jones* [2006] EKLH 16 the House of Lords unanimously

The recently formed United Nations was quick to endorse the law as laid down by the Nuremberg Tribunal. General Assembly resolution 95(I) of 11 December 1946 affirmed 'the principles of international law' recognized by the London Charter and the Judgment, and the next year it directed the new International Law Commission to formulate those principles and to prepare a code of offences against the peace and security of mankind.¹² Thereafter progress stalled. The ILC's draft principles, which followed the IMT Charter in its description of aggression, were neither accepted nor rejected by the General Assembly.¹³ In 1950 the ILC was requested to elaborate a definition of aggression¹⁴ but did not succeed in reaching agreement, the Special Rapporteur indeed deciding that aggression 'by its very essence, is not susceptible of definition'.¹⁵ Although the ILC included a provision on aggression in its 1954 draft code of crimes, the GA decided that the code raised problems 'closely related to that of the definition of aggression' and postponed further consideration until the special committee, established by the GA in 1952 to consider the definition of aggression, had reported.¹⁶

After protracted negotiations in the special committee, made difficult by the tensions of the Cold War in which they were conducted, a 'definition of aggression' was finally adopted in 1974 by GA resolution 3314.¹⁷ The definition begins with a broad definition of aggression and then lists specific examples.¹⁸ Whether or not all the elements of this definition can be considered to reflect customary law with regard to State responsibility,¹⁹ it is clear that the resolution does not as such provide a customary law definition for the crime of aggression.²⁰ Article 5.2 provides:

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

found, contrary to the view of the Court of Appeal, that aggression was a crime under customary international law, in spite of the fact that there was ongoing international discussion about defining the crime and the conditions for the exercise of ICC jurisdiction.

¹² Res. 177(II) of 21.11.1947. ¹³ See res. 488(V) of 12.12.1950.

¹⁴ Res. 378B(V) of 17.11.1950. See further Ahmed Rifaat, *International Aggression* (Stockholm, 1979).

¹⁵ UN doc. A/CN.4/44 at 69.

¹⁶ Res. 897(IX) of 4.12.1954. The definition of aggression in the draft code read in part: 'Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations'; threats were also included.

¹⁷ GA res. 3314(XXIX) of 14.12.1974. The definition is contained in the Annex to the resolution.

¹⁸ See section 13.2.

¹⁹ For doubts that they are all customary, see Andreas Zimmerman, 'Article 5' in Triffterer, *Observers' Notes*, 103. The ICJ has held that paragraph 3(g) of the Definition, which relates to the sending of armed groups into another State, does reflect customary law (*Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (1986) ICJ Rep 14 at para. 195); see also *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Rep at para. 146.

²⁰ As the ILC noted in its commentary on its 1994 draft statute for an international criminal court, the resolution 'deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for judicial use. But, given the provisions of Article 2(4) of the Charter of the United Nations, that resolution offers some guidance'. The view that the resolution does provide a customary law definition was expressed during the course of the ICC negotiations by some State representatives, see, e.g. Mohammed Gomaa, 'The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime' in Mauro Politi and Giuseppe Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Aldershot, 2004) 56.

This distinguishes between a war of aggression, participation in which engages individual criminal responsibility, and acts of aggression, engaging the responsibility of States.²¹ The Friendly Relations Declaration has a similar provision.²²

After a revival of its earlier mandate,²³ the ILC adopted a draft Code of Crimes against the Peace and Security of Mankind in 1996, Article 16 of which reads as follows:

An individual who, as leader or organiser, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.²⁴

The provision begs the question of what aggression is. The ILC noted in its commentary that the issue was 'beyond the scope of the present Code', but stated that individual responsibility for the crime was incurred only if the conduct of the State was 'a sufficiently serious violation of the prohibition' in Article 2(4) of the UN Charter. The Commission also noted that the Charter and Judgment of the Nuremberg Tribunal were the main sources of authority with regard to individual criminal responsibility.²⁵ The Code has not been adopted by governments, their attention having been absorbed by the negotiations on the crimes within the jurisdiction of the ICC.

The International Criminal Court negotiations

The international negotiations to establish the ICC began on the basis of the draft statute proposed by the ILC in 1994.²⁶ This provided that the crime of aggression was within the jurisdiction of the court but that no complaint of 'or directly related to' an act of aggression could be brought before the court unless the Security Council had first determined that a State had committed that act.²⁷ The provision was controversial from the start. Opinion was very much divided on three issues: whether the crime of aggression should be included in the statute at all, how it should be defined, and how and whether the role of the Security Council should be reflected in the statute.²⁸

As regards the framing of a definition, one school of thought favoured using the list of acts of aggression in GA resolution 3314. This met with arguments that the list was illustrative only, thus conflicting with the *nullum crimen* principle²⁹ if it was used to

²¹ For the negotiating history on this point, see Bengt Broms, 'The Definition of Aggression' (1977) 154 *Hague Recueil* 299; Benjamin Ferencz, *Defining International Aggression* (New York, 1975), vol. II, 45; Rifaat, *International Aggression*, 275, 276.

²² Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (res. 2625(XXV) of 24.10.1970, Annex, para.1) states inter alia: 'A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.'

²³ GA res. 36/106 of 10.12.1981, by which the ILC was invited to resume its work on the draft code of offences against the peace and security of mankind.

²⁴ *Yearbook of the International Law Commission* 1996, vol. II, Part Two, 42. ²⁵ *Ibid.* ²⁶ See section 8.2.

²⁷ Art. 23(2). For discussion of the role of the Security Council see section 13.5.3.

²⁸ For the early discussions, see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court GAOR 50th Session Supplement No.22 (A/50/22) paras. 63–71; Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol. I GAOR 51st Session Supplement No.22 (A/51/22).

²⁹ See section 1.5.1.

define a crime, and that the purpose of the resolution was to provide guidance for the Security Council in its determinations of aggression by States³⁰ and not to provide a definition for the purpose of individual responsibility. Another approach was to specify that participation in any unlawful use of force by a State under the UN Charter was criminal. A third category of proposals started from the proposition that only participation in a war of aggression reflected customary law. To deal with the fact that 'war' is now uncommon, suggestions were made to define aggression as the unlawful use of force but adding a threshold of manifest illegality, or an unlawful purpose such as military occupation or annexation.

Proposals reflecting these approaches were transmitted to the Rome Conference,³¹ but there was again failure to reach agreement on the definition and on a role for the Security Council.³² Article 5(2) of the ICC Statute was inserted at the last moment and represents a compromise, required in light of the impossibility of reaching agreement set against the firm insistence of the majority at the conference that the crime be somehow be included in the Statute. It reads:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Accordingly, the ICC will not be able to try any case of aggression unless and until the States Parties to the Statute have reached agreement on these further provisions. Subsequent negotiations, first in the Prepcom established by the Rome Conference to prepare for the entry into force of the Statute,³³ and then in the Special Working Group on the Crime of Aggression³⁴ have made progress in identifying and clarifying the issues but have not pointed the way to reaching final agreement. The discussion paper proposed by the Coordinator of the Working Group in 2002 (the 'Coordinator's Discussion Paper (ICC)'³⁵) forms a basis for the work in the subsequent Special Working Group.

³⁰ Para. 4 of the resolution.

³¹ They are to be found in the Report of the Prepcom on the Establishment of an International Criminal Court UN Doc. A/CONF.183/2, included in the Official Records of the Conference (A/CONF.183/13(Vol. III)) at 14–15.

³² For a brief description of the negotiations at Rome, see Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Lee, *The Making of the Rome Statute* 79 at 81–5.

³³ Res. F of the Rome Conference required the Prepcom to prepare definition, elements and conditions for the exercise of the court's jurisdiction for submission to the Assembly of States Parties ('ASP') at a Review Conference 'with a view to arriving at an acceptable provision on the crime of aggression for inclusion' in the statute. For a summary of the negotiations in the Prepcom, see Silvia Fernandez de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court' (2002) 25 *Fordham International Law Journal* 589; and see Roger Clark, 'Rethinking Aggression as a Crime and Formulating its Elements: the Final Work-Product of the Preparatory Commission for the International Criminal Court' (2002) 15 *LJIL* 859.

³⁴ This working group, established by ICC-ASP/1/Res.1 of 9 September 2002, is open to States on an equal footing, not simply to States Parties to the ICC Statute. It has been holding meetings both during the Assembly of States Parties sessions and intersessionally.

³⁵ Reissued as Annex II to the Official Record of the Second Session of the ASP (ICC-ASP/2/10 at 234).

13.1.3 Relationship to other crimes

Aggression differs markedly from genocide, crimes against humanity and war crimes in that, unlike those crimes, it concerns the *ius ad bellum* (the law governing recourse to conflict), and therefore raises questions of international law regarding State responsibility for aggressive acts.³⁶

Aggression provides an *occasion* for the commission of the other crimes. In the view of the Nuremberg Tribunal, therefore, '[t]o initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.³⁷ War on a major scale causes great suffering and almost inevitably involves the commission of atrocities. Although genocide has now been described as the 'crime of crimes',³⁸ there cannot be any need to engage in an abstract competition for the dreadful title of the worst international crime.

A further distinction from the other crimes is that while genocide, crimes against humanity and war crimes may be, indeed typically are, committed by members of the armed forces of a State or a State-like entity, aggression can *only* be committed on behalf of a State and as part of a State plan or policy. Further, unlike these other crimes, aggression is a leadership crime and is only committed by persons in policy-making positions in a State.³⁹

13.2 State responsibility for unlawful use of force⁴⁰

The Charter of the United Nations put in place a new structure for international peace and security, requiring the settlement of disputes by peaceful means and introducing a collective system for States to act through the UN to suppress aggression and other breaches of international peace. While the collective system has developed in a different direction from that envisaged by the drafters, the prohibition on the use of force remains as set out in Article 2(4) of the Charter:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

³⁶ See further Yoram Dinstein, 'The Distinction between War Crimes and Crimes against Peace' (1995) 24 *Israel Yearbook on Human Rights* 1.

³⁷ Judgment 186 (reprinted in (1947) 41 AJIL 172). ³⁸ Kambanda ICTR T. Ch. I 4.9.1998 para. 16.

³⁹ See section 13.3.1.

⁴⁰ What follows is an extremely brief discussion of a difficult area of public international law. For useful summaries of the law, see Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 (II) *Hague Recueil* II 455; Malcolm Shaw, *International Law* (5th edn Cambridge, 2003) ch. 20; see further Brownlie, *International Law and the Use of Force*; Dinstein, *War, Aggression*; and C. Gray, *International Law and the Use of Force* (2nd edn, Oxford, 2004) chs. 2, 4, 6.

This is the fundamental legal principle governing the use of force and it reflects customary international law.⁴¹ By avoiding the use of the term 'war' it avoids arguments as to whether a specific use of force constitutes a war or not.

At the heart of the rules of international law on the use of force by States, the interpretation and application of Article 2(4) gives rise to a large number of difficulties. It is generally agreed however that the reference in Article 2(4) to a State's territorial integrity or political independence does not restrict the prohibition against using force.⁴² There remain arguments as to whether force used with benign objectives, for example humanitarian purposes or self-determination, conflicts with the prohibition.⁴³ The provision does not encompass force used on the territory of another State with that State's consent, but there have been disagreements as to whether a State did in fact give its consent in particular instances.⁴⁴ There are also differences of view as to the exceptions to the prohibition. The only exceptions universally admitted are individual or collective self-defence and force authorized by the Security Council acting under Chapter VII of the Charter; there is controversy over whether there is also an exception for humanitarian intervention.

13.2.1 Self-defence

Article 51 of the Charter provides in part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security ...

The defensive use of force is lawful only if it is necessary to use force, and only if that force is proportionate, that is, is not excessive in relation to the need to avert or respond to the attack. The classic formulation of the applicable rules is that of US Secretary of State Webster in the 1837 Caroline incident.⁴⁵ In an exchange of correspondence with the British he stated that, for action to be lawful, there must be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation' and that the action must not be 'unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'

⁴¹ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (1986) ICJ Rep 14, paras. 188–90.

⁴² Waldock, 'The Regulation of the Use of Force', 493; Brownlie, *International Law and the Use of Force*, 267.

⁴³ See, e.g. Constantine Antonopoulos, *The Unilateral Use of Force By States In International Law* (Athens, 1997).

⁴⁴ See, e.g. *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Rep, paras. 92–105; Gray, *International Law*, 83–6.

⁴⁵ The incident concerned the destruction over the Niagara Falls of a steamer thought to be supplying Canadian rebels against the British. See Robert Jennings, 'The Caroline and Macleod Cases' (1938) 32 *AJIL* 86.

Commentators differ as to whether force may be used in anticipatory self-defence. On one view, the right to self-defence applies only once an armed attack has begun.⁴⁶ The contrary view, that States have a right to act in order to avert the threat of an imminent attack, is based on the continuing existence of customary law or on the interpretation of Article 2 (4) itself, and is supported by the practical argument that it is unrealistic in all cases, for example with respect to nuclear weapons, to await an actual attack.⁴⁷ The ICJ has left open the issue of the lawfulness of a response to the threat of an imminent armed attack.⁴⁸ However, the claim to 'pre-emptive self-defence' to prevent a threat emerging is widely rejected as impermissible under international law.⁴⁹

Further questions about the right to self-defence concern whether force may be used to rescue a State's nationals in a State which is unable or unwilling to protect them,⁵⁰ whether there is a right of self-defence against non-State organizations within another State,⁵¹ and whether the 'armed attack' must cross some threshold of intensity before self-defence is justified.⁵²

13.2.2 Authorizations under Chapter VII

The Security Council may authorize under Chapter VII the use of force, either by UN peace-keeping or peace-enforcement missions ('blue-helmets') or by coalitions of forces of States. Such authorizations provide an undoubted exception to the prohibition on the use of force set out in Article 2(4) but even here there may be controversy.

⁴⁶ See Brownlie, *International Law and the Use of Force*, 275–8; B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford, 2002) 803; Dinstein, *War, Aggression*, 182–7 (but giving a wide interpretation of what constitutes the start of the attack justifying self-defence).

⁴⁷ See, e.g. Waldock 'The Regulation of the Use of Force', 495–505; Derek Bowett, *Self-Defence in International Law* (Manchester, 1958) 184–93; Christopher Greenwood, 'International Law and the United States' Air Operation against Libya' (1987) 89 *West Virginia Law Review* 933 at 942.

⁴⁸ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (1986) ICJ Rep 14, para. 194. See also *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Rep, para. 143.

⁴⁹ The claim is made in the 2002 'National Security Strategy of the United States' (2002) 41 *ILM* 1478; see Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qauida and Iraq' (2003) 4 *San Diego International Law Journal* 7; for a contrary view see Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense' (2003) 97 *AJIL* 576, at 582–5.

⁵⁰ See Gray, *International Law and the Use of Force*, 126–9; Dinstein, *War, Aggression*, 231–4.

⁵¹ For arguments in favour of the right to self-defence in such circumstances, see Christopher Greenwood, 'International Law and the "War on Terrorism"' (2002) 78 *International Affairs* 301; Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 *ICLQ* 401; for arguments against, see Antonio Cassese, 'Terrorism is also Disrupting some Crucial Legal Categories in International Law' (2001) 12 *EJIL* 993; Eric Myjer and Nigel White, 'The Twin Towers Attack: an Unlimited Right to Self-Defence?' (2002) 7 *Journal of Conflict and Security Law* 5. See also *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 36, para. 139, and *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Rep, paras. 146, 147; the majority decisions in both cases have been criticized for disregarding the possibility of self-defence against non-State actors, see, e.g. Separate Opinions, in the former case by Judge Higgins, paras. 33–6, in the latter by Judge Koijmans, paras. 26–30 and Judge Simma, paras. 7–12; and see Sean Murphy, 'Self-Defence and the Israeli Wall Advisory Opinion: an *Ipse Dixit*' (2005) 99 *AJIL* 62.

⁵² See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (1986) ICJ Rep 14, paras. 191 and 195 and *Oil Platforms (Islamic Republic of Iran v. USA)* (2003) ICJ Rep, paras. 51, 63–4 and 72; for critique of this point, see Oscar Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53 *University of Chicago Law Review* 113.

The legal justification put forward by the United Kingdom and the United States for the intervention in 2003 in Iraq was that their military action had been authorized by the Security Council. The argument, which is widely accepted as having little substance, interpreted resolution 1441(2002) as reviving the authorization (given in resolution 978 (1991)) to use military action to counter Iraq's invasion of Kuwait in 1990, without the need for any further decision by the Council.⁵³

13.2.3 Humanitarian intervention

The debate over military intervention with the objective of preventing present or imminent humanitarian disaster but without Security Council authorization illustrates the difficulties of taking decisions as to the unlawful use of force by a State – and hence as to aggression by an individual. Commentators differ radically as to whether interventions such as that in 1991 in Iraq, and in 1999 by NATO in Kosovo, are lawful under international law as it stands. The conservative view is that humanitarian intervention without Security Council authorization and without the agreement of the State concerned is contrary to Article 2(4) of the Charter, which can be overridden only by a rule of *ius cogens*; a few doubtful examples of humanitarian practice cannot constitute a new rule of customary international law, especially not one with peremptory status. Other commentators consider that there is an emerging norm of customary law allowing the implementation of the responsibility to protect; they emphasize the ability of the international law community to judge *ex post facto* whether a particular exercise of the supposed right is lawful or not. In this problematic area, this is perhaps the best approach to take, although it is not one that has received any universal endorsement. Finally there is the questionable view that unauthorized humanitarian intervention is lawful under existing international law; the view relies on arguments about the interpretation of Article 2(4), and as to the continued existence of a customary law right which has not been displaced by the Charter.⁵⁴

13.2.4 Aggression by a State

What is the relationship between the unlawful use of force by a State and 'aggression' by a State? The Charter does not make clear the connection between the prohibition on the use of force in Article 2(4) and the term 'aggression' in Article 39 (or indeed 'armed attack' in Article 51). The definition of aggression annexed to the GA resolution

⁵³ On these and other arguments for and against the legality of the intervention, see papers in 'Agora: Future Implications of the Iraq Conflict' (2003) 97 *AJIL* 553–642; Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 *ICLQ* 859.

⁵⁴ All of these views are discussed in J. L. Hozgrefe and Robert Keohane (eds.), *Humanitarian Intervention* (Cambridge, 2003); see also Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1; Nico Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council' (1999) 3 *Max Planck United Nations Yearbook* 59; Adam Roberts, 'The So-called "Right" of Humanitarian Intervention' (2000) 3 *YIHL* 3; International Development Research Centre, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, 2001); Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen, 1999).

3314(XXIX) is intended as guidance to the Security Council in making its determinations of aggression under Article 39, but it is doubtful that it has ever been used for that purpose. The resolution defines aggression as:

The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. (Article 1)

Article 3 of the Definition enumerates various examples of acts of aggression, specifying however that they are not exhaustive and that the Security Council may conclude that they do not in specific circumstances constitute aggression while other acts do.⁵⁵ Article 1 of the Definition uses wording similar to that in Article 2(4) of the Charter. It may therefore be considered that aggression by a State is more or less congruent with an unlawful use of force contrary to Article 2(4), with the major difference that the threat of force is not included in the Definition.⁵⁶

Following this brief discussion of the law governing the use of force we can consider the question of what kind of unlawful use of force by States, and what forms of participation in it, are criminalized: in short, the elements of the crime of aggression.

13.3 Material elements

13.3.1 Perpetrators

Aggression is a 'leadership crime': it is committed only by leaders and high-level policy-makers. The ILC draft Code of Crimes refers to the 'leader or organiser'; the Coordinator's Discussion Paper (ICC) to a person 'in a position effectively to exercise control over or to direct the political or military action of a State'. While the reference in the London Charter to the 'waging' of a war of aggression seems to imply that *all* persons carrying out the State's acts of aggression are individually responsible, from the general down to the foot soldier, that is not how the Charter was interpreted in practice.⁵⁷

The point is well illustrated by *Von Leeb and others* (the High Command case), tried before an American Military Tribunal constituted under Control Council Law No. 10.⁵⁸ The fourteen accused were all in positions of high military authority: thirteen generals and one admiral. But, one defendant having committed suicide, all the others were acquitted of the charge of crimes against peace on the ground that 'the criminality which attaches to the waging of an aggressive war should be confined to those

⁵⁵ Arts. 2 and 4. See further on the negotiation of the definition, Rifaat, *International Aggression*, ch. 15; Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 *AJIL* 224; Ferencz, 'Defining'.

⁵⁶ For the differences between Art. 1 of the Definition and Art. 2(4) of the Charter, see Dinstein, *War, Aggression*, 127–8.

⁵⁷ See G. Brand, 'The War Crimes Trials and the Laws of War' (1949) 26 *BYIL* 414 at 419. For a useful compilation of relevant sections of the post Second World War case law, see the UN Secretariat paper, 'Historical review of developments relating to aggression' PCNICC/2002/WGCA/L.1.

⁵⁸ XII LRTWC 1.

who participate in it at the policy level'.⁵⁹ In spite of their senior military positions, the defendants were not at the required policy level and they were not criminalized by not having refused to implement the aggressive plans. Accordingly, in countries where the military are largely kept out of the political decisions on the initiation of force, it will not be the military who are responsible for the crime of aggression, but their political superiors.

The exact threshold of criminal responsibility is not clear and there may not have been complete consistency in the findings of the Nuremberg IMT and in the subsequent proceedings.⁶⁰ But somewhere 'between the Dictator and Supreme Commander of the military forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it'.⁶¹

The relevant levels of policy-making are not necessarily confined to government or the military. Some of the accused in the proceedings subsequent to Nuremberg were industrialists, not part of the government but closely associated with it. In *Krauch and others* (the IG Farben case)⁶² the accused were however acquitted on the ground that, like Albert Speer, one of the Nuremberg IMT defendants, their efforts 'were in aid of the war effort in the same way that other productive enterprises aid in the waging of war'.⁶³ Their responsibility was below that of planning and leading.

13.3.2 Conduct

Unlike the crime of genocide, which divides the *actus reus* into specific acts committed by individuals, the crime of aggression has the collective act by the State as the point of reference for any description of what the individual perpetrator does. The conduct constituting the material element of the crime of aggression therefore is individual participation in the collective act of the State as described below.

Act of aggression

The underlying collective act is the act of a State committed against another State. However, not every unlawful use of force by a State gives rise to individual criminal responsibility. There has been little State practice since the aftermath of the Second World War and only a minority of States have adopted national legislation in respect of the crime of aggression.⁶⁴ Customary international law, therefore, probably remains as in the jurisprudence of Nuremberg, supplemented by the subsequent

⁵⁹ *Ibid.*, 67. The conspiracy charges were dismissed as raising no different issues; eleven of the accused were convicted of war crimes and crimes against humanity.

⁶⁰ Brownlie, *International Law and the Use of Force*, 205.

⁶¹ *Ibid.*

⁶² X LRTWC 1; see also *Krupp and others* X LRTWC 69.

⁶³ Judgment (1947) 41 *AJIL* 321.

⁶⁴ Germany is one that has (in s. 80 of the German Criminal Code). The statute of the Supreme Iraqi Criminal Tribunal, Art. 14(c), which refers to violations of stipulated Iraqi law, includes '[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.' So far as the UK is concerned it is clear that even though the crime is recognized as one under international law, it is not part of domestic law (*R v. Jones* [2006] UKHL 16).

proceedings under Control Council Law No. 10 and by the Tokyo IMT. This means that under customary law it is only aggressive war that founds individual criminal responsibility.⁶⁵ Some commentators however argue that the crime of aggression now extends beyond aggressive wars,⁶⁶ and the Coordinator's Discussion Paper (ICC) mentions other options, including all the acts listed in GA resolution 3314. Declared war is now uncommon and the term is not employed in the legal regimes of the UN Charter and the Geneva Conventions. While it is possible to give the term content even when it has lost its currency in international relations,⁶⁷ a definition of the crime of aggression for the purpose of the ICC Statute which relied on the existence of a war for its material element would revive old arguments about the meaning of war.

It has been suggested that a necessary part of the crime of aggression is the aggressive aim or intention of the leader or the central leadership,⁶⁸ of which the individual perpetrator must be aware. If so, this would help to avoid classifying as the crime of aggression participation in military intervention carried out for humanitarian objectives, for example. One of the German proposals put forward in the ICC negotiations followed this approach; it referred to the unlawful use of force carried out 'with the object or result of establishing a military occupation of, or annexing' the foreign territory.⁶⁹ The choice of those purposes would however exclude acts which might be regarded as properly coming within the criminal category;⁷⁰ aggressive wars to extract economic or political advantages of some kind are not inconceivable. A further suggestion is to exclude from the underlying collective act military intervention which is not unambiguously illegal.⁷¹

The collective act comprises unlawful acts of force which are objectively of a certain gravity; the concept of aggression must not be trivialized or made banal. While minor border skirmishes or infringement of maritime limits or air space would fall within the ambit of the acts of aggression which are listed in GA resolution 3314, they are not part of the collective act for the purpose of the crime of aggression.

The collective act must have been completed in order to found criminal responsibility. The threat of aggression was not included in the Charters of the Nuremberg or Tokyo IMTs, nor in Control Council Law No. 10. The unopposed invasions of Austria and Czechoslovakia, following the successful threat of aggressive force, were

⁶⁵ T. Bruha, *Die Definition der Aggression* (Berlin, 1980) 126; Dinstein, *War, Aggression*, 125–6, noting that the extension in the 1996 ILC draft Code to 'acts of aggression 'short of war' represents a striking departure from the law as perceived in the London Charter and in the consensus Definition of Aggression'; Gerhard Werle, *Principles of International Criminal Law* (The Hague, 2005) 391, 394; Claus Kress, 'The German Chief Federal Prosecutor's Decision not to Investigate the Alleged Crime of Preparing Aggression against Iraq' (2004) 2 *JICJ* 245 at 249.

⁶⁶ See, e.g. Richard Griffiths, 'International Law, the Crime of Aggression and the *Ius Ad Bellum*' (2002) 2 *International Criminal Law Review* 301 at 303–4; Antonio Cassese, *International Criminal Law* (Oxford, 2003) 114.

⁶⁷ See, e.g. Dinstein, *War, Aggression*, 151–2.

⁶⁸ This is variously described as a special intent required for participants in aggression, or as a material element of the crime: Stefan Glaser, 'Quelques remarques sur la définition de l'aggression en droit international pénal' in S. Hohenleitner et al. (eds.), *Festschrift für Theodor Rittler* (Aalen, 1957) 383; Brownlie, *International Law and the Use of Force*, 213; Werle, *Principles*, 395; Kress, 'The German Prosecutor's Decision', 256; see also discussion in Cassese, *International Criminal Law* 115–16.

⁶⁹ PCNICC/1999/DP.13; now included as option 2 in para. I.1 of the Coordinator's Discussion paper (ICC).

⁷⁰ Clark, 'Rethinking Aggression as a Crime', 878.

⁷¹ See discussion at Kress, 'The German Prosecutor's Decision', 259.

treated as evidence of the aggressive conspiracy but were not charged as crimes against peace before the Nuremberg IMT. They were however charged in indictments under Control Council Law No.10 (which included 'invasions' within the jurisdiction of the tribunals constituted under it).⁷²

The crime of aggression constitutes participation in an act by a State against another State. There is no evidence in customary law for extending the crime to acts committed by individual mercenaries not sponsored by a State, or committed by a State against minorities within its own territory, even though the devastation caused by such acts may be comparable to inter-State military intervention.

Planning, preparation, initiation or waging

The nexus between the State's act of aggression, however defined, and the act of the individual leader or other high-level policy-maker is described in similar terms in the Nuremberg Charter, the ILC draft Code of Crimes and the Coordinator's Discussion Paper (ICC)⁷³ though only the Charter has an explicit reference to conspiracy.

Participation in the formulation of aggressive plans, largely of course dependent on Hitler's decisions, was one of the most typical bases for criminal responsibility in the Nuremberg IMT and subsequent proceedings. It is difficult to distinguish planning from preparation in the jurisprudence. Preparation had to be closely linked with planning; preparation for some vague future programme of aggression was not sufficient.⁷⁴ As interpreted by the Nuremberg Tribunal, conspiracy differed little from planning and preparation.⁷⁵ The charge of conspiracy was in effect superfluous, and led to criticism of the Tribunal.⁷⁶

13.4 Mental elements

There must be an intent to participate in the aggressive act. If the perpetrator has knowledge of the collective intent to initiate and wage aggressive war but continues to participate, the requirement is satisfied. Two examples from the Nuremberg trial will suffice. Schacht was at some relevant periods President of the Reichsbank and a central figure in Germany's rearmament programme. 'But', said the Tribunal, 'rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament

⁷² E.g. in the case of *United States of America v. Ernst von Weizsäcker et al.* (the Ministries case) the tribunal held: 'The fact that the aggressor was here able to so overawe the invaded countries does not detract in the slightest from the enormity of the aggression, in reality perpetrated. The invader here employed an act of war.' (Judgment, 11–13 April 1949 (*Trials of War Criminals before the Nuremberg Military Tribunals*) United States Government Printing Office vol. XIV at 330.)

⁷³ Art. 6 of the Charter: 'planning, preparation, initiation or waging' of an aggressive war and 'participation in a common plan or conspiracy' for the foregoing; the ILC draft Code: 'actively participates in or orders the planning, preparation, initiation or waging'; the Discussion Paper: 'orders or participates actively in the planning, preparation, initiation or execution'.

⁷⁴ Judgment (1947) 41 *AJIL* 172 at 222. ⁷⁵ Quincy Wright, (1947) 41 *AJIL* 38 at 68.

⁷⁶ See Brownlie, *International Law and the Use of Force*, 201; the indictments and ruling on conspiracy in the Tokyo IMT were even more unsatisfactory (*ibid.*, 203).

as part of the Nazi plans to wage aggressive wars.’⁷⁷ He was acquitted since it could not be inferred from the evidence that he knew of the plans for aggressive war. Borman rose to a position of great power and was finally of great influence over Hitler. But the evidence did not show that he knew of the plans; he did not attend the crucial planning meetings; he was acquitted of the crimes against peace charge against him.⁷⁸

13.5 Prosecution of aggression in the ICC

13.5.1 Jurisdiction of the ICC

In contrast with the other crimes triable by the ICC, jurisdiction over the crime of aggression will be exercised by the Court only ‘in respect of’ States Parties which have accepted the amendment incorporating a definition and the necessary conditions.⁷⁹ Article 121(5) appears to provide in effect an opt-in system for jurisdiction over aggression, an arrangement rejected as a general mechanism for the Statute during the early negotiations on the establishment of the ICC.⁸⁰ Accordingly, if nationals of one State Party commit aggression on the territory of another, they may be prosecuted only if both States have agreed to the amendment.⁸¹ The wording of the Statute does not appear to allow States not party to the Statute any equivalent right to object to an amendment on aggression (or on any other additional crime). This difference in treatment has been criticized⁸² but the position is not dissimilar from that of non-party States under the Statute generally.

13.5.2 General principles and other provisions of the ICC Statute

Aggression is a leadership crime which typically involves the planning of aggressive acts and of the means of carrying them out; this makes it difficult to apply directly the modes of participation set out in Article 25(3) of the ICC Statute.⁸³ Article 28 (superior responsibility) would seem for the same reason to be inappropriate.⁸⁴ If the ICC is to determine the question of State responsibility, international law defences such as self-defence will have to be available. But these will be defences to the collective act, not to the individual act of participation, and they will not fit readily within Article 31 of the Statute.

⁷⁷ Judgment (1947) 41 *AJIL* 172 at 300. ⁷⁸ *Ibid.*, 329. ⁷⁹ Art. 121(5). ⁸⁰ See section 8.2.

⁸¹ Giorgio Gaja, ‘The Long Journey towards Repressing Aggression’ in Cassese, *Commentary*, 427 at 439; Danesh Sarooshi, ‘The Statute of the ICC’ (1999) 48 *ICLQ* 387 at 401.

⁸² Ruth Wedgwood in ‘The International Criminal Court: an American View’ (1999) 10 *EJIL* 93 at 104 refers to it as an ‘asymmetric immunity for treaty Parties’.

⁸³ The Special Working Group has been discussing the problems of reconciling certain paragraphs of Art. 25(3) with the incorporation of aggression in the statute.

⁸⁴ For the same reason Art. 33 (superior orders) will rarely be applicable, but there would seem no reason to exclude its application in principle.

The crime also does not sit easily with other aspects of the ICC Statute. Complementarity is a fundamental part of the ICC's structure, but it will be the rare case of aggression that can be tried in national courts.⁸⁵ Another important aspect of the Statute is the attention given to the needs of victims of crimes; for example they are accorded rights of participation in trials and rights of protection and reparation.⁸⁶ Whereas the victims of the other crimes within the jurisdiction of the Court are individuals, the victim of an act of aggression is in reality a State.⁸⁷

13.5.3 Conditions for the exercise of the ICC's jurisdiction

The crime of aggression presupposes that an act has been committed by a State. When the ILC included aggression in its draft Statute, it considered that there was a problem with the ICC's trying individuals in the absence of a finding of aggression against the State concerned.⁸⁸ The ILC proposed that, in view of the Security Council's responsibilities under the UN Charter, the way to resolve the problem was to require that, before the ICC could exercise its jurisdiction, there had to be a prior determination by the Security Council that a State had committed the act of aggression which was the subject of the proceedings.⁸⁹ The legal effect of any such determination would be for the ICC itself to decide.

As we have seen, this provision was not included in the ICC Statute. There is however a requirement in Article 5(2) that the conditions for the exercise of the ICC's jurisdiction must be 'consistent with the relevant provisions of the Charter of the United Nations'. This has been interpreted by some as requiring a determination by the Council, prior to ICC prosecution, that the State concerned has committed aggression.⁹⁰ Such a condition would solve the problem that holding individuals responsible for a crime of participation in a State's act condemns the State itself. Those holding this view argue that under Chapter VII of the UN Charter it is the Council alone which has exclusive power to determine the existence of an act of aggression by a State. Provision for a prior Security Council determination regarding a State's responsibility would reflect this logic.⁹¹

⁸⁵ R. E. Fife, 'Criminalizing Individuals for Acts of Aggression committed by States' in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden* (Leiden/Boston, 2003) 69, 70; Pietro Gargiulo, 'The Controversial Relationship between the International Criminal Court and the Security Council' in Flavia Lattanzi and William Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente, 1999), vol. I, 67 at 100.

⁸⁶ Arts. 64(2) and 68 ICC Statute; RPE 89–99.

⁸⁷ See James Boeving, 'Aggression, International Law, and the ICC: an Argument for the Withdrawal of Aggression from the Rome Statute' (2005) 43 *Columbia Journal of Transnational Law* 557 at 583–8.

⁸⁸ James Crawford, 'The ILC's draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 134 at 147.

⁸⁹ Art. 23(2) ILC draft Statute. See Crawford, 'The ILC's draft Statute'; and James Crawford, 'The ILC adopts a Statute for an International Criminal Court' (1995) 89 *AJIL* 404 at 411.

⁹⁰ Zimmerman in Triffterer, *Observers' Notes*, 106; see also Fife, 'Criminalizing Individuals' 67. This was also the understanding of the UK, as indicated in its statement made on adoption of the statute on 17.7.1998 (A/CONF.183/13 (Vol.II) at p. 124).

⁹¹ See Allegra Carpenter, 'The International Criminal Court and the Crime of Aggression' (1995) 64 *NJIL* 223 at 234; Irina Müller-Schieke, 'Defining the Crime of Aggression under the Statute of the International Criminal Court' (2001) 14 *LJIL* 409 at 423.

This view is contentious.⁹² It is clear that the Council does not have *exclusive* responsibility with regard to threats to international peace and security. Its responsibility is exclusive only for the purpose of its powers under Chapter VII which include deciding upon economic sanctions and other responses to breaches of the peace. The General Assembly has the power to take decisions provided that the Council is not dealing with the matter, and has adopted a number of resolutions in which it refers to aggressive acts by States.⁹³ It is undeniable that the ICJ may adjudicate upon questions of aggression:

The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.⁹⁴

There are also arguments of a practical and political nature. On the one hand it is pointed out that if the ICC, in the absence of a Security Council determination, had to decide that an act of aggression had taken place, it would require the Court to decide highly political questions of public international law.⁹⁵ There is a risk that investigations undertaken by the ICC for an act of aggression without a prior Council authorization might bring about an escalation of the situation.⁹⁶ Further, if the ICC were to make its own assessment, without the prior determination of the Council, as to the justification of military action in self-defence, for example, it might infringe on the responsibilities of the Council with regard to the actions of the State concerned. On the other hand, to require the Court to act only after the Council's determination would give the Permanent Members of the Council an effective veto over prosecutions relating to themselves and their allies. The Court ought to be allowed to act without Council interference.⁹⁷ The Council has in fact very rarely made a determination of aggression,⁹⁸ and if this inaction continued there would be a risk that the Court would be blocked from ever considering a case of aggression.

Proposals have been made for an alternative institutional mechanism to determine responsibility by a State before an individual can be tried by the ICC. These seek to avoid the Council blocking a case through inertia.⁹⁹ In particular, it has been proposed

⁹² See, e.g. Giorgio Gaja, 'The Long Journey towards Repressing Aggression' in Cassese, *Commentary*, 427 at 433; Claus Kress, 'Versailles-Nuremberg-The Hague: Germany and the International Criminal Law' (2006) 40 *The International Lawyer* 15 at 38 and n. 133.

⁹³ Arts. 11(2) and 12 of the UN Charter. See GA resolutions listed in 'Historical review' PCNICC/2002/WGCA/L.1 at paras. 405–29.

⁹⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (1984) ICJ Rep 392 para. 95.

⁹⁵ Theodor Meron, 'Defining Aggression for the International Criminal Court' (2001) 25 *Suffolk Transnational Law Review* 1.

⁹⁶ Andreas Zimmerman, 'The Creation of a Permanent International Criminal Court' (1998) 2 *Max Planck Yearbook of International Law* 169 at 203.

⁹⁷ Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 144 at 147.

⁹⁸ Although in relation to several situations the Council has described certain conduct as acts of aggression: see 'Historical review' PCNICC/2002/WGCA/L.1 at paras. 381–404.

⁹⁹ See proposals at e.g. UN Doc. PCNICC/2001/WGCA/DP.1, now largely reflected in Options 3–5 of para. 1.5 of the Coordinator's Discussion Paper.

that if the Council fails to act, the UN General Assembly, or the ICJ under its advisory jurisdiction, may be asked for a prior determination. While a reference to the ICJ would have some logic if a legal decision is required, the use of the ICJ's advisory jurisdiction for such a purpose presents difficulties, in that the nature of the case would essentially be contentious, while the ruling would (presumably) be binding on the ICC, unlike the determinations of a political organ. Further, there would be no possibility for the individual accused to appear before the ICJ and bring evidence.

The problem is a difficult one. Because of the inextricable connection between State act and individual responsibility, a determination that a State is responsible for an aggressive act of a certain magnitude would seem to render much of the upper leadership of that State individually responsible under criminal law, subject of course to the degree of their personal involvement. If that determination were to be made by the Security Council, which inevitably takes decisions for political reasons,¹⁰⁰ the ICC would have to be able to do more than simply decide upon the participation and intent of a particular accused. It would have to reach its own conclusions on any international law defences available to the accused with regard to the act of the State concerned, as did the Nuremberg Tribunal with regard to the self-defence arguments by the defendants concerning the invasion of Norway by Germany.¹⁰¹ The principles of fair trial would be infringed if a decision by a political organ could itself effectively constitute part of the judgment against the accused. But if the ICC were able to take its own decision on the acts of a State, that could result in a finding which differed from a Security Council determination, in that the former might decide that there had been no aggression where the latter had decided that there was.¹⁰² That may however be a necessary price to pay for compliance with the requirements of fair trial.

It may be asked whether there is any reason why there should first be the interposition of a ruling of another body, if the ICC itself will have to judge the legality of the act of the State. The *legal* reasons for the proposal that the Security Council should make a prior determination, as outlined above, are weak; indeed there are legal arguments *against* a requirement for such a determination since it could give rise to problems in achieving a fair trial. But there are other reasons, considered below, why it may be wise to have an external filter or trigger to ensure the necessary support of the international community before resorting to a judicial process which might have an effect on the maintenance of international peace and security. Such a mechanism need not require a determination on aggression to be made; there could be a requirement, for example, that no case of aggression be tried without a referral of the situation to the Court by the Security Council.

¹⁰⁰ As made clear in, for example, Judge Schwebel's dissenting opinion in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (1986) ICJ Rep 14 para. 60.

¹⁰¹ Judgment (1947) 41 *AJIL* 172 at 203–7.

¹⁰² But if the ICC could act only with a prior Council determination of aggression, it would not be able to find aggression if the Council had not.

13.5.4 Implications of the prosecution of aggression before the ICC

The political and practical implications of the prosecution of the crime of aggression which result from the connection between individual and State responsibility help to explain the difficulties of reaching agreement on a definition of aggression and on the conditions for the exercise of the ICC's jurisdiction.

The legal principles of the *ius ad bellum* give rise to significantly more controversy than the *ius in bello*. Illustrations of situations which would call for difficult determinations of the legality of military intervention need be sought no further back in time than the conflict in Afghanistan in 2001, the intervention in Iraq in 2003 by the US, the UK and others, and the action by Israel in Lebanon in 2006. Judicial decisions which involve determinations of State conduct will be likely to have repercussions for the maintenance of international peace and security. The problems relating to jurisdiction by the ICC over a non party State will be exacerbated if the ICC is to decide whether such a State has committed an act of aggression.¹⁰³

There will be difficulties for the ICC itself, difficulties of a kind which may sometimes arise in respect of the other crimes within the Court's jurisdiction but which will be particularly severe in relation to aggression. The constitution and procedures of the ICC are designed for the determination of individual, not State, responsibility. Investigations of the crime will involve questions of the greatest sensitivity for a State's defence and national security. Except where the documents of a defeated State are available to the international community, as with Germany and Japan in the Second World War – when the Tribunals had a glut of the defeated governments' most secret papers¹⁰⁴ – there will be severe difficulties of access to evidence.

Issues such as these have evoked a cautious attitude towards what is, in effect, the invocation of criminal law to regulate the use of force by States. To turn the ICC into a forum for litigating disputes between States risks harm both to the Court and to the maintenance of international peace and security.¹⁰⁵ Doubts have been expressed about the inclusion of aggression in the ICC Statute at all,¹⁰⁶ and about whether its inclusion will be more than pure symbolism.¹⁰⁷ Nevertheless, some way must be found for an appropriate means of bringing the crime of aggression before the Court. As the Nuremberg IMT stated, in relation to a plea of self-defence by the accused, it 'must ultimately be subject to investigation and adjudication if international law is ever to be enforced'.¹⁰⁸

¹⁰³ Wedgwood in 'The International Criminal Court', 105, describes this fairly clear interpretation of Art. 121(5) as a misconstruction of the statute.

¹⁰⁴ In Japan, however, many of the relevant papers had been burnt. ¹⁰⁵ Fife, 'Criminalizing individuals', 70–73.

¹⁰⁶ See, e.g. Antonio Cassese, 'The Statute of the ICC: Some Preliminary Reflections' (1999) 10 *EJIL* 144 at 146; a suggestion to delete aggression from the statute is made in Matthias Schuster, 'The Rome Statute of an International Criminal Court and the Crime of Aggression: A Gordian Knot in Search of a Sword' (2003) 14 *CLF* 1.

¹⁰⁷ Schabas in McGoldrick, *The Permanent ICJ*, 141; and see Zimmerman in Triffterer, *Observers' Notes*, 106.

¹⁰⁸ Judgment (1947) 41 *AJIL* 172 at 207.

Further reading

The website of the ICC may be consulted with regard to the current negotiations on the definition of aggression in the ASP special working group: www.icc-cpi.int

Cherif Bassiouni and Benjamin Ferencz, 'The Crime against Peace' in Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. I, 313.

Ian Brownlie, *International Law and the Use of Force by States* (Oxford, 1963).

Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge, 2005).

Rolf Einar Fife, 'Criminalizing Individuals for Acts of Aggression committed by States' in Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden* (Leiden/Boston, 2003) 53.

Christine Gray, *International Law and the Use of Force* (2nd edn, Oxford, 2004) chs. 2, 4, 6.

Ahmed Rifaat, *International Aggression* (Stockholm, 1979).

Matthias Schuster, 'The Rome Statute of an International Criminal Court and the Crime of Aggression: A Gordian Knot in Search of a Sword' (2003) 14 *CLF* 1.

Transnational Crimes, Terrorism and Torture

14.1 Introduction

14.1.1 Overview

To focus only on the ‘core crimes’ and their prosecution would be to ignore a substantial area of criminal law with international implications; there are other crimes of international concern which have a huge impact on people throughout the world and on global economic development.¹ Crimes which are the subject of international suppression Conventions but for which there is as yet no international criminal jurisdiction, are the focus of this chapter. They are here termed transnational crimes. These are crimes which have actual or potential transboundary effect and crimes which are intra-State but which offend a fundamental value of the international community.²

The prevention and punishment of transnational crimes requires cooperation among governments and among law enforcement agencies. A growing number of agreements are being concluded to provide for this in relation to such crimes as drugs trafficking,³ piracy,⁴ slavery,⁵ terrorism offences,⁶ torture,⁷ apartheid,⁸ enforced disappearances,⁹ transnational organized crime including people trafficking, smuggling migrants and illegal arms trafficking,¹⁰ and corruption.¹¹ Some of these crimes are also crimes of customary international law or are international crimes when

¹ In res. 56/120 the UN General Assembly expressed deep concern over ‘the impact of transnational organized crime on the political, social and economic stability and development of societies.’ UN Doc. A/RES/56/120 (2002).

² Neil Boister, ‘Transnational Criminal Law?’ (2003) 14 EJIL 953 at 967–77.

³ UN Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988.

⁴ Arts. 100–05, UN Law of the Sea Convention 1982.

⁵ Among the more recent agreements on slavery are the 1926 Slavery Convention; the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956; the UN Convention on the Law of the Sea 1982, Art. 99.

⁶ See section 14.2. ⁷ See section 14.3.

⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid 1973.

⁹ International Convention for the Protection of all Persons from Enforced Disappearance 2006.

¹⁰ UN Convention against Transnational Organized Crime 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing that Convention; Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing that Convention; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing that Convention.

¹¹ UN Convention against Corruption 2003.

committed in certain circumstances (for example as crimes against humanity). They include those which were listed as ‘treaty crimes’ in the ILC draft of the ICC Statute, but which were excluded from the Rome Statute in the course of the negotiations.¹² Particular transnational crimes may in the future come to be dealt with as international crimes within the jurisdiction of an international jurisdiction, if States believe that the values they conflict with are sufficiently important to the international community and that international prosecution is an effective way of dealing with them. This may of course occur with terrorism and the International Criminal Court.

While each transnational crime deserves a chapter to itself, for reasons of space only two categories, terrorism and torture, will be covered in this chapter, at sections 14.2 and 14.3 respectively; both of them, when committed in certain circumstances, may also constitute an international crime within the jurisdiction of the international courts and tribunals.

14.1.2 *International suppression Conventions*

The prosecution of transnational crimes is undertaken by domestic legal systems, rather than by international courts and tribunals. To facilitate effective domestic prosecution, as well as to cooperate in the suppression of the crimes, States have concluded international agreements providing for the possibility of cooperation among States which otherwise might have few law enforcement concerns in common.¹³ The typical agreement requires States to create criminal offences of the relevant conduct in their domestic law, to take the necessary jurisdiction for the purpose of prosecution, and to provide penalties which take into account the gravity of the offences. States are also required either to extradite an offender or to consider the case for prosecution (*aut dedere aut judicare*), and to provide each other with mutual legal assistance for the purpose of prosecution or extradition.¹⁴ All of these features are to be seen in the agreements on terrorism discussed in section 14.2.2.

The jurisdiction which States are required to take differs from one agreement to another but in each case there is a close link between the suspect and the State concerned. Most agreements require States to take jurisdiction based on territory and nationality. Some provide other options on grounds such as the nationality of the victim. For example, in the 1997 Convention for the Suppression of Terrorist Bombings each State is *required* to take jurisdiction where the offence is committed in its territory, on its ships or aircraft, or by its nationals; it is *permitted* to take jurisdiction when the offence is committed against a national or against a State or government facility, by a stateless person, or in an attempt to compel the State to

¹² See section 8.2.

¹³ See Ethan A. Nadelmann, ‘Global prohibition regimes: the evolution of norms in international society’ (1990) 44 *International Organisation* 479 at 481.

¹⁴ For discussion of *aut dedere aut judicare* obligations see ch. 4; for extradition and mutual legal assistance, see ch. 5.

action or inaction, or when committed on an aircraft operated by the State.¹⁵ The agreements also require States to take jurisdiction so that they can prosecute if they do not extradite a suspect on their territory, wherever the crime was committed. This is a 'last resort universal jurisdiction'¹⁶ *as between States Parties*, which is dependent on the presence of the suspect. In effect, the States Parties delegate authority to the other parties to exercise jurisdiction on their behalf.¹⁷

Because these agreements require that the crimes be prosecuted under domestic law, they do not themselves prescribe the material and mental elements of the offences.¹⁸ As a unified system of enforcement they are weak.¹⁹ An additional criticism is that they largely rely on domestic legal systems to provide the necessary procedural rights for the accused during investigation and prosecution, and this leaves scope for human rights violations in those States which do not have adequate fair trial and other such protections. In their concern with law and order State Parties to the agreements have neglected human rights requirements, in contrast with the way in which such requirements have been incorporated into the procedure of the International Criminal Court.²⁰

14.2 Terrorism

14.2.1 Introduction

The phenomenon of terrorism presents a number of difficulties of legal categorization. The problem of *defining* terrorism is not unique to lawyers: 'one man's terrorist is the other man's freedom fighter' describes a difficulty common to all who ponder on the concept. But the lawyer has also to consider whether the legal category of terrorism is useful or necessary in law.²¹ Terrorism may be regarded as simply the commission of 'ordinary', though serious, criminal acts with a particular purpose. Some States, including the UK, do not have a specific offence of terrorism in domestic law and use the ordinary criminal law to prosecute serious offences of terrorist violence.²²

¹⁵ Art. 6(1) and (2).

¹⁶ See, e.g. Art. 6(4) of the International Convention for the Suppression of Terrorist Bombings (the Terrorist Bombing Convention). See Roger Clark, 'Offences of International Concern: Multilateral Treaty Practice in the Forty Years since Nuremberg' (1988) 57 *NJIL* 49 at 58.

¹⁷ See further section 3.3.2.

¹⁸ See Clark, 'Offences of International Concern', 72 for further discussion. States often simply include verbatim the treaty definition into their domestic law.

¹⁹ See Boister 'Transnational Criminal Law?.'

²⁰ See Neil Boister, 'Human Rights Protections in the Suppression Conventions' (2002) 2 *Human Rights Law Review* 199. See section 14.2.4 for the occasional human rights clause in the global terrorism agreements.

²¹ 'We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term ... serves no operative legal purpose': R. R. Baxter, 'A Sceptical Look at the Concept of Terrorism' (1973/4) 7 *Akron Law Review* 380. 'Terrorism is a term without legal significance ... The term is at once a shorthand to allude to a variety of problems with some common elements and a method of indicating community condemnation for the conduct concerned': Rosalyn Higgins, in discussing early attempts at a definition of terrorism in R. Higgins and M. Flory (eds.), *Terrorism and International Law* (London, 1997) 28.

²² However, a number of offences created by UK legislation depend upon a definition of terrorism, which is set out in the Terrorism Act 2000, s. 1, as amended by the Terrorism Act 2006: terrorism means 'the use or threat of action where' 'the use or threat is designed to influence the government or an intergovernmental organisation or to intimidate the public or

Some would argue that the categorization of terrorism is positively dangerous, in that it may encourage counter-measures that disregard human rights.

A further difficulty has its source in the different kinds of measures taken by governments to deal with terrorism and the terrorist threat. The fight against terrorism is now multi-faceted²³ and recent responses in the so-called 'war on terror'²⁴ have engaged not so much measures of criminal law enforcement as the use of armed force. In addition some politicians and lawyers have called for new rules to deal with terrorism following 11 September 2001.²⁵ This chapter does not include discussion of the lawfulness of the use of force to counter-terrorism nor the issue of whether international law remains adequate to meet the challenge.²⁶

The primary paradigm remains criminal law, and terrorist acts, in one form or another, constitute offences in both national and international criminal law. Since it is only in particular circumstances that they will be prosecuted at present in an international court, this chapter discusses terrorism within the category of 'transnational' crimes, although brief consideration is also given to terrorism as an international crime at section 14.2.5.

14.2.2 Development of international cooperation against terrorism

One of the earliest attempts at agreeing on an international prohibition of terrorism was the 1937 Convention for the Prevention and Punishment of Terrorism, which was negotiated within the League of Nations following the assassination of King Alexander I of Yugoslavia in 1934. The Convention defined acts of terrorism as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public' and listed acts to be criminalized by States Parties, including those causing death, serious injury or loss of liberty to heads of State and public officials, damage to public property of another State, and risk to the lives of members of the public. The Convention never received sufficient ratifications to enter into force.²⁷ The United Nations took on the task of defining and prohibiting terrorism when the General Assembly set up a committee on terrorism in 1972, but although the committee met

a section of the public, and' it is made 'for the purpose of advancing a political, religious or ideological cause' and involves 'serious violence against a person or serious danger to property, or endangers a person's life, or creates a serious risk to public health or safety, or is designed seriously to interfere with or disrupt an electronic system'.

²³ See John P. Grant, 'Beyond the Montreal Convention' (2004) 36 *Case Western Reserve Journal of International Law* 453 at 472.

²⁴ But the term 'the war on terror', at least in the United Kingdom, is not used in the literal sense of an armed conflict; see the response of the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Baroness Amos): 'The term "the war against terrorism" has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law enforcement measures.' (Hansard 22 Nov 2001: Col.WA153.)

²⁵ See, e.g. Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1.

²⁶ For some of the extensive literature, see Juttee Brunee and Stephen Toope, 'The Use of Force after Iraq' (2004) 53 *ICLQ* 785; Gilbert Guillaume, 'Terrorism and International Law' (2004) 53 *ICLQ* 537; Sean Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter' (2002) 43 *Harvard International Law Journal* 41.

²⁷ League of Nations Doc.C.546(1).M.383(1).1937. V. For an interesting review of its negotiation, see Ben Saul, 'The Legal Response of the League of Nations to Terrorism' (2006) 4 *JICJ* 78.

until 1979 it failed to reach agreement. There was disagreement as to whether acts committed by national liberation movements for causes such as decolonization should be excluded from any definition of terrorism, and there were related arguments that there should be no international ban on terrorist activities unless at the same time the causes of terrorism were understood and resolved.

Terrorism agreements

The impossibility of securing international agreement on an unqualified condemnation of terrorism led to the adoption of a 'thematic' approach to cooperation to prevent and criminalize terrorist acts. International agreements were negotiated on specific areas of terrorist activity, each separately defined. There are eleven of these agreements, each of them negotiated to deal with specific kinds of terrorist threats prevalent at the time the agreements were concluded.²⁸ Two of the earliest conventions, for example, The Hague and Montreal Conventions, deal with safety of civil aviation, following instances of terrorist hijacking and other offences against air travel at the time.²⁹ The impetus for the drafting of the 1988 SUA Convention, on the other hand, was the hijacking in 1985 of the *Achille Lauro*, an Italian cruise ship, and the accompanying murder of an elderly disabled US citizen of Jewish origin.

With the conclusion of the Terrorist Bombing Convention in 1997, most kinds of terrorist act had been covered in one or other of these agreements. For better or worse, however, a proposal was then introduced to negotiate a 'comprehensive' Convention to address explicitly all forms of terrorism; as such it would of course require a definition of terrorism.³⁰ The hope of finally agreeing upon a definition of terrorism for the purpose of such a Convention received some impetus from a GA resolution of 1994,³¹ adopted by consensus, which annexed a Declaration on Terrorism containing the following provision:

²⁸ There are at present thirteen agreements altogether, but two of them, as explained below, do not follow the same model of State cooperation. The eleven agreements are: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention); the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; the 1979 International Convention against the Taking of Hostages; the 1980 Convention on the Physical Protection of Nuclear Material; the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention) and its 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; the 1997 International Convention for the Suppression of Terrorist Bombings (the Terrorist Bombing Convention); the 1999 International Convention for the Suppression of the Financing of Terrorism (the Terrorist Financing Convention); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (the Nuclear Terrorism Convention). Within the list of global terrorism agreements are often included the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (the Tokyo Convention) and the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection but these two differ from the others; the objective of the Tokyo Convention is primarily to assign powers and jurisdiction to different States and persons in relation to activities on board aircraft, while the Plastic Explosives Convention provides for the marking of explosives and the prevention of possession and transfer of unmarked explosives. The UN Convention on the Safety of United Nations and Associated Personnel 1994 (annexed to GA resolution 49/59) is sometimes added to the list; although not drafted primarily as an instrument against terrorism, it follows the same model as the terrorism agreements.

²⁹ See Christopher Joyner and Robert Friedlander, 'International Civil Aviation' in M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. I, 837.

³⁰ The proposal was made by India in 1996, UN Doc.A/C.6/51/6.

³¹ Declaration on Measures to Eliminate International Terrorism (1994), annexed to UNGA Res. 49/60 of 9.12.1994.

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature which may be invoked to justify them.

The resolution, unlike previous ones, had no preambular reference to acts committed by a national liberation movement; it made quite clear that terrorism was condemned whatever the motivation and by whomever it was committed. Unfortunately, the promise held out by the resolution that a similarly unqualified definition could be agreed was not fulfilled, and the negotiation of the Convention has been stalled for years.³²

The eleven terrorism agreements have as their purpose the effective *national* prosecution of acts of terrorism, and thus their better prevention. They share the main features of the model already described,³³ incorporating the principle *aut dedere aut judicare* and imposing obligations on States Parties to give assistance in criminal and extradition proceedings. In their provisions on extradition, the three most recent agreements, unlike the early ones, specify that the offence in question may not be regarded as a political offence for the purpose of extradition or mutual legal assistance.³⁴ Since the most typical of terrorist offences is one committed for a political purpose this removes the loophole by which terrorists could escape extradition and confirms that terrorism cannot be justified, whatever the purpose.

Security Council resolutions

After the occurrence of specific instances of terrorism the Security Council determined that suppression of international terrorism was essential for the maintenance of international peace and security and took decisions requiring the surrender to justice of persons accused of terrorist acts. On 21 December 1988, Pan American Flight 103, bound from London to New York, exploded over Lockerbie, Scotland. The blast killed all 259 people on board and eleven people on the ground. The suspects identified in the Scottish investigation that followed were believed to be State agents and the governments requiring the suspects to be brought to justice did not proceed under the Montreal Convention on the ground that the Convention, with its focus on national proceedings, did not cover State sponsored terrorism.³⁵ The Security Council required Libya to surrender the suspects and imposed sanctions when the request was not acceded to.³⁶ Examples of similar Council resolutions are those requiring Sudan to

³² For reasons given at section 14.2.3; for a study of the negotiations see Tal Becker, *Terrorism and the State* (Oxford, 2006) 84–118. For the text of the draft convention, see UN Doc. A/59/894 and for recent discussions upon it see the report at GAOR Sixtieth Session Supplement No. 37(A/60/37).

³³ At section 14.1.2.

³⁴ Art.11, Terrorist Bombing Convention, Art.14, Terrorist Financing Convention and Art. 15, Nuclear Terrorism Convention. See ch. 5.

³⁵ See Higgins in Higgins and Flory, *Terrorism and International Law*, 23.

³⁶ Security Council resolutions 731(1992) and 748(1992). For the end of the story, see section 9.5, and Michael Plachta, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aud Judicare' (2001) 12 *EJIL* 125.

hand over the persons accused of attempting to assassinate the President of Egypt,³⁷ and requiring the Taliban to transfer Osama bin Laden to countries which had indicted him.³⁸

The Security Council has also determined that international terrorism more generally is a threat to international peace and security. Resolution 1368(2001), adopted the day after 11 September, stated that the terrorist attacks in Washington and New York were, 'like any act of international terrorism ... a threat to international peace and security'. The Council went further in resolution 1373(2001), adopted under Chapter VII of the Charter, and imposed extensive obligations on States in relation to the suppression of terrorist acts generally and the financing of terrorism in particular. That resolution covers some of the same ground as the global terrorism conventions, notably the Terrorist Financing Convention. But in spite of the fact that it imposes binding obligations and establishes the Counter-Terrorism Committee to monitor their implementation, the resolution contains no definition of terrorism.

Resolution 1373(2001) has been criticized as Security Council 'legislation' in a field which is the preserve of intergovernmental agreement.³⁹ The obvious advantage of Council action of this kind is its ability to impose immediate obligations on States, with no need for lengthy negotiations in a wider forum and no need to wait for ratifications before the obligations take effect. But the point is justly made that the Council has gone beyond its previously recognized Charter powers and has trespassed on ground previously covered by the General Assembly and agreements negotiated there. Nevertheless, the resolution has been accepted in practice, albeit grudgingly, and is a significant part of the international counter-terrorism effort.

14.2.3 *The definition of terrorism*

As yet, no definition of terrorism has been agreed for the purpose of a global prohibition of terrorist acts in a legally binding instrument. None of the eleven global agreements defines terrorism except the Terrorist Financing Convention, and that is only for a secondary purpose.⁴⁰ Many of the agreements do not even mention the word terrorism, thus exemplifying the view that it is possible to deal with terrorism without creating specific 'terrorist' offences. There are however definitions of a kind. Each of the international counter-terrorism agreements concluded within the fora of

³⁷ Following their flight to Sudan; res. 1044(1966) and 1054(1966). ³⁸ SC res. 1267(1999) and 1333(2000).

³⁹ For discussion of the issue see Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *LJIL* 593; Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175.

⁴⁰ Art. 2 of the Convention refers to the offence of financing acts of terrorism, defined as those covered by the terrorism conventions and 'any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.'

regional organizations⁴¹ has a definition of terrorism for the purpose of the agreement, some merely listing the offences covered by the global Conventions with or without other serious offences⁴² and others creating their own generic definitions.⁴³ Security Council resolution 1566(2004) has a description of terrorism (said not to be a 'definition'⁴⁴); it covers only acts included in the global Conventions, but specifies that they are committed with 'the purpose to provoke a state of terror ... intimidate a population or compel a government or an international organization to do or to abstain from doing any act.'

The difficulties of reaching agreement on a definition for the purpose of a global prohibition of terrorist acts relate largely to two connected questions: are there causes which justify acts otherwise classed as terrorism, which should therefore be excluded; and should 'State terrorism' be included?

The difficulties of negotiating a definition raise the question whether the effort is worthwhile. It might make more sense for the focus in the UN to revert to the range of acts that all States regard as impermissible in all circumstances.⁴⁵ It is true that a definition of some kind is needed if there is to be a comprehensive international prohibition on terrorism with a requirement for multilateral cooperation including extradition provisions; a definition is also needed if terrorism is to be added to the jurisdiction of the International Criminal Court. Further, existing instruments imposing obligations in relation to counter-terrorism, for example resolution 1373(2001), need a definition to ensure uniform implementation and effective monitoring. Even if a solution is reached for the purpose of a comprehensive Convention, the drafting compromises that will very likely be needed for the Convention are unlikely to result in a definition suitable for all purposes.

Like the suppression Conventions for other transnational crimes, the eleven agreements do not make detailed provision for the material and mental elements of the crimes they cover, leaving these to the domestic law of the States Parties. The same is true of the regional agreements. Without an agreed definition it is possible to do no more than compare the elements of terrorism in some of the different instruments.⁴⁶

⁴¹ Arab Convention on the Suppression of Terrorism 1998 (the Arab Convention); Convention of the Organization of the Islamic Conference on Combating International Terrorism 1999; European Convention on the Suppression of Terrorism 1977; Organization of American States: Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance 1971; OAU Convention on the Prevention and Combating of Terrorism 1999; South Asian Association for Regional Co-operation: Regional Convention on Suppression of Terrorism 1987; Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism 1999 (the CIS Convention); European Convention on the Prevention of Terrorism 2005.

⁴² See, e.g. the European Convention on the Suppression of Terrorism 1977 and the European Convention on the Prevention of Terrorism 2005.

⁴³ See e.g. the Arab Convention on the Suppression of Terrorism 1998.

⁴⁴ See in particular remarks of representative of Brazil on the adoption of the resolution (UN Doc.S/PV 3053).

⁴⁵ G. Levitt, 'Is "Terrorism" worth defining?' (1986) 13 *Ohio Northern University Law Review* 97; John Murphy, 'Defining International Terrorism: a Way out of the Quagmire' (1989) 19 *Israel Yearbook on Human Rights* 13.

⁴⁶ For a more thorough discussion of the elements of the eleven global agreements, see Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 29 *Boston College International and Comparative Law Review* 23.

Material elements

The *actus reus* of the crime of terrorism is the underlying act. The eleven global terrorism agreements require or imply that the underlying act is an offence in itself,⁴⁷ and they are right to do so, in order to exclude, for example, acts causing death with a lawful excuse such as self-defence. The regional agreements mostly do the same, either by listing the offences covered by the global agreements, or within their own generic definitions. Some of the latter however are broad and ambiguous. The 1999 Convention of the OAU (now the African Union), for example, includes: ‘any act which is a violation of the criminal laws of a State Party and which ... may cause damage to public or private property, natural resources, environmental or cultural heritage ...’.⁴⁸ This appears to cover relatively minor criminal conduct. The underlying act of a terrorist offence should be a *serious* offence, if it is to capture what is generally regarded as terrorism. The draft comprehensive Convention lists the underlying acts of: causing death or serious personal injury, serious damage to property including public transport or the environment, or (lesser) damage to property or systems which results in major economic loss.⁴⁹

In spite of the unqualified condemnation of terrorism in the 1994 General Assembly declaration,⁵⁰ the Arab, OIC and AU Conventions, concluded subsequent to that declaration, include an exception for acts committed by peoples struggling against foreign occupation or for national liberation in accordance with the principles of international law.⁵¹ It is not clear whether the reference to international law in these instruments is only to *ius ad bellum* (as the wording in at least the first two mentioned agreements would indicate) or also to international humanitarian law (as is sometimes claimed).⁵² If the latter is a permissible interpretation of these agreements, and since terrorism is prohibited by international humanitarian law, it is puzzling that the States Parties to those agreements continue to seek to exclude acts committed in national liberation struggles from the draft Convention.

It ought to be acknowledged by all that the targeting of civilians, however just the cause of the conflict, is unacceptable. Attempts have therefore been made to solve the problem of definition by specifying only civilians as the targets of terrorism (as in

⁴⁷ See, e.g. Art. 2(1) of the Terrorist Bombing Convention 1997 which lists acts committed ‘unlawfully and intentionally’. In the definition of terrorism in the UK Terrorism Act 2000, however, the underlying acts are not specified as offences, see n. 22 above.

⁴⁸ Art. 1(3). The Arab Convention 1998 and the OIC Convention 1991 have similarly wide formulations; Art. 1(2) of the former and Art. 1(2) of the latter.

⁴⁹ See n. 33 above. For a critique of individual elements of the draft Convention’s elements, see Alexandra Orlova and James Moore, ‘“Umbrellas” or “Building Blocks”? Defining International Terrorism and Transnational Organized Crime in International Law’ (2005) 27 *Houston Journal of International Law* 267 at 271–6.

⁵⁰ See section 14.2.2.

⁵¹ Art. 3(1), OAU Convention; preamble and Art. 2(a), Arab Convention; Art. 2, OIC Convention.

⁵² See Mahmoud Hmoud, ‘The Organization of the Islamic Conference’ in G. Nesi (ed.), *International Cooperation in Counter-Terrorism* 166; see also Michael de Feo, ‘The Political Offence Concept in Regional and International Conventions relating to Terrorism’ in *ibid.*, 116–19. It is interesting to note that the South African legislation implementing the AU agreement adopts this interpretation, referring ‘especially’ to international humanitarian law: Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004.

Article 2(1)(b) of the Terrorist Financing Convention⁵³). As a complete solution this is defective. What after all is the definition of ‘civilian’ in peacetime? And it does not address the question of how to deal with insurgents of various kinds, as either combatants or common criminals⁵⁴ – but admittedly this is a very difficult issue.

Linked to the question of national liberation movements is that of ‘State terrorism’. The long-standing Western position in the UN has been that wrongful acts by States, whether properly termed State terrorism or not, are more appropriately regulated by the ordinary rules of State responsibility rather than under criminal law.⁵⁵ This is also the view of the Secretary-General in his recent report ‘In Larger Freedom’,⁵⁶ and is reflected in Article 19(2) of the Terrorist Bombing Convention, for example. The opposing point of view that, consistent with the 1994 General Assembly Declaration, terrorism is prohibited ‘by whomever committed’ is being put forward in the negotiations on the comprehensive Convention.⁵⁷

Mental elements

The aspect distinguishing terrorism from other crimes is the purpose with which the underlying acts are committed. Like genocide, terrorism in its most typical form is a compound offence and needs both the *mens rea* appropriate to the underlying offence, and a special intent for terrorism itself (which, breaking the normal practice of distinguishing between purpose and intention under criminal law, often uses the terms interchangeably). There are two kinds of victims of terrorism: both the targets of the underlying offence and the ‘real’ targets, those in whom terror has been induced.

Most of the eleven terrorism agreements mentioned above, in avoiding a definition of terrorism, also avoid specifying an intent or purpose for which the criminal acts are committed.⁵⁸ For them there is no special intent. This approach made possible the conclusion of these agreements but it does have the disadvantage that they therefore implicitly include acts committed for merely personal or commercial reasons, and thus miss the unique feature of terrorism. Other terrorism agreements differ in what the special intent is. Spreading terror⁵⁹ would seem the most obvious purpose, but it is

⁵³ The Supreme Court of Canada has stated that this definition ‘catches the essence of what the world understands by terrorism’ (*Suresh v. Canada* [2002] SCC 1 at para. 98). And see para. 164 of the Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change (UN Doc. A/59/565).

⁵⁴ See Jan Klabbers, ‘Rebel with a Cause? Terrorists and Humanitarian Law’ (2003) 14 *EJIL* 299.

⁵⁵ For example, see the statement of the UK representative in the Security Council of 18 January 2002: ‘None of these seminal texts [the global terrorism agreements] refer to State terrorism, which is not an international legal concept. We must be careful not to get caught up in the rhetoric of political conflict. If States abuse their power, they should be judged against the international conventions and other instruments dealing with ... humanitarian law.’ (UN Doc.S/PV.4453 (2002) paras. 24–5).

⁵⁶ ‘It is time to set aside debates on so-called “State terrorism”’. The use of force by States is already thoroughly regulated under international law.’ (UN Doc.A/59/2005 para. 91).

⁵⁷ And it was also the view of Oscar Schachter, ‘The Lawful Use of Force by a State against Terrorists in another Country’ (1989) 19 *Israel Yearbook on Human Rights* 209 at 210.

⁵⁸ The exception is the Hostages Convention, Art. 1 (since the imposition of conditions of release is an intrinsic part of the offence of hostage-taking); and see Art. 2, Terrorist Financing Convention; see also the rather odd references to terrorist acts committed for certain purposes in Art. 5, Terrorist Bombing Convention and Art. 6, Nuclear Terrorism Convention.

⁵⁹ The definition in the CIS Convention includes terrorizing the population as one of the purposes for which terrorist acts are committed. See also Art. 51(2), AP 1.

wide and may be difficult to prove. The draft comprehensive Convention uses the same formulation as the Terrorist Financing Convention, specifying a purpose or intention of intimidating a population or persuading a government to act.⁶⁰ Some instruments go wider. The EU Framework Decision⁶¹ includes the 'aim' of 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation' (which would mean that a protest against the WTO, for example, would constitute terrorism if it caused damage); the OAU Convention includes the intention to 'create general insurrection in a State'.⁶²

Intent must be distinguished from motive. While some national definitions include a motive with which the terrorist act is committed,⁶³ most international formulations, including the draft comprehensive Convention, do not. Motive cannot be a justification of terrorist action, and if the purpose or intention is specified, it is perhaps unnecessary to limit the offence still further by requiring the action to have a political, religious or other motive.

14.2.4 National counter-terrorism measures and human rights

One of the major difficulties of dealing with terrorist offences in the modern age, and perhaps it has always been thus, is in striking a balance between the protection of the community from acts of terrorism on the one hand and, on the other, the maintenance of the rights of all citizens, including suspected terrorists.⁶⁴ Some rights cannot be balanced against any other interest; chief among these is protection from torture. As is indicated below,⁶⁵ there is an absolute prohibition on torture by a State's officials, and on the transfer of an individual to a country where there are substantial grounds for believing that he would be in danger of being tortured. Other rights which are particularly vulnerable to encroachment by counter-terrorism measures include the right not to be arbitrarily detained and the right to a fair trial. Both the UN General Assembly and the Security Council have stressed that in taking counter-terrorism measures States should comply with international human rights law.⁶⁶ Some of the global terrorism Conventions require expressly that the terrorist suspect be treated fairly in proceedings against him, and provide that there is no obligation to extradite where a State has substantial grounds for believing that the extradition request has been made for the purpose of punishing on the basis of race, religion, or political

⁶⁰ See n. 40 above. ⁶¹ OJ 2002 No. L164/3.

⁶² OAU Convention on the Preventing and Combating of Terrorism 1999.

⁶³ See, e.g. the UK definition at n. 22 above, and the South African at n. 52.

⁶⁴ See H. Duffy, *The War on Terror and the Framework of International Law* (Cambridge, 2005) ch. 7; Kalliopi Koufa, 'The UN, Human Rights and Counter-terrorism' in Nesi (ed.), *International Cooperation*. For a discussion of the impact which post-September 11 counter-terrorist legislation has had on human rights in a few common law jurisdictions, see Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43.

⁶⁵ Section 14.3.1.

⁶⁶ See, e.g. GA resolution 51/210 of 17.12.1996, para.3; Security Council res.1456(2003), para.6 of the Annex.

opinion.⁶⁷ But for the most part the agreements leave to national systems the responsibility of protecting the rights of the accused.

Human rights considerations are also important in drafting national definitions of terrorism, whether or not in implementation of the terrorist agreements. Terrorist offences are likely to carry higher penalties than other offences, national systems may have more invasive means of investigation for terrorist offences, the political offence exception in extradition agreements may be disappplied and applications for asylum may be refused. If the criminal acts included in a definition of terrorism are not of a very serious nature, and if there is a specification of wide purposes for which those acts are committed ('intimidating persons') there is a danger that the serious consequences of being a terrorist suspect in national law will be attracted by conduct which is merely criminal, and political opponents or even petty criminals may be treated as terrorists. Minor damage to property committed in the course of a political demonstration, for example, ought not to attract the stigma and legal consequences of being classed as terrorism.⁶⁸ Further, wide and ambiguous definitions of terrorism offend the principle of fair labelling, and leave undue discretion to State authorities, risking abuse by them. Human rights considerations have motivated the 'UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counter-terroring terrorism' to suggest that a definition of terrorism be limited to acts causing death or serious bodily injury, or the taking of hostages, if these acts are within the scope of the global agreements, and are committed with the intention to provoke a state of terror, intimidate a population, or compel a government or international organization to action or inaction.⁶⁹ Such a limited definition as this may be unlikely to attract international support but it attempts to remove the problems caused by international or national definitions that are too wide in scope.

14.2.5 *Terrorism as an international crime*

While there is no international court or tribunal which has jurisdiction over a crime of terrorism as such, a terrorist act may be an international crime if it falls within one of the established categories of crimes against humanity or war crimes.⁷⁰ The organized use of terror was considered as both a war crime and a crime against humanity by the Nuremberg Tribunal.⁷¹

The offences covered by the terrorism Conventions were included in the list of treaty crimes in the ILC draft for the new international criminal court and there was some

⁶⁷ See, e. g. Arts. 12 and 16, Nuclear Terrorism Convention 2005.

⁶⁸ The South African legislation usefully excepts from the definition of terrorism certain kinds of acts committed in pursuance of protests or industrial action if they are not intended to cause particular kinds of harm: Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 s. 1(3).

⁶⁹ Report of 28 December 2005 (E/CN.4/2006/98).

⁷⁰ In the view of some, terrorism is already an international crime, under international customary law, in spite of the absence of a definition; see Antonio Cassese, *International Criminal Law* (Oxford, 2003) 120.

⁷¹ 'Nuremberg IMT: Judgment and Sentence' reprinted in (1947) 41 *AJIL* 172 at e.g. 229, 231, 289, 319.

support during the negotiations for including terrorism within the jurisdiction of the ICC. But this was not done, on the grounds that the existing network of treaties providing for national prosecutions was regarded as adequate and that it would not in any event have been possible to negotiate an agreed definition when the General Assembly had failed to do so. Resolution F of the ICC Final Act recommended that a review conference consider crimes of terrorism 'with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the court'.⁷²

Terrorism as a war crime

Acts of terrorism are prohibited by international humanitarian law and may constitute war crimes.⁷³ In the first case involving terrorism before an international court, the ICTY convicted General Galić on the war crimes charge of 'acts of violence the primary purpose of which is to spread terror among the civilian population', based upon command responsibility for a protracted campaign of shelling and sniping in civilian areas of Sarajevo.⁷⁴ While it is to be expected that acts of war will result in general fear in the country concerned, the Trial Chamber required the prosecution 'to prove not only that the accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.'

As regards the *actus reus*, the Trial Chamber, for reasons relating to the perceived need to consider only 'serious' violations of treaty law as war crimes, specifically left to one side the question whether it had jurisdiction over acts of violence not causing death or injury,⁷⁵ thus apparently coming up with a hybrid crime drawing on both parts of Article 51(2) of AP 1.⁷⁶ Even if there is a requirement that violations of humanitarian law be 'serious'⁷⁷ there would not appear to be a reason to avoid treating breach of the prohibition in the second sentence of Article 51(2) as a war crime. Terrorism is not mentioned specifically in Article 8 of the ICC Statute, and this point will therefore not arise in ICC jurisprudence; attacks on civilians committed with the specific intent to terrorize will be a factor in sentencing only.

⁷² The first review conference will be held at least seven years after the entry into force of the ICC Statute.

⁷³ Art. 51(2) of AP 1; Art. 33(1) of GC IV; Arts. 4(2)(d) and 13(2) of AP 2.

⁷⁴ *Galić* ICTY T. Ch. 5.12.2003; Judge Nieto-Navia dissented on the question whether it is possible to rely on treaties directly for war crimes or whether they must first be established in customary law.

⁷⁵ Cassese however suggests that the second sentence of Art. 51(2) of AP 1 is indeed customary law; Antonio Cassese, 'Terrorism as an International Crime', in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Oxford, 2004) 213, 221–2.

⁷⁶ Robert Cryer, 'Prosecutor v. Galić and the War Crime of Terror Bombing' (2005–2006) 2 *Israel Defence Force Law Review* 73.

⁷⁷ But see to the contrary Cryer, *ibid.*

Terrorism as a crime against humanity

Terrorist acts are not listed as crimes against humanity in the Statutes of the ad hoc Tribunals and the ICC, but it is clear that if the underlying acts fall within the list of crimes and if their commission is widespread or systematic (and, in the case of the ICC, are ‘against any civilian population’), they will fall within the definition of crimes against humanity; the fact that criminal acts were committed with a particular political or other ideological purpose does not of course exclude them from the definition. In the ICTY case of *Galić*, the accused was charged with and convicted of crimes against humanity of murder and inhumane acts on the basis of the same facts as the war crime of terror.⁷⁸

After 11 September, statements were made by public figures condemning the terrorist acts in New York and Washington as crimes against humanity.⁷⁹ There were obvious difficulties with any suggestion that the crimes should therefore be tried by the ICC: the State primarily concerned was opposed to such an idea and the principle of complementarity would have stood in the way even if there was otherwise jurisdiction. But the acts may well have been within the subject matter jurisdiction of the ICC.⁸⁰

14.3 Torture

14.3.1 Introduction

‘There can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the “common enemies of mankind”.’⁸¹

There is a clear and absolute prohibition of torture in international law.⁸² The prohibition applies even in times of national emergencies or wars, and there are no exceptions or justifications.⁸³ The prohibition amounts to *ius cogens* and States incur international responsibility if their officials commit torture.⁸⁴ States have not taken

⁷⁸ *Galić* ICTY T. Ch. 5.12.2003. See also *Krštić* ICTY T. Ch. I 2.8.2001 paras. 607, 653.

⁷⁹ Antonio Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 *EJIL* 993 at 994; see also Antonio Frédéric Mégret, ‘Justice in Times of Violence’ (2003) 14 *EJIL* 327 at 332–4.

⁸⁰ See Roberta Arnold, ‘Terrorism as a Crime against Humanity under the ICC Statute’ in Giuseppe Nesi (ed.), *International Cooperation in Counter-Terrorism* (Aldershot, 2006) 121; see to the contrary William Schabas, ‘Is Terrorism a Crime against Humanity?’ (2002) 8 *International Peacekeeping: The Yearbook of International Peace Operations* 255.

⁸¹ Lord Bingham in the House of Lords case of *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

⁸² For a list of international instruments prohibiting torture, see section 11.3.7.

⁸³ Art. 2(2), 1984 UN Convention Against Torture: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or other public emergency, may be invoked as a justification for torture.’ The classic argument that torture is sometimes justifiable may be found in Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT, 2002). For discussion of whether there are legal exceptions in relation to the crime of torture, see Paola Gaeta, ‘May necessity be available as a defence against torture in the interrogation of suspected terrorists?’ (2004) 2 *JICJ* 762.

⁸⁴ *Furundžija* ICTY T. Ch. II 10.12.1998 para.153.

the step of classifying torture as an international crime *stricto sensu*⁸⁵ – it is not punishable as such by any international court or tribunal – but have concluded a suppression Convention, even though there may be no inter-State element to the commission of the crime.⁸⁶

14.3.2 UN Convention against Torture

The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was concluded to ‘make more effective’ the already existing prohibition under international law.⁸⁷ It follows the same pattern as the model discussed above.⁸⁸ It requires States Parties to criminalize the offence of torture in their domestic law, including attempts and complicity as well as participation (Article 4).⁸⁹ The Committee against Torture, established by the Convention, has confirmed that States must define torture as a separate offence in their criminal law, but the definition does not have to reproduce the Convention definition verbatim; it may be wider. The Convention incorporates the *aut dedere aut judicare* principle (Article 7). Some commentators suggest that the Convention requires States to take universal jurisdiction to allow them to prosecute an act of torture, regardless of whether the State where the act was committed, or the State of nationality of the victim or suspect, is a State party or not,⁹⁰ but this approach would conflict with the ordinary principles of treaty interpretation. There is however generally recognized to be a basis under customary international law for universal jurisdiction in respect of acts of torture.⁹¹

The Convention includes other provisions specific to torture; for example, States may not use in proceedings information obtained by torture (Article 15),⁹² may not deport, extradite or otherwise transfer a person to a country where there are substantial grounds for believing that he would be in danger of being tortured (Article 3) and must afford effective remedies and adequate reparation to the victims (Article 14).

Material elements

As defined in the Convention, and for the purpose of the Convention, the crime has two objective elements. First, it comprises any act by which severe pain or suffering, physical or mental, is inflicted on a person; and second, it is committed ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. The second element is not present in some other

⁸⁵ In some classifications torture is an international crime; the House of Lords in *Pinochet No. 3* regarded it as such (*R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97 at 198, 249, 260, 288) though their lordships’ remarks are not always easy to follow.

⁸⁶ Boister, ‘Transnational Criminal Law?’, 967. ⁸⁷ Preamble to the Convention. ⁸⁸ See section 14.1.2.

⁸⁹ See N. Rodley and M. Pollard, ‘Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and other cruel, Inhuman and Degrading Treatment or Punishment’ (2006) 2 *European Human Rights Law Review* 115 at n. 17.

⁹⁰ *Ibid.*, 131. ⁹¹ See section 3.5.1.

⁹² For the application of this in UK law, see Lord Bingham in the House of Lords case of *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

formulations. For example the Inter-American Convention to Prevent and Punish Torture 1985 provides a wider definition, in allowing any purpose to suffice, and in not specifying the level of pain and suffering, indeed not requiring pain or suffering at all if the act is intended ‘to obliterate the personality of the victim or to diminish his physical or mental capacities’.⁹³ Early commentators have stated that Article 1(1) ‘gives a *description* of torture for the purpose of understanding and implementing the *Convention* rather than a legal definition for direct application in criminal law and criminal procedure’.⁹⁴ The ICTY has pronounced the definition as reflecting customary international law, but only for the purpose of State obligations, not as regards the meaning of the crime more generally.⁹⁵

The Convention definition refers to acts but not to omissions. Does that exclude from the definition omissions such as failure to provide a prisoner with food or water? Such an interpretation would be contrary to common sense, if all the other elements of intention, purpose and connection with a public official are present.⁹⁶

The assessment of whether particular ill-treatment is of a degree to amount to the crime of torture can be a difficult one since the severity threshold qualifies the pain and suffering of the victim, not the treatment itself. Legal memoranda written for the US Administration in 2002 and 2003, which provided an excessively restrictive interpretation of the obligations of the US under the Convention, and the treatment of detainees during the so-called ‘War on Terror’ have occasioned a great deal of debate about what kind of treatment constitutes torture.⁹⁷ The memorandum of August 2002⁹⁸ from the Office of the Legal Counsel in the US Department of Justice, which was later withdrawn, described torture as ‘encompassing only extreme acts’; more specifically, ‘it must be equivalent in intensity to that which accompanies serious physical injury, such as organ failure, impairment of bodily function, or even death’. There is particular difficulty in assessing when ill-treatment is to be distinguished from ‘cruel, inhuman or degrading treatment or punishment’, as that term is used in Article 16 and, of course, in human rights provisions such as Article 3 of the European Convention on Human Rights. Practice under the UN human rights Conventions and regional agreements such as the European Convention on Human Rights may be used in the context of

⁹³ Arts. 1(2), 2 and 3.

⁹⁴ J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden, 1988) 122.

⁹⁵ *Kunarac et al.* ICTY A. Ch. 12.6.2002 paras. 146, 147 (and the other cases there cited); and *Kvočka et al.* ICTY A. Ch. 28.2.2005 para. 284.

⁹⁶ Burgers and Danelius, *The United Nations Convention*, 118, and *Delalić et al.* ICTY T. Ch. II 16.11.1998 para. 468.

⁹⁷ The memoranda are set out in Karen Greenberg and Joshua Dretel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge, 2005). See Mary Ellen O’Connell, ‘Affirming the Ban on Harsh Interrogation’ (2005) 66 *Ohio State Law Journal* 1231; Marcy Strauss, ‘The Lessons of Abu Ghraib’ *ibid.*, 1269; Seth Kreimer, ‘“Torture Lite,” “Full bodied” Torture, and the Insulation of Legal Conscience’ (2005) 1 *Journal of National Security Law and Policy* 187; and see *Situation of Detainees at Guantanamo Bay: Report of the Chairperson–Rapporteur of the Working Group on Arbitrary Detention*; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 15 February 2006, E/CN.4/2006/120.

⁹⁸ Memorandum from the Office of the Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 USC 2340–2340A (1 August 2002).

criminal law;⁹⁹ the case law of the ad hoc Tribunals in relation to war crimes and crimes against humanity is also relevant.

It is not useful to attempt a catalogue of conduct amounting to torture,¹⁰⁰ but the following points are indicative of some current trends. The five interrogation techniques in use by the British security forces in the 1970s, namely 'wall standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink', were held by the European Court of Human Rights in 1978 to be inhuman treatment, not torture,¹⁰¹ but there are indications by the ECtHR that this kind of treatment may now be regarded as torture.¹⁰² Sexual violence 'necessarily gives rise to severe pain or suffering, whether physical or mental';¹⁰³ 'rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture';¹⁰⁴ solitary confinement may be torture 'to the extent that the confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering'.¹⁰⁵

Pain or suffering arising only from lawful punishment, or incidental to it, is excluded from the definition of torture.¹⁰⁶ In recognition of the wide loophole this leaves in the Convention, there was an attempt in the negotiations to specify that the punishment must be limited 'to the extent consistent with' the UN Standard Minimum Rules for the Treatment of Prisoners. This was rejected on the grounds that the Rules are not legally binding, and apply only to prisoners.¹⁰⁷ Article 1(2) makes clear that by excluding from its definition of torture various means of punishment, the Convention does not legitimize any act which would be contrary to some other provision of international law.

The Convention definition of torture is limited to acts committed by 'a public official or other person acting in an official capacity'.¹⁰⁸ That limitation is not included in the definition of torture as a crime against humanity, nor, as now confirmed by the ICTY, in the requirements for war crimes.¹⁰⁹

Mental elements

The pain or suffering must be 'intentionally' inflicted. A further necessary element of the crime as defined in the Convention is that it is committed against a person 'for such purposes as obtaining from him or a third person information or a confession,

⁹⁹ *Furundžija* ICTY A. Ch. II 10.12.1998 para. 159, though see the warning in *Kunarac* ICTY T. Ch. 22.2.2001 para. 471 not to transpose too easily concepts developed in a different legal context.

¹⁰⁰ N. Rodley, *The Treatment of Prisoners under International Law* (2nd edn, Oxford, 1999) reviews the authorities at ch. 3, 'What constitutes torture and other ill-treatment?'; and see *Delalić et al.* ICTY T. Ch. II 16.11.98 paras. 461–9.

¹⁰¹ *Ireland v. United Kingdom*, Series A No. 25, 5310/71 [1978] ECHR 1.

¹⁰² *Selmouni v. France* [1999] ECHR 66; and see Nigel Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 *Current Legal Problems* 467 at 476–7.

¹⁰³ *Kunarac et al.* ICTY A. Ch. 12.6.2002 para. 150. ¹⁰⁴ *Delalić et al.* ICTY T. Ch. II 16.11.1998 para. 489.

¹⁰⁵ *Krnjelac* ICTY T. Ch. II 15.3.2002 para. 183. ¹⁰⁶ Art. 1 of the UN Convention against Torture.

¹⁰⁷ Burgers and Danelius, *The United Nations Convention*, 46–7 and 121–2.

¹⁰⁸ For discussion of the meaning of this term, see Sandesh Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals' (2005) 18 *LJIL* 541.

¹⁰⁹ See sections 11.3.7 and 12.3.2.

punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or a third person, or for any reason based on discrimination of any kind' (Article 1(1)). The list is narrow. While it is not exhaustive, the wording demands that other purposes must be of the same kind as those in the list. If the act is committed for essentially private purposes, out of sheer sadism, it would appear not to be covered, although it might be expected that a court interpreting the words would strive to bring any such act within the ambit of the definition.¹¹⁰ States implementing the Convention in domestic law are not obliged to confine the offence to acts committed only with the listed purposes; the United Kingdom for example has not included any requirement of purpose.¹¹¹

14.3.3 Torture as an international crime

Like terrorism, torture is within the jurisdiction of the ad hoc Tribunals and the ICC if committed under certain conditions. It is included expressly within the categories of crimes against humanity and war crimes in all of the relevant Statutes and as such it is discussed in sections 11.3.7 and 12.3.2 above.

Further reading

Transnational crimes

M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn, New York, 1999), vol. I.

M. Cherif Bassiouni, 'Enslavement' in *ibid.*, 663.

M. Cherif Bassiouni and Jean Francois Thony, 'The International Drug Control System' in *ibid.*, 905.

Roger Clark, 'Offences of International Concern: Multilateral Treaty Practice in the Forty Years since Nuremberg' (1988) 57 *NJIL* 49.

Alexandra Orlova and James Moore, '“Umbrellas” or “Building Blocks”? Defining International Terrorism and Transnational Organized Crime in International Law' (2005) 27 *Houston Journal of International Law* 267.

Terrorism

Helen Duffy, *The War on Terror and the Framework of International Law* (Cambridge, 2005).

John Dugard, 'International Terrorism and the Just War' (1977) 12 *Stanford Journal of International Studies* 21.

Conor Gearty (ed.), *Terrorism* (Dartmouth, 1996).

¹¹⁰ Burgers and Danelius maintain that the common element in the list is the existence of a State interest or policy, but that even where the purpose is sadistic there is usually an aspect of punishment or intimidation to bring it within the list; Burgers and Danelius, *The United Nations Convention*, 119.

¹¹¹ See the Criminal Justice Act 1988, s. 134.

- Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law* (London, 1997).
- Christopher Joyner, 'Suppression of Terrorism on the High Seas: the 1988 IMO Convention on the Safety of Maritime Navigation' (1989) 19 *Israel Journal on Human Rights* 343.
- Giuseppe Nesi (ed.), *International Cooperation in Counter-Terrorism* (Aldershot, 2006).
- Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism' (2003) 97 *AJIL* 333.
- Robert Rosenstock, 'International Convention against the Taking of Hostages: Another International Community Step against Terrorism' (1980) 9 *Denver Journal of International Law and Policy* 169.
- Nicolas Rostov, 'Before and After: The Changed UN Response to Terrorism Since September 11th' (2002) 35 *Cornell International Law Journal* 475.
- Ben Saul, *Defining Terrorism in International Law* (Oxford, 2006).
- Sami Shubber, 'The International Convention Against the Taking of Hostages' (1981) 52 *BYIL* 205.
- Surya P. Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law' (2002) 4 *International Law FORUM du droit international* 159.
- Samuel M. Witten, 'The International Convention for the Suppression of Terrorist Bombings' (1998) 92 *AJIL* 774.
- Michael Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents' (1974) 23 *ICLQ* 791.

Torture

- Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (The Hague, 1999).
- J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden, 1988).
- Nigel Rodley, *The Treatment of Prisoners under International Law* (2nd edn, Oxford, 1999).
- Nigel Rodley and Matt Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' (2006) 2 *European Human Rights Law Review* 115.
- Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (Geneva, 2002).

PART E

Principles and Procedures of International Prosecutions

15

General Principles of Liability

15.1 Introduction

The substantive definitions of crimes (on which, see Chapters 10–13) provide only a part of the picture of criminal liability. The general principles of liability apply across the various different offences and provide for the doctrines by which a person may commit, participate, or otherwise be found responsible for those crimes. They include forms of liability such as aiding and abetting, which are familiar to all domestic criminal lawyers, as well as principles like command responsibility, which are specific to international criminal law. It is important to note at the outset that the various forms of liability not only have different conduct elements, but also different mental elements, and the extent to which principles of accomplice liability have been used in some cases to avoid high *mens rea* requirements for primary commission of international crimes has been controversial. Unlike in domestic law, where the traditional image of a criminal is the primary perpetrator, such as the person who pulls the trigger, in international criminal law, the paradigmatic offender is the person who orders, master-minds, or takes part in a plan at a high level.¹ As a result, principles of secondary liability play a comparatively large role in international criminal law.²

This chapter will discuss the principles of liability from two points of view, the ambit of liability recognized in customary and conventional international law,³ alongside the appropriateness of those principles from the point of view of foundational principles of criminal law, such as the requirements of personal responsibility and fair labelling.⁴

¹ Such persons are often referred to as ‘those bearing greatest responsibility’ for international crimes, (see, e.g. Statute of the Special Court for Sierra Leone, Art. 1) or ‘the most senior leaders suspected of being most responsible for’ international crimes (Security Council resolution 1534 (2004)).

² See William Schabas, ‘Enforcing Individual Criminal Responsibility in International Criminal Law: Prosecuting the Accomplices’ (2001) 843 *International Review of the Red Cross* 439. Equally, as we will see, some forms of liability in international criminal law allow people who would traditionally be seen as accomplices to be viewed as principal perpetrators.

³ As was mentioned in section 8.4, the ICC Statute ought not be taken straightforwardly as determinative of customary international criminal law.

⁴ See further on this point, Robert Cryer, ‘General Principles of Liability in International Criminal Law’ in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The International Criminal Court: Legal and Policy Issues* (Oxford, 2004) 233.

It must be noted at the outset though, that the principles of liability are not watertight compartments, and there are overlaps between them. Where they overlap, the ICTY has suggested that ‘the Trial Chamber has a discretion to choose which is the most appropriate head of responsibility under which to attach criminal responsibility to the accused’.⁵ When exercising such discretion, Trial Chambers have ‘entered a conviction under the head of responsibility which better characterises the criminal conduct of the accused’.⁶ It also ought to be noted at the outset that the Genocide Convention adopts slightly different principles on aspects of liability for genocide.

15.2 Perpetration/commission

The concept of commission (which is synonymous with ‘perpetration’)⁷ is, unsurprisingly, well established in international criminal law. For example, in the *Jaluit Atoll* case in 1945, three Japanese soldiers were convicted of personally shooting prisoners of war.⁸ Article 7(1) of the ICTY Statute (to which Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute conform in all material respects) makes this clear, imposing liability, inter alia, on any ‘person ... [who] ... committed’ an international crime. This description is, however, deceptively simple, as it begs the question of precisely who can be considered to have ‘committed’ a crime. As the ICTY has said, this primarily refers to ‘the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law’.⁹

Article 25(3)(a) of the ICC Statute defines perpetration in a more detailed fashion, criminalizing a person who ‘Commits such a crime whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.’ This formulation raises some of the important issues relating to the concept of perpetration. The first issue is whether or not perpetration can occur by omission. In customary law this is certainly the case, so long as the charge relates to a failure to live up to a duty to act.¹⁰ Although, owing to the fact that an article criminalizing omissions was dropped at Rome,¹¹ some doubt that perpetration by omission is recognized in the ICC Statute,¹² the better view is that liability for

⁵ *Krnjelac* ICTY T. Ch. II 15.3.2002 para. 173.

⁶ *Stakić* ICTY T. Ch. II 31.7.2003 para. 463. See also ch. 18 concerning indictments.

⁷ The two will be used interchangeably here. The ICTY considers liability pursuant to joint criminal enterprise to be a form of commission, but this is controversial.

⁸ *US v. Masuda and others* (The Jaluit Atoll Case) I LRTWC 71.

⁹ *Tadić* ICTY A. Ch. 15.7.1999 (hereinafter *Tadić* 1999 Appeal) para. 188. See similarly, *Kvočka et al.* ICTY T. I Ch. 2.11.2001 para. 251. The ICTR in *Gacumbitsi* ICTR A. Ch. 7.7.2006, para. 60 asserted though, that ‘In the context of Genocide, however, direct and physical perpetration need not mean physical killing; other acts can constitute direct perpetration in the *actus reus* of the crime.’ See also the Separate Opinion of Judge Schomburg, paras. 2–4.

¹⁰ For a list of positive obligations in humanitarian law, see Yves Sandoz, Christoph Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 8 August 1949* (Geneva, 1987) 1009. One example of a conviction for an omission is *Delalić et al.* ICTY T. Ch. II 16.11.1998 paras. 1092–6, 1101–5.

¹¹ Per Saland, ‘International Criminal Law Principles’ in Lee, *Making of the Rome Statute*, 212.

¹² See, e.g. Kai Ambos, ‘Article 25’ in Triffterer, *Observers’ Notes* 475, 492; Kerstin Weltz, *Die Unterlassungshaftung im Völkerstrafrecht* (Freiburg im Breisgau, 2004) 320ff.

omissions was not categorically excluded by the drafters. The ICC Elements of Crimes deliberately avoid the term ‘acts’ in favour of ‘conduct’, on the grounds that the latter term includes acts or omissions.¹³

The next is the concept of what is described as perpetration ‘jointly with another’ in Article 25(3)(a). In the narrow sense, the provision raises no difficulty, in that when two or more people both work together in a final act to bring a result about, it is often artificial to separate off the respective contributions as being primary and secondary. If two people beat someone to death, there is no real sense in distinguishing the person who dealt the particular blow that caused death. The controversy about this, however, is about precisely when someone can be considered to have committed a crime ‘jointly’ with another, rather than having, for example, aided or abetted it.

Article 25(3)(a) also, correctly, recognizes the concept of ‘innocent agency’ by which a person commits a crime through an unwitting person, who cannot be considered to have any culpable part in the crime, for example because they were incapable of understanding the nature of their acts, or because they were an inadvertent participant. Someone who persuades children under the age of criminal responsibility to commit crimes, or one who does something similar with respect to those who are mentally incompetent would be considered the primary perpetrator. In that situation, there is no question of those legally incompetent people having exercised any form of choice, the concept which underlies criminal responsibility at the most basic level.¹⁴

Article 25(3)(a) enters more controversial waters, however, by recognizing the possibility of perpetration through a guilty agent separate from joint perpetration. This appears to be close to the concept in German law of the ‘*Hintermann*’ (roughly, ‘background man’) perpetrator, where the mastermind of an operation is taken to be a direct perpetrator rather than an accomplice.¹⁵ This expansion of the concept of perpetration is necessary in legal systems where accomplices may only be given a lower sentence than is available for principal perpetrators. As this is not the case in international criminal law it is questionable whether it was necessary to include this form of liability,¹⁶ especially as it might be thought to downgrade the gravity of the acts committed by those closest to the crime.¹⁷ Nonetheless, the principle has its defenders,¹⁸ and it does reflect some of the organizational dynamics that characterize the mass commission of international crimes.

¹³ See, e.g. Maria Kelt and Hermann von Hebel, ‘The Making of the Elements of Crimes’ in Lee, *Elements and Rules*, 14.

¹⁴ See, e.g. A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd edn, Oxford, 2003) 108–9.

¹⁵ See, e.g. Claus Krefß, ‘Claus Roxin’s Lehre von der Organisationsherrschaft und das Völkerstrafrecht’ (2006) *Goldammer’s Archiv für Strafrecht* 304. This approach was also used in the (national law) trial of the Argentine *Junta* (1987) 26 *ILM* 317. For support in the ICTR see *Gacumbitsi* ICTR A. Ch. 7.7.2006 (hereinafter *Gacumbitsi* Appeal), separate Opinion of Judge Schomburg, paras. 14–23, but see Separate Opinion of Judge Shahabuddeen, paras. 42–52 and Partially Dissenting Opinion of Judge Güney, paras. 2–9.

¹⁶ See *Krnjelac* ICTY T. Ch. II 15.3.2002 paras. 74–5.

¹⁷ Some of the problems this caused for the prosecution in the Frankfurt Auschwitz trial are discussed in Devin Pendas, *The Frankfurt Auschwitz Trial 1963–1965: Genocide, History and the Limits of Law* (Cambridge, 2006).

¹⁸ Albin Eser, ‘Individual Criminal Responsibility’ in Cassese, *Commentary* 793–5; Mark Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’ (2005) 105 *Columbia Law Review* 1751, 1831–7. See also *Gacumbitsi* Appeal, Separate Opinion of Judge Schomburg, paras. 16–21.

There has been an attempt by at least one Trial Chamber in the ICTY to introduce a form of ‘co-perpetratorship’,¹⁹ one which took a broad approach to what amounts to commission into the law of the ad hoc Tribunals. In the *Stakić* case the Trial Chamber found that there was a form of liability that consisted of:

An explicit agreement or silent consent to reach a common goal by coordinated cooperation and joint control over the criminal conduct . . . These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts.²⁰

Its support for this came from doctrine and national analogies, rather than direct sources of international law. The Appeals Chamber in that case determined that there was no such concept of co-perpetratorship, stating that ‘[t]his mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal’.²¹ The Appeals Chamber preferred to see such a form of co-perpetratorship as being a form of joint criminal enterprise liability.²² The Trial Chamber itself admitted that it was ‘aware that the end result of its definition of co-perpetration approaches that of the aforementioned joint criminal enterprise and even overlaps in part’.²³ The ICC Prosecutor has, nonetheless, sought to use ‘indirect co-perpetration’ in the first case that has come to trial.²⁴

15.3 Joint criminal enterprise²⁵

The Nuremberg and Tokyo IMTs both provided that those who participated in a ‘common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such a plan’.²⁶ The form of liability contained in these provisions, which both tribunals determined only applied to crimes against peace,²⁷ is often called conspiracy.²⁸ The use of ‘conspiracy’ in this regard is misleading as it is apt to cause confusion between this type of liability and the separate (common law) offence of conspiracy, which is an agreement to commit an offence, and

¹⁹ Care must be taken when reading judgments on this point, as sometimes such a term is used to mean joint perpetration or the liability of a person participating in a joint criminal enterprise. See, for the former, e.g. *Furundžija* ICTY T. Ch. II 10.12.1998 para. 252; for the latter, see e.g. *Vasiljević* ICTY A. Ch. 25.2.2004 (hereinafter *Vasiljević* Appeal), para. 102, *Kvočka et al.* ICTY A. Ch. 28.2.2005 (hereinafter *Kvočka* Appeal) para. 90.

²⁰ *Stakić* ICTY T. Ch. II 31.7.2003 para. 440.

²¹ *Stakić* ICTY A. Ch. 22.3.2006 (hereinafter *Stakić* Appeal) para. 62. See also *Multinović et al.* ICTY T. Ch. III 22.3.2006.

²² *Stakić* Appeal paras. 62–3. ²³ *Stakić* ICTY T. Ch. II 31.7.2003 para. 441.

²⁴ *Lubanga Dyilo* ICC PT. Ch. I 24.2.2006: Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, Nr. 96.

²⁵ For a useful overview, see Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, 2003) 94–110.

²⁶ Nuremberg IMT Statute, Art. 6, Tokyo IMT Statute, Art. 5(c).

²⁷ ‘Nuremberg IMT: Judgment and Sentence’ (1947) 41 *AJIL* 172, 221–2; Tokyo IMT Judgment, 48, 449, Judges Bernard and Jaranilla dissented on this; Dissenting Opinion of the Member from France, at 5–7; Concurring Opinion of the Member from the Philippines, 1–7.

²⁸ Including by the Tribunals themselves.

does not require that any further action is taken in pursuance of that agreement.²⁹ In international criminal law this inchoate crime only exists in relation to genocide.³⁰ The Nuremberg and Tokyo IMTs, whilst both using the term conspiracy, were dealing with the situation where the plans were put into effect. Whilst the Nuremberg IMT interpreted the principle quite narrowly,³¹ the Tokyo IMT took a very broad approach to it, and was criticized for doing so.³²

Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute do not contain any express provision on this form of liability. Nonetheless the ICTY has developed a detailed jurisprudence on what it terms ‘joint criminal enterprise’ (or common purpose) liability. The leading judgment on the point was the *Tadić* 1999 Appeal. *Tadić* had been acquitted at trial level of involvement in the killing of five civilians in the village of Jaskici in June 1992 by the armed group he was a member of, as there was no evidence he was involved directly in the killing himself.

The Appeals Chamber overturned this acquittal, and set out its understanding of liability by virtue of participation in a joint criminal enterprise. The Chamber began by looking at Article 7(1) of the ICTY Statute. It decided, on the basis of a teleological interpretation, that as the intention was to cover all those responsible for international crimes in former Yugoslavia, Article 7(1) ‘does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons’.³³ It supported this finding by pointing to the nature of many international crimes, in particular that they are committed jointly by large numbers of people.³⁴ Since the *actus reus* and *mens rea* were not set out in the ICTY Statute, the Appeals Chamber looked to customary law, primarily as evidenced in case law.³⁵

15.3.1. *Actus reus*

Having reviewed post-Second World War cases,³⁶ such as the Almelo Case³⁷ and the Essen Lynching Trial,³⁸ the Appeals Chamber in *Tadić* determined that there was a customary basis for such liability in three classes of cases, ‘co-perpetration, where all

²⁹ *Mutinović et al.* ICTY A. Ch. 21.5. 2003 (hereinafter *Odžanić*) para. 23.

³⁰ 1948 Genocide Convention, Art. 3(d). See William Schabas, *Genocide in International Law* (Cambridge, 2000) 259–66.

³¹ Nuremberg IMT Judgment (1947) 41 *AJIL* 222.

³² Ian Brownlie, *International Law and the Use of Force by States* (Oxford, 1962) 203; John Piccigallo, *The Japanese on Trial* (Austin, TX, 1979) 21.

³³ *Tadić* 1999 Appeal paras. 189–90. A later case has, controversially, determined that Art. 7(1) is not exhaustive: *Odžanić* para. 20. The Appeals Chamber in *Stakić* appeared to frown on new doctrines being introduced into the tribunal’s jurisprudence: *Stakić* Appeal para. 59.

³⁴ *Tadić* 1999 Appeal para. 191.

³⁵ Owing to the complexity of this principle of liability, we will first deal with the way it has been developed by case law, and only then return to the formulation in the ICC. The ICTR’s approach has been, in essence, the same as the ICTY’s here, see, e.g. *Ntakirutimana* ICTR A. Ch. 13.12.2004 paras. 466–7.

³⁶ Not all of which, it must be noted, firmly based their forms of liability in international law.

³⁷ *Otto Sandrock* I LRTWC 35. ³⁸ *Erich Heyer* I LRTWC 88.

participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent) ... so-called “concentration camp” cases,’ and ‘type three’ joint criminal enterprise, where crimes are committed by members of the group, outside its common purpose, but as a foreseeable incident of it.³⁹ It determined that all three types shared a common *actus reus*, namely that there was:

- i. A plurality of persons.
- ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
- iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.⁴⁰

The Appeals Chamber in *Tadić* elaborated on these criteria. For example, the plurality ‘need not be organised in a military, political or administrative structure ...’.⁴¹ ‘There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.’⁴² Participation in the common design ‘need not involve commission of a specific crime under one of those provisions ... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.’⁴³ Later cases have also contributed to understanding of the *actus reus*. It is clear, for example, that membership in the group per se is not enough to ground liability on this basis.⁴⁴ There has to be some form of action by the defendant to contribute to the implementation of the plan.⁴⁵ Equally, both direct and indirect participation suffice.⁴⁶ There is no requirement that the contribution made by the defendant is a significant one.⁴⁷ The ICTY has inconsistent jurisprudence on whether or not those that physically commit the relevant crimes need to be parties to the joint criminal enterprise for participants in that enterprise to be found guilty through this principle.⁴⁸

If the common plan or purpose fundamentally alters, then this is a new plan or purpose, not simply a continuation/mutation of the old one,⁴⁹ and a person is only responsible for crimes which relate to the plan or purpose he or she subscribed to.⁵⁰ Some doubt might be expressed about the statement in *Blagojević and Jokić* that ‘any “escalation” of the original objective must either be agreed to if a person is to entail criminal responsibility for the first category of joint criminal enterprise, or that “escalation” must

³⁹ *Tadić* 1999 Appeal para. 220. See also *Gacumbitsi* Appeal, Separate Opinion of Judge Shahabuddeen, para. 40.

⁴⁰ *Tadić* 1999 Appeal para. 227. ⁴¹ *Ibid.* ⁴² *Ibid.* ⁴³ *Ibid.*

⁴⁴ *Odjanić* para. 26. *Brdjanin and Talić* ICTY T.Ch. I.9.2004 (hereinafter *Brdjanin*) para. 263.

⁴⁵ *Brdjanin* para. 263. ⁴⁶ *Ibid.* ⁴⁷ *Kvočka* Appeal para. 97.

⁴⁸ See *Krstić* ICTY T. Ch. I 2.8.2001 para. 612; *contra Brdjanin* para. 344; *Limaj* ICTY T. Ch. II 30.11.2005 n. 2264; and *Rwamakuba* ICTR A. Ch. 22.10.2004 para. 24. See also *Odjanić* paras. 18–24, the Separate Opinion of Judge Bonomy is clear that liability may lie in such a situation. At para. 13 he asserts that ‘there is certainly no binding decision of the Appeals Chamber that would prevent the Trial Chamber from finding an accused guilty on that basis’.

⁴⁹ *Blagojević and Jokić* ICTY T. Ch. 17.1.2005 para. 700.

⁵⁰ *Ibid.*, para. 701, although if the later plan or purpose is broader, he or she may still be liable for those crimes that fall within the narrower aspect agreed to, *ibid.*, n. 2157.

be a natural and foreseeable consequence of the original enterprise.’⁵¹ This is because in the latter case, there is a risk that a person could become liable for crimes committed as a foreseeable result of the new enterprise, but not the one agreed to.

15.3.2 *Mens rea*

Although the conduct element of all of the forms of joint criminal enterprise liability is the same, the distinction between them comes in through the mental element. The Appeals Chamber in *Tadić* is the standard reference on the point:

... the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which ... is really a variant of the first),⁵² personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused’s position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.⁵³

As ought to be clear, the first category of joint criminal enterprise is close to the concept of co-perpetration: the various participants share the intention to commit the crime that occurs. This is possibly diluted in the second type, where knowledge of the system of ill-treatment suffices rather than the intent to commit the specific crime (if knowledge and intention are entirely separable concepts).⁵⁴ The broadest form of liability comes in ‘type three’ joint criminal responsibility, where the foreseeability of a crime is said to be the test.⁵⁵

It might be thought that by using the term ‘foreseeable’ rather than ‘foreseen’ in relation to ‘type three’ joint criminal enterprise, the Appeals Chamber was imposing a negligence standard. That would be inaccurate, as the second aspect of the test – that the accused ‘willingly took that risk’ – clearly shows that the test is whether the person was subjectively reckless (or, in civil law terms, had *dolus eventualis*) in relation to such

⁵¹ *Ibid.*, n. 2156.

⁵² Although see *Kvočka* Appeal para. 86; Steven Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ (2004) 2 *JICJ* 606, 609–10.

⁵³ *Tadić* 1999 Appeal para. 228.

⁵⁴ Although in both instances the Appeals Chamber has said the participants must share the physical perpetrator’s *mens rea*: *Krnjelac* ICTY A. Ch. 17.9.2003 para. 83.

⁵⁵ One Trial Chamber has controversially asserted the necessity in type three joint criminal enterprise of proving an express agreement between the participants and the physical perpetrator to commit a crime: *Brdjanin* para. 347; for a critique, see Katrina Gustafson, ‘The Requirement of an “Express Agreement” for Joint Criminal Enterprise Liability’ (2007) 5 *JICJ*. The requirement was not mentioned in the *Kvočka* or *Stakić* Appeals.

a crime.⁵⁶ It is also important to note that any inference must take into account what the particular person knew: 'What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them.'⁵⁷ If this is shown, however, 'a person may be found responsible for such acts, even if it is not proved that he or she knew they had occurred'.⁵⁸

15.3.3 The nature of joint criminal enterprise liability

The Appeals Chamber in *Odžanić*, somewhat controversially, determined that joint criminal enterprise liability is a form of 'committing', in the language of Article 7(1).⁵⁹ Even if the other two forms can be considered a form of primary liability, which is also not beyond controversy, it might be questioned whether type three liability could really be seen as a form of 'commission'.

The nature of joint criminal enterprise liability is important. For example, if joint criminal enterprise is considered a primary form of liability, participants in the enterprise can be aided and abetted by those outside it.⁶⁰ If it is a form of secondary liability, then they could not. Also, from the point of view of the principle of fair labelling, the omnibus nature of treating joint criminal enterprise liability as 'committing', runs together rather different levels of culpability, not expressing a distinction between those who are in essence joint perpetrators, but with a simple division of labour, from those who are far closer to aiders and abettors than primary perpetrators. This is particularly the case if '[r]egardless of the role each played in its commission, all of the participants in the enterprise are guilty of the same crime'.⁶¹

Perhaps unsurprisingly, this form of liability has proved very controversial. The Appeals Chamber's induction of joint criminal enterprise liability from the Second World War cases has been criticized on the basis that the cases do not support the conclusions they reached.⁶² Indeed, this was specifically raised by another defendant before the Appeals Chamber, claiming that imposition of liability on this basis violated the *nullum crimen sine lege* principle.⁶³ The Appeals Chamber reaffirmed its earlier holding, however.⁶⁴

From the point of view of fairness to the defendant, the vague, 'elastic' nature of the doctrine has led to claims that it is overbroad, thus reliant on prosecutorial discretion rather than law to keep it in check.⁶⁵ Fears have also been expressed about the extent

⁵⁶ See *Tadić* 1999 Appeal para. 220; *Stakić* Appeal paras. 99–103. ⁵⁷ *Kvočka* Appeal para. 86.

⁵⁸ *Milošević* ICTY T. Ch. III 16.6. 2004 para. 150. ⁵⁹ *Odžanić* para. 20; *Kvočka* Appeal paras. 79–80.

⁶⁰ *Vasiljević* Appeal para. 102.

⁶¹ *Blagojević and Jokić* ICTY T. Ch. 17.1.2005 para. 702, referring inter alia to *Vasiljević* Appeal para. 111.

⁶² See, e.g. Alison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 110–17; Powles, 'Joint Criminal Enterprise', 614–17.

⁶³ *Odžanić*. ⁶⁴ *Ibid.*, paras. 29, 40–3.

⁶⁵ Osiel, 'The Banality of Good', 1799–1802; Danner and Martinez, 'Guilty Associations', 135–46. Equally, see Gustafson, 'Requirement'.

to which it encourages prosecutors to bring indictments that assert joint enterprises in a very general manner, making preparation difficult for the defence.⁶⁶ Turning to the *mens rea*, a person can be convicted of specific intent crimes such as genocide even if that person did not have the relevant *mens rea* for that offence, but the crimes were a natural and foreseen incident of the enterprise he or she was involved in on the basis of joint criminal enterprise.⁶⁷ This has led to criticisms of joint criminal enterprise liability, as allowing the prosecution to circumvent the proper *mens rea* requirements for such serious crimes.⁶⁸ The principle remains, however popular with the ICTY Prosecutor,⁶⁹ and does go some way to describing the joint nature of many international crimes and explaining the culpability of some participants not otherwise easily brought under the ambit of criminality, in spite of their blameworthiness.⁷⁰

The formulation of the principle in the ICC Statute may go some way to mitigate some of the problems identified above. Article 25(3)(d) provides for the responsibility of a person who:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either

- i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- ii. Be made in the knowledge of the intention of the group to commit the crime.

The Article is by no means easy to interpret, and the drafting is the outcome more of compromise than craftsmanship.⁷¹ The wording draws upon the 1997 International Convention for the Suppression of Terrorist Bombings.⁷² It appears to create liability similar to that which the ICTY has approached as type one and possibly type two joint criminal enterprise. Although it sets a low level of participation ('in any other way contributes'),⁷³ the requirement of a group with a purpose that is at least known to the defendant limits the ambit of liability. Although the question may depend on the distinction between the use of indefinite and definite article in (i) and (ii) ('a' in the former, 'the' in the latter'), Article 25(3)(d) does not appear to recognize at least the outer limits of type three joint criminal enterprise.

⁶⁶ Guénaél Mettraux, *International Crimes and the ad Hoc Tribunals* (Oxford, 2005) 293; Osiel, 'The Banality of Good', 1803.

⁶⁷ *Brđjanin and Talić*, ICTY A. Ch. 19.3.2004; *Rwamakuba* ICTR A. Ch. 22.10.2004 paras. 30–1.

⁶⁸ Mettraux, *International Crimes*, 265; Osiel, 'The Banality of Good' 1796.

⁶⁹ See, e.g. Nicola Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for ICTY Prosecutorial Policy' (2004) 2 *JICJ* 446.

⁷⁰ Mettraux, *International Crimes*, 292; Osiel, 'The Banality of Good', 1786–90, but see 1802; Danner and Martinez, 'Guilty Associations', 132–4.

⁷¹ See, e.g. Cryer, 'General Principles', 251. ⁷² General Assembly res. A/RES/52/164 (1997), Art. 2(3)(c).

⁷³ It might be queried if this means that acts that would amount to aiding and abetting are not prosecutable under this head.

15.4 Aiding and abetting

Liability for aiding and abetting (or ‘encouraging’) international crimes is not new. A notable example of a prosecution for aiding a war crime was the *Zyklon B Case*,⁷⁴ in which two German industrialists were convicted of supplying poison gas to the SS for use in concentration camp killings. The existence of liability for aiding and abetting is uncontroversial; it is recognized, for example in Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute, all of which criminalize ‘a person ... who aided and abetted in the planning, preparation or execution’ of an international crime. There have been, and remain, greater controversies about its precise ambit than its existence.⁷⁵ There are also overlaps between this form of liability and joint criminal enterprise,⁷⁶ although the ICTY has said that, where people have participated in a joint criminal enterprise, to convict them ‘only as an aider and abettor might understate the degree of their criminal responsibility’,⁷⁷ and thus ‘aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator’.⁷⁸ The use of the term generally in this context is important, there is no *a priori* reason why an aider or abettor cannot not be as responsible as a perpetrator. The views of the ICTY here also need to be understood against the background of its broad interpretation of what perpetration entails, namely as including participation in a joint criminal enterprise.⁷⁹

The law on aiding and abetting in the ad hoc Tribunals is largely explained by the *Tadić* Appeal Judgment of 1999. This set out the requirements as follows: ‘The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime ... and this support has a substantial effect upon the perpetration of the crime ... the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal’.⁸⁰

⁷⁴ *Tesch and others I* LRTWC 93.

⁷⁵ There is also a question as to whether complicity in genocide, criminalized in Art. 3(e) of the Genocide Convention, is different from this form of liability; the Appeals Chamber in *Krstić* ICTY A. Ch. 19.4.2004 (hereinafter *Krstić* Appeal) paras. 138–44, hinted that the two differ. Since then the case has been read by the Appeals Chamber as establishing that ‘the prohibited act of complicity in genocide, which is included in the Genocide Convention and in Article 2 of the Statute, encompasses aiding and abetting’: *Ntakirutimana and Ntakirutimana* ICTR A. Ch. 13.12.2004 paras. 371 and 500, however, leaves the door open for ‘other forms of complicity’ than aiding and abetting. See though *Blagojević and Jokić* ICTY T. Ch. 17.1.2005 para. 679. See Chile Eboe-Osuji, ‘“Complicity in Genocide” versus “Aiding and Abetting Genocide”’ (2005) 3 *JICJ* 56; Payam Akhavan, ‘The Crime of Genocide in the ICTR Jurisprudence’ (2005) 3 *JICJ* 989.

⁷⁶ The similarities and differences are discussed in *Tadić* 1999 Appeal para. 229 and *Kvočka* Appeal para. 90: the main differences are that an aider or abettor does not need to know of any common plan, but his or her assistance must be substantial, but see below on this criterion. An aider or abettor is only responsible for crimes known about (again, see below), whereas foresight by the defendant suffices for liability for crimes committed pursuant to a joint criminal enterprise.

⁷⁷ *Tadić* 1999 Appeal para. 192.

⁷⁸ *Vasiljević* Appeal para. 182; *Oric* ICTY T. Ch. II 30.6.2006 para. 281. See also *Tadić* 1999 Appeal para. 191.

⁷⁹ See *Oric* ICTY T. Ch. II 30.6.2006 para. 282.

⁸⁰ *Tadić* 1999 Appeal para. 229. *Oric* ICTY T. Ch. II 30.6.2006 para. 288 took the view that ‘the intention must contain a cognitive of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission is more likely than not.’ The Trial Chamber in *Halilović* T. Ch. 16.11.2005 para. 286 asserts that ‘recent judgments also demand some sort of acceptance of the final result’. There is no express requirement in *Blaskić* ICTY A. Ch. 29.7.2004

There are a number of things worth noting about this definition. To begin with, the acts which assist must have a direct and 'substantial' effect on the commission of the crime. However, this should not be taken as setting a high standard: the Yugoslav Tribunal has seen it more as meaning any assistance which is more than *de minimis*.⁸¹ It has accepted, amongst other things, that standing near victims whilst armed to prevent them escaping amounts to aiding,⁸² as does providing weapons to a principal,⁸³ or taking principals to the scene of a crime and pointing at people to be killed.⁸⁴ Allowing resources for which a person is responsible to be used for crimes may also suffice.⁸⁵ Amongst other things, although presence per se does not amount to encouragement,⁸⁶ presence of a superior at the scene of an offence may suffice for liability for abetment.⁸⁷ Omissions may suffice for aiding or abetting, provided that there is an obligation on the defendant to prevent the crime.⁸⁸ Although there is no necessity that the principal offender know of the assistance for liability for aiding to arise,⁸⁹ it would be essentially impossible to abet someone without their being aware of the abetting behaviour.

As to the *mens rea*, all that is required is that the aider and abettor knows that his or her conduct assists a specific crime. It is not necessary that their purpose is to assist. There is, however, the question of how much knowledge about a crime is necessary. Does, for example, the aider or abettor have to know who or what is going to be attacked or in what way? The Appeals Chamber in *Tadić* asserted that 'awareness . . . of the essential elements of the crime committed by the principal would suffice'.⁹⁰ When a person knows that more than one crime might be committed, the ICTY has said that:

it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.⁹¹

Some have criticized a knowledge-based version of *mens rea* in relation to the crime of genocide, on the basis that it dilutes the special intent that characterizes genocide.⁹² These critiques have force. Still, the Tribunals have had no compunction in

(hereinafter *Blaskić* Appeal) para. 46, but in relation to ordering, the Appeals Chamber said that ordering 'with the awareness of the substantial likelihood that a crime will be committed . . . has to be regarded as accepting that crime' *ibid.*, para. 42.

⁸¹ See, e.g. Kai Ambos, 'Article 25' in Triffterer, *Observers' Notes*, 481.

⁸² *Vasiljević* Appeal para. 134. Judge Shahabuddeen in that case considered this to suffice for co-perpetratorship through joint criminal enterprise liability: see Partially Dissenting Opinion of Judge Shahabuddeen, para. 40.

⁸³ *Ntakirutimana* ICTR A. Ch. 13.12.2004 para. 530. ⁸⁴ *Ibid.*, para. 532. ⁸⁵ *Krštić* Appeal para. 137.

⁸⁶ *Oric* ICTY T. Ch. II 30.6.2006 para. 283. ⁸⁷ *Aleksovski* ICTY A. Ch. 24.3.2000 paras. 36–7.

⁸⁸ *Oric* ICTY T. Ch. II 30.6.2006 para. 283. ⁸⁹ *Tadić* 1999 Appeal para. 229.

⁹⁰ *Tadić* 1999 Appeal para. 164. See also *Oric* ICTY T. Ch. II 30.6.2006 para. 288.

⁹¹ *Furundžija* ICTY T. Ch. II 10.12.1998 para. 246. Approved in *Blaskić* Appeal para. 50.

⁹² Mettraux, *International Crimes*, 286–7. Larissa van den Herik and Elies van Sliedregt, 'Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment. Complicity in Genocide, and the Nexus Requirement for War Crimes' (2004) 17 *LJIL* 544–51; for a prosecution of complicity in a Netherlands court, see H. G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction' (2006) 4 *JICJ* 239.

convicting people of aiding and abetting genocide on the basis of knowledge of the genocidal intentions of others.⁹³

The definition of aiding and abetting in the ICC Statute is slightly different from that used by the ICTY and ICTR, the ICC Statute criminalizing anyone who '[f]or the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'⁹⁴ The main differences are that there is no express requirement that the assistance or encouragement make a substantial contribution to the crime, although this change is probably not of much great practical importance.⁹⁵ More important is the *mens rea*, which is that the accomplice's conduct was 'for the purpose' of assisting. This is a higher requirement than the 'knowledge' required by the ICTY and ICTR, and one which will involve some difficult determinations of motive.⁹⁶ It will certainly make prosecuting those who sell arms or other war *matériel* which is used for international crimes difficult to prosecute.⁹⁷ Even if an arms dealer knew weapons that he sold to a country were destined to be used for the commission of international crimes, liability would not arise if the sole purpose for selling them was making profit. It will cause further problems for prosecuting acts which, on their face, are neutral or professional acts such as providing chemicals that may be used for an innocent purpose or to make chemical weapons. Equally, a broad approach to what amounts to participation in a joint criminal enterprise liability could undermine this high threshold in some circumstances.

15.5 Ordering, instigating, soliciting, inducing and inciting

15.5.1 Ordering

As many international crimes are committed by a large number of people acting together, it is frequently the case that such crimes are committed at the behest of a superior authority. If defendants in war crimes trials are to be believed, almost every crime is committed pursuant to orders. It has never really been questioned that those ordering international crimes are responsible for them. The reason given by those supporting a defence of superior orders in the early nineteenth century was that liability was more appropriately placed on the person who gave the order than the person who carried it out.⁹⁸ However, even though reliance on the defence of superior orders was barred in the Nuremberg IMT, that tribunal had no compunction in

⁹³ *Krštić* Appeal para. 140. ⁹⁴ ICC Statute, Art. 25(3)(c).

⁹⁵ There is also some question as to whether, unlike the ICTY in the *Tadić* 1999 Appeal para. 481, Art. 25 includes assistance after the fact: see van Sliedregt, *Criminal Responsibility*, 111–13.

⁹⁶ See Cryer, 'General Principles', 248.

⁹⁷ For a (slightly) more sanguine view, see William A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 842 *International Review of the Red Cross* 439.

⁹⁸ See, e.g. Lassa Oppenheim, *International Law* (London, 1906), vol. II, 264–5.

imposing liability for giving orders.⁹⁹ Although some see those giving orders to commit international crimes as perpetrators acting through innocent or guilty agents,¹⁰⁰ the ICC Statute and the statutes of the ICTY, ICTR and SCSL all treat it as a separate form of liability.¹⁰¹ The core aspect of the crime of ordering, as interpreted by the ICTY and ICTR, is that a 'person in a position of authority uses it to convince another to commit an offence'.¹⁰²

This requires three things, a superior/subordinate relationship, the transmission of an order, and the relevant mental element. In relation to the first of these, it is not necessary that the relationship be a legal one, the point is whether the person giving the order factually had the authority to do so.¹⁰³ The transmission of an order can be established by circumstantial evidence.¹⁰⁴ An example of this would be when there are a remarkable number of similar actions over a disparate area in a short time. A court does not need a paper copy of an order or a tape of it to convict on this basis. A person does not have to be the author of an order to become liable for ordering in international criminal law, passing it down the chain of command can be enough.¹⁰⁵ Similarly, nor does a person who issues an order have to pass it directly to the person who commits the crime, it may go through a number of intermediaries' hands first.¹⁰⁶

The mental element of ordering has been set out by the ICTY as being 'the awareness of the substantial likelihood that a crime will be committed in the execution of that order ... Ordering with such awareness has to be regarded as accepting that crime'.¹⁰⁷ That said, it is not necessary that an order is illegal on its face for a person to become liable for giving it.¹⁰⁸ This is consonant with the point that a mistake of law that does not affect *mens rea* is not exculpatory, and a mistake about whether certain conduct is criminal does not per se affect *mens rea*.¹⁰⁹ The *mens rea* of the person who issued (or passed on) the order is determinative of what particular crime he or she is responsible for ordering, not the *mens rea* of the person who carries it out.¹¹⁰

Article 25(3)(b) of the ICC Statute appears to see ordering as a form of secondary liability, as it provides for responsibility only when the ordered crime 'occurs or is attempted'. The ICTY and ICTR have also conceptualized ordering in this way.¹¹¹ It is questionable whether this was necessary or appropriate. Post-Second World War cases such as *von Falkenhorst* imposed liability for issuing orders which were not

⁹⁹ See, e.g. Nuremberg IMT Judgment (1947) 41 *AJIL* 274 (Göring), 282 (Keitel), 284 (Kaltenbrunner), 289–90 (Frank), 292 (Frick), 312 (Saulkel), 315 (Jodl), 320 (Seyss-Inquart), 325 (von Neurath), 329 (Bormann).

¹⁰⁰ Ambos, 'Article 25', 480, 491.

¹⁰¹ ICC Statute, Art. 25(3)(b); ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1).

¹⁰² *Akayesu* ICTR T. Ch. I 2.9.1998 para. 483; *Blaskić* ICTY T. Ch. I 3.3.2000 para. 601.

¹⁰³ *Kordić and Čerkez* ICTY T. Ch. 26.2.2001 para. 388; ICTY A. Ch. 17.12.2004 (hereinafter *Kordić and Čerkez* Appeal) para. 28.

¹⁰⁴ *Blaskić* ICTY T. Ch. I 3.3.2000 para. 281.

¹⁰⁵ Nuremberg IMT Judgment (1947) 41 *AJIL* 282; *Kupreškić* ICTY T. Ch. II 14.1.2000 para. 862.

¹⁰⁶ *Blaskić* ICTY T. Ch. I 3.3.2000 para. 282. ¹⁰⁷ *Blaskić* Appeal para. 42.

¹⁰⁸ *Blaskić* ICTY T. Ch. I 3.3.2000 para. 282. ¹⁰⁹ See ch. 16. ¹¹⁰ *Blaskić* ICTY T. Ch. I 3.3.2000 para. 282.

¹¹¹ *Ibid.*, paras. 281–2; *Kordić and Čerkez* ICTY T. Ch. 26.2.2001 para. 388; *Akayesu* ICTR T. Ch. I 2.9.1998 para. 483.

implemented.¹¹² There are those who claim that ordering offences should be seen as a form of perpetration by means.¹¹³ Conceptualizing ordering in such a manner would have the advantage of allowing the issuance of orders which were not acted upon to be considered attempts.¹¹⁴ However, there are specific wrongs involved in ordering which are also not quite captured by such a manner of conceptualization, which may be a form of responsibility all of its own,¹¹⁵ and difficult problems of demarcation between the two may arise.¹¹⁶

15.5.2 *Instigating, soliciting, inducing and inciting*¹¹⁷

Instigation, which the ICTY has described as ‘prompting’,¹¹⁸ and the ICTR as ‘urging or encouraging’,¹¹⁹ another to commit a crime, seems to be largely the same as soliciting or inducing in Article 25(3)(b) of the ICC Statute.¹²⁰ As the Trial Chamber in *Blaškić* put it ‘[t]he essence of instigating is that the accused causes another person to commit a crime. Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*’.¹²¹ The Chamber also clarified that ‘[i]nstigation can take many different forms; it can be express or implied, and entail both acts and omissions’.¹²² The instigation must have been a cause (but need not be the only cause) of the crime.¹²³ In other words:

[i]t requires some kind of influencing the principal perpetrator ... [but] does not necessarily presuppose that the original idea or plan to commit the crime was generated by the instigator. Even if the principal perpetrator was already pondering on committing a crime, the final determination can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator ... has definitely decided to commit the crime, further encouragement or moral support may merely, though still, qualify as aiding and abetting.¹²⁴

Turning to the mental element, rather like for ordering, the ICTY has said that ‘a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility ... [for] ... instigating. Instigating with such awareness has to be regarded as accepting that

¹¹² XI LRTWC 18. ¹¹³ Eser, ‘Individual Criminal Responsibility’, 797; van Sliedregt, *Criminal Responsibility*, 78.

¹¹⁴ And, lest we forget, there is an obligation on subordinates to disobey, at the least, manifestly unlawful orders, see ICC Statute, Art. 33.

¹¹⁵ See Cryer, ‘General Principles’, 242–7. ¹¹⁶ Kreß, ‘Claus Roxin’s’.

¹¹⁷ As Mettraux, *International Crimes*, 281, notes, there is considerable overlap here between instigation and abetting.

¹¹⁸ *Blaškić* ICTY T. Ch. I 3.3.2000 para. 280.

¹¹⁹ *Bagilishema* ICTR A. Ch. 2.7.2002 (hereinafter *Bagilishema* Appeal) para. 30.

¹²⁰ See, e.g. Gerhard Werle, *Principles of International Criminal Law* (The Hague, 2005) 125.

¹²¹ *Blaškić* ICTY T. Ch. I 3.3.2000 para. 270; *Oric* ICTY T. Ch. II 30.6.2006 para. 274.

¹²² *Blaškić* para. 270. ¹²³ *Ibid.*, para. 339.

¹²⁴ *Oric* ICTY T. Ch. II 30.6.2006 para. 271. It is questionable whether the implicit assertion that aiding or abetting is per se less serious than incitement (‘merely’) is appropriate.

crime.¹²⁵ Some cases have seen the giving of orders which are not carried out as a form of incitement/instigation.¹²⁶

Direct and public incitement to genocide is specifically criminalized, in essentially the same terms, by Article 3(c) of the Genocide Convention,¹²⁷ Article 4(3)(c) of the ICTY Statute, Article 2(3)(c) of the ICTR Statute, and Article 25(3)(e) of the ICC Statute. Unlike the other crimes of encouragement discussed here, for liability to accrue for incitement to commit genocide, it is not necessary to prove that anyone even attempted to commit genocide. Incitement to genocide can be an inchoate crime,¹²⁸ although sometimes the ICTR has prosecuted defendants under this heading for conduct that has led to the commission of genocide.¹²⁹

The main case in the area is the ICTR's 'Media' case,¹³⁰ in which the editor of the notorious newspaper, *Kangura* was convicted alongside two founders of the similarly infamous radio station, RTLM for incitement to genocide. Drawing, inter alia, on the Nuremberg IMT's verdicts on Julius Streicher and Hans Fritzsche, and Human Rights Committee decisions on the ICCPR, the Trial Chamber decided that, in determining liability, the purpose and context of any communication is important.¹³¹ On the basis of the earlier *Akayesu* case, the Chamber in the 'Media' case determined that the crime required 'a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television'.¹³² On the authority of the same case, the *mens rea* was said to be the:

intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.¹³³

Interpreting what is direct is not simple. As the Trial Chamber in *Akayesu* said, 'the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit . . .'.¹³⁴ Particularly difficult issues of culture, context and interpretation arise here, especially when prosecutions are occurring outside the *locus delicti*.¹³⁵ So far, determining what is public has not been too difficult, most prosecutions being based on speeches to large groups of people

¹²⁵ *Kordić and Čerkez* Appeal para. 32. See similarly, *Oric* ICTY T. Ch. II 30.6.2006 para. 279, which also asserts that the instigator must accept the intentional commission of the relevant crime. *Quaere* whether this is necessary for crimes for which a lesser mental element is required or consistent with *Kordić*.

¹²⁶ *Meyer* (Abbaye Ardenne Case) IV LRTWC 97, 98.

¹²⁷ 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

¹²⁸ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 562; *Mugesera v. Canada* 2005 2 SCR 100, paras. 84–5.

¹²⁹ See, e.g. *Akayesu* ICTR T. Ch. I 2.9.1998 paras. 672–5. Such conduct might be better considered abetment, however.

¹³⁰ *Nahimana, Barayagwiza and Ngeze* ICTR T. Ch. 3.12.2003. ¹³¹ *Ibid.*, paras. 1000–10.

¹³² *Ibid.*, para. 1011. ¹³³ *Ibid.*, para. 1012. ¹³⁴ *Akayesu* ICTR T. Ch. I 2.9.1998 para. 557.

¹³⁵ See, e.g. William Schabas, 'Mugesera v. Minister of Citizenship and Immigration' (1999) 93 *AJIL* 529.

relate to the mass media. The internet and e-mail may raise interesting questions over the ‘public’ requirement.

15.6 Planning, preparation, attempt and conspiracy

15.6.1 Planning and preparing

Planning or preparing a war of aggression was criminalized in Article 6(a) of the Nuremberg IMT Statute and Article 5(a) of the Tokyo IMT Statute. Both also contained a clause that read ‘leaders, organisers, instigators and accomplices participating in the formulation of a common plan . . . to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such a plan’. Both tribunals read this as being limited to crimes against peace, however.

Such crimes are usually considered at the national level to amount to inchoate (incomplete) crimes, that are punishable without proof that the crime itself was completed. Article 7(1) of the ICTY Statute, as well as Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute all criminalize those who ‘aided and abetted in the planning, preparation or execution’ of an international crime. As aiding and abetting is a secondary form of liability, which requires a primary crime to be committed or attempted to attach to, these documents imply that planning is a primary offence, which in turn implies that planning and preparation are in themselves enough, and do not require that the crimes planned or prepared actually occurred.

For planning,¹³⁶ however, the ICTY Appeals Chamber has held differently, stating that ‘[t]he *actus reus* of “planning” requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.’¹³⁷ A number of trial chamber decisions to the same effect, in particular from the ICTR, have been criticized as misunderstanding the nature of ‘planning’.¹³⁸ Either way, the *mens rea* has been said to be fulfilled by ‘a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan . . . Planning with such awareness has to be regarded as accepting that crime.’¹³⁹ The ICC Statute does not have any provision similar to Article 7(1) of the ICTY Statute in relation to planning or preparing.

15.6.2 Attempt

The statutes of all the international criminal tribunals prior to the ICC Statute are silent on attempt liability other than for genocide.¹⁴⁰ The ICTY prosecutor has shown an unwillingness to prosecute attempts to commit international crimes, preferring to

¹³⁶ There is no modern jurisprudence on ‘preparing’ as a separate crime. ¹³⁷ *Kordić and Čerkez* Appeal para. 26.

¹³⁸ Mettraux, *International Crimes*, 279–80.

¹³⁹ *Kordić and Čerkez* Appeal para. 31. The Trial Chamber in *Brdjanin* took a narrower view at para. 357.

¹⁴⁰ Art. 4(d) ICTY Statute; Art. 2(d) ICTR Statute.

conceptualize them under other headings of liability (for example ‘violence to life and person’ or ‘inhumane acts’ rather than attempted murder).¹⁴¹ However, there is sufficient evidence from the post-Second World War era to show such a form of liability exists in custom.¹⁴²

The ICC Statute expressly criminalizes attempts to commit international crimes in Article 25(3)(f): a person is liable who:

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable if that person completely and voluntarily gave up the criminal purpose.

This in many ways makes up for the absence of a provision on planning or preparation, although if those types of liability are in fact inchoate crimes, Article 25(3)(f) may be narrower than them.¹⁴³ The formulation at Rome was a compromise, making it difficult to interpret precisely when a person has ‘commence[d] its execution by a substantial step’.¹⁴⁴ As can be seen, the ICC Statute recognizes that if an attempt is abandoned, or a person prevents the crime, they will not be liable for attempt. However, if they abandon their role in the crime, and it is completed by others, it is possible that liability for aiding and abetting or participating in a joint criminal enterprise might still arise.

15.6.3 Conspiracy

Conspiracy, in the sense of the inchoate crime of agreeing to commit a crime, which does not have to be proved to occur, was applied by the Nuremberg and Tokyo Tribunals to crimes against peace, not war crimes or crimes against humanity.¹⁴⁵ The reason for that limitation was that there was considerable disagreement between the judges on whether or not such a principle existed in international law.¹⁴⁶ This also led the tribunal to take a sensibly narrow view of conspiracy, stating that ‘[t]he conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action.’¹⁴⁷ The Tokyo IMT, although also limiting its decision to conspiracies to commit crimes against peace, took a very broad interpretation of the concept of conspiracy.¹⁴⁸ Under current international

¹⁴¹ See *Vasiljević* ICTY T. Ch. I 29.11.2002. See Antonio Cassese, ‘Black Letter Lawyering vs Constructive Interpretation: The Vasiljević Case’ (2004) 2 *JICJ* 265, 266–71, *contra* Mettraux, *International Crimes*, 293–5.

¹⁴² Cassese, *Black Letter Lawyering*. See also Commentary, XV LRTWC at 89. ¹⁴³ See Cryer, ‘General Principles’, 253.

¹⁴⁴ Eser, ‘Individual Criminal Responsibility’, 811–13; Ambos, ‘Article 25’, 488–9.

¹⁴⁵ ‘Nuremberg IMT: Judgment’ (1947) 41 *AJIL* 172, 224.

¹⁴⁶ See Telford Taylor, *The Anatomy of the Nuremberg Trials* (London, 1993) 36, 50.

¹⁴⁷ Nuremberg IMT Judgment (1947) 41 *AJIL* 172, 222. It must also be noted that the tribunal was dealing with conspiracies which had manifested themselves in later crimes, so was not, strictly speaking, dealing with inchoate conspiracies.

¹⁴⁸ See section 6.4.3.

law, conspiracy does not exist as a form of liability for war crimes or crimes against humanity.¹⁴⁹ Conspiracy to commit genocide, however, is a separate charge. It is included in Article 3(b) of the Genocide Convention, and it is clear that the type of conspiracy included is of the inchoate type.¹⁵⁰ The same crime is included in Article 4(3)(b) of the ICTY Statute and Article 2(3)(b) of the ICTR Statute. It is not, however, present in the ICC Statute. According to the ICTR, conspiracy to commit genocide is '[a]n agreement between two or more persons to commit the crime of genocide'.¹⁵¹ It has also determined, rightly, that 'With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus . . . the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide.'¹⁵²

15.7 Mental elements

It is an important aspect of criminal law that a person must have some form of culpability for their conduct. This is usually shown through their state of mind when they acted (or failed to act). There are various forms of mental element that apply to international crimes, from intention, through recklessness to (arguably) negligence.¹⁵³ Different offences, and different forms of liability require different forms of *mens rea*. Hence, for the most part, they are thus dealt with when dealing with the specific offence or principle of liability.

There is little in the general parts of the statutes of the ICTY, ICTR and SCSL that deals with *mens rea*. Thus it has had to be dealt with at the level of case law.¹⁵⁴ Perhaps the broadest statement that has been made was that by the Trial chamber in *Blaskić* that, in relation to grave breaches, 'the *mens rea* . . . includes both guilty intent and recklessness which may be likened to serious criminal negligence.'¹⁵⁵ This is too broad. Criminal negligence is only possibly at issue in relation to superior responsibility,¹⁵⁶ and in this regard, the ICTR Appeals Chamber has said (controversially) that '[r]eferences to "negligence" in the context of superior responsibility are likely to lead to confusion of thought'.¹⁵⁷

¹⁴⁹ *Hamdan v. Rumsfeld*, 126 S Ct 2749 (2006), 2777–85. The Supreme Court in this case was clear that it was discussing conspiracies that are offences on their own, not forms of participation in completed crimes, see 2785, n. 40.

¹⁵⁰ Schabas, *Genocide*, 260. *Kajelijeli* ICTR T. Ch. II 1.12.2003 para. 788; *Musema* ICTR T. Ch. I 27.1.2000 para. 187.

¹⁵¹ *Musema*, para. 189; *Kajelijeli* para. 787. ¹⁵² *Musema* para. 192.

¹⁵³ Or in analogous, but not identical civil law terms, *dolus directus*, *dolus eventualis* and *culpa*.

¹⁵⁴ See William Schabas, *The UN International Criminal Tribunals: former Yugoslavia, Rwanda, Sierra Leone* (Cambridge, 2006) 292–3.

¹⁵⁵ *Blaskić* ICTY T. Ch. I 3.3.2000 para. 152; see also *Kayishema and Ruzindana* ICTR T. Ch. II 21.5.1999 para. 146.

¹⁵⁶ The Secretary-General described superior responsibility as 'imputed responsibility or criminal negligence': Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808(1993), UN Doc. S/25704, para. 56.

¹⁵⁷ *Bagilishema* Appeal para. 35. But see *Oric* ICTY T. Ch. II 30.6.2006 para. 324.

Outside the crime of genocide, which has a very specific *mens rea*, the ICTY and ICTR have been surprisingly reticent in setting out the ingredients of intent. Discussions in the case law are also sometimes confused by the use of the term ‘intent’ not as a term of art, but to refer to *mens rea* generally.¹⁵⁸ The Appeals chamber in *Čelebići* asserted that an ‘intentional act or omission ... is an act which, judged objectively, is deliberate and not accidental’,¹⁵⁹ but this is decidedly unclear, as there are considerable differences between that which is ‘deliberate’ and that which is ‘not accidental’. Intention has been used to mean only deliberate acts,¹⁶⁰ but the case law on point is inconclusive, not least because as the Tribunals have tended to accept that recklessness suffices for many crimes, they have not drawn the boundaries between intention and recklessness clearly.¹⁶¹

When discussing its concept of recklessness (or perhaps *mens rea* in general) the Appeals Chamber in *Blaškić* set down what, although framed in the context of ordering crimes, might be the general standard for recklessness (or *mens rea*) in the ICTY:

a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.¹⁶²

It has been argued that the default standard for *mens rea* in the tribunals appears to be recklessness.¹⁶³ Whether or not this is correct, the ICC Statute takes a different track, setting intention as the default mental element to be applied. Article 30 of the ICC Statute reads:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this Article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

¹⁵⁸ *Blaškić* ICTY T. Ch. I 3.3.2000 para. 474. The confusion probably arises out of the difference between the meaning of ‘intention’ in civil and common law countries. In the former it is a synonym for *mens rea*, in common law countries, it is a specific type of *mens rea*.

¹⁵⁹ *Čelebići* Appeal ICTY A. Ch. 20.2.2001 para. 426. ¹⁶⁰ *Aleksovski* ICTY T 25.6.1999 para. 56.

¹⁶¹ Although it is clear that neither concept requires motive: see van Sliedregt, *Criminal Responsibility*, 48–9.

¹⁶² *Blaškić* Appeal para. 42.

¹⁶³ Werle, *Principles*, 104–5, although see 113–6. See also van Sliedregt, *Criminal Responsibility*, 48–50.

Article 30 applies absent specific provision elsewhere.¹⁶⁴ The drafters of the ICC Statute appeared to exclude any lesser mental element, unless the statute (or the elements of crimes) expressly provided for one (such as in Article 28). However, States Parties at Rome appeared to minimize the chance that the ICC could go outside the statute and elements of crimes to determine, for example, that customary international law set a lower standard than the statute or the elements of crimes. It has been suggested that it could,¹⁶⁵ but this seems unlikely since the coming into being of the elements of crimes.¹⁶⁶

Article 30 sets the mental-element bar high. By requiring intention, in the clear subjectivist sense, the ICC Statute adopts, as a default, a highly culpable form of mental element for all elements of the offence. This may have a specific effect in relation to the offences for which customary international law and many domestic systems differ as to *mens rea* from the provision in the ICC Statute and the ICC Elements of Crimes. An example is in relation to Article 8(2)(b)(i), attacking of civilians requires a higher *mens rea* (intention) than that required by customary international law, for which recklessness suffices.¹⁶⁷

The requirement that the defendant is ‘aware . . . in relation to a consequence that it will occur in the ordinary course of events’ seems to leave a lacuna. Awareness that something will occur in the ordinary course of events implies that a belief that this is the case must be borne out for a person to fall under Article 30. At the very least, by the time the consequence has manifested itself, there seems to be no necessary reason for this. The culpability of the state of mind is essentially the same.¹⁶⁸

15.8 Command/superior responsibility¹⁶⁹

Command responsibility¹⁷⁰ is an inculpatory doctrine specific to international criminal law, which does not have a concomitant general principle of liability at the domestic level.¹⁷¹ It is a broad form of liability, which is justified by the privileges, honours and responsibilities that command entails.¹⁷² Command responsibility as a whole has a lengthy history, going back roughly 2,500 years to the China of Sun

¹⁶⁴ As will be seen, precisely where is not necessarily clear, see also Roger Clark, ‘The Mental Element in International Criminal Law: The ICC Statute of the International Criminal Court and the Elements of Offences’ (2002) 12 *CLF* 291, 321. On Art. 30’s default position see also ICC Elements of Crimes, general introduction, para. 2.

¹⁶⁵ Knut Dörmann, ‘War Crimes in the Elements of Crimes’ in Horst Fischer, Claus Kreß and Sascha Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin, 2001) 95, 98.

¹⁶⁶ Maria Kelt and Hermann von Hebel, ‘General Principles of Criminal Law and Elements of Crimes’ in Lee, *Elements and Rules*, 29–30; Werle, *Principles*, 113–6.

¹⁶⁷ See William Fenrick, ‘A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor v. Tihomir Blaškić’ (2000) 13 *LJIL* 931, 936–43.

¹⁶⁸ David Ormerod, *Smith and Hogan: Criminal Law* (11th edn, Oxford, 2005) 95.

¹⁶⁹ See generally, van Sliedregt, *Criminal Responsibility*, chs. 3–5.

¹⁷⁰ The terms ‘command responsibility’ and ‘superior responsibility’ are functionally synonymous, although the former is sometimes taken as limited to military personnel. It need not be.

¹⁷¹ Although there are some analogues in limited areas of domestic criminal law.

¹⁷² See, e.g. *Hadžihasanović, Alagić and Kubura* ICTY A. Ch. 16.7.2003 (hereinafter *Hadžihasanović* Appeal), para. 14. See also Cryer, ‘General Principles’, 260–1.

Tzu.¹⁷³ The responsibility of a commander extends far beyond criminal liability, and disciplinary or administrative action can be pursued even if there is no criminal liability.¹⁷⁴ Discussion here, however, is specifically on the criminal responsibility of a commander for offences committed by his or her subordinates. An early, and clear example of such liability, which is remarkably similar to modern command responsibility, may be found in the French Code instituted by Charles VII of Orleans in 1439, which stated:

The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and be punished in the same way as the offender would have been.¹⁷⁵

The foundation of the modern law of command responsibility may be found in the Report of the Commission of Inquiry on the Responsibility of the Authors of the War in 1919, which opined that superiors could be held responsible for crimes of their subordinates where they knew of them but did not intervene.¹⁷⁶ The first major modern case on the principle, though, was the *Yamashita* case.¹⁷⁷ The case has proved controversial and many of its factual findings, and the fairness of the trial, have been subject to considerable critique.¹⁷⁸ The Nuremberg IMT did not deal with command responsibility in this sense in any real way. The Tokyo IMT, however, took a very broad interpretation of the principle, which at times appeared to shade into joint criminal enterprise liability.¹⁷⁹ Command responsibility was included in military manuals after the Second World War,¹⁸⁰ but made its first clear appearance in a treaty in 1977, in Articles 86 and 87 of Additional Protocol I.

In a provision that is similar to, but not quite the same as the provisions of Additional Protocol I, Article 7(3)¹⁸¹ of the ICTY Statute reads:

¹⁷³ See W. Hays Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 1–20.

¹⁷⁴ *Bagilishema* ICTR A. Ch. 2.7.2002 para. 36.

¹⁷⁵ Theodor Meron, *Henry's Laws and Shakespeare's Wars* (Oxford, 1993) 149, n. 40.

¹⁷⁶ 'Report of the Commission on the Responsibility of the Authors of the War' (1920) 14 *AJIL* 95, 121.

¹⁷⁷ *US v. Yamashita* (1945) 327 US 1.

¹⁷⁸ See, e.g. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague, 1999) 427–31; Anne-Marie Prevost, 'Race and War Crimes: the 1945 War Crimes Trial of General Tomoyuki Yamashita' (1992) 14 *Human Rights Quarterly* 303, 318–19; Richard Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Wilmington, 1982).

¹⁷⁹ Tokyo IMT Judgment, 48, 442–7 This engendered dissents from Judges Bernard (12–18), Röling (Dissenting Opinion of the Member from the Netherlands at 54–61) and Pal (Dissenting Opinion of the Member from India at 1027–225).

¹⁸⁰ US Department of the Army Field Manual, *The Law of Land Warfare*, 1956 (FM 27–10) (as revised) para. 501. See also the 1958 British Manual, *The Law of War on Land*, being Part III of the Manual of Military Law, (London, 1958) para. 631.

¹⁸¹ Which has been taken as applying both to international and non-international armed conflicts as a matter of customary international law: *Hadžihasanović* Appeal paras. 10–31.

The fact that [crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁸²

Article 28 of the ICC Statute is more detailed, reading:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person 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.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) 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.

The Trial Chamber in *Čelebići* helpfully elaborated the requirements of command responsibility under customary law;¹⁸³ first, a superior/subordinate relationship; second, the ‘mental element’ and third, a failure to take reasonable measures to prevent or punish violations of international criminal law.¹⁸⁴ This trio has been

¹⁸² Arts. 6(1) of the ICTR Statute and 6(1) of the SCSL Statute are essentially the same. The latter, post-dating the ICC Statute, may be a rejection of aspects of the ICC Statute’s definition of the concept.

¹⁸³ The taxonomy, though, finds a basis in Judge Röling’s Opinion in the Tokyo IMT, 59–61.

¹⁸⁴ *Delalić, Mučić, Delić and Landžo* ICTY T. Ch. II 16.11.1998 para. 344; *Blaškić* ICTY T. Ch. I 3.3.2000 para. 294; *Oric* ICTY T. Ch. II 30.6.2006 para. 294 added that crimes were committed by those other than the superior. This is true, but does not really add to the specifics of the principle of liability. The Chamber added it only as it had been challenged by the defence, *Oric ibid.* para. 295. The Chamber asserted that all forms of participation in Art. 7(1) of the ICTY Statute sufficed to fulfil this criterion, paras. 295–306, 328. This is probably correct, as long as it is remembered that the mental element for superior responsibility must still be fulfilled,

¹⁸⁴ Werle, *Principles*, 136–7. ¹⁸⁴ *Čelebići* ICTY T. Ch. II 16.11.1998 para. 346.

adopted by the UN tribunals since and is a helpful list of the requirements.¹⁸⁵ To that, the ICC Statute has added another requirement: causation.¹⁸⁶

15.8.1 Superior/subordinate relationship

Where there are the clear formal chains of command that characterize modern well-disciplined armies, this criterion may appear simple to apply. However, modern conflicts are not always fought on this basis and by such forces. Therefore, and understandably, the Appeals Chamber in *Čelebići* based itself on a test of 'effective control', defined as 'a material ability to prevent or punish criminal conduct'.¹⁸⁷ Substantial influence is not enough.¹⁸⁸ The *de jure* position of the superior is not determinative, it is factual ability to do so that counts.¹⁸⁹ Equally, a *de jure* position is good evidence of effective control.¹⁹⁰ Issuance of orders is also good evidence, but if they are not obeyed, this will count the other way.¹⁹¹ The issue must be decided on a case-by-case basis, and it ought to be noted that multiple commanders in a chain of command may be held criminally responsible.¹⁹² It is clear that superior responsibility also attaches to civilian superiors.¹⁹³ The standard of control is again 'effective control', 'in the sense that he exercised a degree of control over ... [subordinates] ... which is similar to the degree of control of military commanders'.¹⁹⁴ Also, as Article 28(b)(ii) of the ICC Statute shows, the crimes must fall within the area of responsibility of a civilian commander. The ICTY has on occasion been criticized for taking a narrow approach to effective control, against a background of fluid levels of control and multiple lines of command.¹⁹⁵

The ICTY Appeals Chamber, in its split 3:2 decision in the *Hadžihasanović* Appeal, determined that for superior responsibility to arise the crimes must be committed whilst the superior had effective control over the offenders.¹⁹⁶ This has particular relevance to failure to punish liability. The case has generated considerable debate.¹⁹⁷

¹⁸⁵ See, e.g. *Aleksovski* ICTY T. Ch. II 25.6.1999 paras. 69–71; *Kayishema and Ruzindana* ICTR T. Ch. II 21.5.1999 para. 209; *Blaškić* ICTY T. Ch. I 3.3.2000 para. 294.

¹⁸⁶ Werle, *Principles*, 136–7.

¹⁸⁷ *Delalić, Mučić, Delić and Landžo* ICTY A. Ch. 20.2.2001 (hereinafter *Čelebići* Appeal) para. 256.

¹⁸⁸ *Ibid.*, para. 266.

¹⁸⁹ *Ibid.*, paras. 186–98. See also, e.g. *US v. List et al.* (The Hostages Case) VIII LRTWC 89; Tokyo IMT Judgment, at 48, 820.

¹⁹⁰ *Čelebići* Appeal para. 197. ¹⁹¹ *Blaškić* Appeal paras. 69 and 399.

¹⁹² *Oric* ICTY T. Ch. II 30.6.2006 para. 313.

¹⁹³ *Bagilishema* Appeal para. 52; *Oric* ICTY T. Ch. II 30.6.2006 para. 308 This is also provided for expressly in Art. 28(b) of the ICC Statute. See also Tokyo IMT Judgment, 48, 442–7; *US v. Karl Brandt et al.* (The Doctors' Trial) IV LRTWC 91–3.

¹⁹⁴ *Bagilishema* Appeal para. 52, overturning the Trial Chamber on point. As the Appeals Chamber noted *ibid.*, the way authority is exercised may not be the same.

¹⁹⁵ Osiel, 'The Banality of Good' 1774–9. The ICTY has admitted the fluidity of such situations: *Oric* ICTY T. Ch. II 30.6.2006 paras. 309–10.

¹⁹⁶ *Hadžihasanović* Appeal paras. 37–56.

¹⁹⁷ See Mettraux, *International Crimes*, 301, *contra* Christopher Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision' (2004) 2 *JICJ* 598. One ICTY Trial Chamber has seemingly doubted it: *Oric* ICTY T. Ch. II 30.6.2006 para. 335.

The dissenting judges, in particular were very critical of the majority, and asserted that the decision was wrong in law.¹⁹⁸ One judge asserted also that it left a lacuna in protection.¹⁹⁹ In relation to this last point it is relevant that the primary authors of the crimes are still responsible for them. The ICC Statute, by requiring that offences occur as 'a result of . . . [a superior's] . . . failure to exercise control properly over such forces' leads to the same result as the majority decision, but the customary nature or otherwise of this provision was divisive in the case.²⁰⁰

15.8.2 Mental element

The mental element of command responsibility is one of its most controversial aspects. This is in part because of the broad ambit of this type of liability, which accrues often by omission. The discord is not helped by the opaque nature of the finding in the seminal *Yamashita* case, and the fair trial issues that still cast a pall over that proceeding. The fact that the various documents dealing with the matter use different terminology does not help. The ICTY has been at great pains to explain that superior responsibility is not a form of strict liability.²⁰¹ The leading authority in the ICTY determined that:

[A superior] . . . may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes . . . or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.²⁰²

It is accepted that actual knowledge can be determined by a direct proof, or with reference to circumstantial evidence.²⁰³ Relevant circumstantial evidence for this purpose includes 'the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and location of the commander at the time'.²⁰⁴

The Trial Chamber in the *Blaškić* case, in an opinion which canvassed some jurisprudence not discussed in the *Čelebići* Appeal, took a broader approach to the 'had reason to know standard' than the latter decision, and came to the conclusion that:

¹⁹⁸ *Hadžihasanović* Appeal, Partially Dissenting Opinion of Judge Shahabuddeen, paras. 1–40, Separate and Partially Dissenting Opinion of Judge Hunt, paras. 6–34. Part of the disagreement related to the way in which the nature of superior responsibility is seen, see section 15.8.5. The Trial Chamber in *Oric* ICTY T. Ch. II 30.6.2006 para. 335 was critical of the decision, but felt bound to follow it.

¹⁹⁹ *Hadžihasanović* Appeal, Judge Hunt, para. 22.

²⁰⁰ *Hadžihasanović* Appeal para. 53, Judge Shahabuddeen, para. 38, Judge Hunt paras. 29–33.

²⁰¹ *Čelebići* Appeal paras. 226 and 239. ²⁰² *Ibid.*, paras. 223 and 241.

²⁰³ *Blaškić* ICTY T. Ch. I 3.3.2000 para. 307; *Oric* ICTY T. Ch. II 30.6.2006 para. 319–20; *Halilović* ICTY T. Ch. 16.11.2005 para. 66.

²⁰⁴ *Čelebići* Appeal para. 238; *Limaj* ICTY T. Ch. II 30.11.2005 para. 524; *Halilović* ICTY T. Ch. 16.11.2005 para. 66.

if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.²⁰⁵

Despite considerable academic support,²⁰⁶ this standard has not prevailed in the ICTY,²⁰⁷ and any talk of negligence has been disavowed by the Appeals Chamber.²⁰⁸ The *Čelebići* standard has become the accepted one in the ad hoc Tribunals for both military and civilian superiors.²⁰⁹

The ICC Statute, however, sets a different standard for military and non-military superiors, the standard for the former being that the superior 'knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes'. For civilians, it is that the civilian superior 'knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes'. Commentators have questioned whether this distinction is consistent with customary law,²¹⁰ and the ICTR Appeals Chamber has at least implicitly rejected the ICC Statute *mens rea* for civilian superiors.²¹¹ It may be argued that the statutes of the ad hoc Tribunals and the ICC Statute are broadly consistent on the mental element for military superiors.²¹² In relation to civilians though, the ICC Statute clearly sets a higher *mens rea* standard than exists for military superiors.

15.8.3 Failure to take measures

The final link in the chain of liability under customary law is the failure or refusal to take 'necessary and reasonable measures' to prevent or punish the offences the superior knew

²⁰⁵ Blaškić ICTY T. Ch. I 3.3.2000 para. 332.

²⁰⁶ Monica Feria Tinta, 'Commanders on Trial: The Blaškić Case and the Doctrine of Command Responsibility Under International Law' (2000) 47 *Netherlands International Law Review* 293, 314–22; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge, 2004), 24; Robert Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes' (2000) 69 *BYBIL* 259, 301. Support is not universal though, see Bing Bing Jia, 'The Doctrine of Command Responsibility: Current Problems' (2000) 3 *YIHL* 131, 155–60.

²⁰⁷ *Blaškić* Appeal paras. 58–64.

²⁰⁸ *Bagilishema* Appeal paras. 34–5; *Blaškić* Appeal para. 63; *Halilović* ICTY T. Ch. 16.11.2005 para. 71.

²⁰⁹ *Bagilishema* Appeal paras. 26–37. The ICTR had, on occasion, applied the ICC Statute standard: *Kayishema and Ruzindana* ICTR T. Ch. II 21.5.1999 paras. 227–8, and had been criticized for it. See Alexander Zahar, 'Command Responsibility of Civilian Superiors for Genocide' (2001) 14 *LJIL* 591.

²¹⁰ See Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25 *Yale Journal of International Law* 89; van Sliedregt, *Criminal Responsibility*, 191–2; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) 321–3.

²¹¹ *Bagilishema* Appeal paras. 26–37.

²¹² See Charles Garraway, 'Command Responsibility: Victor's Justice or Just Deserts?' in Richard Burchill, Nigel White and Justin Morris (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge, 2005) 68, 82–3.

or culpably ought to have known of. It is important to emphasize in this regard that liability may accrue to a superior for a failure to prevent or a failure to punish those crimes. The two types of liability are separate.²¹³ There is no necessity that a person knew or should have known of the offences before they occurred for failure to punish liability to arise. Similarly, if a superior knew or should have known of impending offences before they occurred, it is no defence to a charge of failing to take adequate measures to suppress them that he chose to allow them to occur, then punished the perpetrators.²¹⁴ As has been said, 'a superior's failure to prevent the commission of the crime by a subordinate, where he had the ability to do so, cannot simply be remedied by subsequently punishing the subordinate for the crime'.²¹⁵

The measures which can be expected were explained by the ICTY Appeals Chamber in *Blaškić* as being those that:

can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates . . . What constitutes such measures is not a matter of substantive law but of evidence.²¹⁶

Thus, the measures that can be expected to be taken depend on the precise nature of the control exercised by the superior. As the ICC Statute identifies, this can mean acts intended to prevent or punish where that is possible, and/or, where appropriate, submitting the matter to the appropriate prosecutorial organs.²¹⁷ What measures may be expected of a superior relates to what power the superior has, and this requires a contextual analysis.

An ICTY Trial Chamber in the *Oric* case gave some guidance on the yardsticks to be used for failure to prevent: (1) the measures 'depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act'; (2) measures must be taken to prevent planning of preparation of crimes, not simply their execution; (3) 'the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react'; and (4) a superior is not 'obliged to do the impossible'.²¹⁸ Relevant actions are issuing special orders to prevent international crimes and ensuring their implementation, where there is information about the possible commission of crimes, investigating their possible commission, protesting and criticising actions, initiating disciplinary

²¹³ *Hadžihasanović* Appeal, Judge Shahabuddeen, paras. 35–6. See also *Blaškić* Appeal paras. 78–85; *Halilović* ICTY T. Ch. 16.11.2005 para. 94; *Oric* ICTY T. Ch. II 30.6.2006 paras. 325–6.

²¹⁴ *Blaškić* ICTY T. Ch. I 3.3.2000 para. 336, *Strugar* ICTY T. Ch. II 31.1.2005 para. 373, *Halilović* ICTY T. Ch. 16.11.2005 para. 72.

²¹⁵ *Oric* ICTY T. Ch. II 30.6.2006 para. 326. In addition, to fail to take measures may be considered tacit acceptance of the crime: see *Halilović* ICTY T. Ch. 16.11.2005 para. 95.

²¹⁶ *Blaškić* Appeal para. 72.

²¹⁷ But formal legal competence to take the necessary measures to prevent or repress the crime is not required: see *Čelebići* ICTY T. Ch. II 16.11.1998 para. 395; cf ILC 1996 Draft Code of Crimes 38–9.

²¹⁸ *Oric* ICTY T. Ch. II 30.6.2006 para. 329.

measures and reporting to, and insisting on action from, higher authorities.²¹⁹ Turning a ‘blind eye’ to international crimes is clearly unreasonable in this respect.²²⁰

In relation to the duty to punish, the same Chamber noted that:

the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected. Under these conditions, the superior has to order or execute appropriate sanctions or, if not yet able to do so, he or she must at least conduct an investigation and establish the facts in order to ensure that offenders under his or her effective control are brought to justice. The superior need not conduct the investigation or dispense the punishment in person, but he or she must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction . . . Since the duty to punish aims at preventing future crimes of subordinates, a superior’s responsibility may also arise from his or her failure to create or sustain, amongst the persons under his or her control, an environment of discipline and respect for the law.²²¹

15.8.4 Causation

The question of causation is an awkward one in relation to superior responsibility. This is, to a large extent, because superior responsibility is a form of liability for omission, to which causation is difficult, but not impossible, to apply.²²² This has caused considerable confusion as failure to prevent and failure to punish liability are entirely separate forms of liability. For the latter form of liability causation logically cannot be a requirement.²²³ With respect to the former case the Trial Chamber in *Čelebići*, with which the Appeals Chamber in *Blaškić* agreed,²²⁴ said that it:

found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility . . . This is not to say that, conceptually, the principle of causality is without application to the doctrine of command responsibility insofar as it relates to the responsibility of superiors for their failure to prevent the crimes of their subordinates. In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior’s failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.²²⁵

²¹⁹ *Ibid.*, para. 331. See also *Halilović* ICTY T. Ch. 16.11.2005 para. 74.

²²⁰ *Oric* ICTY T. Ch. II 30.6.2006 para. 331. The chamber also mentions failing to give instructions not to commit international crimes owing to absences not mandated by ‘other overriding obligations.’ The Trial Chamber in *Halilović* adds ‘failure to secure reports that military actions have been carried out in accordance with international law’ and notes that ‘[t]he Tokyo Trial held that a superior’s duty may not be discharged by the issuance of routine orders and that more active steps may be required’ ICTY T. Ch. 16.11.2005 para. 89.

²²¹ *Oric* ICTY T. Ch. II 30.6.2006 para. 336; See also *Halilović* ICTY T. Ch. 16.11.2005 paras. 97–100.

²²² See generally Otto Triffterer, ‘Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 of the Rome Statute?’ (2002) 15 *LJIL* 179.

²²³ *Oric* ICTY T. Ch. II 30.6.2006 para. 338.

²²⁴ *Blaškić Appeal* paras. 75–7. See also *Halilović* ICTY T. Ch. 16.11.2005 para. 77.

²²⁵ *Čelebići* ICTY T. Ch. II 16.11.1998 paras. 398–9.

In the *Oric* case the Trial Chamber was certain that there was no requirement of causation for either type of superior responsibility, as ‘even with regard to the superior’s failure to prevent, a requirement of causation would run counter to the very basis of this type of superior responsibility as criminal liability of omission.’²²⁶ However, this appears to misunderstand the idea of negative causation, where an omission permits something to occur. Leaving a window open allows the rain in, even if it does not cause a change in the weather.

The ICC Statute, by imposing the general requirement for liability that the crimes occur as a result of a failure to supervise subordinates, excludes liability where there is no form of causation, even in the expanded sense that a failure to prevent may facilitate commission. This is perhaps best explained by separating off the general duties a superior has to control subordinates, and the specific duties that devolve on a superior when he or she knows or should have known of offences or their imminent commission (to take necessary and reasonable measures to prevent or repress them).²²⁷ A violation of the former duty is necessary, in the ICC Statute, for either type of liability. It is not necessary, however, for failure to punish liability to arise that the superior violate the specific duties to prevent offences.²²⁸ If it was required, failure to punish liability would simply become a sub-category of failure to prevent liability, and would largely lose its function. The ICC Statute, in requiring a violation of the general duty to control as a basis for both forms of liability, as the *Hadžihasanović* Appeal showed, is by no means universally accepted.

15.8.5 The nature of superior responsibility

The nature of responsibility attributed to a superior under this principle of liability is controversial.²²⁹ Some domestic legislation (including that of the UK, which follows Article 28 almost verbatim), criminalizes superior responsibility as a form of complicity.²³⁰ Others believe,²³¹ and the Canadian and German legislation imply, that it is a separate offence of omission, on the grounds that it would be unfair to hold a person vicariously liable for the serious crimes of another based on a relaxed mental element. On this view, command responsibility is in essence a more serious form of a dereliction of duty charge.²³² There was confusion about the basis of liability in the Secretary-General’s report relating to the ICTY Statute, which said that command responsibility is a form of ‘imputed responsibility or criminal negligence’.²³³

²²⁶ *Oric* ICTY T. Ch. II 30.6.2006 para. 338.

²²⁷ The distinction is discussed too, in a different context, in *Halilović* ICTY T. Ch. 16.11.2005 para. 80.

²²⁸ For ICTY jurisprudence on point, see *Blaskić* Appeal para. 83.

²²⁹ See *Halilović* ICTY T. Ch. 16.11.2005 paras. 42–54.

²³⁰ International Criminal Court Act 2001, s. 65.

²³¹ Kai Ambos, ‘Superior Responsibility’ in Cassese, *Commentary*, 850–5.

²³² On the ‘general duty to prevent’ on superiors, see *Halilović* ICTY T. Ch. 16.11.2005 paras. 81–8.

²³³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 para. 56.

Judge Shahabuddeen challenged the idea that command responsibility is a form of complicity, opining that ‘Command responsibility imposes responsibility on a commander for failure to take corrective action in respect of a crime committed by another; it does not make the commander party to the crime committed by that other.’²³⁴ As he accepted, the ambit of superior responsibility is intrinsically linked to its conceptualization.²³⁵ Relying, in part, on Judge Shahabuddeen’s opinion, the Trial Chamber in *Halilović* attempted to square the circle, by asserting that:

command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus “for the acts of his subordinates” as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.²³⁶

This is consistent with the fact that the ICTY considers that Articles 7(1) and 7(3) provide distinct categories of criminal liability which exclude cumulative convictions for the same count based on the same facts.²³⁷ However, it has a questionable relationship with the way command responsibility is seen in the ICC Statute.

Under the ICC Statute, command responsibility is treated as a form of complicity. Although some elements of Article 28 of the ICC Statute could be read as creating a dereliction of duty-type offence,²³⁸ it quite clearly imputes the crimes of the subordinates to the superior,²³⁹ which is more consistent with a form of complicity. Where there is a duty to intervene, and knowledge of an offence, it can be more easily seen that there is a complicity base for liability on the basis of traditional aiding/abetting ideas.²⁴⁰

As it is formulated in international criminal law, command responsibility is unnuanced, covering many different forms of liability under one heading. It moves from deliberate failures to intervene despite a duty to do so, which fall close to traditional complicity ideas, to, in essence, conduct which is close to negligent dereliction of duty.²⁴¹ This is recognized by the German law relating to the subject, which

²³⁴ *Hadžihasanović* Appeal, Judge Shahabuddeen, para. 33. See also *Oric* ICTY T. Ch. II 30.6.2006 para. 294.

²³⁵ *Hadžihasanović* Appeal para. 33.

²³⁶ *Halilović* ICTY T. Ch. 16.11.2005 para. 54.

²³⁷ *Blaskić* Appeal para. 91; but see *Čelebići* Appeal paras. 745–6.

²³⁸ Ambos, ‘Superior Responsibility’, 850–5.

²³⁹ Article 28 provides that the commander ‘shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control’.

²⁴⁰ See the German *Code of Crimes Against International Law*, s. 4.

²⁴¹ See Mirjan Damaška, ‘The Shadow Side of Command Responsibility’ (2001) 49 *American Journal of Comparative Law* 455, 460–71.

deals separately with failure to know of offences in dereliction of duty, failure to report an offence, and knowing tolerance of an offence when there is a duty and ability to intervene to prevent it.²⁴² By running all these concepts together, like joint criminal enterprise, the concept of superior responsibility can be criticized from the point of view of the principle of fair labelling, and on the basis that it ‘display[s] a measure of insensitivity to the degree of the actor’s own personal culpability’,²⁴³ and provides for the negligent commission of intentional offences.²⁴⁴ The fact that on occasion the ICTY and ICTR have accepted that command responsibility can lead to a conviction for genocide if the superior knew or had reason to know that subordinates were committing or about to commit genocide,²⁴⁵ has led some commentators to express a corresponding concern about diluting the seriousness of the label ‘genocide’.²⁴⁶ With regard to the ICC the tribunals’ case law will presumably be followed, unless the court is willing to rely on the ‘unless otherwise provided’ phrase in Article 30 to eliminate the application of ‘negligent’ command responsibility for genocide.²⁴⁷

Further reading

- Kai Ambos, ‘General Principles of Law in the Rome Statute’ (1999) 10 *CLF* 1.
 Kai Ambos, ‘Superior Responsibility’ in Cassese, *Commentary*, 823.
 Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* (Berlin, 2004).
 Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester, 2002).
 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) ch. 6.
 William J. Fenrick, ‘Article 28’ in Triffterer, *Observers’ Notes*, 515.
 Darryl Mundis, ‘Crimes of the Commander: Superior Responsibility Under Article 7(3) of the ICTY Statute’ in Gideon Boas and William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (The Hague, 2003) 239.
 Per Saland, ‘International Criminal Law Principles’ in Lee, *The Making of the Rome Statute*, 189.
 William Schabas, ‘Hate Speech in Rwanda: The Road to Genocide.’ (2000) 46 *McGill Law Journal* 141.
 William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) ch. 9.
 Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, 2003).

²⁴² German Code of Crimes Against International Law, ss. 13, 14.

²⁴³ See Damaška, ‘The Shadow Side’, 456.

²⁴⁴ William A. Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute (Part III)’ (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 400, 417.

²⁴⁵ See, e.g. *Blagojević and Jokić* ICTY T. Ch. 17.1.2005 para. 686.

²⁴⁶ See, prior to *Blagojević and Jokić* ICTY T. Ch. 17.1.2005, and in relation to earlier suggestions along the same lines, Mettraux, *International Crimes*, 261–4.

²⁴⁷ See William A. Schabas, ‘The *Jelisić* Case and the Mens Rea of Genocide’ (2001) 14 *LJIL* 125 at 132.

16

Defences/Grounds for Excluding Criminal Responsibility

16.1 Introduction

Defences (or in the terminology of the ICC Statute ‘grounds for excluding criminal responsibility’)¹ are an oft-forgotten aspect of international criminal law. Jurisprudence from the international criminal Tribunals on the matter is sparse, and not always satisfactory. There are a number of reasons for this, one of which also at least partially explains the relative lack of scholarly attention given to most defences in international criminal law.² This is the tendency towards a lack of sympathy for defendants in international criminal proceedings. As Albin Eser has said, there are ‘certain psychological reservations toward defences. By providing perpetrators of brutal crimes against humanity . . . with defences for their offences, we have effectively lent them a hand in finding grounds for excluding punishability.’³ It is the purpose of this chapter to set out and critique the law relating to defences, in both treaty-based and customary international law. This chapter is primarily concerned with substantive defences to international crimes, it does not deal with issues such as immunity, youth, *ne bis in idem* or limitation periods. These are not defences for conduct, but pleas as to the jurisdiction or right of a court to try a person, both of which are separate matters.

16.1.1 *The types of defences*

At the outset, certain terminological and conceptual matters ought to be discussed. In the common law world, it is usual to speak of ‘defences’ in the omnibus sense whereas in civil law jurisdictions a firm distinction is drawn between types of defences, in particular between justifications and excuses.⁴ Justifications, broadly speaking, are pleas that the conduct of the defendant was acceptable, and thus necessarily lawful. It is difficult, for example, to argue that a person acting in self-defence has done anything

¹ Although this chapter uses ‘defences’ it is not to be taken as representing a position on the doctrinal controversies about the choice of terminology.

² Superior orders are an exception to this trend.

³ Albin Eser, ‘Defences in War Crimes Trials’ in Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law* (The Hague, 1996) 251.

⁴ See generally Antonio Cassese, ‘Justifications and Excuses in International Criminal Law’ in Cassese, *Commentary*, 951. The distinction is not unknown to the common law, however.

which the law seeks to prevent. 'Excuses', painting again with something of a broad brush, do not seek to defend the conduct of the defendant per se, but seek to say that, in the particular instance, the defendant ought not be blamed for what he or she did. The boundary between the different types of defences is not especially clear, however,⁵ even though the classification does have important consequences, at least in national law. For example, there may be no secondary liability for aiding and abetting justified conduct, the same may not be the case for excused conduct. Also justifications tend to exclude liability for the conduct in private law, whereas excuses do not necessarily do so.⁶ It is not clear that there was agreement on distinction at Rome, hence the neutral terminology of the ICC Statute, 'grounds for excluding criminal responsibility' rather than 'defences', 'justifications' or 'excuses'.

There is another set of 'defences', however, which also require treatment. These are what can be termed 'failure of proof defences'.⁷ These defences are usually denials that a person can be held responsible on the basis that the prosecution has failed to show a fundamental element of the offence. As a result, some national legal systems do not treat these issues as defences. These pleas often relate to the presence or otherwise of *mens rea*.⁸ Consent is a notable example in relation to offences to which it is relevant. Such defences, depending on the circumstances, may also operate across the excuse/justification divide.⁹ They are dealt with in this chapter, as the ICC Statute impliedly treats them as defences.¹⁰ A final introductory point is that defences here are those that serve, as the ICC Statute puts it, to 'exclude criminal responsibility'. Mitigating factors, such as inexperience or pressure not amounting to duress are merely mitigating factors, which go to sentencing rather than responsibility.¹¹

16.2 The ICC Statute and defences

Although the ICC Statute is neither a complete, nor an entirely accurate, statement of defences as they exist in international criminal law, it is the first treaty that attempts to deal with defences in any systematic way. Its provisions were the outcome of compromises between a large number of States, some of which came from the common law tradition, and some from their civil law counterparts. While the provisions therefore leave something to be desired from a criminal law point of view, they provide a sensible structure within which to investigate defences in international criminal law. Article 31 sets out a reasonable proportion of the defences which are applicable to international crimes, providing for defences of insanity, intoxication, self-defence (including defence of others or, exceptionally, property), duress and necessity.

⁵ See A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd edn, Oxford, 2003) 541–4.

⁶ See Cassese, 'Justifications' at 952–4. As he notes though, *ibid.*, so far, international criminal law has yet to make any practical distinction between the two.

⁷ Simester and Sullivan, *Criminal Law*, 538–40.

⁸ Alibi is sometimes seen as a type of this claim, in that the assertion is that the person did not undertake the conduct, as he or she was not there. In fact it is slightly different, in that it is a denial of any of the conduct at all.

⁹ Cassese, 'Justifications', 953–4 treats some such defences as excuses, but others (consent) as a justification.

¹⁰ See, e.g. Art. 32. ¹¹ See section 18.3.1.

Certain points ought to be noted at the outset. First, as Article 31(1) makes clear, it is not intended to be exhaustive. There are other parts of the statute (in particular Articles 32 and 33, which deal with mistakes of fact and law and the defence of superior orders respectively) that are also relevant. Second, as the definitions of defences given in the statute are the outcome of difficult negotiations, Article 31(2)) provides that ‘the Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.’ It has been argued, by one of its drafters, that this provision recognizes that the ICC has a residual power to refuse to apply a defence to an individual case even where the text of the ICC Statute might require it.¹² This might be criticized on the basis that a person ought to be able to rely on the defences that the statute ostensibly sets down without the risk that they will be set aside in an individual case. A better way to interpret this provision may be that the ICC has discretion to determine the factual applicability of a defence before entering into serious discussion of it at trial. In other words, the court may require an ‘air of reality’ of a defence to be established before permitting detailed argument and evidence to be tendered.¹³

On the other side, Article 31(3) of the ICC Statute recognizes that there are defences applicable to international crimes which it does not enumerate. Article 31(3) reads:

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21.¹⁴

Pursuant to this Article a defendant may plead defences before the ICC which have their basis outside the ICC Statute, i.e. in other applicable treaties, customary law and general principles of law. There are a number of such defences, to which we will return. However, owing to the hierarchy of sources established in Article 21 (which places the statute at the apex of authority), arguments that defences contained within Article 31 are narrower than those available under customary law are not admissible under this head, although they may have purchase in arguments about the appropriate application of Article 31(2).

16.3 Mental incapacity¹⁵

Insanity is a defence which often amounts to a claim of lack of proof. Article 31(1)(a) of the ICC Statute is the first codification of a defence of insanity in international law, and applies when:

¹² Per Saland, ‘International Criminal Law Principles’ in Lee, *The Making of the Rome Statute*, 189, 208–9.

¹³ This is particularly relevant where evidence, such as of consent in sexual offences, is sensitive and examination of witnesses can be distressing. See ICC RPE, r. 72.

¹⁴ Other than the ICC Statute, the Elements of Crimes and RPE, Art. 21 provides for the use of applicable treaties, principles and rules of international law (i.e. custom) and ‘failing that’ general principles of law.

¹⁵ See generally, Peter Krug, ‘The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation’ (2000) 96 *AJIL* 317.

The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

Although parts of the provision are quite restrictive, Article 31(1)(a) is a fairly uncontroversial formulation of the defence. It encompasses three situations. The first is the *locus classicus* of a mental incapacity plea, which is when a person is unable to understand the nature of his or her conduct. The usual example given to explain this situation is a person who cuts the victim's throat delusionally thinking that it is a loaf of bread.¹⁶ There is no point convicting such a person, who is in need of treatment rather than prison. Article 31(1)(a) also covers the situation where a person is incapable of understanding the unlawfulness of his or her conduct. Such a person may well deserve exemption from liability, but this is not quite the same as exemption under the first head, at least as appreciation of unlawfulness may involve a more subtle analysis than the concept that the drafters were probably trying to codify, which is that the person was incapable of understanding the wrongfulness of the conduct. The final concept recognized by Article 31(1)(a) is that of the 'irresistible impulse', where a person understands the nature and wrongfulness of the conduct, but is unable, owing to mental illness, to stop from acting as he or she did. There is no requirement that insanity is permanent. It is sufficient that the person's capacity was destroyed at the time of the impugned conduct. As with the other forms of the defence, such a plea will require expert evidence from both sides.¹⁷

It is notable that Article 31(1)(a) requires destruction, rather than impairment, of ability. This is a high standard, albeit one which is consistent with the way most domestic jurisdictions deal with the matter. Diminished, as opposed to absent, ability to comprehend the nature or unlawfulness of conduct, or comply with the law is no defence in the ICC Statute, nor is it in the jurisprudence of the ad hoc Tribunals, which treat any such matter as one of mitigation of sentence.¹⁸ This is similar to the way the issue was treated in the post-Second World War trials in which it was raised,¹⁹ and in the ICC Rules of Procedure and Evidence.²⁰

One unfortunate aspect of Article 31(1)(a) is its failure to provide for a special verdict in the eventuality of a person being acquitted on the basis of mental incapacity. This is important; in domestic systems, a person who is acquitted on the basis of lack of mental capacity is necessarily liable to some other form of order, which provides for

¹⁶ This is, of course, also a mistake of fact, but it would essentially be impossible to persuade a fact-finder that this belief was honestly held without proof of mental incapacity.

¹⁷ See Krug, 'The Emerging Mental Incapacity Defense'.

¹⁸ See *Delalić, Mučić, Delić and Landžo* ICTY A. Ch. 20.2. 2001 paras. 580–90. The Trial Chamber in *Vasiljević* ICTY T. Ch. I 29.11.2002 paras. 282–3 defined diminished responsibility as 'an impairment to his capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law'. In *Jelišić* ICTY T. Ch. 14.12.1999 para. 125 'personality disorders ... [and] ... borderline, narcissistic and anti-social characteristics' were insufficient to diminish responsibility.

¹⁹ *Gerbsch* XIII LRTWC 131, 132, 137. See also Antonio Cassese, *International Criminal Law* (Oxford, 2003) 224–8.

²⁰ ICC RPE, r. 145(2).

psychiatric evaluation and treatment.²¹ It is to be hoped that some arrangements may be found with the mental health authorities in States supportive of the ICC that will provide for those who have been acquitted by the ICC, but are in need of treatment or confinement on the basis of their disorder.²²

16.4 Intoxication

There is a considerable history of commission of international crimes by the intoxicated. In the Second World War the *Sonderkommandos*, who were forced to work in the concentration camps they were held in, were frequently given intoxicants. Many of the participants in Rwanda's genocide were drunk.²³ Child soldiers are often given drugs or alcohol as a control mechanism, to loosen inhibitions and increase their ferocity.²⁴ After the Second World War, at least one case accepted the existence of a partial defence of intoxication, although it was rejected on the facts.²⁵

Although it might be queried if those most responsible for international crimes, who are likely to be the defendants before the ICC, will have much resort to the defence,²⁶ intoxication is dealt with in Article 31(1)(b) of the ICC Statute, which provides for the exclusion of responsibility when:

The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

At the outset it ought to be noted that chronic alcoholism or addition to drugs might also lead to a defence under Article 31(1)(a).²⁷ The nature of the plea is that, owing to the intoxication, the mental element is not formed; thus it is a plea of failure of proof. However, debate on the defence in Rome was awkward, as some delegations were opposed to its inclusion at all.²⁸ As a result of this, the scope of the defence in Article 31(1)(b) is narrow.

²¹ In the UK see, e.g. the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

²² See William Schabas, *Genocide in International Law* (Cambridge, 2000) 344.

²³ Schabas, *Genocide*, 343.

²⁴ Matthew Happold, *Child Soldiers in International Law* (Manchester, 2004) 16–17.

²⁵ *Chusaburo III LRTWC* 76, 78.

²⁶ Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in Cassese, *Commentary*, 1003, 1031.

²⁷ Geert-Jan Knoops, *Defences in Contemporary International Criminal Law* (New York, 2001) 123.

²⁸ Saland, 'Principles', 209; Ambos, 'Other Grounds', 1029–30. Most (although not all) domestic systems provide for some form of defence of involuntary intoxication, but some States refuse to accept voluntary intoxication as a defence, on policy grounds. The ICTY has said that 'in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor': *Kvočka* ICTY T. Ch. I 2.11.2001 para. 706. ICTY A. Ch. 28.2.2005 paras. 707–8.

16.4.1 Voluntary and involuntary intoxication

The primary focus of the text of the Article is involuntary intoxication, that is to say when a person unwittingly becomes intoxicated owing to inadvertent consumption of drugs or alcohol. Voluntary intoxication is only a defence when a person did not realize that he or she might engage in conduct prohibited by the Statute, and was not at fault in failing to realize this.²⁹ Taking drink or drugs to gain ‘Dutch courage’ will not provide the basis for a defence under this provision as the person will know of at least the risk that he or she will commit the offence.

16.4.2 Destruction of capacity

The intoxication must have destroyed the person’s capacity to understand the nature or unlawfulness of the conduct, or ability to conform to the law’s dictates. Impairment, even of a substantial nature, is insufficient to exclude a person’s liability.³⁰ On the language of Article 31(1)(b), it appears that the person must be incapable of understanding or controlling his or her conduct; it does not appear sufficient that the person simply did not do so owing to the intoxication, although it is uncertain if this was the intention of the drafters.

It is not clear precisely how specific the risk of conduct has to be to exclude the defence. ‘Conduct constituting a crime within the jurisdiction of the court’ could be broad, simply meaning any physical act or omission prohibited in the Statute, for example killing, engaging in inhumane treatment, or inflicting serious injury. Or it could be interpreted more narrowly, meaning that the person must have known or disregarded the risk that he or she would engage in the specific conduct for which he or she is being prosecuted. Also there is ambiguity about whether the reference to ‘conduct’ includes the relevant circumstantial elements (for example that there was an armed conflict, there was a widespread or systematic attack on the civilian population, or a manifest pattern of similar events).³¹

16.4.3 A complete defence

In common law systems such as the UK, intoxication is only a defence to certain crimes (known, rather unfortunately, as crimes of ‘specific intent’).³² Pleas that *mens rea* is not established owing to voluntary intoxication are not admissible in crimes of ‘basic intent’, which tend to be less serious versions of specific intent crimes (that is to

²⁹ Where someone is at fault in failing to realize, his or her liability is said to rest on this prior fault.

³⁰ See Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, 2003) 249.

³¹ See Albin Eser, ‘Article 31’ in Triffterer, *Observers’ Notes*, 537, 548; Gerhard Werle, *Principles of International Criminal Law* (Cambridge, 2004) 162.

³² See generally, Simester and Sullivan, *Criminal Law*, 559–64. The term could cause confusion owing to its use in international criminal law, in particular when referring to the intention required for genocide.

say murder is a crime of specific intent, manslaughter is a crime of basic intent). The result of a plea of intoxication is thus usually a conviction for a less serious offence. The ICC Statute does not adopt such a position. Thus a drunk offender could entirely escape criminal responsibility on the basis of this provision, although the strict terms of the defence mean that it will be difficult to sustain a plea of intoxication.

16.5 Self-defence, defence of others and of property³³

It has never been questioned that people have the right to defend themselves. There were a number of cases in which this justification was raised after the Second World War.³⁴ The Trial Chamber in *Kordić and Čerkez* accepted that customary law accepted self-defence,³⁵ an uncontroversial finding made more contentious by the fact that the Chamber asserted that the formulation found in the ICC Statute represented customary law.³⁶ Article 31(1)(c) provides for an acquittal when:

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

16.5.1 Imminent, unlawful use of force

Defence here ought not to be confused with self-defence by States under Article 51 of the UN Charter.³⁷ In addition, this defence is not available in relation to *any* threat. It is limited to action in response to 'an imminent and unlawful use of force against an attack on a protected person or property'.³⁸ What is imminent is a matter of appreciation, although Article 31(1)(c) does make clear that a person must not wait for someone else to strike the first blow.³⁹ 'Unlawful' means that there is no right to defend against someone who is acting lawfully. However, this should not be interpreted as meaning 'criminally'. There have been some suggestions that there is no right to defend against those covered by any of the grounds in Article 31(1).⁴⁰ However, at the domestic level, defence against the insane or highly intoxicated is acceptable, and there seems to be no reason to doubt that the same would apply here. Some assistance might usefully be drawn here from the distinction between justifications and excuses.

³³ See generally, van Sliedregt, *Criminal Responsibility*, 254–67.

³⁴ See *Tessmann (Willi)* XV LRTWC 177.

³⁵ *Kordić and Čerkez* ICTY T. Ch. 26.2.2001 paras. 448–52.

³⁶ *Ibid.* ³⁷ Werle, *Principles*, 142–3. ³⁸ *Kordić and Čerkez* ICTY T. Ch. 26.2.2001 para. 451.

³⁹ Eser, 'Article 31', 549 defines imminent as 'immediately antecedent, presently exercised or still enduring'.

⁴⁰ Werle, *Principles*, 141.

Justified actors are not acting unlawfully, whereas those who are merely excused (the insane and the very intoxicated are two examples of such actors) are acting unlawfully, and thus can be defended against.

The expansion of defence, with respect to war crimes, to protect ‘mission essential property’⁴¹ was controversial in the negotiations at Rome. According to Cassese ‘this extension is manifestly outside the *lex lata* and may generate quite a few misgivings’.⁴² Given that many States have limited rights to use force to protect, for example, nuclear installations, and UN Rules of Engagement often provide for defence of mission essential property, this criticism may be a little harsh.⁴³ On the other hand, Belgium considered this provision contrary to *jus cogens* and therefore issued a declaration on point at the time of its ratification.⁴⁴ Nonetheless fears that aspects of the provision are open to abuse have some foundation.⁴⁵ As the Article clarifies, however, the simple fact that a State is acting in self-defence is not enough in itself to invoke this provision. There does not appear to be any acceptance in this provision for a defence when a person reasonably (but wrongly) believes that there is such an attack.⁴⁶

16.5.2 Reasonable and proportionate response

Not every reaction to an attack is acceptable. For a response to be defended on the basis of Article 31(1)(c), it must be reasonable to resort to force, and the level of force must be ‘proportionate to the degree of danger’ faced. Proportionality is not a test which can be set down with scientific precision in advance. However, in applying the test, ‘such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon, and so forth, have to be considered’.⁴⁷ ‘Eagle-eye’ hindsight is to be avoided when appraising proportionality, as a person does not have the luxury of time to weigh things very carefully when there is an imminent or ongoing attack. Article 31(1)(c) does not create a duty to retreat⁴⁸ or any specific rules on what the response must be, other than setting down the test of proportionality to the level of danger. This test is to be applied by the court; the defendant’s view is not determinative. The language of the Article (the person ‘acts . . . to defend’) implies that the person must intend to act in defence.⁴⁹

⁴¹ Property essential to the survival of a person may be different here.

⁴² Antonio Cassese, ‘The Rome Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 *EJIL* 144, 154–5.

⁴³ It might be questioned if a civilian stealing a truck full of small arms ought to be protected in this situation, although in that situation it is quite possible the person would be considered (or reasonably believed) to be taking an active part in hostilities, thus forfeiting their protection.

⁴⁴ See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>. Although incorrect as a matter of law, this is State practice, accompanied by *opinio juris*, thus relevant for the determination of customary law, as well as interpretation of the ICC Statute.

⁴⁵ See Ambos, ‘Other Grounds’, 1033.

⁴⁶ Eser, ‘Article 31’, 549, and see section 16.7.1 on mistake of fact.

⁴⁷ *Tessmann (Willi)* XV LRTWC 177.

⁴⁸ *Tessman (ibid.)* could be read as requiring this. ⁴⁹ See also Werle, *Principles*, 142.

16.6 Duress and necessity

Situations in which international crimes are committed tend to be ones in which there is group activity, and therefore some level of coercion of an offender by colleagues is often to be expected.⁵⁰ Also in such situations painful choices have at times to be made. Article 31(1)(d), the first codification at the international level of necessity and duress, decidedly controversially,⁵¹ treats the two together, providing for a defence when:⁵²

[t]he conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

Although this was the first codification of these defences, one of the most plausible explanations of the way in which the Nuremberg IMT dealt with its provision on superior orders⁵³ is that it laid down a test for duress.⁵⁴ There was also considerable jurisprudence on duress and necessity in other post-Second World War cases,⁵⁵ such as *Krupp*,⁵⁶ *Flick*,⁵⁷ *Krauch*⁵⁸ and *von Leeb*.⁵⁹ Much of this jurisprudence was canvassed in the ICTY in one of its few fully reasoned decisions on defences, *Prosecutor v. Erdemović*.⁶⁰ In this case, a bare majority of the Appeals Chamber decided that although there was a defence of duress in international law, it did not apply to cases involving the killings of innocents.⁶¹ In particular as two of the judges determined the matter on avowedly policy-based grounds, and there were strong dissents from two other judges,⁶² the finding was controversial.⁶³ Notably, this aspect

⁵⁰ Such colleagues may, of course, become secondarily liable themselves for offences they encouraged, assisted or participated in.

⁵¹ Claus Kreß, 'War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook on Human Rights* 103, 152ff.

⁵² And has been criticized for doing so, not least as duress is an excuse, and most examples of necessity are justifications: see Eser, 'Article 31', 550.

⁵³ See Section 16.8.

⁵⁴ See Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Criminal Law* (The Hague, 1965) 147–56.

⁵⁵ See Commentary, XV LRTWC 170–5. ⁵⁶ X LRTWC 69, 156. ⁵⁷ IX LRTWC 1, 19.

⁵⁸ X LRTWC 1, 54, 57. ⁵⁹ XII LRTWC 1, 144, 149. ⁶⁰ *Erdemović* ICTY A. Ch. 7.10.1997.

⁶¹ *Ibid.*, Separate Opinion of Judge Li, paras. 1–12; Separate Opinion of Judges McDonald and Vohrah, paras. 32–89.

⁶² *Ibid.*, Dissenting Opinion of Judge Stephen, paras. 23–67; Dissenting Opinion of Judge Cassese, paras. 11–51.

⁶³ See, e.g. Peter Rowe, 'Duress as a Defence to War Crimes After Erdemović: A Laboratory for a Permanent Court?' (1998) 1 *YIHL* 210; David Turns, 'The International Criminal Tribunal for the Former Yugoslavia: The *Erdemović* Case' (1998) 47 *ICLQ* 461; Claus Kreß, 'Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts. Die Bewertung von Tötungen im Nötigungsnotstand durch die Rechtsmittelkammer des Internationalen Straftribunals für das ehemalige Jugoslawien im Fall Erdemović' (1999) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft* 597; Robert Cryer, 'One Appeal, Four Opinions, Two Philosophies and a Remittal' (1998) 2 *Journal of Armed Conflict Law* 193.

of the decision in *Erdemović* was not taken up in the ICC Statute. The requirements of the defence in the ICC Statute are probably customary.

16.6.1 Imminent threat beyond the control of the accused

The first requirement is that there is a threat of ‘imminent death or of continuing or imminent serious bodily harm’. Thus it is clear that blackmail or other threats not involving imminent serious violence will not suffice. For the criminal law to permit a person to excuse himself or herself from liability on the basis of threats, those threats must be very serious. Also, the threats must be of imminent danger. It is by no means clear that imminent means the same thing here as in Article 31(1)(c). The threats may be against the accused or others; there is no requirement that there be any particular relationship between the accused and the people threatened. The threat must be real, however, and not simply believed to exist by the defendant.⁶⁴

As recognized by Article 31(1)(c)(ii), the threat must be outside the control of the defendant. The use of the term ‘other’ in that part of the Article implies that this condition also applies to duress in (i). This would exclude the situation where a person had ‘courted’ the threats by others, such as in the instance where a person had joined a group notorious for its criminality. This condition was considered a part of customary law by Judges Cassese and Stephen in *Erdemović*,⁶⁵ and is consistent with national practice.⁶⁶

16.6.2 Necessary and reasonable actions

As with self-defence, pressure, be it from another or by virtue of circumstance, does not suffice to defend *any* reaction. The reactions of the person seeking to use the defence must be both necessary and reasonable in the circumstances to avoid the threat. The test is similar to that of proportionality in self-defence.⁶⁷

16.6.3 Causation

It is an express requirement that the threats caused the impugned conduct. If a person would have acted as they did anyway, they will not be able to take advantage of this defence. Article 31(1)(d) is silent on whether the threats have to be the sole cause of the defendant’s conduct, or whether they only need to be one of a number of causes. This also means, though, that there is nothing in the Article that would require the ICC to take the view that the relevant threat needs to be the sole cause.

⁶⁴ The *Krupp* case may have seen things differently, *Krupp* X LRTWC 69 at 148, See also Commentary, XV LRTWC 174.

⁶⁵ *Erdemović* ICTY A. Ch. 7.10.1997, Opinion of Judge Cassese, para. 16; Opinion of Judge Stephen, para. 68.

⁶⁶ See, e.g. Simister and Sullivan, *Criminal Law*, 596–7. See also Werle, *Principles*, 147–8.

⁶⁷ The test is described in proportionality terms in *Erdemović* ICTY A. Ch. 7.10.1997, Opinion of Judge Cassese, para. 16; Opinion of Judges McDonald and Vohrah, para. 37. See also Eser, ‘Article 31’, 551.

16.6.4 Mental element

As can be seen from Article 31(1)(d), the intention of the person seeking to rely on either defence must be to bring about the lesser of the two evils. In the words of the *Krupp* case, 'if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the original conduct.'⁶⁸ Owing to the formulation of the mental aspect of this defence in the ICC Statute, 'provided that the person does not intend to cause a greater harm than the one sought to be avoided', it is not absolutely clear whether a distinction between actions undertaken to avoid the harm and their consequences is created.⁶⁹ If there is a distinction, then unintended excessive consequences of necessary and reasonable reactions are not to be taken into account. If there is no distinction, then the consequences, as well as the actions of the accused, must be necessary and reasonable. Basing himself on post-Second World War case law, Judge Cassese in the *Erdemović* case took the latter view.⁷⁰

16.7 Mistake of fact and law⁷¹

Mistakes of fact and law are issues which tend to be dealt with differently by civil and common law systems. Civil law jurisdictions tend to be more generous with regard to mistakes of law, allowing for defences where there are reasonable mistakes relating to various aspects of crimes or defences.⁷² Although there might be a trend away from this, in common law systems mistakes generally only provide an excuse when they serve to undermine *mens rea*, making the plea one of failure of proof.⁷³ Article 32 of the ICC Statute appears to adopt the common law approach. Article 32 provides that:

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

⁶⁸ *Krupp* X LRTWC 69 at 149.

⁶⁹ Against any distinction, see Ambos, 'Other Grounds', 1040.

⁷⁰ *Erdemović*, ICTY A. Ch. 7.10.1997, Opinion of Judge Cassese, para. 16.

⁷¹ See generally Albin Eser, 'Mental Elements – Mistake of Fact and Mistake of Law' in Cassese, *Commentary*, 889 at 934–46. Also there is a 'grey zone' in which it is difficult to separate off mistakes of fact and law: see Thomas Wiegand, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and the ICC: An Overview' (2004) 19 *Nouvelles Etudes Pénales* 319, 333.

⁷² See George Fletcher, *Rethinking Criminal Law* (Oxford, 2000) 683–91.

⁷³ In relation to mistakes of law, these are relevant, for example, in relation to the requirement of dishonesty in theft.

16.7.1 *Mistake of fact*

Article 32(1) is unequivocal. A mistake of fact is only relevant to liability if it serves to show that the defendant did not have the *mens rea*. For example, if a person bombed a civilian bunker believing it was a military command centre, there would not be liability on the basis of this provision. Interestingly, Article 32(1) does not contain any express requirement that the mistake be a reasonable one.⁷⁴ One practical limitation, though, is that the person must prove that he or she was honestly mistaken. Questions may arise about the situation where a person is at fault in making the mistake, such as if he or she was drunk or reckless when he or she decided what he or she believed. From its terms, it seems that mistakes of fact which, if they were true, would provide the basis of a defence do not fall under Article 32, as they do not relate to *mens rea*.⁷⁵ Earlier cases allowed such mistakes to negate responsibility.⁷⁶

16.7.2 *Mistake of law*

Like mistake of fact, mistakes of law, with one exception (superior orders), must negate *mens rea*. This defence does not include mistakes about whether conduct is criminalized by the ICC Statute, or whether a defence exists in law.⁷⁷ Nor does it deal with errors about the ambit of defences. The only acceptable mistake in Article 32(2) is where an element of a crime requires a legal evaluation, and the mistake relates to this, for example, where a person is ignorant of the rules on flags of truce and thus did not know the meaning of the use of a white flag.⁷⁸ It has been suggested that when the defence is made out, the use of 'may' in Article 33(2) implies that the ICC may convict the defendant nonetheless.⁷⁹ However, the fact that this defence is a plea of failure of proof, means the argument cannot be correct as it would involve convicting someone despite an element of the offence not being proved by the prosecution.

16.8 Superior orders

The defence of superior orders has a lengthy history,⁸⁰ and reflects a basic tension between the importance of the principles of international law and those of military discipline. Originally, the tendency was to accept that orders amounted to a defence

⁷⁴ Cassese, *International Criminal Law*, 251 considers that any mistake must be reasonable to found a defence under Art. 32(1).

⁷⁵ Eser, 'Mental Elements', 945 argues that Art. 32(1) ought to apply by analogy to mistakes relating to justifications (as opposed to excuses), but the terms of Art. 32(1) do not provide particularly fertile soil for such arguments. See also Werle, *Principles*, 151.

⁷⁶ See, e.g. *US v. List VIII LRTWC* 1, 69.

⁷⁷ See Neil Boister, 'Reflections on the Relationship Between the Duty to Educate in Humanitarian Law and the Absence of a Defence of Mistakes of Law in the Rome Statute' in Richard Burchill, Nigel White and Justin Morris (eds.), *International Conflict and Security Law* (Cambridge, 2005) 32, 38–43.

⁷⁸ See ICC Elements of Crimes for Art. 8(2)(b)(vi), and n. 39.

⁷⁹ See Boister, 'Reflections', 39; Eser, 'Mental Elements', 942. ⁸⁰ See Dinstein, *Superior Orders*, 93–103.

for those who carried them out, and thus that liability accrued to the person who ordered the offence, rather than the one who carried that order out.⁸¹ This was not the clearly accepted position, though, even by the late nineteenth century there was significant evidence that the *respondeat superior* principle (that is to say a complete defence of superior orders) had been replaced by the rule that orders only protected a subordinate if they were manifestly unlawful.⁸² Such a position crystallized after the First World War, if not before.⁸³ The position seemed to change, however, with Article 8 of the Nuremberg IMT Statute, which read: ‘the fact that the defendant acted pursuant to an order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires’.⁸⁴ The Nuremberg IMT explained that provision as follows:

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of punishment. The true test, which is found in various degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.⁸⁵

After this, and General Assembly Resolution 95(I),⁸⁶ which affirmed the Nuremberg Charter and Judgment, it might be thought that international law no longer permitted superior orders as a defence. However, case law and practice on the point from the period up to the creation of the ICTY was more equivocal.⁸⁷ The Genocide Convention, and the Geneva Conventions for example, contain no provision on superior orders, although the Torture Convention excludes reliance on them.⁸⁸ Article 7(4) of the ICTY Statute (and Article 6(4) of the ICTR Statute) essentially repeated Article 8 of the Nuremberg IMT Statute. The ICC Statute, on the other hand, takes a different track, largely returning to the ‘manifest illegality’ test.⁸⁹ The ICC Statute has been criticized for this, although such critiques rely on the controversial assertion that the Nuremberg IMT Charter reflects customary law.⁹⁰ Also, it must be

⁸¹ Lassa Oppenheim, *International Law* (London, 1906), vol. II, 264–5.

⁸² William Winthrop, *Military Law and Precedents* (Washington, 1896) 446–7.

⁸³ See, e.g. *Llandovery Castle* (1922) 16 *AJIL* 708.

⁸⁴ Charter of the International Military Tribunal, annex to the London Agreement on the Prosecution and Punishment of the major War Criminals of the European Axis Powers 82 UNTS 279, Art. 8. Art. 6 of the Tokyo IMT Charter is largely the same: see Special Proclamation: Establishment of an International Military Tribunal for the Far East, 19 January 1946 TIAS no. 1589.

⁸⁵ Nuremberg IMT Judgment (1947) 41 *AJIL* 172, 221. ⁸⁶ UN Doc. A/64/Add.1.

⁸⁷ Paula Gaeta, ‘The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law’ (1999) 10 *EJIL* 172; *contra* Charles Garraway, ‘Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?’ (1999) 836 *International Review of the Red Cross* 785.

⁸⁸ Torture Convention 1984, Art. 2.

⁸⁹ Art. 6(4) of the SCSL Statute returns to the Nuremberg/Tokyo/ICTY/ICTR standard.

⁹⁰ Cassese, *International Criminal Law*, 241; Gaeta, ‘Defence of Superior Orders’.

remembered that the person giving the order will be responsible for his or her part in the crime whether or not the defence applies. Article 33 also adopts a narrow view of the applicability of superior orders as a defence:

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

As can be seen, Article 33 provides that superior orders are not a defence unless three cumulative conditions are fulfilled.⁹¹

16.8.1 Obligation to obey

For the defence to apply, the person obeying the order must be under a legal obligation to obey orders in domestic law. This will be the case for soldiers in all countries, but civilians may be in a different position in different States. The reference in Article 33(1)(a) to 'orders' is deliberate. In some States the obligation is only to obey *lawful* orders⁹² and it was necessary to generalize the reference (to 'orders') as otherwise in those States at any time the defence could apply, there would be no obligation to obey the particular order. There have been suggestions that a superior/subordinate relationship is required.⁹³ This is only correct in so far as it could be an aspect of the requirement that there must be a legal obligation on the person to obey orders. This requirement creates an interesting question about the status of orders from rebel authorities and commanders. Owing to the requirement that there be a legal obligation to obey orders, it appears that such orders cannot form the basis of a defence of obedience.⁹⁴ Furthermore, it has been asserted that if a person mistakenly believes himself or herself to be under an obligation to obey an order, a defence of mistake of law may be pleaded.⁹⁵ However, according to Article 32, mistakes of law only exculpate if they negate *mens rea* (or as provided in Article 33), and this would not apply here.

⁹¹ The order must also have a causal link to the commission of the offence: van Sliedregt, *Criminal Responsibility*, 324.

⁹² In the UK, see the Army Act 1958, s. 34.

⁹³ Andreas Zimmermann, 'Superior Orders' in Cassese, *Commentary*, 957, 968.

⁹⁴ *Ibid.*, 969; and see van Sliedregt, *Criminal Responsibility*, 323–4.

⁹⁵ See Zimmermann, 'Superior Orders'.

16.8.2 Knowledge of unlawfulness

The nature of the defence in the ICC Statute is, as implied by Article 32(2), an expanded form of a mistake of law defence.⁹⁶ Therefore, if a person knows that an order is unlawful, he or she cannot use that order as a defence. It is not always easy to determine what the person knew about the legality of the order, however.

16.8.3 Manifest illegality

Ignorance of the unlawfulness of the order is not enough to exempt a subordinate from liability. That ignorance must, in essence, be forgivable or, to put it another way, the subordinate must not be at fault in not knowing that the order was unlawful. The manifest illegality test now exists to help evaluate if a defendant was culpably ignorant of the illegality of the order.⁹⁷ If an order is manifestly illegal, there is no defence that can be based on it, irrespective of whether or not the subordinate knew it was unlawful. It must be remembered though that ‘no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject.’⁹⁸ Some cases have attempted to provide a definition of manifest illegality. The *Eichmann* case, for example stated that:

[t]he distinguishing mark of a ‘manifestly unlawful order’ should fly like a black flag above the order given . . . [n]ot formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only to the eyes of legal experts, but a flagrant and manifest breach of the law.⁹⁹

The High Command case, however, framed the test as whether the order was ‘criminal on its face’.¹⁰⁰ The *Finta* case in Canada said an order could not be relied upon if it was ‘so outrageous as to be manifestly unlawful’.¹⁰¹ It might be questioned, however, if any of these formulations provide a clear standard. The question remains: manifest to whom? A different standard may be expected, for example, of fully trained army lawyers or high-ranking officials from that of young, low-ranking soldiers who are on their first tour of duty. The role of culture, propaganda and ‘common knowledge’ may also be relevant to the extent to which unlawfulness is manifest.¹⁰² Whether or not such considerations are appropriately integrated into the manifest illegality test is not without controversy. The Canadian War Crimes and Crimes Against Humanity Act attempts to tread a middle path, providing that:

An accused cannot base their defence . . . [of superior orders] . . . on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group

⁹⁶ But not a plea of failure of proof. See Kreß, ‘War Crimes’, 150.

⁹⁷ Earlier cases sometimes used the test to determine if, in fact, the person knew the order was unlawful, see Dinstein, *Superior Orders*, 26–37.

⁹⁸ *Peleus* 13 ILR 248, 249. ⁹⁹ *A-G of Israel v. Eichmann* 36 ILR 277.

¹⁰⁰ *Von Leeb XII LRTWC* 1, 74. ¹⁰¹ *R v. Finta* 104 ILR 285, 322.

¹⁰² See, e.g. Mark Osiel, *Mass Atrocity, Ordinary Evil and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (New Haven, 2001).

of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.¹⁰³

16.8.4 Genocide and crimes against humanity

Article 33(2) was intended to ensure that superior orders could be pleaded in cases involving war crimes (or, possibly, aggression) but not genocide or crimes against humanity. The wording, however, is unfortunate, as it focuses on ‘orders to commit genocide or crimes against humanity’ rather than focusing on the perpetrator’s *mens rea*.¹⁰⁴ It also, illegitimately, assumes that every example of a war crime will necessarily be less serious than every example of a crime against humanity, and (perhaps more legitimately) every example of genocide.¹⁰⁵

16.8.5 The relationship of superior orders to other defences

The existence of superior orders may also give rise to other defences, in particular mistake of fact and duress. If an order contains a factual assertion, such as ‘bomb the enemy arms cache at’ particular coordinates, and it turns out that the building at those coordinates is a hospital, the order forms the factual underpinning for a defence of mistake of fact, as it would undermine *mens rea*. Duress may be relevant because, as President Cassese stated in *Erdemović*:

Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance.¹⁰⁶

16.9 Other ‘defences’

There are other defences that may apply in international criminal law which are not directly enumerated in the ICC Statute. The three main defences falling under this head are consent and (more controversially) reprisals and military necessity.¹⁰⁷ If aggression is added to the jurisdiction of the ICC, it is possible that other defences may be added to the statute, although this is, currently, speculative.

¹⁰³ 2000, c. 24, s. 14(3).

¹⁰⁴ See further Robert Cryer, ‘Superior Orders in the International Criminal Court’ in Burchill *et al.* (eds.), *Conflict and Security*, 49, 63–7.

¹⁰⁵ Zimmermann, ‘Superior Orders’, 972. See also s. 3 of the German Code of Crimes Against International Law, which applies the manifest illegality principle to all crimes.

¹⁰⁶ *Erdemović* ICTY A. Ch. 7.10.1997, Separate and Dissenting Opinion of Judge Cassese, para.15. Although orders lose their legal relevance, they retain an evidential one.

¹⁰⁷ *Tu quoque*, a plea that others (in particular, prosecuting States) have committed similar offences, is not a defence in law: *Kupreskić et al.* ICTY T. Ch. II 14.1.2000 paras. 515–20, although admittedly, it can affect the legitimacy of proceedings.

16.9.1 Consent

Certain offences, in particular sexual offences, are subject to ‘defences’ of consent.¹⁰⁸ Indeed, the absence of consent is a definitional aspect of many of those offences. However, as many situations in which international crimes occur are coercive, especially when people are confined, the reality of any consent must be carefully investigated.¹⁰⁹ In relation to sexual offences, The ICC Elements of Crimes vitiate any purported consent where certain offences are committed ‘by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent’.¹¹⁰ Owing to the sensitivity of evidence relating to consent, the ICC Rules of Procedure and Evidence set up a special regime for when and how the court is to hear it.¹¹¹

16.9.2 Reprisals

Reprisals are responses to violations of humanitarian law that would themselves otherwise amount to violations of that law. They are a crude and dangerous form of law enforcement, but remain lawful in limited situations, and subject to a number of stringent requirements. The ICTY summed up those restrictions as being:

(a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary’s crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) ‘elementary considerations of humanity’.¹¹²

There are prohibitions on reprisals against the wounded, sick and shipwrecked, prisoners of war, interned civilians and those in occupied territories,¹¹³ which are considered customary.¹¹⁴ The prohibitions on reprisals against other civilians and

¹⁰⁸ Outside this context, Art. 52 of Geneva Convention III also only allows certain forms of work to be undertaken by PoWs if they consent.

¹⁰⁹ *Naletilić and Martinović* ICTY T. Ch. I 31.3.2003 para. 519 saw the test as being of ‘true’ or ‘real’ consent. In *Kunarac, Kovač and Vuković* ICTY A. Ch. 12.6.2002 paras. 132–3 the Chamber notes that in the (egregious) circumstances of the victim’s detention, ‘the circumstances ... were so coercive as to negate any possibility of consent’, although it appeared (*ibid.*, para. 131) to err towards not seeing consent as an element of the offence.

¹¹⁰ Elements of Crimes, Art. 8(2)(b)(xxii-1), this includes, ‘natural, induced or age-related incapacity’. Other elements also note that ‘genuine consent’ can be vitiated through deception, see e.g. Elements of Crimes, Art. 8(2)(b)(xxii-5).

¹¹¹ Rr. 70–2. See also ICTY and ICTR Rr. 96. ¹¹² *Kupreškić et al.* ICTY T. Ch. II 14.1.2000 para. 535.

¹¹³ Geneva Convention I, Art. 46; Geneva Convention II Art. 47; Geneva Convention III, Art. 13; Geneva Convention IV, Art. 33.

¹¹⁴ Henckaerts and Doswald-Beck, *ICRC Customary Law*, 519–20.

against cultural property, laid down in Articles 51.6 and 53(c) AP I are of a more dubious customary status.¹¹⁵

16.9.3 Military necessity¹¹⁶

Military necessity is no longer, if it ever was, a general defence. As was said in the Hostages case, 'Military necessity or expediency do not justify a violation of positive rules . . . [which are] . . . superior to military necessities of the most urgent nature except where the regulations themselves specifically provide to the contrary'.¹¹⁷ Thus it is only a defence where rules expressly incorporate it, as, for example Article 8(2)(a)(iv) of the ICC Statute does. It is difficult to define in the abstract what is or is not a matter of military necessity, but two things are reasonably clear; neither mere expediency¹¹⁸ nor political necessity¹¹⁹ is sufficient.

Further reading

- Roger Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2002) 12 *Criminal Law Forum* 291.
- Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) ch. 6.
- Yoram Dinstein, 'Defences' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (The Hague, 2000), vol. I, 367.
- Leslie Green, *Superior Orders in National and International Law* (Leyden, 1976).
- Frits Kalshoven, *Belligerent Reprisals* (Leyden, 1976).
- Matthew Lippman, 'Conundrums of Armed Conflict: Criminal Defences to Violations of the Humanitarian Law of War' (1996) 15 *Dickinson Journal of International Law* 1.
- Mark Osiel, *Obedying Orders: Atrocities, Military Discipline and the Law of War* (New Brunswick, 1999).
- Massimo Scalotti, 'Defences Before the International Criminal Court' Parts 1 and 2 (2001) 1 *International Criminal Law Review* 111 and (2002) 2 *International Criminal Law Review* 1.
- Otto Triffterer, 'Article 33' in Triffterer, *Observers' Notes*, 573.

¹¹⁵ In favour see *Kupreškić, et al.* ICTY T. Ch. II 14.1.2000 paras. 527–35. Against see Christopher Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin, 2001) 359. See also Kreß, 'War Crimes', 153ff.

¹¹⁶ See further van Sliedregt, *Criminal Responsibility*, 295–8.

¹¹⁷ List VIII LRTWC 66–9. ¹¹⁸ Geoffrey Best, *Humanity in Warfare* (London, 1983) 64.

¹¹⁹ Commentary, XV LRTWC 176.

Procedures of International Criminal Investigations and Prosecutions

17.1 International criminal procedures

17.1.1 Introduction

From the Nuremberg trials and onwards, the need to develop a new procedural system for any new international criminal tribunal has been acknowledged. Such a procedural system would be *sui generis* in the sense that it would depart from any one domestic system or legal tradition. But, inevitably, it would have elements from the major domestic legal systems of the world, also enhancing the perceived legitimacy of the tribunal and its proceedings. In this chapter we will focus on the procedures that have developed for the ICTY, ICTR and ICC and consider how they blend elements from different legal traditions.

17.1.2 Different legal traditions

There is a significant distinction in the criminal procedures of two major domestic legal traditions: the common law tradition (or Anglo-American tradition) and the civil law tradition (or Continental or Romano-Germanic tradition). While these traditions go beyond the system of criminal procedures,¹ the common law model is said to be ‘adversarial’ or ‘accusatorial’ and the civil law model ‘inquisitorial’. No domestic system represents a pure model,² however, and there are considerable differences between systems belonging to the same tradition. Moreover, some systems, e.g. in Scandinavia, do not really belong to either of the two traditions. In spite of shortcomings,³ we will here use the terms ‘adversarial’ and ‘inquisitorial’ to describe in a general sense differences attributed to the two traditions, but also, on occasion, resort to the common law and civil law labels.

¹ Not only legal but also sociological and cultural differences are espoused by the different legal traditions.

² Regarding Europe, see e.g. Mireille Delmas-Marty and John R. Spencer (eds.), *European Criminal Procedure* (Cambridge, 2002).

³ See e.g. Kai Ambos, ‘International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?’ (2003) 3 *ICLR* 1 (noting that modern systems depart from the traditional ‘inquisitorial’ model, where the prosecutor and judge was one and the same, and that both models are ‘accusatorial’ in nature).

The fundamental difference between the models is the role of the parties and of the judges. While both systems aim at finding the truth,⁴ the means and methods vary. The 'adversarial' model, as the term suggests, is premised on two adversarial parties each bringing its case to court, the prosecution and the defence. Hence, the two parties conduct their own investigations and the role of the judge at trial is (traditionally) like a referee, mainly deciding procedural issues raised by the parties; a system that fits well with jury trials. In the 'inquisitorial' model, on the contrary, State agencies are obliged to carry out objective criminal investigations and prosecutions and, essentially, only one case is presented to the court. Defence interests are looked after in the investigation and there is judicial supervision, often by an examining judge (*juge d'instruction*). The prosecutor and the examining judge instruct the police and a 'dossier' is assembled for the entire case. The trial judge is different from the examining judge, but will have access to the 'dossier'. The judge plays a much more active and intervening role at trial, with an explicit task to 'seek the truth'. These differences have effects throughout the proceedings and have led to different procedures.

Ideally, elements from different domestic legal systems should be incorporated in international procedural rules with a view to creating a coherent whole, providing for fair and yet effective proceedings. But blending elements from different legal traditions is not without its problems and adversarial and inquisitorial features are not always compatible. Furthermore, political considerations (and perhaps nationalistic pride) require compromises, which in turn may result in untested solutions or overly flexible rules; procedural efficiency and fair trial rights could thereby be affected.

Apart from the need to achieve broad acceptance there are other reasons for a mixed model. Adversarial principles are generally attractive for fulfilling the fair trial rights of the accused as laid down in international human rights instruments.⁵ On the other hand, procedures that require the suspect or accused to conduct his or her investigation in preparation of a separate case may prove difficult, or even impossible, in international criminal proceedings dependant upon State cooperation.⁶ Moreover, the focus on objective truth-finding in inquisitorial systems may better serve, for example, the aim of creating an 'accurate historical record'. A less two party-centred process also allows the crime victims a more pronounced role and increased judicial control may enhance the efficiency of the proceedings and the acceptance of broad prosecutorial powers.

⁴ It is sometimes said that the civil law system aims at establishing 'objective truth', as a necessary precondition for a just decision, and the common law system rather seeks 'procedural truth', with an emphasis on a just settlement of dispute; e.g. Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, 2003) 16.

⁵ Indeed, the detailed minimum guarantees laid down in Art. 14 of the ICCPR are based on the Anglo-Saxon common law tradition of 'due process of law'; see Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd edn, Kehl/Strasbourg/Arlington, 2005) 305.

⁶ This may work both ways, however, and sometimes the accused will have much better access to State archives and other information than the international prosecutor (e.g. in the Former Yugoslavia). But in other instances, e.g. after a regime change (e.g. in Rwanda), the accused could be completely barred from access to the State where the investigation is to be conducted.

17.1.3 International criminal tribunals and courts

Special criminal procedures were established for the Nuremberg and Tokyo IMTs. Basic provisions concerning the powers of each tribunal and the conduct of the trial, the judgment and sentences, and certain fair trial rights for the defendants, were laid down in the respective Charters.⁷ In addition, the Charters provided for Rules of Procedure to be established by each tribunal.⁸ Nonetheless, the procedures of the Tribunals were influenced by domestic procedural principles, primarily from the Anglo-American adversarial system. Adversarial features included the defendant's right to a detailed indictment, to conduct his own defence or to have assistance of counsel, as well as to present evidence and cross-examine witnesses. The examination of witnesses at trial was also left to the parties. But the Nuremberg procedures also had some inquisitorial elements, such as allowing trials *in absentia*, giving the defendant a right to explain himself at a preliminary hearing, relaxed rules on admissibility of evidence, and trial by a panel of judges instead of a jury. When assessed by the standards of the day, the criminal procedures were essentially fair.⁹ Measured against today's standards, however, the protections were minimal and did not include, for example, a right to remain silent or to appeal against a conviction.

The subsequent trials in Germany under Control Council Law No. 10 were conducted under criminal procedures established by the commanders of the different zones of occupation.¹⁰ Except for some general principles, the criminal procedures of the Military Tribunals after the Second World War were mainly judge-made law.

The ICTY and ICTR Statutes, adopted by the Security Council, include only a few basic procedural provisions; further detail was left to the judges to establish in the form of Rules of Procedure and Evidence (RPE). The approach was that the RPE had to reflect 'concepts that are generally recognized as being fair and just in the international arena'¹¹ and an early ICTY Trial Chamber decision¹² explained that the procedures were a 'unique amalgam of common and civil law features' and did not 'strictly follow the procedure of civil law or common law'. In fact, however, the ICTY procedures were mainly adversarial in nature. The RPEs for the Tribunals were

⁷ Arts. 16 (fair trial rights), 17–25 (powers and trial procedures) and 26–29 (judgment and sentence) of the Nuremberg Charter and Arts. 9–10 (fair trial), 11–15 (powers and trial procedures), and 16–17 (judgment and sentence) of the Tokyo Charter.

⁸ Art. 13 of the Nuremberg Charter and Art. 7 of the Tokyo Charter. The Nuremberg Rules, adopted on 29 October 1945, contained a few more detailed procedural provisions.

⁹ The argument has also been made that the trials as such contravened the principle of legality, but such criticisms are directed more against the substantive law than the criminal procedures.

¹⁰ Art. III.2 of Control Council Law No. 10. In the United States zone of occupation, e.g. general criminal procedures were set forth in Ordinance No. 7 of Military Government for Germany, United States Zone, and more specific provisions adopted by the established Military Tribunals, e.g. the Rules of Procedure of Military Tribunal I, adopted on 2 November 1946 and later amended. Later Uniform Rules of Procedure were adopted for all Military Tribunals in the US zone.

¹¹ *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, UN Doc. A/49/342 – S/1994/1007, para. 53 (First ICTY Report to the UN, 1994).

¹² *Tadić* ICTY T. Ch. II 5.8.1996 para. 14. Similarly, *Delalić et al.* ICTY T. Ch. II 1.5.1997 para. 15.

experimental¹³ and have been amended many times, leading to criticism regarding legal certainty and fairness.¹⁴ Many of the amendments have been in an inquisitorial direction, inter alia increasing the judges' controlling powers with the aim to reduce the length of the proceedings.¹⁵ In addition to written law, the ICTY and ICTR judges have resorted to the so-called 'inherent powers' of the Tribunal in seeking out procedures. Notable examples are a decision in *Tadić*¹⁶ on the competence to ascertain the Tribunal's jurisdiction and one in *Blaskić*¹⁷ regarding the issuance of binding orders to States, but inherent powers have also been used for more routine matters such as the withdrawal of counsel¹⁸ and ordering disclosure.¹⁹

The ICC Statute is a treaty negotiated by States. The ILC draft Statute, much inspired by the procedural law of the ICTY and ICTR, reflected a rather adversarial approach. But during the preparatory negotiations more inquisitorial features were proposed and incorporated²⁰ partly as a reaction against the ICTY and ICTR procedures. Huge efforts were made towards finding solutions satisfactory to the different legal traditions, resulting in agreement on important 'bridges' between the two traditions such a pre-trial chamber and the procedure in case of admission of guilt. In addition to the very detailed procedural regime they negotiated in the ICC Statute, the States also reserved for themselves the powers to formulate the RPE.²¹ This departs from the practice of other international courts and tribunals where the adoption of procedural law is left to the judges. The ICC judges were, however, given the power to adopt Regulations of the Court,²² which in practice also regulate procedural matters of substantive importance.

17.1.4 International and domestic procedural law

The relationship between international and domestic criminal procedures is complex. While influenced by domestic procedures, the ICTY, ICTR and ICC all have mixed systems with adversarial as well as inquisitorial elements. At least to an extent, the

¹³ See also the First ICTY Report to the UN, 1994, para. 54 (stressing that the Tribunal had little by way of precedent to guide it when drafting the RPE).

¹⁴ On 29.3.2006, the 37th revised version of the ICTY RPE was adopted, and on 7 June 2005 version 15 of the ICTR RPE. For a critical view see, e.g. Andreas O'Shea, 'Changing the Rules of the Game in the Middle of Play: The Dilemma of Procedural Development in the Rwanda Tribunal' (2001) 14 *South African Journal of Criminal Justice* 233.

¹⁵ E.g. Daryl Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence' (2001) 14 *LJIL* 367.

¹⁶ *Tadić* ICTY A. Ch. 2.10.1995 paras. 14–20 (a power often referred to as '*Kompetenz-Kompetenz*' or '*la compétence de la compétence*').

¹⁷ *Blaskić* ICTY T. Ch. II 18.7.1997 paras. 30–40, and A. Ch. 29.10.1997 paras. 25–31 (also explaining that 'inherent powers' is preferably used for functions that are judicial in nature, while 'implied powers' is often used in relation to expanded competencies).

¹⁸ E.g. *Delalić et al.* ICTY A. Ch. 24.6.1999. ¹⁹ E.g. *Tadić* ICTY A. Ch. 15.7.1999 para. 322.

²⁰ On the ICC negotiations, see Silvia Fernández de Gurmendi, 'International Criminal Law Procedures: The Process of Negotiations' in Lee, *The Making of the Rome Statute*, 217–27.

²¹ Art. 51 of the ICC Statute (which allows the judges to adopt amendments to the RPE under certain conditions, but only on a provisional basis and subject to the approval of the ICC States parties).

²² *Ibid.*, Art. 52.

traditional common law and civil law divide has been overcome.²³ Nonetheless, the procedures are primarily adversarial in nature and the procedures of the ICTY and ICTR more so than those of the ICC.

Seen as a whole each procedural system is unprecedented and may be considered as unique (*sui generis*).²⁴ But some lawyers are uneasy about the hybrid systems created, which depart from the mature and carefully structured balance of domestic systems.²⁵ The fact that they are unique and, in the case of the ICC, the avoidance of 'technical terms' with a special meaning in domestic systems, creates uncertainties. In any case, domestic notions, legal constructs and terms of art should not be 'mechanically imported into international proceedings'; they must be understood against the object and purpose of the international proceedings.²⁶ Additionally, domestic procedures are so diverse that it is often difficult to argue customary law status, and only to a limited extent are principles conceived so uniformly that domestic law analogies are relevant.

These institutions serve as models for international criminal justice and a source of inspiration for the development of domestic proceedings.²⁷ It is important to bear in mind, however, that these international criminal procedures were never devised to be adopted by States and have been framed against the specific circumstances applicable to the international jurisdictions; they might not always represent 'best practice' for States.

17.2 International criminal proceedings and human rights

17.2.1 International human rights standards

It is to be expected that an international criminal jurisdiction should adhere to internationally recognized human rights standards. In his report on the establishment of the ICTY, the UN Secretary-General underlined, as axiomatic, that such standards regarding the rights of the accused be fully respected at all stages of the proceedings.²⁸ Apart from the argument of principle, this is also a necessary requirement for allowing an international court to prosecute individuals, a matter that is normally intrinsically

²³ But whether this reflects a real development towards a new, fused procedural tradition more generally or is just the result of the political wish to establish the ICC is a debated issue; see e.g. Mark Findlay, 'Synthesis in Trial Proceedings? The Experience of International Criminal Tribunals' (2001) 50 *ICLQ* 26.

²⁴ E.g. *Delalić et al.* ICTY T. Ch. II 1.5.1997 para. 15. See e.g. Patrick Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *EJIL* 569 at 574 (the ICTY procedures are 'neither common law accusatorial nor civil law inquisitorial, nor even an amalgam of both; it is *sui generis*'). Similarly, Ambos, 'International Criminal Procedure', 34–5, and Gabrielle Kirk McDonald, 'Trial Procedures and Practice' in Gabrielle Kirk McDonald and Olivia Swaak Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer, 2000) 556.

²⁵ E.g. Vladimir Tochilovsky, 'International Criminal Justice: Strangers in the Foreign System' (2004) 15 *CLF* 319.

²⁶ See Judge Cassese's dissenting opinion in *Erdemović* ICTY A. Ch. 7.10.1997 paras. 1–6.

²⁷ The ICTY, ICTR and ICC procedures have also influenced the so-called 'internationalized criminal courts', e.g. the Special Court for Sierra Leone; see ch. 9.

²⁸ Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3.5.1993 para. 106.

linked to State sovereignty.²⁹ Adherence to international human rights standards is also important in order to obtain cooperation by States having obligations under international law to respect human rights.

Nevertheless, the international criminal courts and tribunals are not parties to, and therefore are not formally bound by, international human rights treaties nor the jurisprudence developed by international human rights courts and other organs. These are directed to States. Instead, some human rights principles are set out in the Statutes and RPEs, and are thus directly applicable in the proceedings. Being a global treaty with a large number of ratifications, the ICCPR has served as the model.³⁰ Such principles have also entered into the legal framework more indirectly as principles of the UN or as enshrined in customary international law or general principles of law, regarding which human rights treaties and jurisprudence may serve as authoritative evidence.³¹

After some initial reluctance³² the ICTY and ICTR now frequently make reference to international human rights treaties and case law in their decisions.³³ Nevertheless, in some instances the Tribunals have departed from a strict adherence to human rights standards, as developed for domestic proceedings. The Tribunals' unique structure, status, and subject matter jurisdiction have been regarded as justification for this departure. But even when the outcome can be defended, the method used may be criticized.³⁴ The ICC Statute, on the other hand, contains provisions reflecting international human rights law and directs that the Court must apply applicable treaties and the principles and rules of international law as sources of law; additionally, the application and interpretation of the law 'must be consistent with internationally recognized human rights'.³⁵

17.2.2 Independence and impartiality

All human rights treaties require an institutional guarantee in the form of an independent and impartial tribunal or court established by law. This is an integral part of the accused's right to a fair trial and a general principle of law recognized by all legal

²⁹ Antonio Cassese, 'Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) 4 *European Human Rights Law Review* 329 at 332.

³⁰ Particularly Art. 14 of the ICCPR. One should remember, however, that some States made far-reaching reservations with respect to that Article; see Nowak, *UN Covenant*, 306–307.

³¹ E.g. *Kajelijeli* ICTR A. Ch. 23.5.2005 para. 209 (customary international law is reflected, inter alia, in the ICCPR).

³² E.g. *Tadić* ICTY T. Ch. II 10.8.1995 paras. 17–30 (interpretations of human rights standards made by other judicial bodies were considered, by the majority, to be of limited value due to the Tribunal's unique procedures).

³³ E.g. *Delalić et al.* ICTY T. Ch. II 28.4.1997 para. 27 (decisions on provisions of the ICCPR and the ECHR were found 'authoritative and applicable'); see also *Kajelijeli* ICTR A. Ch. 23.5.2005 para. 209. Generally, see Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks' in Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Ashbjørn Eide* (Leiden, 2003) 19–52.

³⁴ E.g. Gabrielle McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas and William Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Dordrecht, 2003) 193–238.

³⁵ Art. 21(1)(b) and (3) of the ICC Statute.

systems of the world. Independence requires an institutional and functional separation from the executive and legislative powers as well as from the parties.³⁶ One problem for the international criminal jurisdictions is their dependence on cooperation by States and others. The difficulties this creates were described in the *Barayagwiza* case, after suspension by the government of Rwanda of cooperation with ICTR, though well aware of the fact that most of the evidence that the Tribunal needed was located in Rwanda.³⁷

The impartiality requirement also relates to the judge who must be both personally and institutionally impartial. The ICTY Statute and ICTR Statute expressly require the impartiality of judges but do not address the independence of the tribunal.³⁸ Their status as judicial institutions established by the Security Council has led to some discomfort regarding their institutional independence.³⁹ However, domestic courts are also subject to the exercise of executive and legislative powers, for example as regards budgets, and appointments, and this alone does not rule out independence. In an objective sense, the ICTY and ICTR are institutionally and functionally independent. For example, both Tribunals have addressed the legality of their creation⁴⁰ and there are no provisions allowing the Security Council to interfere in individual cases. In *Furundžija* the ICTY Appeals Chamber addressed the question of impartiality of the judges. Taking into account ECtHR jurisprudence and domestic practice, the Chamber established a standard for the assessment of impartiality.⁴¹ Actual bias or an unacceptable appearance of bias – certain interests or circumstances that would lead ‘a reasonable observer, properly informed, to reasonably apprehend bias’ – reflect partiality and, hence, the judge should be disqualified.⁴²

The ICC is an independent, treaty-based body and its more comprehensive Statute explicitly addresses the independence and impartiality of the judges and the Prosecutor (and Deputy Prosecutors), as well as the right of the accused to a ‘fair hearing conducted impartially’.⁴³ The Statute provides for both personal and institutional impartiality. With respect to the Security Council, the relationship is essentially of a legal nature, but some have expressed concerns regarding the Council’s power to

³⁶ E.g. *Ringeisen v. Austria*, ECtHR 16.7.1971 para. 95 Series A No. 13.

³⁷ *Barayagwiza* ICTR A. Ch. 3.11.1999 and 31.3.2000 (particularly the separate opinions by Judges Vohrah and Nieto-Navia).

³⁸ Art. 13 of the ICTY Statute and Art. 12 of the ICTR Statute. See also Rules 14–15 of the ICTY RPE and ICTR RPE (solemn declaration and disqualification of judges).

³⁹ E.g. José Alvarez, ‘Nuremberg Revisited: The Tadić Case’ (1996) 7 *EJIL* 245 at 253–4.

⁴⁰ E.g. *Tadić* ICTY A. Ch. 2.10.1995, and *Kanyabashi* ICTR T. Ch. II 18.6.1997.

⁴¹ *Furundžija* ICTY A. Ch. 21.7.2000 paras. 177–91. See also *Rutaganda* ICTR A. Ch. 26.5.2003 paras. 39–49. Other interesting decisions on disqualification are *Sesay et al.* SCSL A. Ch. 13.3.2004, and *Norman et al.* SCSL A. Ch. 28.5.2004.

⁴² In one case before the ICTR, the appearance of bias regarding one judge extended to the whole Trial Chamber and the Chamber was reconstituted: *Kamukama et al.* ICTR A. Ch. 28.9.2004 and 22.10.2004 paras. 62–8 (two judges dissenting).

⁴³ Arts. 36 (qualifications and election of judges), 40 (independence of judges), 41 (excusing and disqualification of judges), 42.5–8 (independence, impartiality and disqualification of the Prosecutor), 45 (solemn undertaking), and 67(1) (fair trial rights) of the ICC Statute. See also rr. 5–6 and 33–35 of the ICC RPE, which include, inter alia, a duty for a judge or Prosecutor to request excusal if he or she ‘has reason to believe that a ground for disqualification exist in relation to him or her’ (r. 35).

request a deferral of an investigation or prosecution.⁴⁴ The non-renewable term in office of the judges and prosecutors is one way of ensuring independence and impartiality. While the Prosecutor's institutional independence and large functional autonomy under the law are adversarial features, the prescribed impartiality is more inquisitorial in nature and indicates a role as 'an officer of justice' rather than a partisan party to the proceedings. There is a case for disqualification when the impartiality of a judge or the Prosecutor 'might reasonably be doubted'.

17.2.3 Presumption of innocence

Another fundamental principle set forth in human rights instruments, and also generally accepted and often constitutionally protected by States, is that the accused shall be presumed innocent until proven guilty according to law.⁴⁵ As phrased in those instruments, the principle applies only to an 'accused' and the same restriction is expressed in the ICTY and ICTR Statutes.⁴⁶ However, a widely shared opinion is that the presumption should also extend to the investigative stage. The ICC Statute indeed affords this right to 'everyone' and this wording, in spite of the provision being placed in the part dealing with trials, may suggest that it is of general application.⁴⁷

The presumption of innocence has many implications. A corollary right is to remain silent and not be compelled to incriminate oneself or confess guilt, which, broadly interpreted, applies throughout the proceedings. Indeed, this right is provided for 'suspects' at the ICTY and ICTR and generally at the ICC.⁴⁸ Silence may not be used as evidence to prove guilt and may not be interpreted as an admission.⁴⁹ Another consequence is that an accused refusing to express an opinion as to his or her guilt or innocence shall be considered not having admitted any guilt; in the system with formal pleadings at the ICTY and ICTR, the judge shall enter a 'plea of not guilty' on behalf of the accused.⁵⁰

Another important effect is that the prosecution must prove the defendant's guilt and in case of doubt the accused must be found not guilty (*in dubio pro reo*). Hence, the prosecutor has the burden of proof. National systems take different approaches as to the scope of the prosecutor's burden. In common law and other adversarial systems the standard is referred to as 'guilt beyond a reasonable doubt' and in civil law systems often 'the judge's innermost conviction' (*l'intime conviction du juge*). The ICTY and ICTR have themselves adopted a common law-inspired approach whereby the Prosecutor is required to prove guilt 'beyond a reasonable doubt',⁵¹ but the onus to

⁴⁴ See further ch. 8.

⁴⁵ Some countries, however, interpret the principle as 'not presumed guilty', e.g. the Italian Constitution.

⁴⁶ Art. 21(3) of the ICTY Statute and Art. 20(3) of the ICTR Statute.

⁴⁷ Art. 66(1) of the ICC Statute (in Part 6 'The Trial').

⁴⁸ Rule 42(A)(iii) of the ICTY RPE and ICTR RPE; Art. 55(1)(a) and (2)(b) of the ICC Statute.

⁴⁹ Arts. 55(2) and 67(1)(g) of the ICC Statute. See, e.g. also *Brđjanin* ICTY T. Ch. II 1.9.2004 para. 24.

⁵⁰ Rule 62 of the ICTY RPE and ICTR RPE. ⁵¹ Rule 87(A) of the ICTY RPE and ICTR RPE.

establish a defence rests with the accused.⁵² In relation to the charges, the accused need only bring evidence ‘to suggest a reasonable possibility’ in order to induce a reasonable doubt, while the proof required for other issues which the accused might raise has been declared as ‘on the balance of probabilities’.⁵³

In spite of domestic differences, the States agreed that the ICC Statute should establish the Prosecutor’s onus and a ‘beyond a reasonable doubt’ standard for a conviction, but also a right for the accused ‘not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal’.⁵⁴ What this right will mean in practice is not entirely clear and it may create problems, for example with respect to the generally accepted presumption of a person’s sanity. But some (civil law-inspired) commentators go further claiming a burden on the prosecution to disprove defences.⁵⁵

17.2.4 Public, fair and expeditious proceedings

The principle of a public hearing allows a public scrutiny of the judicial proceedings and thus a protection against unfairness and arbitrary action by the courts. This principle also applies at the ICTY, ICTR and ICC. The respective Statutes provide for public hearings and delivery of the judgment in public.⁵⁶ As in domestic proceedings there are exceptions, however, and the provisions of the ICTY and ICTR RPEs are inspired by the exceptions set out in the ICCPR and ECHR; closed sessions are allowed for reasons of: public order or morality, safety, security or non-disclosure of the identity of a protected victim or witness, and the protection of the interests of justice.⁵⁷ The ICC Statute provides for two exceptions: protection of the accused, victims and witnesses, and protection of confidential or sensitive evidence.⁵⁸ It has been argued that these exceptions should be interpreted in strict accordance with human rights law.⁵⁹

To provide for a ‘fair trial’ is a fundamental aim for any criminal procedures, also for international ones. But although the principle is recognized as such as a general principle of international law, it is subject to different interpretations. Consequently, the standards laid down in international human rights instruments are drafted in quite general terms and implemented quite differently domestically. Nonetheless, the international criminal jurisdictions require specific rules and not merely general principles.

⁵² E.g. *Delalić et al.* ICTY A. Ch. 20.2.2001 para. 582. ⁵³ E.g. *ibid.*, para. 603.

⁵⁴ Arts. 66(2)–(3) and 67(1)(i) of the ICC Statute. Cf. Art. 21 of the ICTY Statute and Art. 20 of the ICTR Statute, which simply refer to the accused being proven guilty ‘according to the provisions of the present Statute’. The reasonable doubt standard was also defeated with respect to Art. 14 of the ICCPR.

⁵⁵ E.g. Salvatore Zappalà, ‘The Rights of the Accused’ in Cassese, *Commentary*, 1346.

⁵⁶ Arts. 21(2) and 23(2) of the ICTY Statute, Arts. 20(2) and 22(2) of the ICTR Statute, and Arts. 64(7), 67(1) and 74(5) of the ICC Statute. See also rr. 78 and 98ter of the ICTY RPE and r. 78 of the ICTR RPE.

⁵⁷ R. 79 of the ICTY RPE and ICTR RPE, to be compared with Art. 14(1) of the ICCPR and Art. 6(1) of the ECHR.

⁵⁸ Art. 64(7) of the ICC Statute, referring to Art. 68 concerning the protection of the accused, victims and witnesses. See also Art. 72(5)(d) (national security information) and rr. 72 (relevance or admissibility of evidence in cases of sexual violence) and 87–88 (protective and special measures).

⁵⁹ E.g. Christoph Safferling, *Towards an International Criminal Procedure* (Oxford, 2001) 238–9.

A fundamental element of a fair trial, and a general principle of law, is the principle of equality of arms; a principle that should not be confused with the principle of equality before the law, or non-discrimination.⁶⁰ Equality of arms is more significant in adversarial proceedings and requires opportunities for each party to prepare and present its case, both on law and on facts, and to respond to the opponent's case. The Tribunals argue a broad interpretation,⁶¹ but also establish limitations. A judicial body must ensure that neither party is put at a disadvantage when presenting its case⁶² but the application is less far-reaching with respect to preparations. The accused's right to have adequate time and facilities to prepare the defence should be ensured under conditions that do not place him or her at a substantial disadvantage vis-à-vis the Prosecutor, but does not imply ensuring parity of resources between the parties, such as the material equality of financial or personal resources.⁶³ It is likely that the ICC will take a similar stance. Other aspects of the equality of arms are the accused's rights to prompt and detailed information about the charges, to disclosure of and access to the Prosecutor's evidence, to defence counsel, to examine witnesses against him or her, and to call witnesses under equal conditions.⁶⁴ The right to call witnesses has been interpreted as placing a positive duty upon the Tribunal to assist the accused with summonses, safe conducts and other measures necessary for obtaining the testimony.⁶⁵

Each Statute provides the accused with the right to be tried without 'undue delay'; a right also reflected in all major human rights instruments.⁶⁶ The ICTY and ICTR are often criticized for excessively long proceedings⁶⁷ and many challenges have been launched by accused claiming violations of this right but so far unsuccessfully. To no surprise, many critics are coloured by their own legal tradition; common law observers would, for example, question the relaxed practice on admissibility of evidence,⁶⁸ and civil law observers argue in favour of even more judicial intervention in the investigation and, based on a dossier, at trial.⁶⁹ In response, the ICTY and ICTR have amended their practice and rules to achieve more expeditious proceedings but they still remain very long in most cases. Quite apart from the fact that the Tribunals' resources are limited, the main reason is that international investigations and prosecutions are very complex, factually, legally and politically, and therefore more time-consuming than most domestic ones.

⁶⁰ Art. 21(1) of the ICTY Statute, Art. 20(1) of the ICTR Statute, and Art. 67(1) of the ICC Statute. See also Arts. 14(1) and 26 of the ICCPR.

⁶¹ E.g. *Tadić* ICTY A. Ch. 15.7.1999 paras. 44 and 52. ⁶² *Ibid.*, para. 48.

⁶³ E.g. *Kayishema and Ruzindana* ICTR A. Ch. 1.6.2001 paras. 67–9, and *Kordić and Čerkez* ICTY A. Ch. 17.12.2004 paras. 175–6 (referring to an earlier decision in the same case: A. Ch. 11.9.2001 paras. 5–9).

⁶⁴ These rights are also specifically provided for: Art. 21(4) of the ICTY Statute, Art. 20(4) of the ICTR Statute, and Art. 67(1) of the ICC Statute.

⁶⁵ E.g. *Tadić* ICTY T. Ch. II 26.6.1996, and *Kupreškić et al.* ICTY T. Ch. II 6.10.1998.

⁶⁶ Art. 21 of the ICTY Statute, Art. 20 of the ICTR Statute, and Art. 67 of the ICC Statute. See also Art. 14(3) of the ICCPR. In addition, Art. 64(3)(c) of the ICC Statute obliges the Trial Chamber to: 'confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'.

⁶⁷ Reference is sometimes made to the Nuremberg trials which lasted some ten months and covered all of the Second World War in the Western theatre, but this comparison is not entirely relevant due to the development of fair trial rights since the 1940s, including the right to appeals.

⁶⁸ E.g. Ian Bryan and Peter Rowe, 'The Role of Evidence in War Crimes Trials: The Common Law and the Yugoslav Tribunal' (1999) 2 *YIHL* 307.

⁶⁹ E.g. Stéphane Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice' (2004) 2 *JICJ* 526.

17.3 Actors in the proceedings and their roles

The organs of the ICTY, ICTR and ICC are all organized in a similar way and the organs have been described briefly in Chapters 7 and 8. Their functions and powers are set out in the applicable Statute and RPE.

17.3.1 Judges

The role of the judges at the ICTY and ICTR was from the outset inspired by the adversarial nature of the proceedings; to an extent they act as umpires. But some provisions allow them a more active role, for example to order the parties to present additional evidence and *ex officio* to summon a witness. Over time the judges have become more active in controlling the proceedings as a whole, rather than simply the trial. The introduction of pre-trial judges in the ICTY and more stringent provisions for both Tribunals on preparations for trial mark this development.

The role of the ICC judges, on the other hand, is already from the outset more interventionist in nature. Apart from activities regarding preparations for trial and submission of evidence, judges have a certain limited role to play in the criminal investigation. It may be a far cry from the role of an investigative judge in a civil law system, but it reflects additional inquisitorial elements in the criminal procedures. Early judicial involvement helps ensure the rights of the suspect or accused, and the protection of other interests, such as the interests of victims or States. It may also assist in obtaining State cooperation.

17.3.2 Prosecutor

True to adversarial principles, the international Prosecutor enjoys a high degree of independence, albeit under some judicial supervision. The supervision is greater in the ICC than in the ICTY and ICTR. One crucial difference is in the extent of their powers flowing from the more limited geographical and temporal jurisdiction of the Tribunals compared with the ICC.⁷⁰ Each Prosecutor decides on the commencement of the investigation, the conduct of the investigation and any prosecution of a crime. The onus to prove the guilt of the accused rests with the Prosecutor. However, the scope of the investigation obligations differs and the prosecutorial role to represent the public interest of prosecuting and punishing the perpetrators of crimes under its jurisdiction is tempered at the ICC by a more active truth-seeking duty.⁷¹

⁷⁰ Although the temporal jurisdiction of the ICTY is open-ended, in reality there will be an end to its operations as clearly set out in the so-called 'completion strategy', see ch. 7.

⁷¹ Generally, see Christopher Keith Hall, 'The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity' (2004) 17 *LJIL* 121.

17.3.3 Defendant and defence counsel

At the ICTY and ICTR, a 'suspect' is a person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction; the 'suspect' becomes an 'accused' upon the confirmation of an indictment.⁷² The ICC Statute and RPE avoid the term 'suspect', which creates unnecessary ambiguities, and the term 'accused' applies to someone against whom charges have been confirmed.⁷³ The Statutes and RPE provide for some fundamental rights for those suspected or accused of a crime. Among the rights of the suspect are the right to remain silent, to legal assistance during questioning, and to interpretation and translations.⁷⁴ More extensive rights, reflecting international human rights instruments, are prescribed for the 'accused'.⁷⁵ These and other rights are further developed in more detailed statutory provisions and in the ICTY and ICTR jurisprudence.

The adversarial nature of the ICTY and ICTR proceedings presupposes that the defendant may put forward his or her own 'defence case'. In turn, this requires a separate investigation conducted by the defence. The Appeals Chamber in *Tadić* stressed the importance of 'equality of arms' and concluded that the principle must be given a more liberal interpretation than at domestic courts, due to the difficulties encountered by the parties in tracing and gaining access to evidence.⁷⁶

Under these circumstances the assistance of a defence counsel is particularly important. Almost all defendants at the ICTY and ICTR have been or are represented by counsel, normally appointed and paid for by the Tribunal. However, two political leaders (both also lawyers) indicted by the ICTY have demanded to conduct their own defences, which have highlighted the question whether legal assistance could be imposed against the will of the accused. One may note, however, that mandatory representation is accepted in civil law systems,⁷⁷ but contrary to the practice in common law systems this does not mean that the accused is prevented from participating actively at the trial. The ICTY has tried different approaches, such as *amicus curiae* (friends of the court) to assist the court⁷⁸ and 'stand-by counsel'⁷⁹, but has in the end concluded that the right to self-representation is not absolute and has imposed counsel.⁸⁰

⁷² Rr. 2 and 47(H)(ii) of the ICTY RPE and ICTR RPE.

⁷³ Art. 55(2) of the ICC Statute refers to '[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court', which is the equivalent of a 'suspect'. See Art. 61 of the ICC Statute regarding the 'accused' (cf. 'the person charged' or 'the person').

⁷⁴ In particular, Art. 18(3) of the ICTY Statute and Art. 17(3) of the ICTR Statute, r. 42 of the ICTY RPE and ICTR RPE, and Art. 55(2) of the ICC Statute.

⁷⁵ Primarily, Art. 21 of the ICTY Statute, Art. 20 of the ICTR Statute, and Art. 67 of the ICC Statute. At the ICC, these rights are applicable, in principle, from the first appearance before the Court, see r. 121(1) of the ICC RPE. Compare with Art. 14 of the ICCPR.

⁷⁶ *Tadić* ICTY A. Ch. 15.7.1999 para. 52.

⁷⁷ See Mirjan Damaška, 'Assignment of Counsel and Perceptions of Fairness' (2005) 3 *JICJ* 3.

⁷⁸ *Milošević* ICTY T. Ch. III 30.8.2001. Subsequently, Milošević identified some lawyers as 'legal associates' and was granted privileged communications with them.

⁷⁹ *Šešelj* ICTY T. Ch. II 9.5.2003.

⁸⁰ *Milošević* ICTY A. Ch. 1.11.2004, and *Šešelj* ICTY T. Ch. I 21.8.2006. Similarly, *Norman et al.* SCSL T. Ch. 8.6.2004 paras. 8 and 27.

The ICC Statute also recognizes the right to legal representation of the suspect's or accused's own choosing, and if necessary free of cost.⁸¹ As in the Tribunals, the registrar is to establish and maintain a list of counsel from which counsel are to be chosen, but the ICC RPE also allows a counsel not on the list to be chosen if that counsel meets the required qualifications and is willing to be included in the list.⁸² The ICC has also established a system with public defence counsel to assist in the very early stages of an investigation.⁸³

17.3.4 Victims and witnesses

In the Tribunal proceedings, the victims participate as witnesses. Not even with respect to restitution of property are they parties to the proceedings.⁸⁴ The role of victims⁸⁵ is significantly strengthened in the ICC and they are granted a right to participation in the proceedings in pursuance of their own personal interests.⁸⁶ The ICC Chambers have considerable discretion as regards the manner of presenting the views of the victims and the stages of the proceedings at which this may be done. A Chamber may direct that victims be legally represented and the Office of Legal Counsel for victims has been established.⁸⁷ The Chambers will have a challenging task in balancing the victims' rights so that a 'second prosecution' to the detriment of the accused and the prosecution is avoided; this is not a *partie civile* status as known to many civil law systems. It is also necessary to find practical and pragmatic solutions in light of the potentially very large number of affected victims. The first, but not unproblematic, decision on participation was handed down in *Situation in the Democratic Republic of Congo*.⁸⁸

In addition, the ICC Statute provides for reparations to victims through proceedings in which the victim may appear as a party (see Chapter 18).

The term 'witness' is not defined in the rules of the ICTY, ICTR or ICC but there is a distinction between 'expert witnesses'⁸⁹ and other witnesses. Generally, adversarial and inquisitorial systems view the role of the witness differently. The ICTY and ICTR have primarily opted for an adversarial approach whereby the parties have the primary responsibility for the evidence and, accordingly, each party may call

⁸¹ Arts. 55(2) and 67(1)(d) of the ICC Statute.

⁸² R. 22 of the ICC RPE and regs. 69–76 of the ICC Regulations. See also r. 45 of the ICTY RPE and ICTR RPE. Regarding qualifications, see r. 44 of the ICTY RPE and ICTR RPE, r. 22 of the ICC RPE and regs. 67–68 of the ICC Regulations.

⁸³ Reg. 77 of the ICC Regulations.

⁸⁴ R. 105 of the ICTY RPE and ICTR RPE (the question of restitution may be raised by the prosecutor or by the trial chamber *proprio motu*).

⁸⁵ A broad definition of 'victims' is provided in r. 85 of the ICC RPE.

⁸⁶ Arts. 15(3), 19(3) and 68(3) of the ICC Statute. See also rr. 89–93 of the ICC RPE. In addition, victims may also provide the Prosecutor with information for the purpose of a criminal investigation, but this is not a formal report of a crime (*notitia criminis*) which automatically triggers an investigation: see Art. 15 of the ICC Statute.

⁸⁷ Regs. 79–82 of the ICC Regulations.

⁸⁸ ICC PT.Ch. I 17.1.2006, followed by a string of decisions in the *Lubanga Dyilo* case. Leave to appeal was refused and the A.Ch. thereafter denied an extraordinary review (A.Ch. 13.7.2006 *Situation in the Democratic Republic of the Congo*).

⁸⁹ R. 94bis of the ICTY RPE and ICTR RPE, and r. 140(3) of the ICC RPE (see also rr. 91 and 191 of the ICC RPE).

witnesses, who will be therefore either ‘prosecution witnesses’ or ‘defence witnesses’.⁹⁰ A more inquisitorial element, however, is the power of the judges to summon witnesses or order their attendance.⁹¹ Such witnesses are sometimes called ‘court witnesses’.⁹² Similar provisions apply to the ICC.⁹³ Also victims and the accused may give testimony as a witness, but the accused only in his own defence.

A witness giving testimony under solemn declaration (a neutral term for ‘oath’) is obliged to speak the truth and is doing so with criminal liability for a false testimony.⁹⁴ A protection against self-incrimination is provided for.⁹⁵ Certain witness privileges apply.⁹⁶ The ICTY and ICTR Trial Chambers may issue a *subpoena ad testificandum* when it is ‘necessary for the purpose of an investigation or for the preparation or conduct of the trial’.⁹⁷ The ICC Trial Chambers may ‘require the attendance and testimony of a witness’.⁹⁸ But the enforcement of such orders differs, see Chapter 19.

Both in the Tribunals and in the ICC, the protection of victims and witnesses is provided for and has been widely applied in practice.⁹⁹ This is natural due to the nature of the crimes and the conflicts in question, but requires a careful balancing of interests, particularly against the rights of the suspect or accused. While the grant of protective measures is primarily a responsibility of the Chambers in the Tribunals, the Prosecutor and the Chambers share the responsibility in the ICC. Special units for victims and witness issues are also established in the respective Registries.¹⁰⁰ The protection may be motivated by security or privacy reasons and include measures to prevent disclosure to the public, postponed disclosure, closed sessions, testimony by video-conference link, and even physical protection such as witness relocation.¹⁰¹ A particularly controversial measure is the use of anonymous witnesses, that is to

⁹⁰ E.g. r. 65ter of the ICTY RPE and ICTR RPE. ⁹¹ R. 98 of the ICTY RPE and ICTR RPE.

⁹² E.g. *Milošević* ICTY T.Ch. III 18.2.2004. There are also examples where the Trial Chamber has considered all witnesses as ‘witnesses of justice’, and not of either of the parties, once they have made the solemn declaration, e.g. *Jelić* ICTY T. Ch. I 11.12.1998.

⁹³ Arts. 64(6)(b) and 69(3) of the ICC Statute, and rr. 76 and 79 of the ICC RPE.

⁹⁴ Rr. 90 and 91 of the ICTY RPE and ICTR RPE; Arts. 69(1) and 70 of the ICC Statute and r. 66 of the ICC RPE.

⁹⁵ R. 90(E) of the ICTY RPE and ICTR RPE, and rr. 65, 74–5 of the ICC RPE (which also covers incrimination of family members). However, the witness may be compelled to answer incriminating questions under an assurance that the information will not be used for prosecution against him or her.

⁹⁶ R. 97 of the ICTY RPE and ICTR RPE (lawyer–client). Further privileges have evolved in practice, e.g. for a former employee of the ICRC (*Šimić et al.* ICTY T.Ch. III 27.7.1999), employees and functionaries of the Tribunals (*Delalić et al.* ICTY T.Ch. II 8.7.1997), and a war correspondent (*Brđjanin and Talić* ICTY A.Ch. 11.12.2002, reversing the decision by a Trial Chamber of 7.6.2002). See also r. 73 of the ICC RPE (a more general formula for privilege and special provisions regarding the ICRC). Privileges also apply for confidential (national security) information: r. 70 of the ICTY RPE and ICTR RPE, and Art. 72 of the ICC Statute; see also e.g. *Milošević* ICTY A.Ch. 23.10.2002 (interpretation of r. 70) and the subsequent application by the Trial Chamber of 30.10.2003. See further, Emily Ann Berman, ‘In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals’ (2005) 80 *New York University Law Review* 241. Cf. the interesting decision by the SCSL whereby an international human rights worker was refused witness privileges: *Brima et al.* SCSL T.Ch. II 16.9.2005.

⁹⁷ R. 54 of the ICTY RPE and ICTR RPE. See ch. 5.

⁹⁸ Art. 64(6)(b) of the ICC Statute. In addition, the pre-trial chamber has a general power to issue necessary orders at the request of the Prosecutor or the defence: Art. 57(3)(a)–(b) of the ICC Statute.

⁹⁹ Arts. 20(1) and 22 of the ICTY Statute, Arts. 19(1) and 21 of the ICTR Statute, rr. 69, 75 and 79 of the ICTY RPE and ICTR RPE, Arts. 54(3)(f), 57(3)(c), 64(6)(e) and 68 of the ICC Statute, and rr. 87–8 of the ICC RPE.

¹⁰⁰ R. 34 of the ICTY RPE and ICTR RPE, Art. 43(6) of the ICC Statute, and rr. 16–19 of the ICC RPE.

¹⁰¹ The ICTY and ICTR have concluded special agreements with States for the purpose of witness protection and the ICC will follow suit.

say a witness whose identity is not known to both parties. An early decision to allow this practice at the ICTY was sharply criticized, particularly by proponents of adversarial procedures,¹⁰² and has not been repeated.

17.3.5 *States, international organizations and others*

An international criminal jurisdiction will inevitably take decisions which affect State interests, for example decisions regarding the exercise of jurisdiction or State cooperation. Hence, there are certain possibilities for States to intervene in the proceedings. In ICTY, States 'directly affected' by a decision have a right to request a review and this right has been exercised with respect to, *inter alia*, an order to a State to provide documents,¹⁰³ an order to NATO (and SFOR) to provide reports and documents,¹⁰⁴ a request for arrest and surrender,¹⁰⁵ and disclosure of confidential information.¹⁰⁶

Due to their origin, the Tribunals have a particular relationship with the UN Security Council. But while the Tribunals report to the Security Council, it is important to note that there are no provisions allowing the Security Council to intervene in their proceedings. As to other international organizations, the ICTY and ICTR have directed requests for cooperation to such organizations, but also concluded that they are not, formally speaking, obliged to cooperate.¹⁰⁷ As previously noted,¹⁰⁸ the ICRC is afforded special privileges.

At the ICC, States are given an even greater scope for intervention which is partly due to the principle of complementarity.¹⁰⁹ A referring State (or the Security Council) may request a review of the Prosecutor's decision not to investigate or to prosecute.¹¹⁰ Certain decisions may be appealed by an affected State¹¹¹ and States may also seek a ruling on the legality of a request for cooperation and intervene in procedures regarding a failure to cooperate.¹¹² Of course, the Security Council's power to require the deferral of an investigation or prosecution is a substantive form of intervention.¹¹³

¹⁰² *Tadić* ICTY T.Ch. II 10.8.1995 (Judge Stephen dissenting). See also Monroe Leigh, 'The Yugoslav Tribunal: Anonymity is Inconsistent with Due Process' (1996) 90 *AJIL* 235 (and (1997) 99 *AJIL* 80); Christine Chinkin, 'Due Process and Witness Anonymity' (1997) 99 *AJIL* 75; Olivia Swaak-Goldman, 'The ICTY and the Right to a Fair Trial: A Critique of the Critics' (1997) 10 *LJIL* 215; and Natasha Affolder, 'Tadić, the Anonymous Witness and the Sources of International Procedural Law' (1998) 19 *Michigan Journal of International Law* 445.

¹⁰³ *Blaskić* ICTY A.Ch. 29.10.1997 (Croatia against a *subpoena duces tecum*), and *Kordić and Čerkez* ICTY A.Ch. 26.3.1999.

¹⁰⁴ *Simić et al.* ICTY A.Ch. 27.3.2001 (the motions became moot after the prosecution and the accused entered into a plea agreement).

¹⁰⁵ *Bobetko* ICTY A.Ch. 29.11.2002. ¹⁰⁶ *Milošević* ICTY A.Ch. 23.10.2002.

¹⁰⁷ E.g. *Simić et al.* ICTY T.Ch. III 27.7.1999 para. 78 (Art. 29 of the ICTY Statute does not apply to international organizations).

¹⁰⁸ See n. 96 above. ¹⁰⁹ Arts. 18–19 of the ICC Statute. ¹¹⁰ *Ibid.*, Art. 53(3).

¹¹¹ *Ibid.*, Art. 82(1)(d) and (2). ¹¹² Regs. 108–9 of the ICC Regulations. ¹¹³ See ch. 8.

Additionally, the Chambers of both tribunals and the ICC may allow States, organizations or individuals to make *amicus curiae* (friends of the court) submissions on legal or other issues.¹¹⁴

17.4 Jurisdiction and admissibility procedures

The Tribunals have established their authority to determine the legality of their creation.¹¹⁵ Challenges to the Tribunals' jurisdiction, of which there have been many in practice, are dealt with as preliminary motions and carry a right to interlocutory appeal.¹¹⁶

The procedures for establishing jurisdiction and admissibility were an important component in reaching an agreement in the ICC negotiations.¹¹⁷ The main rule is that the Court must satisfy itself that it has jurisdiction and it may also, on its own motion, determine the admissibility of a case.¹¹⁸ The Prosecutor must also consider these issues when deciding whether to proceed with an investigation or prosecution.¹¹⁹ Upon the commencement of an investigation, a notification procedure will take place with a view to allowing States to seek a deferral of the ICC investigation.¹²⁰ But this does not apply when the Security Council has referred the situation to the Court.

At the ICC, challenges to the jurisdiction or to the admissibility of a case may be raised at any time prior to the commencement of the trial, and exceptionally thereafter.¹²¹ A right to challenge is afforded to: (1) the accused or a person for whom a warrant of arrest or a summons to appear has been issued, (2) any State with concurrent jurisdiction over the crimes and where investigation or prosecution has been commenced, and (3) any State from which acceptance of jurisdiction is required.¹²² Certain provisions seek to make the scheme manageable, for example that States must make their challenge at the earliest opportunity and that a person or a State may make a challenge only once.¹²³ Still, these proceedings might be many and time-consuming.¹²⁴ In order to avoid a complete standstill the Pre-Trial Chamber may authorize the Prosecutor to perform specific investigative measures in spite of a deferral or a State challenge.¹²⁵ As in the Tribunals, a challenge may not only refer to the jurisdiction as such, but also to the exercise of jurisdiction in the particular case (see section 17.7.3).

¹¹⁴ R. 74 of the ICTY RPE and ICTR RPE, and r. 103 of the ICC RPE. ¹¹⁵ See section 7.2.4.

¹¹⁶ R. 72 of the ICTY RPE and the ICTR RPE. ¹¹⁷ See ch. 8.

¹¹⁸ Art. 19(1) of the ICC Statute. See also *Lubanga Dyilo* ICC PT.Ch. I 10.2.2006 paras. 17–20.

¹¹⁹ See sections 17.5 and 17.8.1. ¹²⁰ Art. 18 of the ICC Statute and rr. 52–7 of the ICC RPE.

¹²¹ *Ibid.*, Art. 19(4); see also Arts. 17(1)(c) and 20(3) and rr. 58–60.

¹²² *Ibid.*, Art. 19(2). In addition, the Prosecutor may seek a ruling from the Court: *ibid.*, Art. 19(3).

¹²³ *Ibid.*, Art. 19(4)–(5).

¹²⁴ They have been described as a 'complex and burdensome procedural regime', likely to impede the functioning of the ICC; see Leila Sadat and Richard Carden, 'The New International Criminal Court: an Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381 at 417.

¹²⁵ ICC Statute, Arts. 18(6) and 19(7)–(8) and rr. 57 and 61 of the ICC RPE.

17.5 Commencement and discontinuance of a criminal investigation

The ICTY and ICTR have clear jurisdictional mandates where the substantive (crimes), personal (nationality of the individual), territorial and temporal parameters are provided in the respective Statutes (see Chapter 7). Within these parameters, the Prosecutor initiates investigations *ex officio* or on the basis of information obtained from any source, assesses the information received and decides whether there is ‘sufficient basis to proceed’.¹²⁶ No permission from a judge is required and the Prosecutor has discretion to decide whether to commence a particular investigation. This discretion means, unlike the case in many civil law jurisdictions, that there is no real obligation placed upon the Prosecutor to investigate all crimes that fulfil the jurisdictional criteria.

The first indictments at the ICTY were directed against lower-level perpetrators, prompted by the interest in showing concrete results as soon as possible. To continue with this approach would have been unsustainable, however, and the ICTY Prosecutor soon adopted a strategy focusing on those most responsible for the most serious violations of international humanitarian law, that is to say persons of authority or leadership.¹²⁷ A clear example of this strategy was the indictment against *Karadžić and Mladić* in 1996. More recently the prioritization has been further sharpened in light of the completion strategy.¹²⁸ The ICTR applies a similar prosecutorial strategy, and here the need for selectivity was even more pronounced considering that more than 100,000 suspects were held in Rwandan prisons.

At the ICC, the requirements for the commencement of an investigation are more complex. Unlike the Tribunals the ICC will potentially have global jurisdiction and specified ‘trigger mechanisms’ are therefore required for bringing a ‘situation’ before the Court.¹²⁹ Regardless of trigger mechanisms, however, the Prosecutor must determine whether an investigation may be initiated in accordance with set criteria: a reasonable suspicion of a crime under the Court’s jurisdiction,¹³⁰ the admissibility of the case, in accordance with the complementarity principle and the requirement of ‘sufficient gravity’, and an assessment of the ‘interests of justice’.¹³¹ A process of information gathering and analysis thus precedes the criminal investigation.¹³² Similar to the ICTY and ICTR, the ICC Prosecutor has made public a prosecutorial

¹²⁶ Art. 18.1 of the ICTY Statute and Art. 17.1 of the ICTR Statute.

¹²⁷ See ICTY’s annual report to the United Nations regarding the period from 1 August 1996 to 31 July 1997, UN Doc. A/52/375 – S/1997/729 of 18.9.1997, para. 58. This followed an intervention by the ICTY judges, see Antonio Cassese, ‘The ICTY: A Living and Vital Reality’ (2004) 2 *JICJ* 585 at 586–8.

¹²⁸ See ch. 7. ¹²⁹ See section 8.6.

¹³⁰ This requirement also includes respecting any applicable reservations concerning jurisdiction over war crimes (Art. 124 of the ICC Statute).

¹³¹ Art. 53(1) of the ICC Statute and r. 48 of the ICC RPE.

¹³² Procedures have been established as to how to handle referrals and communications from different sources, see Annex to the *Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications*, ICC Office of the Prosecutor, 2003 (available at www.icc-cpi.int).

policy focusing on those bearing the greatest responsibility for the crimes;¹³³ this may comprise commanders and other superiors, but also others who are implicated in particularly serious or notorious crimes. The significance and degree of the person's involvement in the crimes are of importance.

Upon a referral of the situation, the decision whether to start an investigation rests with the Prosecutor. The Pre-Trial Chamber may review a decision not to investigate,¹³⁴ but may overrule the Prosecutor's decision to decline only if it is solely based on the 'interests of justice' criterion. Where there is no referral, the investigation is always subject to approval by the Pre-Trial Chamber, which in turn requires 'a reasonable basis to proceed with an investigation' and a preliminary assessment of jurisdiction.¹³⁵ Hence, a system of checks and balances between the Prosecutor and the judiciary has been built into the ICC Statute regarding the sensitive issue of the commencement of an investigation.

In sum, any ICC investigation depends upon a positive decision by the Prosecutor. Although the drafting of Article 53 ('shall initiate . . . unless . . .') indicates a duty to go ahead if the conditions are met, the conditions in reality provide for a high degree of discretion. Such discretion is known in common law jurisdictions, but foreign to civil law systems where instead the duty approach applies. The solution provides necessary flexibility to set strategies and focus resources, but may be criticized on principled and other grounds, and has led to a debate in the literature.¹³⁶ The 'interests of justice' criterion is particularly contentious and complex and it has not been defined. However, the text and purpose of the ICC Statute clearly favour the pursuit of investigations and prosecutions when the conditions concerning the evidentiary threshold and admissibility are met. Hence, declining to proceed due to 'interests of justice' should be an exceptional decision.

17.6 The criminal investigation

At the ad hoc Tribunals as well as at the ICC, the Prosecutor is in charge of the criminal investigation.¹³⁷ Each investigation is conducted by a multidisciplinary team (lawyers, investigators, analysts and others) and led by a senior trial attorney. Hence, lawyers are directing the investigation, which departs from the traditional approach in many common law jurisdictions but corresponds to some other domestic jurisdictions.¹³⁸

¹³³ *Paper on some policy issues before the Office of the Prosecutor*, ICC Office of the Prosecutor, September 2003 (available at: www.icc-cpi.int). See ch. 8.

¹³⁴ Art. 53(3) of the ICC Statute.

¹³⁵ *Ibid.*, Art. 15(4). See also reg. 49 of the ICC Regulations regarding the Prosecutor's request for authorization.

¹³⁶ See section 17.8.1.

¹³⁷ In the ICC Office of the Prosecutor, one of the two Deputy Prosecutors is heading the investigation division and the other in charge of the prosecution division.

¹³⁸ On different approaches in some European systems, see e.g. Eric Mathias, 'The Balance of Power Between the Police and the Public Prosecutor' in Delmas-Marty and Spencer, *European Criminal Procedure*, 459–87.

As a general rule, each Prosecutor is given the authority to take necessary measures in the investigation.¹³⁹ A specific feature of the ICC Statute is the functions of the Pre-Trial Chamber with respect to the investigation. Limited but important judicial intervention in the investigation, inspired by civil law systems, is provided for a so-called 'unique investigative opportunity', whereby the Chambers may take measures to ensure the efficiency and integrity of the proceedings and protect the rights of the defence.¹⁴⁰ In addition, the Chamber has certain general functions which also apply during the investigation.¹⁴¹

Another important question is the scope of the Prosecutor's investigation. In the ICTY and ICTR, the Prosecutor is not required actively to investigate circumstances and collect evidence that speak in favour of the suspect.¹⁴² Only if such evidence emerges anyway during the investigation must it be considered and disclosed. The ICC Prosecutor, on the contrary, is under an obligation to 'investigate incriminating and exonerating circumstances equally' (a 'principle of objectivity').¹⁴³ It has been argued that this mechanism, properly operated, has the potential to narrow the scope of the case, reducing the number of charges, and possibly the length of the subsequent trial;¹⁴⁴ the traditional division in adversarial proceedings between a 'prosecution case' and a 'defence case' could be reduced.

The investigation includes the questioning of individuals (suspects, victims, witnesses, experts and others) and the collection of written and other material. In some cases, extensive and resource-intensive exhumation of mass graves and other forensic measures are required. The Prosecutor is responsible for the retention, storage and security of the information and material collected.¹⁴⁵ Without an international police force to carry out the investigation and to enforce court orders, the investigation depends very much on the cooperation of States and other entities such as peace-keeping forces.¹⁴⁶ The Prosecutor is entitled to seek cooperation from States and others in the investigation.¹⁴⁷ A Chamber may also issue necessary orders and warrants.¹⁴⁸ The defence may by this means seek a request for cooperation by a State and,

¹³⁹ R. 39(ii) of the ICTY RPE and ICTR RPE, and Art. 54(1)(b) of the ICC Statute.

¹⁴⁰ Art. 56 of the ICC Statute. See also *Situation in the Democratic Republic of Congo* ICC PT.Ch. I 26.4.2005.

¹⁴¹ Article 57(3) of the ICC Statute. These functions include, inter alia, protection and privacy of victims and witnesses, preservation of evidence, protection of persons who have been arrested or appeared in response to a summons, and protection of national security information (para. 3(c)). In order to fulfil its functions, the Pre-Trial Chamber may request the Prosecutor to provide information; reg. 48 of the ICC Regulations.

¹⁴² One ICTY Trial Chamber, however, has referred to the Prosecutor as not only a party to adversarial proceedings but 'an organ of the Tribunal and an organ of international criminal justice whose object is not only to secure a conviction but to present the case for the Prosecution, which includes not inculpatory evidence, but also exculpatory evidence, in order to assist the Chamber discover the truth in a judicial setting': *Kupreškić et al.* ICTY T.Ch. II 21.9.1998.

¹⁴³ Art. 54(1)(a) of the ICC Statute.

¹⁴⁴ See e.g. Informal expert paper: *Measures available to the International Criminal Court to reduce the length of proceedings*, ICC Office of the Prosecutor, 2003, paras. 22–30.

¹⁴⁵ R. 41 of the ICTY RPE and ICTR RPE, and r. 10 of the ICC RPE. ¹⁴⁶ See further in ch. 19.

¹⁴⁷ Art. 18(2) of the ICTY Statute, Art. 17(2) of the ICTR Statute, and Art. 54(2)(c) of the ICC Statute, as well as provisions in the respective RPE.

¹⁴⁸ R. 54 of the ICTY RPE and ICTR RPE, and Art. 57(3) of the ICC Statute. One form of assistance is an order to a State for production of documents, which requires a sufficient level of specificity and a 'fishing expedition' is not allowed; see *Blaškić* ICTY A.Ch. 29.10.1997 para. 32, subsequently codified in r. 54bis of the ICTY RPE. See also r. 116 of the ICC RPE. See further ch. 19.

at least in the ICC, an order directed to the Prosecutor regarding specific investigative measures.

To the extent possible, the Court's own investigators will conduct, or at least participate in, the investigative measures. This is important in order to ensure various rights and to secure the collection of evidence that can later be used in the proceedings and, sometimes, to secure the confidence and cooperation of victims and witnesses. The ICTY and ICTR Prosecutors have a statutory right to conduct on site-investigations.¹⁴⁹ For the ICC, this right is circumscribed by specific conditions and confined to non-coercive measures.¹⁵⁰ Exceptionally, however, the ICC Pre-Trial Chamber may authorize the Prosecutor 'to take specific investigative steps within the territory of a State without having secured the cooperation of that State'.¹⁵¹ This requires the complete or partial collapse of the functions of the State in question.

A suspect who is questioned has to be given certain information and has rights to silence, the presence of legal assistance, and interpretation.¹⁵² The circumstances surrounding the interview may affect the use at trial of the statement obtained.¹⁵³ The ICC provisions apply also when national authorities conduct the questioning on behalf of the Court. This is not explicitly provided for the ICTY and ICTR, but a statement given to national authorities could be declared inadmissible as evidence if the suspect is not afforded equivalent rights.¹⁵⁴ Additionally, the ICC Statute provides for certain fundamental rights of any person¹⁵⁵ – concerning self-incrimination, coercion, duress and threat, interpretation and translations, and deprivation of liberty – which reflect generally accepted human rights and, as such, will be observed also by the ICTY and ICTR. An important but difficult task, shared by the prosecution and Chambers, is to provide for protection of victims and witnesses.¹⁵⁶

17.7 Coercive measures

17.7.1 Coercive measures in general

In all criminal investigations and proceedings it must be possible to resort to coercive measures of various kinds. Due to the relationship between the international criminal jurisdictions and domestic jurisdictions, the international Prosecutor will primarily have to resort to the cooperation of States or sometimes other entities, primarily international military or police forces. The ICC Statute gives the Prosecutor powers to conduct measures on-site only in so far they are non-coercive, although coercive

¹⁴⁹ Art. 18(2) of the ICTY Statute and Art. 17(2) of the ICTR Statute. ¹⁵⁰ Art. 99(4) of the ICC Statute.

¹⁵¹ Arts. 54(2) and 57(3)(d) of the ICC Statute and r. 115 of the ICC RPE. For these (controversial) cases there is no explicit restriction to non-coercive measures.

¹⁵² Art. 18(3) of the ICTY Statute, Art. 17(3) of the ICTR Statute, r. 42 of the ICTY RPE and ICTR RPE, and Art. 55(2) of the ICC Statute.

¹⁵³ E.g. *Halilović* ICTY A.Ch. 19.8.2005. ¹⁵⁴ *Delalić et al.* ICTY T.Ch. II 2.9.1997 para. 55.

¹⁵⁵ Art. 55(1) of the ICC Statute.

¹⁵⁶ R. 39(ii) of the ICTY RPE and ICTR RPE ('potential witnesses and informants'); Arts. 54(1)(b) and (3)(f) ('any person'), 56 and 57(3)(c) (Pre-Trial Chamber), and 68(1) of the ICC Statute.

measures could arguably be authorized by the Pre-Trial Chamber in case of a failed State (see section 17.6). The powers of the ICTY and ICTR Prosecutors to conduct an on-site investigation are provided for in more general terms and there are examples where persons representing the Prosecutor have executed a seizure on the territory of a State.¹⁵⁷ In *Blaškić*,¹⁵⁸ the ICTY Appeals Chamber concluded that the Prosecutor was entitled to undertake coercive measures directly on the territory of a State, that is to say without turning to the national authorities of that State, when authorized to do so by national legislation or special agreement as well as in the States and entities of the former Yugoslavia. The latter was considered an inherent power, necessary for the discharge of the Tribunal's fundamental functions, including guaranteeing the accused a fair trial.

In domestic systems, coercive measures which infringe on the rights and freedoms of individuals are generally subject to judicial review, either before the measure is taken or afterwards. The Chambers of the ICTY, ICTR and the ICC have explicit powers to issue necessary warrants and orders,¹⁵⁹ which may also concern coercive measures. On-site measures by the ICTY and ICTR without the assistance of national authorities have been conducted pursuant to such warrants.¹⁶⁰ But a debated issue is whether international warrants may, or even should, be issued also in connection with a request for cooperation.¹⁶¹

17.7.2 *Deprivation or restriction of liberty and surrender of suspects*

Deprivation or restriction of liberty infringes on the fundamental rights of the person concerned and is at the same time an essential mechanism for the effective operation of criminal justice systems. These matters are therefore regulated in relative detail for the international criminal tribunals.

At the ICTY and ICTR, the arrest warrant must be issued by a judge following confirmation of the indictment in whole or in part.¹⁶² The warrant is accompanied by the indictment and a statement of the accused's rights and, unless under seal, copies must be transmitted to States for execution.¹⁶³ The linkage to a confirmed indictment means that the judge must be convinced that a *prima facie* case exists (see section 17.9.1). Based on the warrant, the accused shall be arrested and surrendered to the Tribunal. In urgent cases the Prosecutor may request any State to arrest the suspect provisionally

¹⁵⁷ *Kordić and Čerkez* ICTY T. Ch. III 25.6.1999 (the investigation, resulting in the seizure of certain material, 'was perfectly within the powers of the Prosecution provided for in the Statute').

¹⁵⁸ *Blaškić* ICTY A.Ch. 29.10.1997 para. 55.

¹⁵⁹ R. 54 of the ICTY RPE and ICTR RPE, and Art. 57(3) of the ICC Statute.

¹⁶⁰ See e.g. decisions in *Kordić and Čerkez* ICTY T. Ch. III 25.6.1999 and *Blaškić* ICTY A. Ch. 29.10.1997

¹⁶¹ See ch. 19. ¹⁶² Rr. 47(H)(i) and 54 of the ICTY RPE and ICTR RPE.

¹⁶³ The ICTY and ICTR rules are similar but not identical and the ICTY RPE (r. 55bis) contain provisions on general circulation to all States.

without an arrest warrant, but the subsequent transfer to and provisional arrest at the Tribunal require an order issued by a judge.¹⁶⁴

The ICTY and ICTR rules provide for mandatory detention of the accused upon being transferred to the Tribunal.¹⁶⁵ This common law inspired model is balanced by provisions on provisional release, which become even more important in order to respect the fundamental principle that liberty is the general rule and detention the exception.¹⁶⁶ The Trial Chamber may order provisional release if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other persons.¹⁶⁷ But the accused must prove that the conditions are met¹⁶⁸ and provisional release is a discretionary power of the Chamber; even if the explicit conditions are met, release will be ordered only when appropriate in the particular case.¹⁶⁹ An earlier requirement of 'extraordinary circumstances' was the major obstacle to release, but it was abandoned by the Tribunals after extensive internal debates and external criticism.¹⁷⁰ The requirement, which was said to turn the general principle of liberty on its head, was motivated by the extremely serious crimes and the lack of independent resources to enforce an arrest (or re-arrest) or release conditions. Subsequent to this amendment, the ICTY has released numerous accused while the ICTR has yet to order the first provisional release; improved State cooperation vis-à-vis the ICTY has been a decisive factor for this development.

The ICC Statute provides a quite different regime. Every request for a person's arrest must be based on an arrest warrant issued by the Pre-Trial Chamber (in practice by a single judge of that Chamber).¹⁷¹ A separate procedure applies for issuance of an arrest warrant and the warrant is independent of, and would normally precede, the indictment. Specific requirements must be satisfied for a warrant to be issued: 'reasonable grounds to believe' that the person has committed a crime and additional prerequisites regarding a risk that the suspect absconds, obstructs or endangers the investigation or court proceedings, or continues to commit the crime in question or a related crime.¹⁷² The same prerequisites shall also be assessed when the ICC decides upon a request for interim release pending trial and if any criterion is not met, the person shall be released, with or without conditions.¹⁷³ Unlike the Tribunals, the ICC is also given the option to issue a summons to appear, instead of an arrest warrant, when this is considered sufficient to ensure the person's appearance before the Court.¹⁷⁴ The

¹⁶⁴ R. 40bis of the ICTY RPE and ICTR RPE. Regarding the Prosecutor's obligations, see *Kajelijeli* ICTR A.Ch. 23.5.2005 paras. 218–33.

¹⁶⁵ R. 64 of the ICTY RPE and ICTR RPE.

¹⁶⁶ See Art. 9(3) of the ICCPR, Art. 5(1) of the ECHR, Art. 6 of the ACHPR, and Art. 7(1) of the ACHR.

¹⁶⁷ R. 65 of the ICTY RPE and ICTR RPE. On the cumulative nature of the conditions, see e.g. *Rukundo* ICTR T.Ch. III 15.7.2004 para. 19.

¹⁶⁸ E.g. *Prlić et al.* ICTY A.Ch. 8.9.2004 paras. 27–8. ¹⁶⁹ E.g. *Brdjanin and Talić* ICTY T.Ch. II 25.7.2000 para. 22.

¹⁷⁰ See the dissenting opinion by Judge Patrick Robinson in *Krajišnik and Plavšić* ICTY T.Ch. III 8.10.2001. See also A-M La Rosa, 'A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with those of Fair Trial' (1997) 321 *International Review of the Red Cross* 635, and Safferling, *International Criminal Procedure*, 143–7.

¹⁷¹ Arts. 58(5), 91 (arrest and surrender) and 92 (provisional arrest) of the ICC Statute. ¹⁷² *Ibid.*, Art. 58(1).

¹⁷³ *Ibid.*, Art. 60(2), and r. 118 of the ICC RPE. Regarding conditional release, see r. 119 of the ICC RPE.

¹⁷⁴ Art. 58(7) of the ICC Statute. See also r. 119 of the ICC RPE.

summons may be combined with conditions restricting the person's liberty. In sum, the conditions for deprivation of liberty are stricter than at the Tribunals.

Interestingly, the test for provisional release at the Tribunals does not include an assessment of the strength of the suspicion and Chambers have refused to review the evidentiary basis for a challenged arrest.¹⁷⁵ But since the decision to confirm the indictment is not subject to a separate appeal¹⁷⁶ and no periodic review of detention is required, the practice prevents the accused from challenging the lawfulness of the arrest with respect to the requirement of a 'reasonable suspicion'. Hence, some ICTY Trial Chambers have allowed a review of the evidence 'in a cursory manner' in order to ascertain whether the detention of the accused remains lawful.¹⁷⁷ At the ICC, on the other hand, prosecution evidence is required and will be assessed already when the issuance of the warrant is considered.¹⁷⁸ Additionally, the ICC Pre-Trial Chamber is required to review its rulings on release or detention periodically, on its own motion or at the request of a party,¹⁷⁹ and arguably the Prosecutor retains the obligation to show that the conditions for an arrest warrant are still met.

The ICC Statute, but not the rules of the ICTY and ICTR, provides for compensation to wrongfully arrested or convicted persons.¹⁸⁰ Such compensation is considered very differently in domestic jurisdictions; some have a general right to compensation when deprivation of liberty is not followed by a conviction and others restrict compensation to unlawful arrests. International human rights instruments reflect this divide and require compensation only for 'unlawful arrests'.¹⁸¹ The ICC provisions go further and the provisions represent a breakthrough for broader compensation rights.¹⁸²

17.7.3 *Legality of the arrest and violations of procedural rights*

The statutes of the ICTY, ICTR and ICC make no explicit provision for challenges to the legality of deprivation of liberty of the kind which are available under the common law remedy of *habeas corpus*.¹⁸³ Nonetheless, in *Barayagwiza* the ICTR Appeals Chamber concluded that a detained individual must have recourse to a court to challenge the lawfulness of his detention,¹⁸⁴ a conclusion that has been upheld in subsequent ICTY and ICTR decisions where *habeas corpus* motions have been

¹⁷⁵ E.g. *Brdjanin and Talić* ICTY T.Ch. II 8.12.1999 para. 16, and T.Ch. II 10.12.1999.

¹⁷⁶ E.g. *Bagosora and 28 Others* ICTR A.Ch. 8.6.1998.

¹⁷⁷ E.g. *Delalić et al.* ICTY T.Ch. II 25.9.1996 para. 24. See also McIntyre, 'Defining Human Rights', 211–14.

¹⁷⁸ See *Lubanga Dyilo* ICC PT.Ch. I 10.2.2006 paras. 7–15.

¹⁷⁹ Art. 60(3) of the ICC Statute and r. 118(2) of the ICC RPE.

¹⁸⁰ Art. 85 of the ICC Statute and rr. 173–5 of the ICC RPE.

¹⁸¹ E.g. Art. 9(5) of the ICCPR. See also Art. 5(4) of the ECHR.

¹⁸² See also Stuart Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals' (2002) 96 *AJIL* 628.

¹⁸³ The writ of *habeas corpus* is a fundamental feature of the common law jurisdiction, deriving its origins from Magna Carta, and has long been used domestically as a means of testing the validity of executive committals. However, this judicial remedy is peculiar to certain national jurisdictions – and nominally a precept of a sovereign or a head of State (a 'writ') – but not applicable, as such, in international criminal proceedings.

¹⁸⁴ *Barayagwiza* ICTR A.Ch. 3.11.1999 para. 88.

heard.¹⁸⁵ The Chamber found support in the ICTR Statute and RPE and noted that such a right to a judicial review is also enshrined in international human rights instruments.¹⁸⁶ Violations of other rights may be challenged, such as the rights to be promptly informed of the reasons for the arrest, brought promptly before a judge, assisted by counsel during questioning, and an initial appearance.¹⁸⁷ The Appeals Chamber may also intervene *proprio motu*.¹⁸⁸

A challenge of this kind must be heard and ruled upon without delay.¹⁸⁹ However, if the objection is not pursued by the appellant with due diligence¹⁹⁰ or raised only a long time after the arrest,¹⁹¹ the violation of the appellant's rights may not require a remedy. When the violation of the accused's rights is considered 'serious and egregious', the *Barayagwiza* decision established that there is a discretionary power, based on the so-called abuse of process doctrine, to decline to exercise jurisdiction and hence to dismiss the case.¹⁹² This is an exceptional measure, however, and other more proportionate remedies would be a reduction of an imposed sentence or, if acquitted, compensation.¹⁹³

The arrest requires the involvement of both the international and domestic jurisdictions and a difficult question is how far the international jurisdiction should go in the exercise of its powers to review the legality of the deprivation of liberty. Could the tribunal also review the legality of domestic measures and, if so, which legal standard should be applied? Furthermore, abductions and the abuse of process doctrine are not merely concerned with violations of individual rights, but may also relate to a violation of rights of another State and thus a breach of international law. One view is that such a breach is always a reason to decline jurisdiction,¹⁹⁴ another that this should be done only if the custodial State colluded in the abduction.¹⁹⁵

The Tribunals have reviewed domestic measures, by applying a Tribunal's own legal requirements and international human rights standards when the possible violation, at least to some extent, could be attributed to that Tribunal.¹⁹⁶ In addition, the ICTR Appeals Chamber in *Barayagwiza* did not feel barred from addressing the question of violations of the rights of the accused also when these were attributable to a State;¹⁹⁷ the Prosecutor and the State often have overlapping responsibilities. As clarified in

¹⁸⁵ E.g. *Brdjanin and Talić* ICTY T.Ch. II 8.12.1999, and *Kanyabashi* ICTR T.Ch. II 23.5.2000.

¹⁸⁶ See Art. 8 of the Universal Declaration of Human Rights, Art. 9(4) of the ICCPR, Art. 5(4) of the ECHR, Art. 7(6) of the ACHR and Art. 7(1)(a) of the ACHPR. See also, Separate Opinion of Judge Robinson in *Simić et al.* ICTY T.Ch. III 18.10.2000.

¹⁸⁷ E.g. *Kajelijeli* ICTR A.Ch. 23.5.2005 paras. 251–3. ¹⁸⁸ *Ibid.*, para. 208.

¹⁸⁹ *Semanza* ICTR A.Ch. 31.5.2000 paras. 112–13. ¹⁹⁰ *Ibid.*, paras. 119 and 121.

¹⁹¹ *Nyiramasuhuko* ICTR T.Ch. II 20.2.2004.

¹⁹² *Barayagwiza* ICTR A.Ch. 3.11.1999 para. 74. See also *Dragan Nikolić* ICTY T.Ch. II 9.10.2002 para. 114, and A.Ch. 5.6.2003 paras. 28–30.

¹⁹³ E.g. *Kajelijeli* ICTR A.Ch. 23.5.2005 paras. 206, 254–5, 320–4.

¹⁹⁴ E.g. the South African Supreme Court in *State v. Ebrahim* 1991 (2) SA 553.

¹⁹⁵ Regarding British law, see Colin Warbrick, 'Judicial Jurisdiction and Abuse of Process' (2000) 49 *ICLQ* 489. See also *Öcalan v. Turkey* ECtHR 12.5.2005, paras. 83–90.

¹⁹⁶ E.g. *Barayagwiza* ICTR A.Ch. 3.11.1999, and *Kajelijeli* ICTR A.Ch. 23.5.2005. See also *Delalić et al.* ICTY T.Ch. II 2.9.1997, confirmed on appeal, A.Ch. 20.2.2001 paras. 528–64.

¹⁹⁷ *Barayagwiza* ICTR A.Ch. 3.11.1999 para. 73.

Kajelijeli, however, the Tribunal is not competent to pronounce on the responsibility of the State for any violations, only on faults attributable to the Tribunal.¹⁹⁸

Similarly, the ICTY has had to consider these issues in cases where the accused was subject to a sealed indictment and apprehended through irregular practices by the prosecution ('luring')¹⁹⁹ or abduction of fugitives from Serbia by unknown individuals and delivered to SFOR, with which the Prosecutor had a confidential cooperation agreement.²⁰⁰ Regarding setting aside jurisdiction because of a violation of State sovereignty, the Appeals Chamber concluded in *Nikolić* that State practice differed but that sovereign rights (and international human rights) must be weighed against the interest of bringing those accused of 'universally condemned offences' to justice – an 'Eichmann exception'.²⁰¹ But a minor intrusion, particularly when the violated State is in default of its cooperation obligations and has not complained, was not sufficient to decline jurisdiction. Moreover, the Chamber questioned whether abductions carried out by private individuals without being instigated, acknowledged or condoned by a State, international organization, or other entity, violate State sovereignty at all.

On the legality of the arrest warrant, the ICC law explicitly provides for both challenges and *proprio motu* reviews;²⁰² a challenge may be launched after the arrest but before the person is surrendered to the Court.²⁰³ The Statute also provides that the legality of the arrest process in the custodial State is, at least primarily, a matter for domestic courts.²⁰⁴ Nonetheless, the extent to which the ICC will entertain challenges to the lawfulness of domestic measures, concerning the arrest or otherwise, is still unresolved.²⁰⁵ A challenge to jurisdiction, based on the 'abuse of process' doctrine, was launched in 2006 in the *Lubanga* case.

17.8 Prosecution and indictment

17.8.1 Decision whether to prosecute

The determination whether to prosecute follows adversarial principles, in that the Prosecutor is the only one who may initiate a trial by submitting an indictment; a judge or Chamber cannot do so. Furthermore, the ultimate responsibility for the content of the indictment rests with the Prosecutor. However, there are also different forms of judicial review. One review common to all international jurisdictions is the confirmation of the indictment (see section 17.9.1).

¹⁹⁸ *Kajelijeli* ICTR A.Ch. 23.5.2005 paras. 219–21, 252.

¹⁹⁹ *Dokmanović* (see *Mrkšić et al.*) ICTY T.Ch. II 22.10.1997. For a critical view, see Michael Scharf, 'The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY' (1998) 11 *LJIL* 369.

²⁰⁰ E.g. *Simić et al.* ICTY T.Ch. III 18.10.2000 (proceedings which were later abandoned due to a plea-bargaining arrangement).

²⁰¹ *Dragan Nikolić* ICTY A.Ch. 5.6.2003 paras. 24–7. Regarding the *Eichmann* case, see ch. 3. See also section 5.4.7.

²⁰² Art. 60 of the ICC Statute. ²⁰³ R. 117(3) of the ICC RPE.

²⁰⁴ Art. 59(2)(c) of the ICC Statute. The domestic court is not allowed, however, to consider the legality of the ICC arrest warrant: Art. 59(4).

²⁰⁵ One may note, however, that the ICC, when deciding on the relevance or admissibility of evidence collected by a State, is not allowed to rule on the application of that State's national law: see Art. 69(8) of the ICC Statute.

At the ICTY and ICTR, the Prosecutor must prepare an indictment and transmit it to a judge of a Trial Chamber '[u]pon the determination that a prima facie case exists'.²⁰⁶ In practice, this determination is subject to an extensive scrutiny process within the Office of the Prosecutor. In practice, this has not been interpreted as an obligation to prosecute and the general prosecution strategy (to focus on those bearing the greatest responsibility) has guided the decisions.²⁰⁷ Judicial screening of new indictments was introduced as part of ICTY's completion strategy.²⁰⁸

The provisions of the ICC Statute are different, stating the conditions under which there can be no prosecution.²⁰⁹ The conditions relate to a suspicion of crime sufficient for an arrest warrant, the admissibility of the case, and an assessment of 'the interests of justice'. A decision not to prosecute is subject to judicial review by the Pre-Trial Chamber under the same terms as a decision not to commence an investigation.²¹⁰ The Prosecutor may reconsider a decision not to prosecute.²¹¹ Here too, the decision whether to prosecute is subject to discretion and no obligation to prosecute is prescribed. The prosecutorial strategy regarding cases to pursue applies.

The question of prosecutorial discretion, including its limits and judicial supervision, has been the subject of considerable debate, often with reference to domestic practice.²¹² The question of improperly exercised (selective) discretion was raised in *Delalić et al.*²¹³ The Appeals Chamber concluded that the ICTY Prosecutor has a broad discretion concerning initiation of investigations and preparations of indictments, but also that there are limitations, particularly the statutory requirements of prosecutorial independence and equality before the Tribunal (that is to say the law). Since it was not established that the Prosecutor had any discriminatory or otherwise unlawful or improper motive, the challenge was dismissed.

17.8.2 Amendments to and withdrawal of the indictment

As in domestic criminal proceedings, an international indictment may be amended or withdrawn.²¹⁴ In accordance with adversarial principles, these measures are, generally, the Prosecutor's prerogative in the ICTY, ICTR and ICC, but the principles and

²⁰⁶ Art. 18(4) of the ICTY Statute and Art. 17(4) of the ICTR Statute.

²⁰⁷ Indeed, Trial Chambers have accepted the withdrawal of indictments in cases where the statutory conditions for the indictment were met but the case did not fall under the (new) prosecutorial strategy, e.g. *Sikirica and Others* ICTY T.Ch. 5.5.1998.

²⁰⁸ R. 28(A) of the ICTY RPE; see further ch. 7. For a critical view, see Daryl Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals' (2005) 99 *AJIL* 142.

²⁰⁹ Art. 53(2) of the ICC Statute. ²¹⁰ *Ibid.*, Art. 53(3); see section 17.5.

²¹¹ *Ibid.*, Art. 53(4).

²¹² Generally, see Robert Cryer, *Prosecuting International Crimes* (Cambridge, 2005). See also, e.g. Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of the Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510; Luc Côte, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *JICJ* 162; Geert-Jan Alexander Knoops, 'Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective' (2005) 16 *CLF* 365.

²¹³ *Delalić et al.* ICTY A.Ch. 20.2.2001 paras. 596–618.

²¹⁴ Rr. 50–1 of the ICTY RPE and ICTR RPE; see also, e.g. *Dragan Nikolić* ICTY T.Ch. II 20.10.1995 para. 32; Art. 61(4) of the ICC Statute.

procedures vary. Amendments and clarifications are common at the ICTY and ICTR and the required judicial approval has normally been granted; the main consideration is whether the amendment will cause the accused prejudice.²¹⁵ A 'new charge' requires a new confirmation and to be supported by evidence. Amendments may also be made during trial,²¹⁶ but not on appeal.²¹⁷

Post-confirmation, the ICC Prosecutor may amend the charges only with permission of the Pre-Trial Chamber; a new confirmation is required if the Prosecutor 'seeks to add additional charges or to substitute more serious charges'.²¹⁸ But without a formal hierarchy of crimes,²¹⁹ the notion of 'more serious charges' will cause difficulties in practice. Moreover, the provisions refer only to amendments 'before the trial has begun' and thus beg the question whether any amendments may be made thereafter. Different interpretations are possible. A complete ban on amendments at trial could result in acquittals on 'technical' grounds, although this may be counteracted by the chamber's power to 'modify the legal characterization' of the facts (see section 17.8.4).

17.8.3 The indictment

Framing an indictment is often a routine task in domestic criminal systems, but not so in the international jurisdictions; the crimes and further requirements for criminal responsibility are not very well defined in law and the indictments often cover multiple alleged perpetrators and events. The form of the indictment and the relationship between the charges and a subsequent judgment vary in different domestic legal systems. Hence, the principles for and form of the indictment have been subject to much confusion and many challenges in the ICTY and ICTR. True to adversarial trial principles, however, the Chambers have been unwilling, although empowered thereto, to check the form of the indictment *ex officio*.²²⁰ But over time, a relatively consistent practice has been established,²²¹ which the ICC will most likely take into account.

The form of the indictment is important in order to uphold the rights of the accused to a fair hearing, to be informed promptly and in detail of the nature and cause of the charges, and to have adequate time and facilities for the preparation of the defence.²²² The 'nature' of the charge relates to the legal characterization of the charge, that is to say the alleged offence and form of criminal liability, and the 'cause' to the factual basis or description of the charge.

²¹⁵ E.g. *Naletilić and Martinović* ICTY T.Ch. I 14.2.2001. Regarding other circumstances to consider, such as delays, see e.g. *Kovačević* ICTY A.Ch. 2.7.1998, and *Karemera et al.* ICTR A. Ch. 19.12.2003.

²¹⁶ *Akayesu* ICTR A.Ch. 1.6.2001 para. 120. ²¹⁷ *Niyitegeka* ICTR A.Ch. 9.7.2004 para. 196.

²¹⁸ Art. 61(4) and (9) of the ICC Statute. ²¹⁹ See further in ch. 18.

²²⁰ E.g. *Brdjanin and Talić* ICTY T.Ch. II 20.2.2001 para. 23.

²²¹ For a survey of the principles as developed in case law, see e.g. *Blaškić* ICTY A.Ch. 29.7.2004 paras. 207–21, and *Ntakirutimana* ICTR A.Ch. 13.12.2004 paras. 21–9 and 469–77.

²²² Art. 21(2) and (4)(a)–(b) of the ICTY Statute, Art. 20(2) and (4)(a)–(b) of the ICTR Statute, and Art. 67(1)(a)–(b) of the ICC Statute. The text of the ICC Statute is different, however, and speaks of, inter alia, the 'nature, cause, and content' of the charges.

Nonetheless, the statutory requirements for the Tribunals are very general in nature and instead a rich case law has developed.²²³ The indictment must include the ‘material facts’ underpinning the charges, but not the evidence by which such material facts are to be proven. The material facts must be given with enough detail to inform the defendant clearly of the charges and allow him or her to prepare the defence. What constitutes a material fact, however, depends on the nature of the case at hand, and the specificity, such as the identity of the victims, mainly on the nature of the alleged criminal conduct. Direct perpetration requires a higher degree of precision than more indirect conduct such as aiding or abetting. With the experiences and case law of the Tribunals in mind, the ICC Regulations are more detailed.²²⁴

Defects may be cured by amendments of the indictment or subsequent information and minor ones may be ignored, as long as the fair trial rights of the accused are not affected. A fundamental defect, however, can result in the Trial Chamber disregarding the charge or the Appeals Chamber reversing a conviction.²²⁵

17.8.4 The charge and its relationship to the judgment

The indictment is the primary accusatory instrument and establishes the frame for the criminal trial; only what is properly charged may lead to a conviction. Hence, the judges of the Tribunals and the ICC are required to identify, assess and pronounce on each charge (or count) of the indictment, and the ICC Statute clarifies that the judgment ‘shall not exceed the facts and circumstances described in the charges and any amendment to the charges’.²²⁶

Other questions are how the legal classification of facts – the nature of the charge – in the indictment should be understood and how Trial Chambers should act in the case of an erroneous legal classification. All the Statutes and RPE are silent on these matters and different legal traditions take different approaches. Common law jurisdictions place the emphasis on the ‘offence’ as categorized by the prosecutor in the indictment. This means that the legal characterization made for a charge is binding on the trial court; after all, it is against the crime charged that the accused raises the defence. An exception, however, is that the court may, without amendment, convict for a lesser included offence. As a consequence, the indictment will often present numerous counts in order to avoid an acquittal when all the factual and legal requirements for a conviction are met but the court finds a crime different from the one charged. The ICTY was opted to follow this model.²²⁷

In many civil law jurisdictions and mixed jurisdictions the conduct – the acts or omissions – is instead decisive, not the legal categorization of the ‘offence’. The

²²³ Art. 18(4) of the ICTY Statute and Art. 17(4) of the ICTR Statute, r. 47(C) of the ICTY RPE and ICTR RPE. See also, e.g. *Milutinović et al.* ICTY T.Ch. III 22.3.2006 (with references).

²²⁴ Reg. 52 of the ICC Regulations. ²²⁵ E.g. *Krnjelac* ICTY A.Ch. 17.9.2003 paras. 138–42.

²²⁶ R. 87 of the ICTY RPE and ICTR RPE, Art. 74(2) of the ICC Statute (where ‘charges’ is used instead of the term ‘indictment’, see also Art. 61 of the ICC Statute).

²²⁷ See *Kupreskić et al.* ICTY T.Ch. 14.1.2000 paras. 728–48 (including a survey of domestic law in different countries).

principle *iura novit curia* (the court knows the law) applies and, therefore, the prosecutor's legal characterization is not binding but merely a theory (a recommendation). The ICTY Trial Chamber in *Kupreškić et al.* discussed the possible application of this principle but concluded that it should not be applied.²²⁸ In the ICC, however, an expression of the *iura novit curia* principle has been established in the Regulations, allowing a chamber to 'modify the legal characterization' of the facts;²²⁹ that is to determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or a different form of participation than that which the Prosecutor has chosen. Indictments with a large number of counts and acquittals on 'technical grounds' could hereby be avoided.

17.8.5 Concurrence of offences – alternative and cumulative charges

International crimes are more complex than most crimes under domestic law. Multiple acts by many perpetrators and over a long period of time are often the case. Overlapping crimes are also common; the same killing or rape could, depending on the surrounding (contextual) facts, simultaneously be considered as genocide, crimes against humanity and war crimes. This concurrence of offences (*concursum delictorum*) gives rise to both theoretical and practical difficulties,²³⁰ but the Statutes and RPE provide little assistance and here too the common law and civil law approaches vary.

The ICTY and ICTR have long accepted cumulative charges and, when challenged, the Trial Chambers have concluded that this is a matter to be resolved at trial, particularly in sentencing.²³¹ In turn, this triggers the question of cumulative convictions and after some initial uncertainty consistent principles now apply in both Tribunals. The Appeals Chamber in *Delalić et al.* concluded that only distinct crimes justify multiple convictions.²³² Cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if both statutory provisions involved have a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required

²²⁸ *Ibid.*, para. 740. The Chamber was prepared to apply a lesser included offence theory and gave some examples, which however require an established hierarchy of offences and of modes of criminal liability (crimes against humanity more serious than war crimes, perpetration more serious than aiding or abetting, etc.): paras. 744–6. The issue was raised but not considered in *Aleksovski* ICTY A.Ch. 24.3.2000 para. 55. Cf. *Karemera et al.* ICTR T.Ch. III 13.2.2004 para. 47, where the Trial Chamber indicated that it would apply the principle of *iura novit curia* at the close of the proceedings. Similarly, *Ntagerura et al.* ICTR T.Ch. 25.2.2004 paras. 36–8.

²²⁹ Reg. 55 of the ICC Regulations. Any such re-categorization is subject to safeguards ensuring the participants, particularly the accused, an opportunity to respond and make preparations. The accused may also, if necessary, examine again a previous witness or call new evidence. See further Carsten Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 *CLF* 1.

²³⁰ See Carl-Friedrich Stuckenberg, 'Multiplicity of Offences: Concursum Delictorum' in Horst Fischer Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin, 2001) 559–604.

²³¹ E.g. *Delalić et al.* ICTY T.Ch. II 2.10.1996 para. 24, and *Kanyabashi* ICTR T.Ch. II 31.5.2000 paras. 5.5–5.7. See ch. 18.

²³² *Delalić et al.* ICTY A.Ch. 20.2.2001 paras. 412–13. See also *Musema* ICTR A.Ch. 16.11.2001 paras. 358–70. But cf. *Kupreškić et al.* ICTY T.Ch. II 14.1.2000 paras. 637–748.

by the other element.²³³ If this test is not met, a single conviction must be entered; the more specific offence is to have preference over the more general one (a *lex specialis* principle). The contextual elements for the different crimes are also to be taken into account, meaning that cumulative convictions for the same conduct, for example murder/killing, are permissible as different crimes (under different articles of the Statute). The test becomes more complicated for different charges for the same conduct under the same Article; for example cumulative convictions are not permitted for persecution as a crime against humanity and other underlying crimes against humanity unless each offence has a materially distinct element which the ICTY Appeals Chamber has concluded that many of them have.²³⁴

When cumulative charges and cumulative convictions are allowed there is little need for alternative charges. However, different forms of criminal responsibility cannot be imposed for the same conduct and thus these forms may be pleaded in the alternative in the ICTY and ICTR.²³⁵ For example, superior responsibility is subsidiary to other modes of liability, and commission excludes a conviction for also planning the crime; a superior position or participation in planning will instead be factors in sentencing.²³⁶

The pleading practice of the ICC – alternative or cumulative charges – is still in its infancy, but one should expect that the practice will be influenced by the provisions allowing the Trial Chamber to ‘modify the legal characterization’ of the facts (see section 17.8.4).

17.9 Pre-trial proceedings – preparations for trial

17.9.1 First appearance and confirmation of charges

As with many domestic jurisdictions, a formal first appearance hearing is held at the ICTY, ICTR and ICC as soon as the suspect has arrived at the Tribunal or Court.²³⁷ The Chamber will check that the person has been served with the indictment (ICTY/ICTR) or arrest warrant (ICC) and that certain rights are respected. At the ICTY and ICTR, one main function is to charge the accused formally and allow him or her to enter a plea to the charges (immediately or at a further appearance). A date for trial will be set in case of a plea of not guilty, while a guilty plea leads to simplified trial proceedings (see section 17.11). In the ICC proceedings, on the other hand, it is not required that the person is formally charged at this stage and the main purpose, apart from the assurance of rights, is instead to set a date for the confirmation of charges.

Another common feature of many, but not all, domestic systems is a judicial pre-trial review of the indictment to assess that charges concern criminal acts and that there is evidence of sufficient strength for prosecution. Judicial confirmation of the

²³³ This test serves two purposes: to ensure that the accused is convicted only for distinct offences and that the convictions fully reflect his or her criminality: *Kordić and Čerkez* ICTY A.Ch. 17.12.2004 para. 1033.

²³⁴ *Ibid.*, paras. 1039–44. ²³⁵ E.g. *Stanisić* ICTY T.Ch. II 19.7.2005 para. 6.

²³⁶ E.g. *Blaskić* ICTY A.Ch. 29.7.2004 para. 91, and *Kajelijeli* ICTR A.Ch. 23.5.2005 para. 81.

²³⁷ R. 62 of the ICTY RPE and ICTR RPE, Art. 60(1) of the ICC Statute and r. 121 of the ICC RPE.

indictment (in the ICC Statute called 'charges') is also required at the ICTY, ICTR and ICC.²³⁸ It is intended to protect suspects against unsubstantiated prosecutions, which is particularly important when the crimes are inherently very serious and the proceedings often attract public attention.²³⁹ While the ICTY and ICTR judges have decided that a review by a single judge is sufficient, the States negotiating the ICC Statute sought additional protection against unsubstantiated indictments and required the full Pre-Trial Chamber.²⁴⁰

Furthermore, the Tribunal proceedings are *ex parte* while the ICC Statute provides for an adversarial process with a hearing in the presence of the prosecution and defence.²⁴¹ In both cases the Prosecutor must support the charges with sufficient evidence, at this stage normally documentary or summary evidence. But in the ICC process the accused is also entitled to challenge the Prosecutor's evidence and to present his or her own evidence, which has prompted concerns that the proceedings could lead to an additional 'mini-trial' without sufficient control by the Pre-Trial Chamber. The Tribunals apply a *prima facie* test and the ICC Statute requires 'substantial grounds to believe' that the person has committed the crime charged.²⁴² The primary purpose is to test whether the evidentiary requirements for committing the case to trial are met. The judge or Chamber is to consider each charge and either confirm or dismiss it. Upon confirmation, a case at the ICC is transferred from the Pre-Trial Chamber to the Trial Chamber.

In general, the confirmation of the indictment at the ICTY and ICTR precedes the arrest and surrender of the accused, while the opposite is scheduled to apply at the ICC. But the actual apprehension and surrender of the suspect or accused is a serious obstacle to international criminal proceedings. Therefore, special confirmation proceedings *in absentia* have been introduced.²⁴³ In the Tribunals, these rather controversial proceedings²⁴⁴ relate to indictments that have already been confirmed with a view to issuing an international arrest warrant to all States. Moreover, the Trial Chamber in *Karadžić and Mladić* expressed the view that the proceedings have stigmatizing and reparative effects and contribute to a true historical record.²⁴⁵ While the first two results are undoubtedly true, the third is debatable since only the prosecution case is presented and the accused could be unrepresented. At the ICC, on the other hand, confirmation *in absentia* is neither a second (more extensive) proceeding, nor a precondition for an international arrest warrant, and its value is questionable. Indeed, a

²³⁸ Art. 19 of the ICTY Statute, Art. 18 of the ICTR Statute, and Art. 61 of the ICC Statute.

²³⁹ The indictment (and any subsequent amendment to it) is to be served upon the accused: r. 53*bis* of the ICTY RPE and ICTR RPE, and r. 121 of the ICC RPE.

²⁴⁰ R. 47 of the ICTY RPE and ICTR RPE and Art. 57(2)(a) of the ICC Statute.

²⁴¹ Art. 61 of the ICC Statute and r. 121 of the ICC RPE.

²⁴² See e.g. *Milošević* ICTY (Judge May) 22.11.2001; Art. 61(6)–(7) of the ICC Statute.

²⁴³ R. 61 of the ICTY RPE and ICTR RPE, as well as Art. 61(2) of the ICC Statute and rr. 123–6 of the ICC RPE.

²⁴⁴ See e.g. Mark Tieroff and Edward Amley, 'Proceeding Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61' (1998) 23 *Yale Journal of International Law* 231; Shuichi Furuya, 'Rule 61 Procedure in the International Criminal Tribunal for the Former Yugoslavia: A Lesson for the ICC' (1999) 12 *LJIL* 635.

²⁴⁵ *Karadžić and Mladić* ICTY T.Ch. I 11.7.1996 para. 3.

confirmation *in absentia* does not substitute for a trial and cannot result in a verdict unless the accused subsequently appears before the Tribunal or Court. Moreover, the conclusions reached in a decision of this kind can only be preliminary in nature and cannot prevent different conclusions at trial.²⁴⁶

The general principle is that ICTY and ICTR indictments are to be made public,²⁴⁷ but it is possible to keep the indictment under seal, *inter alia* to facilitate an arrest or protect confidential information.²⁴⁸ This was for a long time standard practice at the ICTY and disclosure took place first when the indictment had been served on the accused. This is not an issue for the ICC since the indictment is not a prerequisite for the arrest warrant and the warrant need not be made public.²⁴⁹

17.9.2 Preparations for trial

The preparations for trial include the resolution of many legal issues, such as challenges²⁵⁰ to jurisdiction, matters relating to evidence, protective measures, and, in the ICC, the admissibility of a case. Another important issue is the joinder or severance of trials against multiple accused,²⁵¹ which has been ordered in many ICTY and ICTR cases concerning crimes committed in the course of ‘the same transaction’.²⁵² Joint trials may promote judicial economy, avoid duplication of evidence and repeated witness appearances, and ensure the consistency of verdicts, but a concern is prejudice to the accused.²⁵³

Much time and effort has been devoted to such issues in the Tribunals and the ICC process will be no different. In the interest of efficiency, the ICTY, ICTR and ICC have developed different procedural tools, such as pre-trial (or pre-appeal) judges,²⁵⁴ status conferences,²⁵⁵ and pre-trial and pre-defence conferences.²⁵⁶ The ICC also has a detailed pre-confirmation scheme.²⁵⁷ A common feature is that the judges have assumed an increasingly active and controlling role. This even includes powers to restrict, *inter alia*, the number of witnesses at trial and the time available to the respective party for presenting evidence at trial.²⁵⁸

²⁴⁶ Christopher Greenwood, ‘The Development of International Humanitarian Law by the International Criminal for the Former Yugoslavia’ (1998) 2 *Max Planck Yearbook of United Nations Law* 97 at 113.

²⁴⁷ R. 52 of the ICTY RPE and ICTR RPE. ²⁴⁸ *Ibid.*, r. 53.

²⁴⁹ *Situation in Uganda* ICC PT.Ch. II 13.10.2005. ²⁵⁰ See rr. 54, 72 and 73 of the ICTY RPE and ICTR RPE.

²⁵¹ Rr. 48, 49 and 82 of the ICTY RPE; rr. 48, 48bis, 49 and 82 of the ICTR RPE; Art. 64(5) of the ICC Statute and r. 136 of the ICC RPE.

²⁵² R. 2 of the ICTY RPE and ICTR RPE; see also *Milošević* ICTY A.Ch. 18.4.2002 para. 20.

²⁵³ For a review of the jurisprudence, see *Popović et al.* ICTY T.Ch. III 21.9.2005.

²⁵⁴ Rr. 65ter and 108bis of the ICTY RPE; Arts. 39(2)(b)(iii) and 57(2)(b) of the ICC Statute, r. 7 of the ICC RPE, and reg. 47 of the ICC Regulations.

²⁵⁵ R. 65bis of the ICTY RPE and ICTR RPE; r. 132 of the ICC RPE and reg. 54 of the ICC Regulations.

²⁵⁶ Rr. 73bis and 73ter of the ICTY RPE and ICTR RPE; reg. 54 of the ICC Regulations. ²⁵⁷ R. 121 of the ICC RPE.

²⁵⁸ E.g. *Milošević* ICTY A.Ch. 16.5.2002 (time limit etc. for the prosecution case), and T.Ch. III 25.2.2004 (time limit etc. for the defence case). See also T.Ch. III 17.9.2003 (time for preparation of the defence case), upheld on appeal, A.Ch. 20.1.2004, and T.Ch. III 17.10.2003 (time limits for examination of a witness). Regarding limitations, however, see *Oric* ICTY A.Ch. 20.7.2005.

17.9.3 Disclosure of evidence

A fundamental feature of a fair trial – a manifestation of ‘equality of arms’ – is the disclosure of the prosecutor’s evidence to the accused, allowing the latter to prepare for trial. In an inquisitorial system, this is done easily since all the material collected during the investigation – incriminating and exonerating – is collected in a ‘dossier’ which, in principle, is available to the accused. In an adversarial system, however, disclosure is more complicated and premised on separate prosecution and defence cases. While the prosecutor normally has extensive disclosure obligations, including for material that is favourable to the accused, defence disclosure is more restricted and is often postponed until the prosecutor has presented his evidence at trial. The defendant has the right to remain silent. Another difference is the extent to which the evidence should be disclosed to the court before the trial. Such disclosure allows the judges to prepare and control the trial more actively, as well as fulfilling a truth-finding function, but could taint the court’s impartiality (or at least be perceived to do so). Where a ‘dossier’ is collected, the material is also made available to the court.

The ICTY and ICTR procedures are primarily adversarial in nature and disclosure is regulated against this background. The Prosecutor has extensive, and continuous, obligations concerning pre-trial disclosure: the material supporting the indictment, copies of statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all statements offered in evidence in lieu of a witness testimony.²⁵⁹ The defence shall also be permitted to inspect the prosecutor’s material.²⁶⁰ The obligation to disclose also extends to exculpatory and other relevant material within the custody or control of the Prosecutor,²⁶¹ a provision which has triggered numerous claims of violations at both Tribunals. However, certain information and material are exempt from disclosure²⁶² and, in addition, the Trial Chamber may allow non-disclosure of specific information. Defence disclosure is also provided with respect to a defence of alibi or any special defence (for example diminished or lack of mental responsibility), at the ICTR before the commencement of the trial but at the ICTY full disclosure is provided only once the prosecution has closed its case at trial.²⁶³ Failure by the defence to disclose does not prevent it from raising a defence or presenting evidence.

The Trial Chamber also exerts a certain control over disclosure; the Prosecutor may seek clarifications on disclosure from the Chamber²⁶⁴ and the accused may obtain an order to the Prosecutor to meet the disclosure obligations. In case of violations, the trial may be reopened in order to allow the presentation of additional evidence,²⁶⁵ and

²⁵⁹ Rr. 66, 92*bis* and 94*bis* of the ICTY RPE and ICTR RPE.

²⁶⁰ At the ICTR, the Prosecutor has a reciprocal right to inspect material within the custody or control of the accused and intended to be used as evidence at trial: r. 66(B) of the ICTR RPE. An equivalent provision was repealed from the ICTY RPE.

²⁶¹ R. 68 of the ICTY RPE and ICTR RPE. See also *Blaškić* ICTY A.Ch. 29.7.2004 paras. 263–9.

²⁶² R. 70 of the ICTY RPE and ICTR RPE.

²⁶³ R. 67 of the ICTY RPE and ICTR RPE. Regarding the timing of the defence disclosure, see also r. 65*ter* of the ICTY RPE.

²⁶⁴ E.g. *Krajišnik and Plavšić* ICTY T.Ch. III 1.8.2001. ²⁶⁵ See *Furundžija* ICTY T.Ch. II 10.12.1998 para. 22.

sanctions may be imposed.²⁶⁶ A controversial question is whether the evidence should also be disclosed to the Trial Chamber. Some Chambers have required such disclosure by the Prosecutor, but others have refused, and the ICTY Appeals Chamber has established that this is a discretionary matter for the Trial Chamber.²⁶⁷

Disclosure is briefly touched upon in the ICC Statute and further developed in the RPE. Controversial questions in the negotiations were whether full disclosure of the evidence for trial should take place before or after the confirmation hearing and whether the Chambers should have access to a 'dossier'.²⁶⁸ The rules leave room for different interpretations. But it is important to note that the confirmation and the trial serve different purposes and that the evidentiary requirements differ, which is also reflected in the rules on pre-confirmation disclosure.²⁶⁹

The Pre-Trial Chamber is empowered to order disclosure for the purpose of the confirmation of charges and the Trial Chamber to provide for disclosure of documents and information not previously disclosed.²⁷⁰ The Statute places an important obligation upon the Prosecutor to disclose evidence that is exculpatory, mitigating, or which may affect the credibility of prosecution evidence.²⁷¹ The RPE contain provisions on disclosure by the prosecution and, regarding material offered in evidence, by the defence as well as on inspection by the other party of material subject to disclosure.²⁷² Exceptions from disclosure are also available.²⁷³ Regarding disclosure of exculpatory evidence, the Prosecutor may in *ex parte* proceedings seek a ruling from the relevant Chamber.²⁷⁴

17.10 Evidentiary rules

At the ICTY, ICTR and ICC the procedures are adversarial in the sense that the parties are primarily responsible for putting evidence before the court, although the judges may provide for additional evidence. Issues concerning the burden and standard of proof, the role of witnesses and disclosure, have already been discussed (see sections 17.2.3, 17.3.4 and 17.9.3).

Domestic systems provide for rules on evidence, particularly rules regarding the admission and exclusion of evidence. While many adversarial systems, particularly those with jury trials, tend to have strict and technical provisions, inquisitorial systems do not and instead admit most evidence to be presented at trial. The former approach seeks to protect the fact-finder from unreliable or improper evidence. The

²⁶⁶ Rr. 46 and 68bis of the ICTY RPE and r. 46 of the ICTR RPE; e.g. *Krštić* ICTY A.Ch. 19.4.2004 paras. 210–15, and *Blaškić* ICTY A.Ch. 29.7.2004 para. 295.

²⁶⁷ *Blagojević et al.* ICTY A.Ch. 8.4.2003 paras. 11–19.

²⁶⁸ For opposing views, see contributions by Helen Brady and Gilbert Bitti in Fischer *et al.*, *International and National Prosecution*, 261–88.

²⁶⁹ Regarding the confirmation hearing, see Art. 61(5) of the ICC Statute and r. 121(3) of the ICC RPE.

²⁷⁰ Arts. 61(3) (pre-trial chamber) and 64(3)(c) (trial chamber) of the ICC Statute. Extensive instructions for disclosure were issued in *Lubanga Dyilo* ICC PT.Ch. I 15.5.2006 and 19.5.2006.

²⁷¹ Art. 67(2) of the ICC Statute. ²⁷² Rr. 76–9 of the ICC RPE.

²⁷³ *Ibid.*, rr. 81–2. ²⁷⁴ *Ibid.*, r. 83.

latter places the emphasis on the court weighing the totality of the evidence (a principle of 'free evaluation of evidence') and providing the findings in a reasoned opinion. Regardless of the system, however, a high evidentiary standard is important for the legitimacy of any court; in *Kupreškić et al.* the Trial Chamber stated: 'we have had to shoulder the heavy burden of establishing incredible facts by means of credible evidence'.²⁷⁵

The approach to evidence at the Tribunals has been described as flexible, liberal and unhindered by technical rules found in national and particularly common law systems.²⁷⁶ Professional judges try both fact and law and there is no need to protect jurors from lay prejudice. The same is true for the ICC. The complex factual situations, large amount of evidence, and difficulties in obtaining it, are all reasons for flexibility, but this also raises issues of fairness and efficiency of the proceedings.²⁷⁷

There are a few rules for the Tribunals but a rich jurisprudence,²⁷⁸ which have also influenced the ICC law. The Trial Chambers are not to be bound by national rules of evidence.²⁷⁹ Instead, the Tribunals are instructed to apply the rules 'which will best favour a fair determination of the matter' and 'are consonant with the spirit of the Statute and the general principles of law'.²⁸⁰ They have the discretion to 'admit any relevant evidence which it deems to have probative value' and to exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial'.²⁸¹ In order to be relevant (to an allegation or issue in the trial) and probative (whether it tends to prove an issue) the evidence must be 'reliable', which in turn depends upon many circumstances, for example the origin, content, corroboration, truthfulness, voluntariness, and trustworthiness of the evidence.²⁸² The ICC Statute is less extensive but provides a few exclusionary rules. Generally, the 'probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness' are decisive factors for a ruling on admissibility or relevance.²⁸³ Additionally, evidence before the Tribunals as well as the ICC may be excluded because of the means by which it was obtained.²⁸⁴

With legally trained judges only, and an obligation to provide reasons for the factual findings, a presumption in favour of admission of evidence exists in the Tribunals and the ICC; the evidence should rather be assessed at trial than

²⁷⁵ ICTY T.Ch. II 14.1.2000 para. 758; see also A.Ch. 23.10.2001 paras. 34–40 (on domestic principles).

²⁷⁶ Richard May and Marieke Wierda, 'Evidence before the ICTY' in Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence* (The Hague, 2001), 251.

²⁷⁷ In particular, commentators with a common law background have been critical of the relaxed regime of the Tribunals, e.g. Patricia Wald, 'To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings' (2001) 42 *Harvard International Law Review* 535.

²⁷⁸ Instructive are the 'guidelines' issued in *Brdjanin and Talić* ICTY T.Ch. II 15.2.2002.

²⁷⁹ R. 89(A) of the ICTY RPE and ICTR RPE; Art. 69(8) of the ICC Statute and r. 63(5) of the ICC RPE.

²⁸⁰ R. 89(B) of the ICTY RPE and ICTR RPE.

²⁸¹ R. 89(C)–(D) of the ICTY RPE. Cf. the ICTR RPE which only set out the first part on admission: r. 89(C).

²⁸² E.g. *Tadić* ICTY T.Ch. II 5.8.1996 paras. 15–19, and *Musema* ICTR T.Ch. I 27.1.2000 paras. 38–42.

²⁸³ Art. 69(4) of the ICC Statute. ²⁸⁴ R. 95 of the ICTY RPE and ICTR RPE; Art. 69(7) of the ICC Statute.

weeded-out beforehand.²⁸⁵ For example, the Tribunals have usually accepted hearsay evidence.²⁸⁶

But with respect to certain evidence in cases of sexual assault the opposite presumption applies or the evidence is banned altogether.²⁸⁷ The issue of ‘consent’ with respect to crimes of sexual violence committed in coercive circumstances requires special attention; in such a situation, a claim of consent is rarely credible. But the issue is difficult both in substance and with respect to the conflation of material (element of the crime) and procedural aspects. The Tribunals have established that consent must be given voluntarily and be assessed in the context of the circumstances, but that it is not necessary to show the use of force by the perpetrator, nor is it necessary to prove resistance by the victim.²⁸⁸ From national jurisprudence has been drawn a principle of presumed non-consent in certain situations such as between detainees and captors.²⁸⁹ Similarly, the ICC RPE provide that consent cannot be inferred from silence or lack of resistance, nor can it be inferred from words or conduct of a victim incapable of giving genuine consent.²⁹⁰ It is against this interpretation of the law that the special evidentiary rules, which also aim to protect the victims from spurious lines of questioning, are to be understood.

Another issue that has provoked much debate and litigation is the use of written witness statements in lieu of oral testimony, which is now allowed at the ICTY and ICTR regarding ‘proof of a matter other than the acts and conduct of the accused as charged in the indictment’.²⁹¹ Other rules address depositions, evidence of a consistent pattern of conduct and judicial notice of notorious facts and adjudicated facts or documentary evidence from other proceedings.²⁹² Similarly, the ICC may also permit video-recorded or audio-recorded testimony, documents and written transcripts;²⁹³ but how the Court will deal with already adjudicated facts and material from other proceedings is a matter for jurisprudence.²⁹⁴ While there is still a preference for oral testimony in principle, the ICTY in particular has been prepared to depart from this in the interest of shorter trials.²⁹⁵

17.11 Admission of guilt, guilty pleas, plea-bargaining

Common law and civil law systems take very different approaches when the accused confesses the crimes charged. The law of the ICTY and ICTR, on the one hand, and

²⁸⁵ On general considerations concerning the evaluation of evidence, see e.g. *Brdjanin* ICTY T.Ch. II 1.9.2004 paras. 20–36.

²⁸⁶ E.g. *Aleksovski* ICTY A.Ch. 16.2.1999 para. 15.

²⁸⁷ R. 96 of the ICTY RPE and ICTR RPE, and rr. 70–2 of the ICC RPE. See further Donald Piragoff, ‘Evidence’ in Lee, *Elements and Rules*, 369–91.

²⁸⁸ E.g. *Kunarac et al.* ICTY A.Ch. 12.6.2002 paras. 127–9. ²⁸⁹ *Ibid.*, para. 131.

²⁹⁰ R. 70 of the ICC RPE. ²⁹¹ R. 92bis of the ICTY RPE and ICTR RPE.

²⁹² *Ibid.*, rr. 71, 93 and 94. ²⁹³ Art. 69(2) of the ICC Statute and rr. 47, 67 and 68 of the ICC RPE.

²⁹⁴ There are, however, provisions on judicial notice of facts of common knowledge and on agreements between the parties regarding evidence: Art. 69(6) of the ICC Statute and r. 69 of the ICC RPE.

²⁹⁵ Compare r. 89(F) of the ICTY RPE and r. 90.1 of the ICTR RPE; the ICTY, but not the ICTR, has departed from the primary reliance on oral testimony. See also *Milošević* ICTY T.Ch. III 21.3.2002 (general requirements for r. 92bis), and A.Ch. 30.9.2003 (relationship between rr. 89 and 92bis; including a dissenting opinion).

the ICC, on the other, reflect these differences. The Tribunals have adopted the common law approach of a formal review of the 'guilty plea' and, if accepted by the Chamber, a finding of guilt and a move to a sentencing hearing, that is to say simplified proceedings.²⁹⁶ The test is whether it was a voluntary, informed and unequivocal plea, and whether there is a sufficient factual basis for the crime and the participation of the accused in it. The crucial difference between the common law and civil law view is whether the court must accept the facts as the parties have agreed them or whether it will conduct a further inquiry and perhaps require additional evidence. Although the ICTY and ICTR Chambers are required to satisfy themselves as to the facts, the factual basis is often limited and the Chambers are reluctant to call for additional evidence. Recent ICTY practice, however, reveals a more thorough examination of the agreed facts and the consistency with the admitted crimes.²⁹⁷

This approach leaves room for agreements between the parties regarding matters of guilt and sentencing – 'plea-bargaining' – as is the case in many common law jurisdictions.²⁹⁸ The idea is that the dispute between the parties may be resolved in this way too. It is a debated matter, however, and while proponents often highlight the judicial economy of plea-bargaining, opponents focus instead on inequality before the law and the risk of materially incorrect verdicts.²⁹⁹

The ICTY and ICTR have long accepted plea-bargaining, but the attraction of this tool depends on a predictable outcome for the accused, particularly a sentencing rebate, and here the jurisprudence is inconsistent.³⁰⁰ While it is clear that the Chamber is not bound by any agreement between the parties, many sentencing recommendations have been accepted and the Trial Chamber in *Todorović* concluded that a timely plea would normally result in a rebate.³⁰¹ But in more recent decisions, ICTY Trial Chambers have departed from such recommendations and the Appeals Chamber has avoided giving express support to a rebate.³⁰²

During the ICC negotiations, the issue of guilty pleas was extensively discussed. As a compromise, the Statute provides a formula more towards the civil law view that a confession is merely one piece of evidence, but it still allows simplified proceedings in case of 'an admission of guilt'.³⁰³ The assessment of the 'admission of guilt' by the trial chamber is similar to that of the Tribunals but with a stronger focus on the submitted facts and any evidence. The Chamber may also, in 'the interests of justice', decide on a

²⁹⁶ Rr. 62bis and 62ter of the ICTY RPE, and rr. 62 and 62bis of the ICTR RPE. Cf. Art. 20(3) of the ICTY Statute and Art. 19(3) of the ICTR Statute, which direct that, regardless of the plea, there be a 'trial'.

²⁹⁷ See e.g. *Babić* ICTY A.Ch. 18.7.2005 paras. 8–10, and *Deronjić* ICTY A.Ch. 20.7.2005 paras. 12–19. Cf. *Jelisić* ICTY A.Ch. 5.7.2001 para. 87 (unless cogent reasons indicate otherwise, the sentence should be based on the agreed facts).

²⁹⁸ One should note, however, that not all common law jurisdictions allow plea bargaining and that among those allowing the practice there are important differences.

²⁹⁹ See *Erdemović* ICTY A.Ch. 7.10.1997 paras. 17–21, and the dissenting opinion by Judge Cassese. See further, e.g. Michael Bohlander, 'Plea-Bargaining before the ICTY' in May *et al.* *ICTY Essays* at 151–63; Nancy Amoury Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes' (2002) 151 *University of Pennsylvania Law Review* 1; Henri Bosly, 'Admission of Guilt before the ICC and in Continental Systems' (2004) 2 *JICJ* 1040; Julian Cook, 'Plea Bargaining at the Hague' (2005) 30 *Yale Journal of International Law* 473.

³⁰⁰ On concerns regarding such rebates, see section 18.3.1. ³⁰¹ *Todorović* ICTY T.Ch. I 31.7.2001 para. 80.

³⁰² See *Dragan Nikolić* ICTY A.Ch. 4.2.2005 paras. 55–6. ³⁰³ Art. 65 of the ICC Statute and r. 139 of the ICC RPE.

more complete presentation of the facts of the case by requesting the Prosecutor to present additional evidence or ordering a trial under the ordinary trial procedures. The question of plea-bargaining was also a hotly contested issue in the negotiations and some expressed strong reservations. A provision was also inserted in the Statute that no agreement between the parties is to be binding on the Court. But the provision does not prevent plea-bargaining as such and certain powers of the Prosecutor, albeit under certain court control, could leave room for such agreements.³⁰⁴ Whether the ICC will accept the practical necessity of some form of plea-bargaining in spite of the principled concerns and likely criticism is not yet known. But, as one commentator suggests, it would be desirable to conduct as many trials as possible, and resort to bargaining only when absolutely necessary.³⁰⁵

17.12 Trial and judgment

Generally, the trial hearings before the Tribunals have been lengthy. In part this is due to the adversarial nature of the trial whereby the prosecution and the defence present separate ‘cases’. The parties have been allowed to make different dispositions and adapt their evidence depending on the development of the trial with little intervention by the Chambers. This has changed over time, however, and the preparations are now much more rigorous and under stricter judicial control (see section 17.9).

Unlike many civil law jurisdictions, neither the ICTY and ICTR nor the ICC may proceed with the trial in the absence of the accused (trials *in absentia*).³⁰⁶ While some criticize this choice, particularly in light of the difficulties to apprehend the accused, others consider this to be a fundamental precondition for a fair trial and the issue was much discussed in the ICC negotiations.³⁰⁷ Nonetheless, the compromise was to allow for confirmation hearings *in absentia* (see section 17.9.1).

In principle, the trial is to be public but closed sessions are allowed for specified reasons: public order and morality, safety and security of a victim or witness, protection of confidential or sensitive information, or the protection of the interests of justice.³⁰⁸ Disruptive persons, including the accused, may be removed from the courtroom.³⁰⁹

The trial itself follows a straightforward scheme: opening statements, presentation of evidence, closing arguments, deliberations, and judgment.³¹⁰ Sentencing and reparations proceedings are discussed in Chapter 18. In the ICTY and ICTR this follows the two-case model, prosecution first and defence thereafter. This will not necessarily be the case at the ICC, however, where the presiding judge has broad

³⁰⁴ Art. 54(3)(d) of the ICC Statute, on agreements with individuals, as well as Arts. 53(3) and 61(4) and (9), relating to decisions not to pursue a prosecution.

³⁰⁵ Mirjan Damaska, ‘Negotiated Justice in International Criminal Courts’ (2004) 2 *JICJ* 1018.

³⁰⁶ Art. 21(4)(d) of the ICTY Statute, Art. 20(4)(d) of the ICTR Statute, and Art. 63 of the ICC Statute.

³⁰⁷ See Håkan Friman, ‘Rights of Persons Suspected or Accused of a Crime’ in Lee, *The Making of the Rome Statute*, 255–61.

³⁰⁸ Rr. 78 and 79 of the ICTY RPE and ICTR RPE, and Arts. 63 and 64(7) of the ICC Statute.

³⁰⁹ R. 80 of the ICTY RPE and ICTR RPE, and Arts. 63(2) and 71 of the ICC Statute.

³¹⁰ Rr. 84–7 of the ICTY RPE, rr. 84–8 of the ICTR RPE; Art. 64(8) of the ICC Statute and rr. 140–2 of the ICC RPE.

powers to give directions for the conduct of the proceedings; the considerable discretion could result in fundamentally different approaches being taken in different cases, and in turn affect the perceived fairness of the Court proceedings and the right of all accused to equal treatment, but this risk could be reduced by practice directives or harmonization in other forms.

Unless the Trial Chamber decides otherwise, the presentation of evidence in Tribunal trials follows a true adversarial model: prosecution evidence, defence evidence, prosecution evidence in rebuttal, defence evidence in rejoinder, evidence ordered by the Chamber, evidence regarding sentencing.³¹¹ In each case, examination-in-chief, cross-examination, and re-examination shall be allowed and the judge may ask questions at any stage.³¹² The Chamber is to exercise control over the mode and order of interrogating witnesses, with a view to efficiency, and the cross-examination is limited in scope.³¹³ The ICC scheme, on the other hand, leaves room for a different approach inspired by inquisitorial principles: less of a distinction, or none at all, between prosecution and defence witnesses, and a less strict scheme for examination beginning with a free statement and questions by the judges, not the parties. There are some minimum rules, however, which provide for an examination model quite similar to that of the Tribunals.³¹⁴

Before the Tribunals and the ICC, the accused may appear as a witness in his or her own defence, which departs from the practice in civil law jurisdictions. In addition, both the ICTY and ICC allow the accused to make unsworn statements at trial.³¹⁵

In line with the adversarial two-case model at the ICTY and ICTR, there is room for the accused to request a judgment after the presentation of the prosecution case, a so-called mid-trial acquittal.³¹⁶ The Chamber may also enter such a judgment *proprio motu*. The rationale is that the accused has ‘no case to answer’ due to insufficient evidence, but the assessment of evidence at mid-trial could potentially affect the perception of the judges’ impartiality. Attempting to overcome this, the test is explained as: ‘whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question’.³¹⁷ No similar provisions are provided for the ICC but it is possible that the Court, like early ICTY decisions,³¹⁸ will argue an ‘inherent power’ to dismiss charges due to insufficient evidence.

The judgment must contain reasons, which allows a subsequent review of the legal and factual findings.³¹⁹ As majority decisions are permitted, both majority and minority opinions are to be included.

³¹¹ R. 85 of the ICTY RPE and ICTR RPE.

³¹² In particular the cross-examination is considered a cornerstone for the common law trial model, sometimes even called ‘the greatest legal engine ever invented for the discovery of truth’, see John H. Wigmore, *A Treatise on the Anglo-American System of Evidence at Trials in Common Law* (3rd edn, Boston 1940) 29, § 1367.

³¹³ R. 90 of the ICTY RPE and ICTR RPE. ³¹⁴ R. 140 of the ICC RPE.

³¹⁵ R. 84bis of the ICTY RPE and Art. 67(1)(h) of the ICC Statute. ³¹⁶ R. 98bis of the ICTY RPE and ICTR RPE.

³¹⁷ E.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 434. ³¹⁸ *Tadić* ICTY T.Ch. II 13.9.1996.

³¹⁹ Art. 23 of the ICTY Statute and r. 98ter of the ICTY RPE; Art. 22 of the ICTR Statute and r. 88 of the ICTR RPE; Art. 74 of the ICC Statute and r. 144 of the ICC RPE.

17.13 Appeals proceedings

17.13.1 Appeal against judgment and sentence

The Nuremberg and Tokyo Tribunals did not provide for appeals, but today anyone convicted of a crime is entitled to a review of the conviction and sentence by a higher court.³²⁰ The ICTY, ICTR and ICC all allow appeals.³²¹ Like many civil law jurisdictions, appeals are not restricted to convictions or sentences, but also extend to acquittals. In many common law jurisdictions, on the contrary, acquittals are considered final immediately and are not subject to appeal. The latter model stresses a protection of the individual against repeated charges by the State,³²² the former is more concerned with achieving a materially correct verdict.

On appeal, the Appeals Chamber may affirm, reverse or revise the appealed decision.³²³ Alternatively, it may set aside the judgment and order a new trial before a different trial chamber.³²⁴ Detailed procedures are set forth for each jurisdiction.³²⁵

A safeguard in domestic jurisdictions where acquittals are subject to appeals is a prohibition against *reformatio in peius* (worsening of an earlier verdict), which safeguard prevents changes regarding the verdict or sentence to the detriment of the accused if only he or she appeals; such a change requires the prosecutor to appeal. While the ICC Statute sets forth this principle, the Tribunals have not explicitly adhered to it.³²⁶ In practice, however, the principle will be straightforward concerning penalties but hard to apply regarding convictions since no formal hierarchal order has been established between the different crimes (see section 18.3).

17.13.2 Standard of review

At the ICTY and ICTR, appeals against trial judgments, as appeals against sentencing judgments, are appeals *stricto sensu*, that is to say of a corrective nature, and not new trials (trials *de novo*).³²⁷ Hence, the process is limited to correcting errors of law invalidating the decision and errors of fact resulting in a ‘miscarriage of justice’. The threshold for intervening in factual determinations is high and requires that the Trial

³²⁰ E.g. Art. 14(5) of the ICCPR.

³²¹ Art. 25 of the ICTY Statute, Art. 24 of the ICTR Statute, and Art. 81 of the ICC Statute.

³²² In the common law jurisdictions an appeal against an acquittal would contravene the principle of protection against double jeopardy, at least if it relates to facts established by a jury, but exceptions also exist, see e.g. Rafael Nieto-Navia and Barbara Roche, ‘The Ambit of the Powers under Article 25 of the ICTY Statute: Three Issues of Recent Interest’ in May *et al.* *ICTY Essays*, 473–94.

³²³ Art. 25(2) of the ICTY Statute, Art. 24(2) of the ICTR Statute, and Art. 81(2) of the ICC Statute.

³²⁴ Art. 81(2) of the ICC Statute. At ICTY, cases have been remitted to the Trial Chamber when a guilty plea was invalid (*Erdemović* ICTY A.Ch. 7.10.1997) or for resentencing subsequent to the reversal of acquittals (*Tadić* ICTY A.Ch. 10.9.1999). See also r. 117(C) of the ICTY RPE and r. 118(C) of the ICTR RPE.

³²⁵ Rr. 107–18 of the ICTY RPE, rr. 107–19 of the ICTR RPE, rr. 149–58 of the ICC RPE and regs. 57–65 of the ICC Regulations.

³²⁶ Art. 83(2) of the ICC Statute; see also the declaration by Judge Nieto-Navia in *Tadić* ICTY A.Ch. 15.7.1999 para. 11.

³²⁷ Art. 25 of the ICTY Statute and Art. 24 of the ICTR Statute; also e.g. *Kupreškić et al.* ICTY A.Ch. 23.10.2001 para. 408.

Chamber's conclusion is one 'which no reasonable trier of fact could have reached',³²⁸ leading to a 'grossly unfair outcome in judicial proceedings, as when the defendant is convicted despite a lack of evidence on an essential element of the crime'.³²⁹

Against this limited scope of the appeals process, the ICTY and ICTR Appeals Chambers have also established an inherent power, deriving from their judicial function, to ensure that justice is done by assuming a discretionary power to correct an error of law on their own motion if the interests of justice so require.³³⁰ Consequently, the burden of proof on appeals is not absolute regarding points of law, but the party must at least identify the alleged error, present arguments and explain how the error invalidates the decision.³³¹

In earlier decisions, the ICTY Appeals Chamber has avoided assuming the role of trier of fact after having established an error of law, and instead ordered a retrial by a Trial Chamber. But increasingly being faced with additional evidence on appeal,³³² and mindful of the long trials and limited resources, the Appeals Chamber has become less hesitant. Hence, in *Blaškić* it decided not only to correct errors of law but also to apply the correct legal standard to the case at hand.³³³ Critics would argue, however, that the parties thereby are deprived of the right to appeal the subsequent factual findings.

As to sentencing, both Tribunals have taken the view that the Appeals Chamber should not revise the sentence unless the Trial Chamber has committed a 'discernible error' in exercising its discretion or has failed to follow applicable law.³³⁴

The ICC Statute lists the grounds of appeal as procedural error, error of fact, and error of law, and, as an additional ground in case of conviction, 'any other ground that affects the fairness or reliability of the proceedings or decision'.³³⁵ Regarding sentences, the main ground of appeal is disproportion between the crime and the sentence.³³⁶ In addition, however, a reversal, amendment or remittal to a new trial before a Trial Chamber requires that the 'proceedings were unfair in a way that affected the reliability of the decision or sentence' or that 'the decision or sentence ... was materially affected by error of fact or law or procedural error'.³³⁷ Hence, the standard of review is further qualified. The Appeals Chamber is not restricted by the appeals and may also on its own motion raise the question to set aside a conviction or reduce a sentence, that is only to the benefit of the convicted person.³³⁸

The nature of the appeals review at the ICC is less clear and the Statute leaves the Appeals Chamber with broad discretion; the Chamber has all the powers of the Trial Chamber and evidence may be presented in the appeals proceedings.³³⁹ Although it

³²⁸ E.g. *Tadić* ICTY A.Ch. 15.7.1999 para. 64, and *Akayesu* ICTR A.Ch. 1.6.2001 para. 178.

³²⁹ *Furundžija* ICTY A.Ch. 21.7.2000 para. 37.

³³⁰ E.g. *Delalić et al.* ICTY A.Ch. 8.4.2003 para. 16, and *Kambanda* ICTR A.Ch. 19.10.2000 para. 98.

³³¹ E.g. *Krnjelac* ICTY A.Ch. 17.9.2003 para. 10. ³³² R. 115 of the ICTY RPE and ICTR RPE.

³³³ *Blaškić* ICTY A.Ch. 29.7.2004 para. 24. See also *Kordić and Čerkez* ICTY A.Ch. 17.12.2004 para. 24.

³³⁴ E.g. *Tadić* ICTY A.Ch. 26.1.2000 para. 22, and *Musema* ICTR A.Ch. 16.11.2001 para. 395.

³³⁵ Art. 81(1) of the ICC Statute; see also Christopher Staker, 'Article 81' in Triffterer, *Observers' Notes*, 1019–20.

³³⁶ Arts. 81(2) and 83(3) of the ICC Statute. ³³⁷ *Ibid.*, Art. 83(2).

³³⁸ *Ibid.*, Art. 81(2); similarly, see *Erdemović* ICTY A.Ch. 7.10.1997 para. 39 (exercising an 'inherent power').

³³⁹ Art. 83(1)–(2) of the ICC Statute; see also r. 149 of the ICC RPE.

could be argued that the scheme leaves room for a trial *de novo*, the enumerated grounds for an appeal rather point towards a corrective procedure with a possibility of admitting additional evidence.³⁴⁰

17.13.3 Interlocutory appeals

Interlocutory appeals are not provided for in the ICTY and ICTR Statutes, but they were soon accepted in practice³⁴¹ and are now provided for in the RPE.³⁴² Such appeals are also allowed at the ICC.³⁴³ But since interlocutory appeals are time and resource consuming, only certain decisions are subject to such review. Decisions on jurisdiction, traditionally quite strictly defined in ICTY and ICTR jurisprudence,³⁴⁴ and in the ICC also decisions concerning the admissibility of the case, are always subject to separate appeals. The ICC Statute also allows interlocutory appeals against decisions concerning provisional release and certain Pre-Trial Chamber-ordered measures during the investigation. All other decisions require leave of appeal (or certification) by the Chamber issuing the challenged decision. In turn, a leave to appeal normally requires that the decision ‘involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial’ and for which ‘an immediate resolution by the Appeals Chamber may materially advance the proceedings’.³⁴⁵

The ICTY and ICTR have adopted a restrictive approach to reviews of the Trial Chamber’s exercise of discretionary powers, restricting it to whether the discretion was correctly exercised, but not to whether the Appeals Chamber agrees in substance.³⁴⁶ A matter determined in an interlocutory decision is not open for reconsideration unless ‘a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice’.³⁴⁷

17.14 Revision

The Statutes of the ICTY, ICTR and ICC make provision for review proceedings,³⁴⁸ an exceptional remedy typically found in civil law systems, which goes beyond mere errors of fact or law. There are some important differences between the ICTY and ICTR on the one hand and the ICC on the other. While the Tribunals allow either party

³⁴⁰ See Helen Brady, ‘Appeal and Revision’ in Lee, *The Making of the Rome Statute*, 585–6, and Alphons Orie, ‘Accusatorial v. Inquisitorial Approaches in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC’ in Cassese, *Commentary*, 1490–1.

³⁴¹ E.g. *Tadić* ICTY A.Ch. 2.10.1995 paras. 4–6. ³⁴² Rr. 72 and 73 of the ICTY RPE and ICTR RPE.

³⁴³ Art. 81 of the ICC Statute and rr. 154–8 of the ICC RPE.

³⁴⁴ However, a more generous practice is discernible in more recent decisions, e.g. *Boškoski and Tarčulovski* ICTY A.Ch. 22.7.2005 para. 5.

³⁴⁵ Rr. 72(B)(ii) and 73(B) of the ICTY RPE and ICTR RPE, and Art. 82(1)(d) of the ICC Statute. At least initially, the ICC has adopted a very restrictive approach to granting leave, e.g. *Situation in Uganda* ICC PT.Ch. II 19.8.2005.

³⁴⁶ E.g. *Milošević* ICTY A.Ch. 1.11.2004 paras. 9–10. ³⁴⁷ E.g. *Kajelijeli* ICTR A.Ch. 23.5.2005 paras. 201–7.

³⁴⁸ Art. 26 of the ICTY Statute, Art. 25 of the ICTR Statute, and Art. 84 of the ICC Statute.

to seek revision, thus allowing the Prosecutor to apply in relation to an acquittal,³⁴⁹ revision at the ICC applies only to a conviction or sentence.³⁵⁰ Moreover, the Tribunals have extended the scope to all final decisions, not only those which include a verdict of conviction or acquittal but also, for example, final decisions resulting in the dismissal of the case with prejudice to the Prosecutor.³⁵¹

The requirements for a review by the ICTY or ICTR are: (1) a new fact; (2) the new fact was not known to the applicant at the time of the original proceedings; (3) the failure to discover the new fact was not due to the applicant's lack of due diligence; and (4) the new fact could have been a decisive factor in reaching the original decision.³⁵² In extraordinary circumstances, however, review may be granted by the Tribunal although the fact was known to or discoverable by the applicant; this is in order to prevent a miscarriage of justice.³⁵³ Similarly, revision at the ICC requires that new evidence, which was not available at the time of the trial by reasons not wholly or partially attributable to the moving party, is sufficiently important so that the verdict is likely to have turned out differently. In addition, however, the ICC Statute allows revision when decisive evidence at trial turns out to be false, forged or falsified, or in case of serious misconduct or breach of duty by a participating judge.

Also the procedures differ.³⁵⁴ At the Tribunals, both admissibility of the application for revision and any review of the earlier decision are normally adjudicated by the original Chamber. At the ICC, however, a two-step approach applies whereby the Appeals Chamber first determines admissibility and, if the application succeeds, the revision itself is conducted by this or another Chamber.

17.15 Offences against the administration of justice

The ICTY, ICTR and ICC all have provisions on prosecution and punishment of offences directed against the administration of justice. Since the ICTY and ICTR Statutes are silent on the matter, this is considered an inherent power derived from the judicial function of the Tribunals.³⁵⁵ For the ICC, however, the power is laid down in the Statute.³⁵⁶ Another important difference is that prosecution and punishment of these offences is a shared responsibility between the ICC and the States Parties.³⁵⁷

At the Tribunals, the rules refer to 'contempt of court' and specify the criminal offences, penalties and the procedures. The ICC provisions, however, make a distinction between 'offences against the administration of justice' – with a broader scope

³⁴⁹ The Prosecutor may seek revision within one year after the final judgment, for the convicted person there is no time limit: r. 119 of the ICTY RPE and r. 120 of the ICTR RPE.

³⁵⁰ Art. 84(1) of the ICC Statute.

³⁵¹ E.g. *Barayagwiza* ICTR A.Ch. 31.3.2000 paras. 45–50 and *Delalić et al.* ICTY A.Ch. 25.4.2002 para. 5.

³⁵² *Barayagwiza* ICTR A. Ch. 31.3.2000 para. 41, and *Delalić et al.* ICTY A. Ch. 25.4.2002 para. 8.

³⁵³ *Baryagwiza* ICTR A. Ch. 31.3.2000 para. 65, and *Tadić* ICTY A.Ch. 30.7.2002 para. 27.

³⁵⁴ Rr. 119–22 of the ICTY RPE; rr. 120–3 of the ICTR RPE; Art. 84(2) of the ICC Statute, rr. 159–61 of the ICC RPE, and reg. 66 of the ICC Regulations.

³⁵⁵ R. 77 of the ICTY RPE and ICTR RPE. See also, e.g. *Tadić* ICTY A.Ch. 31.1.2000 para. 13.

³⁵⁶ Arts. 70 and 71 of the ICC Statute; see also rr. 162–72 of the ICC RPE. ³⁵⁷ Art. 70(4) of the ICC Statute.

than the Tribunals' contempt provisions – and lesser 'misconduct before the Court'. The maximum penalty is a prison sentence, a fine, or a combination of the two; misconduct at the ICC may lead to a fine and other measures.³⁵⁸ Separate provisions apply for misconduct of counsel.³⁵⁹

Further reading

- Michael Bohlander, Roman Boed and Richard Wilson (eds.), *Defence in International Criminal Proceedings* (New York, 2005).
- Antonio Cassese, Paolo Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court* (Oxford, 2002) ch. 28–38.
- Rodney Dixon and Karim Kahn (eds.), *Archbold International Criminal Courts – Practice, Procedure and Evidence* (2nd edn, London, 2005).
- Silvia Fernández de Gurmendi and Håkan Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' (2000) 3 *YIHL* 289.
- Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin, 2001).
- John R. W. D. Jones and Steven Powles, *International Criminal Practice* (3rd edn, New York, 2003).
- Roy Lee *et al.* (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (New York, 2001).
- Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence* (The Hague, 2001).
- Christoph Safferling, *Towards an International Criminal Procedure* (Oxford, 2001).
- William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) ch. 10–13.
- Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, 2003).

³⁵⁸ In addition, the ICC may also order forfeiture: r. 166(2) of the ICC RPE.

³⁵⁹ R. 46 of the ICTY RPE and ICTR RPE; concerning the ICC, see Arts. 30–44 of the *Code of Professional Conduct for Counsel* (ICC-ASP/4/Res.1) of 2.12.2005.

Sentencing, Penalties and Reparations to Victims

18.1 International punishment of crimes

International humanitarian law and criminal law treaties provide for individual criminal responsibility for certain violations, but they give virtually no guidance as to applicable penalties or other sentencing issues. For example, the Genocide Convention merely provides that penalties shall be ‘effective’ and the Torture Convention that the penalties shall be ‘appropriate’ and take into account the ‘grave nature’ of the offence.¹ However, the principle of legality includes a prohibition against retroactive creation of punishments (*nulla poena sine lege*) and for that reason an international criminal jurisdiction regulation is required; an effort that is fraught with difficulties since States take very different views on penalties. Consequently, international provisions on penalties and sentencing are rather general, leaving a tribunal with wide discretion, again triggering concerns regarding the legality principle.²

The Nuremberg and Tokyo Tribunals had the power to impose ‘death or such other punishment as shall be determined by it to be just’.³ At Nuremberg, twelve of the accused were sentenced to death (by hanging), three to life imprisonment and four to fixed-term prison sentences. The Tokyo trial produced seven sentences of death, eleven of life imprisonment and two of fixed-term imprisonment. The national military tribunals operating in Germany (under Control Council Law No. 10) and in the Far East had the same sentencing powers. To dispel concerns about retroactivity, the penalties were considered rooted in customary international law.⁴ None of these Tribunals developed sentencing guidelines of use for later Tribunals. In fact, sentencing

¹ Art. 5 of the Genocide Convention 1948; Art. 4(2) of the Torture Convention 1984. The requirement of effective punishment is also reflected elsewhere, e.g. the Geneva Conventions (Art. 49 of GC I; Art. 50 of GC II; Art. 129 of GC III; Art. 146 of GC IV).

² On the discussions concerning the ICTY, see William Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ (1997) 7 *Duke Journal of Comparative & International Law* 461.

³ Art. 27 of the Nuremberg Charter and Art. 16 of the Tokyo Charter. In addition, the Nuremberg Tribunal could deprive the convicted person of stolen property; Art. 28 of the Nuremberg Charter.

⁴ For a critical view, see e.g. W. A. Schabas, ‘War Crimes, Crimes Against Humanity, and the Death Penalty’ (1997) 60 *Albany Law Review* 733 at 735.

considerations occupied very little room in the judgments and, even then, only briefly on mitigating factors.⁵

When the ICTY and ICTR were established, the development of international human rights standards in general, and the gradual international rejection of capital punishment in particular, had an impact. Capital punishment is highly controversial and State practice ranges from extensive use to complete abolition. This divide is also reflected in international human rights treaties. The ICCPR and ECHR restrict, but do not prohibit, the penalty, while additional protocols to those treaties provide for prohibitions which, by way of reservations, may be set aside in time of war;⁶ however, Protocol No.13 to the ECHR prohibits capital punishment in all circumstances. States may therefore be treaty-bound to abolish the death penalty and an emerging abolitionist norm in customary international law is asserted,⁷ but a universally accepted prohibition does not exist today.

The only applicable penalty for the core crimes at the Tribunals is a term of imprisonment, for life or time-limited.⁸ In response to concerns regarding the principle of legality, the Statutes provide that the respective Tribunal shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and Rwanda. In practice, however, both Tribunals have established that there is no obligation to conform to the national practice, only to take it into account and give reasons for any departure.⁹ The principle also applies when the domestic law prescribes a less severe penalty than the law of the Tribunal.¹⁰ Imposing life imprisonment does not violate the principle of legality, according to the Tribunals, since domestic law provides for a more severe penalty (capital punishment)¹¹ and the accused must have been aware that the crimes constitute 'the most serious violations of international humanitarian law, punishable by the most severe penalties'.¹²

The issue of applicable penalties was also controversial in the ICC negotiations.¹³ Some States, a number of them strong supporters of the Court generally, insisted on the death penalty as a prerequisite for the Court's credibility and its deterrent functions, but many other States could not accept this penalty, not the least because of other treaty commitments. Life imprisonment represented a compromise solution. But again, concerns were raised from a human rights perspective, some States also

⁵ See Bradley Smith, *Recalling Judgment at Nuremberg* (New York, 1977) chs. 7–9. As to the Tokyo judgment, Judge Röling developed his views in his dissenting opinion; see Bernard Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Oxford, 1993) 64.

⁶ Art. 6 ICCPR and Art. 2 ECHR; Second Optional Protocol to the ICCPR 15.12.1989, and Protocol No. 6 to the ECHR 28.4.1983.

⁷ E.g. William Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge, 2002).

⁸ Art. 24 of the ICTY Statute, Art. 23 of the ICTR Statute, and r. 101 of the ICTY RPE and ICTR RPE. The Tribunals may also order the return of property and proceeds of crime to their rightful owners, but this penalty has not yet been applied. For contempt of court, fines may also be imposed: r. 77 of the ICTY RPE and ICTR RPE.

⁹ E.g. *Kunarac et al.* ICTY T.Ch. II 22.2.2001 para. 829, *Krštić* ICTY A.Ch. 19.4.2004 para. 260, and *Semanza* ICTR A.Ch. 20.5.2005 para. 377. It has also been noted in this context that very important differences often exist between international and national prosecutions, particularly concerning the nature, scope and scale of the offences.

¹⁰ E.g. *Dragan Nikolić* ICTY A.Ch. 4.2.2005 paras. 77–86. ¹¹ E.g. *Tadić* ICTY T.Ch. II 14.7.1997 para. 9.

¹² *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 817 (with reference to ECHR practice). For a critical view, see e.g. Dick van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (The Hague, 2002) 180–183.

¹³ E.g. Rolf Einar Fife, Penalties in Lee, *The Making of the Rome Statute*, 319–43.

referring to constitutional prohibitions. The solution was imprisonment for a fixed term not exceeding thirty years or, when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, life imprisonment.¹⁴ An aspect of the compromise was the insertion of a provision to ensure that the penalties which the ICC may impose will not affect any powers by States to impose penalties that are allowed in their national law, penalties either more lenient or more severe than those applicable at the ICC.¹⁵ This is a step away from the idea of a more coherent international criminal justice system with harmonized penalties for international crimes as one element.¹⁶

The ICC may also impose a fine and may order forfeiture of proceeds, property and assets derived directly or indirectly from the crime. It is noteworthy that forfeiture does not include instrumentalities of crime; for example, forfeiture of military equipment would be very sensitive. While forfeiture is a post-conviction measure, the ICC may also seek to obtain, from a State, provisional measures for the purpose of forfeiture;¹⁷ victims may ultimately benefit if the money or other property is subsequently forfeited and transferred to the trust fund for victims.

18.2 Purposes of sentencing

The purposes of sentencing, and indeed the purposes of punishment as such, are a relatively undeveloped aspect of international criminal law. Classical objectives in municipal systems are retribution, deterrence, public protection (incapacitation), rehabilitation and social integration of the offender. As discussed in section 2.2, however, the objectives of punishment in general, and for the purpose of international criminal justice in particular, are the subject of very different opinions. All of them have their strengths and pitfalls, particularly in the context of international criminal justice. Some consider that retribution (or 'just desert') is the appropriate philosophical and policy ground for international punishment.¹⁸ Others, however, dispute this advocating a more restorative approach in international sentencing and arguing that this will better serve peace and reconciliation efforts.¹⁹ Deterrence presents special difficulties in this context. Broader aims such as rehabilitation and social integration are difficult to pursue; the range of penalties is limited and the enforcement is outsourced to States. In the absence of consensus regarding the objectives of punishment and how to balance different objectives against each other, the ICTY, ICTR and ICC are provided with very little guidance as to the purposes of sentencing.

¹⁴ Art. 77 of the ICC Statute. Offences against the administration of justice may be punished by a maximum five-year sentence, or a fine, or both; *ibid.*, Art. 70(3).

¹⁵ *Ibid.*, Art. 80. ¹⁶ E.g. M. Cherif Bassiouni, *Introduction to International Criminal Law* (New York, 2002), 682.

¹⁷ Arts. 57(3)(e) and 93(1)(k) of the ICC Statute, and r. 99 of the ICC RPE.

¹⁸ E.g. Bassiouni, *Introduction to International Criminal Law*, 681.

¹⁹ E.g. Ralph Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 *ICLQ* 81.

As primary purposes for sentencing, the ICTY and ICTR have consistently emphasized retribution and general deterrence,²⁰ although retribution appears to be considered most important.²¹ Retribution should be seen as ‘just desert’ and not as revenge or vengeance.²² But other objectives are also emphasized such as special deterrence (concerning the defendant),²³ rehabilitation,²⁴ ‘protection of society, stigmatization and public reprobation’,²⁵ and reconciliation.²⁶ However, as the ICTY has said:

[t]he other three aims that sentencing usually promotes, namely, rehabilitation, social defence and restoration have not yet achieved the same dominance as retribution and deterrence in the sentencing history of this Tribunal, even though, in the opinion of the Trial Chamber, they are important for achieving the goals of this Tribunal. Such factors have tended to be dealt with as mitigating or aggravating factors, with social defence intermingling with the understanding that this Tribunal has of the aim of deterrence.²⁷

Inconsistency in sentencing exists, revealing an absence of agreed principles, and could affect the legitimacy of the judicial institution.²⁸ It has also been noted that the pragmatic rationales behind plea bargaining in the Tribunals are at odds with the general purposes of punishment; sentencing rebates depart from the idea of punishment based on the gravity of the crime (retribution) and could weaken its deterrent function.²⁹

18.3 Sentencing practice

The ICTY and ICTR have emphasized that sentencing is an essentially discretionary responsibility; no sentencing scales for the different crimes are provided. Consequently, the ICTY Appeals Chamber has repeatedly refused to set down a definite list of sentencing guidelines.³⁰ While emphasizing the principle of equal treatment, that is to say consistency, the Appeals Chamber has also concluded that a comparison with the sentences imposed in other cases before the Tribunal is often of limited assistance; the previous decision must relate to the same offence and the circumstances be

²⁰ E.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 806 and *Serushago* ICTR T.Ch. I 5.2.1999 para. 20. On deterrence, see section 2.2.2.

²¹ See Mark Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539.

²² See section 2.2.1 (with references) and *Kordić & Čerkez* ICTY A.Ch. 17.12.2004 para. 1075.

²³ *Ibid.*, paras. 1076–7; cf. *Dragan Nikolić* ICTY A.Ch. 4.2.2005 paras. 45–7 (may be considered but is merely one factor in sentencing).

²⁴ But rehabilitation should not be given ‘undue weight’, e.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 806; cf. *Kunarac et al.* ICTY T.Ch. 22.2.2001 para. 844 (questioning rehabilitation as a sentencing purpose). Cf. *Erdemović* ICTY T.Ch. I 29.11.1996 para. 111 (considering the ‘corrigible personality’ as a mitigating factor), and see section 2.2.4.

²⁵ See section 2.2.5 (with references), and *Ntakirutimana* ICTR T.Ch. I 21.2.2003 paras. 881–2; cf. *Kunarac et al.* ICTY T.Ch. 22.2.2001 para. 843 (protection of society not very relevant).

²⁶ *Kamuhanda* ICTR T.Ch. II 22.1.2004 paras. 753–4 and A.Ch. 19.9.2005 para. 351 (see also the preamble to the ICTR Statute); *Momir Nikolić* ICTY T.Ch. I 2.12.2003 para. 93.

²⁷ *Brdjanin* ICTY T.Ch. II 1.9.2004 para. 1092.

²⁸ See e.g. Ralph Henham, *Punishment and Process in International Criminal Trials* (Aldershot, 2005) 16–24.

²⁹ E.g. Ralph Henham and Mark Drumbl, ‘Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia’ (2005) 16 *CLF* 56–9.

³⁰ E.g. *Furundžija* ICTY A.Ch. 21.7.2000 para. 238, *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 715, and *Krštić* ICTY A.Ch. 19.4.2004 para. 242.

substantially similar.³¹ In fact, the sentencing practice of the ICTY and ICTR has not been consistent, neither within the same Tribunal nor between them.³²

Most important for sentencing at the Tribunals is the gravity of the offence, including considerations regarding the form and degree of the participation of the accused in the crimes and the circumstances of the case.³³ Lacking any formal hierarchy of crimes, advocated by some as necessary for sentencing,³⁴ the Tribunals have taken a case-by-case approach. Due to the special *mens rea* requirement, however, genocide has generally been regarded as more serious than crimes against humanity and war crimes.³⁵ Similarly, persecution has been considered ‘inherently very serious’, justifying a more severe penalty.³⁶ Although not uncontroversial, crimes against humanity and war crimes are seen as equally serious in principle.³⁷ However, the Tribunals’ broad acceptance of cumulative convictions reduces the legal importance of a hierarchy of crimes.³⁸ Moreover, the form of responsibility is also important and both Tribunals have established that aiding and abetting generally warrants lower sentences than co-perpetration.³⁹ But an abstract ranking and comparison are not decisive; the punishment always depends on the facts of the case. Additionally, the Tribunals are required to take into account the individual circumstances of the accused and give credit for time already spent in detention.⁴⁰ Similar provisions and principles are applicable to the ICC, although the RPE give some further direction.⁴¹

In practice, and in spite of the general seriousness of the crimes, the final sentences imposed by the ICTY and ICTR have had a very broad span from three years to life. Life sentences have been meted out in a number of ICTR cases regarding genocide and more rarely by the ICTY for, inter alia, crimes against humanity.⁴²

18.3.1 Aggravating and mitigating circumstances

While the ICTY and ICTR Trial Chambers are required to consider any aggravating and mitigating circumstances in passing sentence, neither the Statutes nor the RPE

³¹ E.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 paras. 719–20, *Kamuhanda* ICTR A.Ch. 19.9.2005 paras. 361–2, and *Momir Nikolić* ICTY A.Ch. 8.3.2006 paras. 38–54.

³² For examples, see John R. W. D. Jones and Steven Powles, *International Criminal Practice* (3rd edn, Oxford, 2003) 778–80.

³³ Art. 24(2) of the ICTY Statute and Art. 23(2) of the ICTR Statute; and e.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 paras. 731 and 741; *Blaškić* ICTY A.Ch. 29.7.2004 para. 683.

³⁴ E.g. Allison Marston Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 *Virginia Law Review* 415.

³⁵ E.g. *Kambanda* ICTR T.Ch. I 4.9.1998 para. 16; *Krštić* ICTY T.Ch. I 2.8.2001 para. 700 and A.Ch. 19.4.2004 paras. 36–7 and 275.

³⁶ E.g. *Blaškić* ICTY T.Ch. I 3.3.2000 para. 785, *Todorović* ICTY T.Ch. I 31.7.2001 para. 31.

³⁷ E.g. *Tadić* ICTY A.Ch. 26.1.2000 para. 69. Earlier decisions, however, considered crimes against humanity as more serious and carrying a higher penalty than war crimes, e.g. *Tadić* ICTY T.Ch. II 14.7.1997 para. 73, and *Erdemović* ICTY A.Ch. 7.10.1997 (majority) paras. 20–6.

³⁸ See section 17.8.5.

³⁹ E.g. *Vasiljević* ICTY A.Ch. 25.2.2004 para. 182 and *Kajelijeli* ICTR T.Ch. II 1.12.2003 para. 963.

⁴⁰ Art. 24(2) of the ICTY Statute, Art. 23(2) of the ICTR Statute, and r. 101 of the respective RPE.

⁴¹ Art. 78 of the ICC Statute and r. 145 of the ICC RPE.

⁴² E.g. *Akayesu* ICTR A.Ch. 1.6.2001, and *Stakić* ICTY T.Ch. II 31.7.2003 (but replaced on appeal by a fixed-term sentence of forty years: A.Ch. 22.3.2006).

exhaustively define those factors.⁴³ Instead, both the factors and their relative weight are left for judicial discretion. The RPE of the ICC, although inspired by Tribunal case law, are more detailed.⁴⁴ In the Tribunals, and most likely in the ICC, the Prosecutor must establish any aggravating circumstances; proof ‘beyond a reasonable doubt’ is required.⁴⁵ The defendant is required to prove mitigating circumstances on a lower – ‘balance of probabilities’ – standard.⁴⁶

The aggravating factors developed by the ICTY and ICTR in the jurisprudence include⁴⁷ the gravity and scale of the crimes, the age, number and suffering of the victims, the nature of the perpetrator’s involvement, premeditation and discriminatory intent, abuse of power and position as a superior. The ICTY has made clear that a factor may not be aggravating if it forms an element of the actual crime.⁴⁸ More controversial is the acceptance of the conduct of the accused at trial, indicating lack of remorse, as an aggravating factor.⁴⁹ Similarly, the ICC RPE mention abuse of power or official capacity, particularly defenceless victims, multiple victims, particular cruelty, and discrimination; relevant prior convictions must also be taken into account.⁵⁰

The only mitigating circumstance expressed in the ICTY and ICTR RPE is substantial cooperation with the Prosecutor before or after conviction.⁵¹ A related issue is whether and to what extent a guilty plea should be a mitigating factor. Usually such pleas have been linked to an agreement between the accused and the prosecution, which may include non-binding recommendations to the court as to the sentence. In order to encourage guilty pleas – for reasons of judicial economy, concerns for victims, or otherwise – it is important that the accused can expect a sentencing discount. While guilty pleas have generally been considered in mitigation, the chambers have avoided declaring a guaranteed discount and have instead adopted an individualized approach to the mitigating effect of the plea.⁵² Hence, there are examples where the Tribunal has found that the aggravating circumstances outweighed the mitigating effect of a guilty plea⁵³ and also, more recently, departed from the sentencing recommendations.⁵⁴

⁴³ R. 101 of the ICTY RPE and ICTR RPE. E.g. *Musema* ICTR A.Ch. 16.11.2001 para. 395.

⁴⁴ R. 145(2) of the ICC RPE.

⁴⁵ E.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 763, and *Kajelijeli* ICTR A.Ch. 23.5.2005 para. 294.

⁴⁶ The circumstance must be ‘more probable than not’; e.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 590, and *Kajelijeli* ICTR A.Ch. 23.5.2005 para. 294.

⁴⁷ E.g. *Blaškić* ICTY A.Ch. 29.7.2004 para. 686 (with references).

⁴⁸ *Ibid.*, para. 693; *Momir Nikolić* ICTY A.Ch. 8.3.2006 paras. 57–67.

⁴⁹ *Delalić et al.* ICTY A.Ch. 20.2.2001 paras. 780–9; cf. *Stakić* ICTY T.Ch. II 31.7.2003 para. 911 (only circumstances directly related to the offence may be considered as aggravating).

⁵⁰ R. 145(2) of the ICC RPE.

⁵¹ R. 101(B)(ii); e.g. *Jokić* ICTY T.Ch. I 18.3.2004 paras. 93–6 and A.Ch. 30.8.2005 paras. 87–9.

⁵² See Henham & Drumble, ‘Plea Bargaining’.

⁵³ E.g. *Kambanda* ICTR T.Ch. I 4.9.1998 paras. 60–2 and A.Ch. 19.10.2000 paras. 125–6.

⁵⁴ E.g. *Dragan Nikolić* ICTY T.Ch. II 18.12.2003 and A.Ch. 4.2.2005 (a sentence of twenty-three years imposed when the recommendation was fifteen years; reduced to twenty years on appeal).

Other mitigating factors include⁵⁵ an expression of remorse,⁵⁶ voluntary surrender, assistance to detainees or victims, and personal circumstances such as good character,⁵⁷ age, comportment in detention, and family circumstances, but only exceptionally poor health. Hence, many mitigating circumstances relate to conduct subsequent to the crime, and this is also acknowledged when a Tribunal has attached significant weight to the contributions of the accused to peace.⁵⁸ But factors directly related to the crime in question are also of importance, such as indirect or limited participation⁵⁹ and circumstances falling short of constituting grounds for excluding criminal liability (duress and diminished mental responsibility). Similar factors apply for the ICC.⁶⁰ Importantly, the ICTR has also established that the sentence may be reduced as a remedy for violations of the convicted person's fundamental rights during the proceedings.⁶¹

The relative significance of the role of the accused may have an impact on the penalty. But the Tribunals have stated that a high position should not automatically aggravate, or a low rank or subordinate function mitigate, the sentence.⁶²

18.3.2 Cumulative or joint sentences

As we have seen in section 17.8.5, the ICTY and ICTR allow cumulative charges and convictions based on the same underlying conduct; this practice ought not to prejudice the accused, and therefore raises the question of sentencing. The jurisprudence of both Tribunals establishes that a chamber has discretion to impose sentences which are either global, concurrent or consecutive; this has subsequently also been clarified in the ICTY RPE.⁶³ Consequently, the practice is not consistent. Regardless of method, however, the final or aggregated sentence should reflect the totality of the culpable conduct in a just and appropriate way.

The ICC Statute provides that a separate sentence is to be pronounced for each crime together with a joint sentence specifying the total period of imprisonment.⁶⁴ The joint sentence must not be less than the highest individual sentence or exceed the maximum sentence according to the Statute.

⁵⁵ E.g. *Blaškić* ICTY A.Ch. 29.7.2004 para. 696 (with references).

⁵⁶ To be understood in the context of reconciliation, e.g. Alan Tieger, 'Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia' (2003) 16 *LJIL* 777, and Henham & Drumble, 'Plea Bargaining'.

⁵⁷ Generally of limited importance, e.g. *Semanza* ICTR A.Ch. 20.5.2005 para. 398 (with references). Cf. *Tadić* ICTY T.Ch. II 14.7.1997 para. 59 (good character was considered to aggravate more than mitigate: 'for such a man to have committed these crimes requires an even greater evil will on his part than for a lesser man').

⁵⁸ E.g. *Krajišnik and Plavšić* ICTY T.Ch. III 27.2.2003 paras. 85–94, and *Babić* ICTY A.Ch. 18.7.2005 paras. 55–9.

⁵⁹ E.g. *Babić* ICTY A.Ch. 18.7.2005 paras. 39–40 (with references). ⁶⁰ R. 145(2) of the ICC RPE.

⁶¹ *Semanza* ICTR A.Ch. 31.5.2000 and 20.5.2005 para. 389, and *Kajelijeli* ICTR A.Ch. 23.5.2005 paras. 320–4.

⁶² See e.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 847, and *Kršić* ICTY T.Ch. I 2.8.2001 para. 709. See further, Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford, 2005) 353–5.

⁶³ R. 87(C) of the ICTY RPE; see *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 429, and *Kambanda* ICTR A.Ch. 19.10.2000 paras. 102–12 (interpreting r. 101 of the respective RPE).

⁶⁴ Art. 78(3) of the ICC Statute.

18.4 Reparations to victims

The ICTY and ICTR Statutes do not provide for reparations to victims and the rule on compensation in the RPE relate to domestic proceedings.⁶⁵ The ICC, however, does have the power to order reparations directly to, or in respect of, victims;⁶⁶ a contentious matter in political as well as in legal terms.⁶⁷ Reparations may include restitution, compensation and rehabilitation. It is left to the judges to establish principles and determine the scope and extent of any damage, loss or injury: so far no general principles have been established and it appears that this will occur on a case by case basis. While it could be argued that the reparations are a penal sanction – as it presupposes a conviction – they are rather of a civil nature;⁶⁸ an order will normally follow upon a request, albeit that the ICC in exceptional circumstances may act upon its own motion. Both individual and collective awards are foreseen and a special trust fund will likely be the main conduit for the latter.⁶⁹ Reparations are subject to separate proceedings including appeals.⁷⁰

The ICC reparations regime is an unprecedented and often hailed restorative justice element in international criminal law. But the scheme is not yet fully developed and it requires further elaboration. It is not intended to prejudice any other international or domestic reparations options that may exist and unrealistic expectations as to what this scheme may bring should be avoided.

18.5 Sentencing procedures

Initially the ICTY trial chambers addressed sentencing separately and subsequent to conviction.⁷¹ Thereafter the RPE have been amended and guilt and sentencing may be determined in a single judgment,⁷² which is now the practice in both Tribunals. Also the ICC Statute provides for unified trials, but a bifurcated trial will be conducted if either party so requests;⁷³ reparations claims should normally be heard at a sentencing or separate hearing. A unified trial means that the defendant cannot apply a different strategy for the purpose of sentencing. In case of an accepted guilty plea at the Tribunals or admission of guilt at the ICC, the case will move to a sentencing hearing.⁷⁴

⁶⁵ R. 106 of the ICTY RPE and ICTR RPE, which also provide that the judgment of the Tribunal 'shall be final and binding as to the criminal responsibility of the convicted person for such injury'. However, whether this provision binds States is debatable, see e.g. Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, 2003), 227–8.

⁶⁶ Art. 75 of the ICC Statute.

⁶⁷ E.g. Christopher Muttukumaru, 'Reparations to Victims' in Lee, *The Making of the Rome Statute*, 262–70.

⁶⁸ Cf. Birte Timm, 'The Legal Position of Victims in the Rules of Procedure and Evidence' in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin, 2001), 306–8.

⁶⁹ Arts. 75(2) and 79 of the ICC Statute and rr. 98 and 221 of the ICC RPE. A board of directors has been appointed and Regulations of the Trust Fund for Victims (ICC-ASP/4/Res.3 of 3.12.2005) have been adopted.

⁷⁰ Arts. 76(3) and 82(4) of the ICC Statute; rr. 91(4) and 94–7 of the ICC RPE.

⁷¹ E.g. *Erdemović* ICTY T.Ch. I 29.11.1996, and *Tadić* ICTY T.Ch. II 14.7.1997.

⁷² Rr. 85 and 87 of the ICTY RPE and ICTR RPE.

⁷³ Art. 76 of the ICC Statute and r. 143 of the ICC RPE. In addition, the Trial Chamber on its own motion may decide to hold a separate sentencing hearing.

⁷⁴ Rr. 62bis and 100 of the ICTY RPE, rr. 62(B) and 100 of the ICTR RPE, and (indirectly) Art. 76(2) of the ICC Statute.

A sentence may be appealed separately both at the Tribunals and at the ICC,⁷⁵ and an appeal against a conviction or acquittal may also lead to the revision of the sentence. Due to the corrective nature of the ICTY and ICTR appeals proceedings, the normal test will be whether the Trial Chamber has committed a ‘discernible error’ in the exercise of its sentencing discretion, something that the appellant must demonstrate.⁷⁶ If a conviction or acquittal is revised on appeal, however, the Appeals Chamber will either refer the matter back to the Trial Chamber for sentencing⁷⁷ or itself impose a new sentence.⁷⁸ At the ICC, a different test applies – whether ‘the sentence is disproportionate to the crime’ – and the determination of a new sentence on appeal is a matter for the Appeals Chamber unless a retrial is ordered.⁷⁹

18.6 Pardon, early release and review of sentence

The prisoner may be eligible for pardon, commutation of the sentence or early release in the State where it is served (see section 18.7) but the Tribunal stays in control of the sentence and therefore retains the final say on the matter.⁸⁰ Although not provided in the Statute or the RPE, the Tribunals apply the same rules to prisoners who have not been transferred to a State but still remain in the Tribunal’s detention centre in The Hague or Arusha.⁸¹ The Tribunal will consider, *inter alia*, the gravity of the crimes, the prisoner’s demonstration of rehabilitation, any substantial cooperation with the Prosecutor, and personal circumstances.

As part of the compromise reached at the Rome Conference regarding applicable penalties, the ICC Statute makes provision for an automatic review of sentences.⁸² The review must take place when two-thirds of the sentence has been served, or twenty-five years of life imprisonment, and a decision not to reduce the sentence must be reviewed at regular intervals. The grounds for reduction of sentence relate to post-conviction cooperation or change of circumstances and the mechanism serves essentially the same purpose as an early release or a pardon.

18.7 Enforcement

A sentence imposed by a Tribunal or the ICC will be served in a State which has declared its willingness to enforce the sentence.⁸³ This is a voluntary undertaking by

⁷⁵ See section 17.13.

⁷⁶ E.g. *Delalić et al.* ICTY A.Ch. 20.2.2001 para. 725, and *Semanza* ICTR A.Ch. 20.5.2005 para. 374.

⁷⁷ E.g. *Tadić* ICTY A.Ch. 15.7.1999 para. 27. ⁷⁸ E.g. *Blaskić* ICTY A.Ch. 29.7.2004 para. 726.

⁷⁹ Art. 83 of the ICC Statute.

⁸⁰ Art. 28 of the ICTY Statute, Art. 27 of the ICTR Statute, rr. 123–5 of the ICTY RPE, and rr. 124–6 of the ICTR RPE. See also ICTY, *Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal* (IT/146, 7 April 1999). E.g. *Furundžija* ICTY President 29.7.2004.

⁸¹ In accordance with *Practice Directions*, the respective President takes a decision, which is not subject to appeal; e.g. *Simić et al.* ICTY President 21.1.2004, and *Rutaganira* ICTR A.Ch. 24.8.2006.

⁸² Art. 110 of the ICC Statute and rr. 223–4 of the ICC RPE.

⁸³ Art. 27 of the ICTY Statute, Art. 26 of the ICTR Statute, and Art. 103 of the ICC Statute.

States and may have conditions attached, for example regarding the nationality of the prisoner, acceptance of only a limited number of prisoners, or retention of a right to accept or reject in each individual case. Separate enforcement agreements with States have been concluded. The Tribunal President or the (collective) ICC Presidency designates the State of enforcement in the individual case.⁸⁴

The enforcing State may not modify the length of the sentence. Consequently, the State may not decide questions of pardon, commutation of sentence and early release, without the approval of the Tribunal or Court.⁸⁵ Disapproval of an impending domestic measure may cause a transfer of the enforcement to another State.⁸⁶ The conditions of imprisonment will be in accordance with domestic law, but subject to the supervision of the respective Tribunal or Court.⁸⁷ The ICC Statute additionally requires compliance with 'widely accepted international treaty standards governing treatment of prisoners' and no better or worse treatment than other prisoners convicted of similar offences.⁸⁸

The ICC Statute also provides for the obligatory enforcement of fines, forfeiture orders and reparation orders by national authorities at the request of the Court.⁸⁹ Here too, the State of enforcement must not modify the fines or orders. Enforcement by national authorities is also foreseen concerning restitution of property or the proceeds thereof to victims at the ICTY and ICTR.⁹⁰

The ICC Statute distinguishes between international cooperation (Part 9) and enforcement (Part 10) in spite of the close relationship between the two. While enforcement of prison sentences differs in that it is voluntary, enforcement of the other specified orders is not and it has been argued that certain cooperation provisions of Part 9 should apply by analogy also to obligations regarding the latter.⁹¹

⁸⁴ R. 103 of the ICTY RPE and ICTR RPE, rr. 198–206 of the ICC RPE and regs. 113–15 of the ICC Regulations.

⁸⁵ Art. 28 of the ICTY Statute, Art. 27 of the ICTR Statute, and Arts. 105(1) and 110(1) of the ICC Statute. Hence, Art. 103(2) of the ICC Statute, and the tribunal enforcement agreements, provide for notifications and consultations on matters which could affect the terms or extent of the imprisonment.

⁸⁶ See Art. 104 of the ICC Statute and rr. 209–10 of the ICC RPE. Transfer for this reason may also be ordered by the ICTY and ICTR but is not explicitly provided for in the statutes or RPEs.

⁸⁷ Art. 27 of the ICTY Statute, Art. 26 of the ICTR Statute, and Art. 106 of the ICC Statute.

⁸⁸ Art. 106(2) of the ICC Statute. Similarly, a standards requirement is included in the tribunal enforcement agreements.

⁸⁹ *Ibid.*, Arts. 75 and 109. See also rr. 212, 217–22 of the ICC RPE and reg. 116 of the ICC Regulations.

⁹⁰ R. 105 of the ICTY RPE and ICTR RPE.

⁹¹ See further Claus Kress and Göran Sluiter, 'Enforcement, in Cassese, *Commentary*, 1752 and 1831.

Further reading***Penalties and sentencing***

- Stuart Beresford, 'Unshackling the Paper Tiger – The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 *ICLR* 33.
- Andrea Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law' (2002) 51 *ICLQ* 583.
- Rolf Einar Fife, 'Penalties' in Lee, *The Making of the Rome Statute*, 319–43.
- Rolf Einar Fife, 'Penalties' in Lee, *Elements and Rules*, 555–73.
- Ralph Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 *ICLQ* 81.
- Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1 *JICJ* 64.
- Ralph Henham and Mark Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' (2005) 16 *CLF* 49.
- Jan Christoph Nemitz, 'The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence' (2001) 4 *IYHL* 87.
- Olaoluwa Abiola Olusanya, 'Do Crimes against Humanity Deserve a Higher Sentence Than War Crimes?' (2004) 4 *ICLR* 431.
- William A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7 *Duke Journal of Comparative & International Law* 461.
- William A. Schabas, 'Penalties' in Cassese, *Commentary*, 1497–534.
- William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) ch. 14.
- Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (The Hague, 2002) ch. 5.
- Dirk van Zyl Smit, 'International Imprisonment' (2005) 54 *ICLQ* 357.

Reparations to victims

- Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *LJIL* 667.
- Peter Lewis and Håkan Friman, 'Reparations to Victims' in Lee, *Elements and Rules*, 474–91.

Enforcement of penalties

- Claus Kress and Göran Sluiter, 'Enforcement' in Cassese, *Commentary*, chs. 43–5.
- David Tolbert and Åsa Rydberg, 'Enforcement of Sentences' in Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence – In Honour of Gabrielle Kirk McDonald* (The Hague, 2001) 533–43.

PART F

Relationship Between National and International Systems

19

State Cooperation with the International Courts and Tribunals

19.1 Characteristics of the cooperation regimes

State cooperation with the Tribunals and the ICC departs in many important ways from State-to-State cooperation in criminal matters (see Chapter 5). The obligations vis-à-vis the international jurisdictions are more far-reaching¹ since these jurisdictions are created by the international community to investigate and prosecute the most serious crimes of international concern. As regards the Tribunals, and Security Council referrals of situations to the ICC, they also explicitly form part of international efforts to preserve or restore international peace and security. In addition, traditional restrictions on cooperation can be renounced since the international jurisdictions must act in accordance with the highest international standards of procedures and protection of individual rights.

The successful operation of these institutions is completely dependent upon international cooperation. They may not and cannot themselves implement their decisions, such as an arrest warrant, on the territory of a State, and they do not have their own police force.² As the ICTY Appeals Chamber concluded in its landmark decision in *Blaškić*, enforcement powers must be expressly provided and cannot be regarded as inherent in an international criminal tribunal.³ Cooperation is therefore at the heart of effective international criminal proceedings, but this dependence has led to many difficulties in practice.⁴

The *Blaškić* decision found that inter-State and State-tribunal cooperation follows different models;⁵ the former is ‘horizontal’ and the latter ‘vertical’ in nature. This characterization is now commonly used. The distinction is based on the stricter

¹ Compare, however, the SCSL which cannot demand that any State, except Sierra Leone, cooperate unless the State has entered into a separate cooperation agreement with the Court.

² Of course, this was not the case for the Nuremberg and Tokyo IMTs, which were established by occupying powers.

³ *Blaškić* ICTY A.Ch. 29.10.1997 para. 25.

⁴ See Mark Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’ (2004) 2 *JICJ* 403.

⁵ *Blaškić* ICTY A.Ch. 29.10.1997 paras. 47 and 54.

obligations to the international jurisdictions, non-reciprocity, and the right of the requesting party (that is, the Court or Tribunal) unilaterally to interpret and determine the duties of cooperation.⁶

The ICC is the creation of all States Parties and acceptance of even stricter obligations to cooperate than with respect to the Tribunals could therefore be expected. But in fact the opposite is true. The general duty to cooperate set forth in the ICTY and ICTR Statutes⁷ is binding on all UN Member States by virtue of Chapter VII of the UN Charter and it contains no qualifications or exceptions; a truly vertical scheme. The State-negotiated ICC scheme, on the other hand, also contains a duty to cooperate but it is in some respects closer to inter-State cooperation. In particular, the regime is based on requests instead of orders, certain grounds for postponement or refusal exist, and scope for site investigations and compelling individuals to give evidence is limited. The weaknesses of the ICC cooperation regime, sometimes referred to as a middle ground between a vertical and a horizontal model, are often criticized.⁸

19.2 Obligation to cooperate

19.2.1 States

The ICTY and ICTR are subsidiary organs of the Security Council, and thus of the UN, but being judicial institutions they are of 'a special kind' and have been given powers by the Security Council, to make decisions that are binding on sovereign States.⁹ The duty to cooperate is explicitly laid down in the Statutes (see section 19.1) and corresponds to the general principle that the Tribunals have primacy over national courts. In accordance with the principle that an international treaty cannot impose obligations on third States without their consent (*pacta tertiis non nocent*)¹⁰ this duty is confined to UN Member States and other States that have accepted obligations of cooperation. But the ICTY has gone further and decided, inter alia, that self-proclaimed and non-recognized entities which exercise governmental functions must also cooperate.¹¹ In addition there are duties of cooperation under the Dayton Peace Agreement and other agreements; the Dayton Agreement imposes on the signatories, States of the Former Yugoslavia and the Bosnian Serb entity, obligations supplementary to the ICTY Statute on important issues such as unrestricted access to areas over which the signatory exercises control.

The Tribunal Statutes provide a non-exhaustive list, which means that the duty is not confined to particular forms of cooperation. Grounds for refusal traditional to

⁶ See Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Antwerp, 2002) 82–8.

⁷ Art. 29 of the ICTY Statute and Art. 28 of the ICTR Statute, which derive their authority from SC Res. 827(1993) and 955(1994). According to the wording, the Tribunal may choose between issuing an 'order' or a 'request', both being equally binding on the States; see Sluiter, *International Criminal Adjudication*, 147–50.

⁸ E.g. Bert Swart, 'General Problems' in Cassese, *Commentary* at 1589–605.

⁹ See *Blaskić* ICTY T.Ch. II 18.7.1997 paras. 18–23. ¹⁰ Art. 35, Vienna Convention on the Law of Treaties 1969.

¹¹ E.g. *Karadžić and Mladić* ICTY T.Ch. I 11.7.1996 para. 98. See also r. 2 of the ICTY RPE regarding the definition of a 'State'. For a critical view, see Sluiter, *International Criminal Adjudication*, 54–5.

inter-State cooperation are not permitted.¹² The Tribunal decides the scope of the duty in the particular case and it may issue binding orders to States and, as we shall see in section 19.2.3, to individuals, ‘as may be necessary for the purposes of an investigation or for the preparations of conduct of the trial’.¹³ The Appeals Chamber in *Blaškić* concluded that the term ‘binding order’ should be used with respect to States, not ‘subpoena’ which requires that the injunction is accompanied by a threat of penalty.¹⁴

The ICC is an independent and autonomous intergovernmental organization with international legal personality and powers to request cooperation from the States Parties.¹⁵ The Statute explicitly require these States to ‘cooperate fully with the Court’ and ensure that national law allows all specified forms of cooperation.¹⁶ The provisions should serve as general interpretive principles for the specific obligations set out in the Statute.¹⁷ The duty to ‘cooperate fully’ is explicitly confined to cooperation in accordance with the provisions of the Statute, which means that the ICC cannot demand cooperation beyond what the Statute requires. However, there is a catch-all provision at the end of the list of measures for assistance other than arrest and surrender.¹⁸ States may also provide additional cooperation voluntarily. The duty of implementation requires that States make any necessary domestic changes so that they are able to provide all the required forms of cooperation, but allows the States Parties to design the procedures in keeping with their legal and constitutional systems (see section 19.9). Some grounds for refusal are explicitly laid down in the Statute; in the light of the negotiating history these should be considered as exhaustive.¹⁹ There may be additional obligations to cooperate in other agreements, including those concluded by the Court with individual States to enhance cooperation.²⁰

Although not beyond dispute, the duty to cooperate with the ICC (and Part 9 of the Statute) is triggered first when an investigation is formally commenced.²¹ It thereafter covers subsequent proceedings; certain obligations apply after the final verdict, for example the temporary transfer of a prisoner to the Court for testimony.²²

19.2.2 Conflicting international obligations of States

Another important aspect of the different regimes is the relationship between the State’s cooperation duties towards the Tribunal or Court and other international obligations. Since the duties vis-à-vis the Tribunals have their legal force in the UN

¹² See ch. 5. ¹³ R. 54 of the ICTY RPE and ICTR RPE. ¹⁴ *Blaškić* ICTY A.Ch. 29.10.1997 para. 25.

¹⁵ Art. 4 and Part 9 of the ICC Statute. ¹⁶ *Ibid.*, Arts. 86 and 88.

¹⁷ Claus Kress, ‘Penalties, Enforcement and Cooperation in the International Criminal Court’ (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 442 at 450.

¹⁸ Art. 93(1)(l) of the ICC Statute.

¹⁹ See Phakiso Mochochoko, ‘International Cooperation and Judicial Assistance’ in Lee, *The Making of the Rome Statute*, 305–17.

²⁰ See Art. 54(3)(d) of the ICC Statute and reg. 107 of the ICC Regulations; and see *Report of the International Criminal Court for 2005–2006* (UN Doc. A/61/217 of 3.8.2006) paras. 52–6.

²¹ See Informal Expert Paper: *Fact-finding and investigative functions of the Office of the Prosecutor, including international cooperation* (2003) paras. 22–9, available at the ICC webpage: www.icc-cpi.int

²² R. 193 of the ICC RPE.

Charter, these will normally prevail over the State's obligations under other international agreements, at least agreements between UN Member States.²³

The situation is more complex regarding the ICC. If the Security Council imposes cooperation obligations when referring a situation to the Court, and thus acts under Chapter VII of the UN Charter, the equivalent primacy over other international obligations should apply.²⁴ But in other instances general international principles for contradictory treaty obligations will apply, such as *lex posterior* (the treaty later in time prevails) and *lex specialis* (the more specific treaty prevails). To what extent such interpretations favour the Court will depend on the circumstances. Hence, the obligations vis-à-vis the ICC do not have a general primacy. Two types of conflicts are addressed in the Statute: competing requests for cooperation, and immunities and similar obstacles. On competing requests the Statute sets out a complex system whereby the existence of an admissibility decision by the Court (on the grounds of complementarity) and the origin of the competing request (from a State Party or third State) are important factors for the resolution of the conflict.²⁵

The provision on conflicts regarding immunities (for example state immunity, diplomatic immunity, or safe conduct) and similar obstacles (for example exclusive jurisdiction in Status of Forces Agreements or conditioned re-extradition in extradition agreements) is Article 98; it has turned out to be controversial.²⁶ From a cooperation perspective, however, it is important to note that the provision, as drafted, is directed to the ICC: '[t]he Court may not proceed with a request' unless a waiver of immunity or consent for surrender has been obtained. Hence, the requested State may raise the issue of conflicting obligations before the Court,²⁷ but the conflict is not a ground for refusal if the Court still insists on the request.²⁸ If the requested State continues to resist, however, the issue may be subject to adjudication by the Court in non-compliance proceedings.²⁹ Besides, nothing prevents a non-State Party from seeking a remedy against a violation by the requested State of the agreement between them.

19.2.3 Individuals

The Tribunals have on occasion issued binding orders to individuals to appear and give evidence. These orders are 'subpoenas' (*subpoena ad testificandum*) since non-compliance may result in liability for contempt. Lacking explicit support in the Statutes, the practice

²³ Art. 103 of the UN Charter. This principle also covers binding decisions taken under the Charter and is not confined to other treaty obligations, but the legal situation concerning treaties with third States is uncertain; see Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (Oxford, 2002) 1292–1302.

²⁴ It is not clear, however, that a referral would automatically entail the specific provisions on competing requests in the ICC Statute, see Bert Swart, 'Arrest and Surrender' in Cassese, *Commentary*, 1677.

²⁵ Art. 90 of the ICC Statute. See also Art. 93.9 on other forms of cooperation.

²⁶ See section 8.10.3. ²⁷ R. 195 of the ICC RPE.

²⁸ See also Art. 119(1) of the ICC Statute which provides: 'Any dispute concerning the judicial functions of the Court shall be settled by the direction of the Court'.

²⁹ Reg. 109 of the ICC Regulations.

has been based on 'inherent powers'.³⁰ The orders, as well as any sanctions, must be enforced by national authorities and most States will require that a domestic order be issued. Some States attribute direct effect to the order issued by the Tribunal, meaning that the Tribunal order serves as the basis for a domestic compulsory process. According to the Appeals Chamber in *Blaškić* States have a duty, when requested, to arrest, compel under threat of a domestic penalty to surrender evidence, or bring a witness to the Tribunal to testify.³¹ These are far-reaching obligations that depart from the general practice among States, which does not recognize a duty to testify across national borders.³² In practice, however, only a few States have introduced legislation providing for forcible transfer of witnesses to the Tribunals, and the Tribunals have framed their requests for State assistance in very cautious terms.³³

Here the traditional act of State doctrine is to be observed and the Tribunal may not address binding orders to State officials for cooperation in their official capacity; such orders must instead be made to the State.³⁴ The orders may, however, be addressed to officials when acting in their 'private capacity', but still the Tribunal will normally proceed via national authorities and only exceptionally address itself directly to the individual.³⁵ An unqualified immunity of this kind could go too far,³⁶ however, and subsequently the 'State official' exception has been further restricted to apply 'only in relation to the production of documents in their custody in their official capacity'; it does not cover what the official has seen or heard in the course of exercising official functions.³⁷ The Tribunals have dismissed claims of immunity, inter alia, regarding the British Prime Minister Blair and the former German Chancellor Schröder, and have issued a subpoena to the Rwandan Defence Minister.³⁸ Members of international peacekeeping or peace-enforcing forces with a UN mandate are also compellable.³⁹

The ICC Statute gives conflicting messages as to whether the Court may compel an individual to cooperate, the suspect or accused of course being excluded. The cooperation obligation of Part 9 does not extend to private individuals. But another provision authorizes the Trial Chamber to 'require the attendance and testimony of witnesses', although the RPE restrict the 'compellability of witnesses' to those who actually appear before the Court.⁴⁰ Read together with the provision that States are required to assist with the 'voluntary appearance' of witnesses and experts,⁴¹ it appears that the ICC might have the power to order a witness to appear before the

³⁰ *Blaškić* ICTY A.Ch. 29.10.1997 paras. 47 and 55. ³¹ *Ibid.*, para. 27.

³² A special scheme exists among the Nordic countries, however, but it does not include effective sanctions in case of non-compliance by the witness.

³³ See Sluiter, *International Criminal Adjudication*, 253–68. ³⁴ *Blaškić* ICTY A.Ch. 29.10.1997 paras. 39–44.

³⁵ *Ibid.*, paras. 46–51 and 53–6.

³⁶ For criticism, see e.g. Susan Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia' (1999) 70 *BYBIL* 165 at 217–18.

³⁷ *Krštić* ICTY A.Ch. 1.7.2003 paras. 24, 26–8.

³⁸ *Milošević* ICTY T.Ch. III 9.12.2005, and *Bagosora et al.* ICTR T.Ch. I 11.9.2006. Cf. the SCSL which avoided the issue of immunity when refusing to subpoena the President of Sierra Leone: *Norman et al.* SCSL A.Ch. 11.9.2006 paras. 40–4 (but Judge Robertson, dissenting, addressed the issue). For further discussion of immunities, see ch. 20.

³⁹ E.g. *Simić et al.* ICTY T.Ch. I 18.10.2000 paras. 62–3, and *Bagosora et al.* ICTR T.Ch. III 14.7.2006.

⁴⁰ Art. 64(6)(b) of the ICC Statute, and r. 65 of the ICC RPE. ⁴¹ Art. 93(1)(e) of the ICC Statute.

Court but cannot demand that a State deliver a witness who does not comply. The Court might request non-voluntary transfer of a witness under the catch-all provision. But this requires that no 'existing fundamental legal principle of general application' in the requested State would be violated, which could well be argued to preclude coercive measures without an explicit authorization in national law.

19.3 Non-States Parties and international organizations

In practice, cooperation with non-States Parties has not been much of an issue for the Tribunals owing to the practically universal membership of the UN; Switzerland, a non-member at the time of the Tribunals' creation, declared that it would cooperate voluntarily. Neither has the application of the cooperation duty laid down in the ICTY Statute to the newly independent States after the break-up of the former Yugoslavia been challenged with reference to non-membership in the UN, which would have involved difficult issues of State succession.⁴² All but one of these States were UN members when the ICTY was established; Serbia and Montenegro considered itself the successor State, although this was not accepted by the UN with respect to membership.⁴³

The explicit duty to cooperate set forth in the ICC Statute is confined to States Parties, but special provisions authorize the Court to invite non-States Parties to cooperate in accordance with separate arrangements.⁴⁴ In addition, non-States Parties which accept the jurisdiction of the ICC in individual cases must also cooperate with the Court in accordance with Part 9 of the ICC Statute.⁴⁵ Finally, the Security Council may, when referring a situation to the ICC, require that UN Member States cooperate with the Court, regardless of whether those States are parties to the ICC Statute or not. This was done with respect to Sudan (Darfur).⁴⁶ Quite apart from this, it has been argued that there may be a customary law duty to ensure compliance with international humanitarian law, which in turn could translate into a duty to cooperate with the ICC in a given case,⁴⁷ although such an argument has by no means been universally accepted.⁴⁸

The cooperation of entities other than States has proved indispensable in practice. For example, international forces have carried out most of the arrests for the ICTY. Such action was controversial and there was initial resistance to authorizing, let alone requiring, IFOR to arrest indicted war criminals.⁴⁹ Nonetheless, an authorization to

⁴² These issues were raised, however, with respect to ICTY's jurisdiction over crimes committed in Kosovo, see *Milutinović et al.* ICTY T.Ch. III 6.5.2003.

⁴³ The question of the UN membership of Serbia and Montenegro was extraordinarily complicated and was described as a 'rather confused and complex state of affairs': see ICJ in *Case Concerning Legality of Use of Force (Serbia and Montenegro v. United Kingdom)* 15.12.2004 paras. 53–77.

⁴⁴ Art. 87(5) of the ICC Statute. ⁴⁵ *Ibid.*, Art. 12(3). ⁴⁶ SC res. 1593 (2005) of 31.3.2005.

⁴⁷ Claus Kress and Kimberly Prost, 'Article 87' in Triffterer, *Observers' Notes*, 1061–2; Zhu Wenqi, 'On Co-operation by States Not Party to the International Criminal Court' (2006) 88:861 *International Review of the Red Cross* 87.

⁴⁸ Henckaerts & Doswald-Beck, *ICRC Customary Law*, 618–21.

⁴⁹ See Richard Holbrook, *To End a War* (2nd edn, New York, 1998) 221–2.

arrest was given to IFOR, but only under restrictive conditions, and it took some time before the first arrest was made. Contributing to this increased willingness to assist was a practice of 'sealed indictments' which reduced the risks to troops effectuating the arrests.⁵⁰ It has been debated whether the ICTY Statute allows arrest by bodies other than States and whether IFOR (later SFOR) has a duty to arrest;⁵¹ ICTY itself has given an affirmative answer to the former question⁵² and a negative to the latter.⁵³ Arrest warrants have sometimes been issued directly to non-State entities instead of States.⁵⁴ It is truly an anomaly, however, that the international community imposed a duty on States to cooperate with the ICTY but provided the relevant international forces (IFOR/SFOR and KFOR) with only a permission to do so.

Intergovernmental organizations may have international legal personality, separate from that of the constituent States. Regardless of this, the ICTY, by using a 'purposive interpretation' of its Statute, has found itself competent to issue binding orders to such organizations. In *Simić et al.*, for example, such an order was issued not only to the participating States of SFOR but also to SFOR, as a collective State enterprise, and its responsible authority, the North Atlantic Council.⁵⁵ Binding orders have also been directed to others.⁵⁶ The ICC, on the other hand, applies the same scheme to intergovernmental organizations as to non-States Parties, and cooperation thus depends on a voluntary commitment.⁵⁷ For example, a cooperation agreement has been concluded with the European Union.⁵⁸ A special relationship exists between the ICC and the United Nations and matters having an impact on cooperation are addressed in a Relationship Agreement.⁵⁹

One organization, the ICRC, has been granted special treatment, motivated by the special status drawn from its mandate under the Geneva Conventions. In *Simić et al.*, the ICTY found that in order to discharge its mandate the ICRC must have a right not to disclose information relating to its activities.⁶⁰ The ICC has followed suit with an

⁵⁰ See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000) 265–7.

⁵¹ E.g. John R. W. D. Jones, 'The Implications of the Dayton Peace Agreement for the International Criminal Tribunals for the Former Yugoslavia' (1996) 7 *EJIL* 226; Gary Sharp, 'International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia' (1997) 7 *Duke Journal of Comparative & International Law* 411; Paolo Gaeta, 'Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?' (1998) 9 *EJIL* 174; and Lamb, 'Powers of Arrest', 165–244.

⁵² See r. 59bis of the ICTY RPE. ⁵³ (1996) *Yearbook of the ICTY* 229.

⁵⁴ See e.g. *Dokmanović* ICTY T.Ch. II 22.10.1997 para. 3 (arrest warrant issued to the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium, UNTAES).

⁵⁵ ICTY T.Ch. III 18.10.2000 paras. 46–9, 58. One should note, however, that SFOR is different from regular UN peacekeeping forces since it consists of different State-led forces remaining under the control of their respective governments.

⁵⁶ E.g. *Kordić* ICTY T.Ch. III 4.8.2000 (the European Community Monitoring Mission), and *Milutinović et al.* ICTY T.Ch. III 17.11.2005 paras. 35–7 (NATO); cf. *Kovačević* ICTY T.Ch. II 23.6.1998 (refusal to issue an order to the OSCE).

⁵⁷ Art. 87(6) of the ICC Statute.

⁵⁸ Agreement between the International Criminal Court and the European Union on Cooperation and Assistance of 10.4.2006 (ICC-PRES/01-01-06).

⁵⁹ Art. 2 of the ICC Statute and the Relationship Agreement between the International Criminal Court and the United Nations of 4.10.2004 (ICC-ASP/3/Res.1).

⁶⁰ *Simić et al.* ICTY T.Ch. III 27.7.1999 paras. 72–4 (but with one judge dissenting).

absolute privilege provision.⁶¹ The ICRC may thus prevent disclosure of information or testimonies by present and past ICRC officials or employees.

19.4 Non-compliance

The ICTY and ICTR Statutes do not address the issue of non-compliance with the duty of cooperation, but again the *Blaškić* decision provides answers. The Appeals Chamber found that an international tribunal must have powers to make all judicial determinations that are necessary for the exercise of its primary jurisdiction, including making a finding of non-compliance and reporting this to the Security Council.⁶² But the Tribunal may not recommend or suggest how the Security Council could or should address the matter. Similarly, the ICC may make a finding of non-compliance and refer the matter to the Assembly of States Parties or, when the Security Council has referred the underlying situation, to the Security Council.⁶³ A breach by a non-State Party of a legally binding cooperation agreement or arrangement may also be reported. Having the power to make findings of non-cooperation is important for the credibility of the institution, but also a sensitive matter to States, and the potential consequences are not spelled out at all; measures such as public condemnation and even collective economic sanctions could be contemplated, but other considerations, such as the need to maintain support for the international jurisdiction, may well prevail.⁶⁴

In practice, however, the Security Council has failed to respond effectively to reports of non-compliance by the ICTY; collective action by States, such as threats to withhold financial aid, has been more successful.⁶⁵ Although Slobodan Milošević was at last surrendered to the Tribunal in 2001, some high-profile indicted persons still remain at large. The ICTR has also experienced instances of non-cooperation, including at times by the Government of Rwanda.⁶⁶ But the potential tools available are manifold⁶⁷ and international pressure and Security Council action toward the arrest and surrender to the SCSL of the former Liberian President, Charles Taylor in 2006 show that if there is a will there is also hope.⁶⁸

19.5 Cooperation and the ICC complementarity principle

The ICC cooperation regime is influenced by the fundamental complementarity principle; domestic investigations and prosecutions have priority in principle. The regulation of issues such as competing requests (see section 19.2.2), challenges

⁶¹ R. 73(4) of the ICC RPE. ⁶² *Blaškić* ICTY A.Ch. 29.10.1997 paras. 33–7. ⁶³ Art. 87(7) of the ICC Statute.

⁶⁴ See Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford, 2003) 156–7.

⁶⁵ Gabrielle Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 *JICJ* 558 at 562–7.

⁶⁶ See, e.g. Erik Mose, 'Main Achievements of the ICTR' (2005) 3 *JICJ* 920 at 939–40.

⁶⁷ See Michael Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslav Tribunal' (2000) 49 *DePaul Law Review* 925.

⁶⁸ See SC Res. 1638(2005) of 11.11.2005.

concerning *ne bis in idem* (or double jeopardy),⁶⁹ and simultaneous proceedings in the requested State concerning other crimes,⁷⁰ bear evidence of this. Generally, a decision by the Court on admissibility is decisive of the matter since that decision determines whether the Court will go ahead with its investigation or prosecution. A complementarity challenge by a State has the effect that the prosecutor must suspend the investigation. However, authority to take certain measures may be sought from the Chamber; in addition, the State's duty to cooperate remains in effect until the Court orders otherwise, as does an arrest warrant.⁷¹ In line with this a *ne bis in idem* challenge before a national court may cause the requested State to postpone surrender pending an admissibility decision by the ICC, but the execution of the arrest warrant may not be postponed.⁷²

The Statute also provides for some, limited, assistance that the ICC may grant a State, which is a logical consequence of the complementarity principle.⁷³ Moreover, the ICC may transfer the suspect or accused to a State that has made a successful admissibility challenge, but only with the approval of the originally surrendering State.⁷⁴ Clearly, the negotiating States were more hesitant about transferring information and suspects to other States than to the ICC. Nonetheless, cooperation among States is truly important for the prosecution of the Statute crimes where there is more than one State willing and able to take jurisdiction, a situation that will often arise with the growth of universal jurisdiction. This is not however addressed by the Statute.

The ICC's activities, and hence the need for cooperation, will in many cases occur when the State most concerned is unwilling or unable to take appropriate action itself. How could one then expect any constructive assistance from that State? This is a strong argument in favour of a vertical approach to cooperation, to a greater degree than that provided in the Statute.⁷⁵ But the picture need not be so bleak in practice. For example, the current practice of 'self-referrals' of situations to the ICC⁷⁶ includes a particular commitment to cooperate with the Court, something that the ICC Prosecutor has stressed as important.⁷⁷

19.6 Authority to seek cooperation and defence rights

As in inter-State cooperation, there is a certain inequality between the powers of the prosecution and the defence to seek cooperation, and this is a source of criticism.⁷⁸

⁶⁹ Art. 89(2) of the ICC Statute. ⁷⁰ *Ibid.*, Arts. 89(4) and 94. ⁷¹ *Ibid.*, Arts. 19(7)–(9) and 58(4).

⁷² *Ibid.*, Art. 89(2). See Informal Expert Paper: *Fact-finding and investigative functions*, paras. 45–7; but cf. Bert Swart, 'Arrest and Surrender' in Cassese, *Commentary*, 1694–5.

⁷³ Art. 93(10) of the ICC Statute. ⁷⁴ R. 185 of the ICC RPE.

⁷⁵ For a critical view, see e.g. Hans-Peter Kaul and Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 *YIHL* 143 at 158–61.

⁷⁶ See section 8.6.2, which also notes risks arising from self-referrals.

⁷⁷ Remarks by ICC prosecutor, Luis Moreno-Ocampo at the 27th meeting of the Committee of Legal Advisers on Public International Law (CADHI), Strasbourg, 18–19.3.2004.

⁷⁸ See, e.g. Mark Ellis, 'Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defence Counsel' (1997) 7 *Duke Journal of Comparative and International Law* 519 at 533–6.

While the Prosecutor has certain powers to seek cooperation independently on behalf of the international jurisdiction, including provisional arrest and seizure of evidence in urgent cases,⁷⁹ the defence is directed to go through a judge.⁸⁰ The problem is more pronounced in adversarial proceedings where each party prepares its case, than in inquisitorial ones where the prosecution has a duty to investigate exonerating circumstances actively.⁸¹ Hence, this may be less of a problem at the ICC than in the Tribunal proceedings.

In addition, the Prosecutor may turn to the relevant Chamber for the grant or authorization of necessary warrants or orders.⁸² The ICTY judges may issue an arrest warrant directly to the Prosecutor.⁸³ In the same vein, it has been suggested that the ICC Prosecutor may retain the right to determine where and when to request an arrest, although the underlying arrest warrant will always be issued by the Pre-Trial Chamber.⁸⁴ But in practice the Chambers have rejected such an argument and instead made the requests themselves.⁸⁵

Another issue is to what extent fair trial rights and other procedural standards must be respected by national authorities when acting on behalf of the Tribunal or Court and what remedies are available when such rights or standards are violated. This is discussed in more detail in Chapter 17, but it should now be noted that the ICC Statute lays down some procedural rights relating to the questioning of a suspect which are also explicitly applicable when it is being conducted by national authorities.⁸⁶

19.7 Arrest and surrender

The duty to assist with arrest and surrender is explicitly mentioned in the ICTY and ICTR Statutes and further reinforced in the respective RPE. The basis is normally an arrest warrant issued by a Tribunal judge, but in urgent cases the Prosecutor may request provisional arrest to be followed up by a judge-made order for surrender.⁸⁷ The special confirmation proceedings *in absentia* at the Tribunals are provided with a view to issuing an international arrest warrant to all States.⁸⁸ Both an international and, according to case law, a regular arrest warrant may be combined with an order to freeze the assets of the accused.⁸⁹

In spite of the lack of grounds for refusal, States have sometimes refused cooperation on grounds of national law. For example, a US court refused to extradite an accused to the ICTR claiming that there was no extradition treaty, as required by

⁷⁹ Rr. 39(iii) and 40(A) of the ICTY RPE and ICTR RPE; Art. 54(3)(c)–(d) of the ICC Statute.

⁸⁰ R. 54 of the ICTY RPE and ICTR RPE; Art. 57(3)(b) of the ICC Statute and r. 116 of the ICC RPE.

⁸¹ See sections 17.3.2 and 17.6. ⁸² R. 54 of the ICTY RPE and ICTR RPE; Art. 57(3)(a) of the ICC Statute.

⁸³ R. 59*bis* of the ICTY RPE. ⁸⁴ Informal Expert Paper: *Fact-finding and investigative functions*, para. 82.

⁸⁵ *Situation in Uganda* ICC PT.Ch. II 8.7.2005, and *Lubanga Dyilo* ICC PT.Ch. I 24.2.2006.

⁸⁶ Art. 55(2) of the ICC Statute. ⁸⁷ Rr. 40 and 40*bis* of the ICTY RPE and ICTR RPE.

⁸⁸ So-called 'Rule 61 proceedings'; see section 17.9.1.

⁸⁹ R. 61(D) of the ICTY RPE and ICTR RPE; *Milošević* ICTY (Judge Hunt) 24.5.1999 paras. 26–9.

national law.⁹⁰ The Federal Republic of Yugoslavia initially refused to transfer indictees to the ICTY on the basis of a constitutional prohibition against extradition of nationals.⁹¹ Moreover, some domestic implementation laws contain double criminality requirements.⁹² But such traditional grounds for refusing extradition are not compatible with the Tribunal cooperation regime.⁹³

The fact remains that the national law of many States prohibits 'extradition' under certain circumstances, most notably concerning nationals in many civil law jurisdictions. These strongly held exceptions were advanced in the ICC negotiations and in order to create a regime which excludes any explicit grounds for refusal, compromises were required. One element of the agreed regime was to distinguish between 'surrender' (to the Court) and 'extradition' (to a State), and thereby avoid a potential application of ordinary extradition principles and national requirements (see section 19.9).⁹⁴ Another element was to satisfy the evidentiary requirements that apply to extradition in many common law States. In spite of concerns from others, the Statute indirectly acknowledges that the requested State, as part of its surrender procedures, may test evidence and that the Court must support its request with documents, statements or information to meet the requirements.⁹⁵ But the Statute also requires that national requirements for surrender should not be more burdensome, and should if possible be less burdensome, than those applicable to inter-State extradition. A State that normally applies evidentiary requirements for extradition but has made exceptions concerning requests from certain States, will therefore arguably be prevented from applying such requirements vis-à-vis the ICC.

Other issues were resolved in the Statute by introducing postponements or consultations.⁹⁶ By containing these detailed provisions, the Statute may satisfy any national requirement that there must be an extradition treaty before a person may be transferred.

For the ICC, arrest and surrender or provisional arrest will always be based on an arrest warrant issued by the Pre-Trial Chamber. National authorities will enforce the request by applying national procedures, but the Statute sets forth some minimum requirements concerning the national arrest proceedings, and prescribes a division of competences, consultations regarding provisional release, and speedy execution of the request.⁹⁷ An arrest warrant may be combined with a request for identification, tracing, and seizing or freezing assets and property belonging to the suspect.⁹⁸

⁹⁰ See Göran Sluiter, 'To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal' (1998) 11 *LJIL* 383, and Mary Coombs, 'International Decisions: In Re Surrender of Ntakirutimana' (2000) 94 *AJIL* 171.

⁹¹ ICTY Report to the United Nations 1997, UN Doc. A/52/375 and S/1997/729 para. 189. ⁹² See section 5.3.2.

⁹³ See r. 58 of the ICTY RPE and ICTR RPE.

⁹⁴ Art. 102 of the ICC Statute. See Michael Plachta, "'Surrender" in the context of the International Criminal Court and the European Union' (2004) 19 *Nouvelles études pénales* 465.

⁹⁵ Art. 91(2) and (4) of the ICC Statute; see Kaul and Kress, 'Jurisdiction and Cooperation', 165–6.

⁹⁶ ICC Statute, Art. 89(2) (*ne bis in idem* challenge), Art. 89(4) (domestic proceeding concerning other crimes), and Art. 95 (general provision on postponement).

⁹⁷ *Ibid.*, Arts. 89(1), 58 and 59. ⁹⁸ *Ibid.*, Art. 57(3)(e); *Lubanga Dyilo* ICC PT.Ch. I 24.2.2006 paras. 130–41.

Somewhat surprisingly, in view of the strictly limited subject matter jurisdiction of the ICC, there was strong support for including the rule of specialty in the ICC Statute.⁹⁹ Hence, if there are amendments to the charges a waiver may have to be obtained from the surrendering State.¹⁰⁰ The consent of the person surrendered is not required. The Tribunals, on the other hand, have rejected the rule by reference to the fact that States cannot refuse surrender on any ground.¹⁰¹ The same argument could be made for the ICC, but still the specialty rule applies explicitly and may create practical problems.

19.8 Other forms of legal assistance

As already mentioned, the cooperation obligation of the ICTY and ICTR Statutes are not restricted to specified forms of cooperation; it is up to the Tribunal to decide what is required for the case at hand. Requests and orders for various measures have been issued and the Tribunals have established some general principles. For example, a request for an order to produce documents must be relatively specific, explain why the documents are relevant for trial, not be unduly onerous, and allow sufficient time for compliance.¹⁰²

Article 93 of the ICC Statute, on the other hand, sets out various forms of assistance that are to be provided, but also other measures than those listed are available under the ‘catch-all’ provision (see section 19.2.1). The drafting of the Statute, and indeed early practice, suggests that the Court makes the requests and the requested State thereafter performs the investigative acts or other measures on behalf of the Court.

19.8.1 Grounds for refusal

No grounds for refusal are provided with respect to cooperation with the Tribunals. Apart from the national security exception (see section 19.8.2), only one ground for refusal for ‘other forms’ of assistance was retained in the ICC regime: if the requested measure is prohibited on the basis of ‘an existing fundamental legal principle of general application’ in the requested State.¹⁰³ Arguably, a strict interpretation should apply and it may even be that the principle must be of a constitutional character.¹⁰⁴ But all other grounds for declining assistance that normally apply in inter-State cooperation,¹⁰⁵ such as a double criminality requirement, are disallowed.

⁹⁹ *Ibid.*, Art. 101.

¹⁰⁰ Unlike most extradition instruments, however, the provision is drafted in such a way that it only targets a different ‘conduct or course of conduct’ but does not apply to a different legal qualification of the charged facts: see Peter Wilkitzki, ‘Article 101’ in Triffler, *Observers’ Notes*, 1151.

¹⁰¹ Kovačević ICTY A.Ch. 2.7.1998 para. 37. ¹⁰² Blaškić ICTY A.Ch. 29.10.1997 para. 32.

¹⁰³ Art. 93(3) of the ICC Statute; on national security, see Art. 93(4).

¹⁰⁴ See Kress, ‘Penalties, Enforcement and Cooperation’, 456–7. ¹⁰⁵ See further ch. 5.

19.8.2 National security objections

Orders or requests directed to States or individuals may give rise to national security concerns; the question arises whether the relevant national law of a State should constitute an obstacle to cooperation. Clearly a national security exception can jeopardize efficient cooperation and even the rights of the accused (if the information is exculpatory in nature). But it is at the same time unrealistic to believe that a State will readily reveal sensitive secrets, or even admit to their existence, even though the information could be indispensable to the case. Hence, both the ICTY RPE and the ICC Statute contain compromise solutions in order to protect national security interests.

The Appeals Chamber in *Blaškić* rejected Croatia's claim that it is for the State to determine its national security needs and that such needs may serve as a ground for refusal. The Chamber decided that a right to refuse by reference to *ordre public*, which is a general cooperation principle, would therefore not be 'fully in keeping with the Statute'.¹⁰⁶ But since national security concerns may well be legitimate, the Chamber devised a number of mechanisms to protect sensitive information in the Tribunal proceedings,¹⁰⁷ which have later been codified.¹⁰⁸ They apply also when the information is provided in the form of testimony.¹⁰⁹

The ICC negotiations had a different result and the Statute allows a State to deny cooperation on national security grounds.¹¹⁰ The State itself determines when such interests are affected, but it must comply with detailed procedures that are inspired by the *Blaškić* scheme and aimed at ensuring sufficient protection so that the information can be made available. As with the Tribunals, sensitive information may also be transmitted to the Court on the condition that it be used solely for the purpose of generating new evidence and, thus, not be subject to disclosure without the consent of the provider.¹¹¹ Nevertheless, it is ultimately the Chamber that determines whether a State has complied with its duty to cooperate, and if it decides that it has not, the Court may refer the matter to the Assembly of States Parties or the Security Council. Apart from this, the Chamber may make certain inferences at trial.¹¹²

19.8.3 On-site investigations

On-site investigations can be crucial for the criminal investigation and not only when the State is uncooperative. Having direct access to sites and victims and witnesses will generally be conducive to an effective and complete investigation. For example, potential witnesses may be reluctant to speak in the presence of national authorities

¹⁰⁶ *Blaškić* ICTY A.Ch. 29.10.1997 paras. 61–6. ¹⁰⁷ *Ibid.*, paras. 67–9. ¹⁰⁸ Rr. 54*bis* and 70 of the ICTY RPE.

¹⁰⁹ *Milošević* ICTY A.Ch. 23.10.2002.

¹¹⁰ Arts. 72, 73 and 93(4)–(6) of the ICC Statute. See further Donald Piragoff, 'Protection of National Security Information' in Lee, *The Making of the Rome Statute*, 270–94.

¹¹¹ Arts. 54(3)(e) and 93(8) of the ICC Statute. ¹¹² *Ibid.*, Art. 72(7).

in view of their recent experience; to be meaningful the questioning would have to be conducted by the international investigators alone. Their involvement on site will also offer an assurance that the investigative measures are taken in accordance with international standards and procedures, which in turn may preclude later challenges by the accused.

In the Tribunals, the Prosecutor's power to conduct on-site investigations is expressly laid down in the Statutes;¹¹³ the Prosecutor may seek assistance of State authorities, but the consent of the State is not required. Coercive measures may be taken, such as search and seizure.¹¹⁴ In practice, however, State permission or other involvement will often be sought and one may note that only a few domestic implementation laws authorize the Prosecutor to act independently on national territory.¹¹⁵

The ICC Statute contains provisions empowering the ICC Prosecutor to undertake certain measures on the territory of a State Party without making a request for assistance by State authorities. But being controversial, this power is normally confined to non-compulsory measures, for example taking voluntary witness statements, and may require consultations and sometimes adherence to reasonable State-imposed conditions.¹¹⁶ Exceptionally, the Pre-Trial Chamber may also authorize specific on-site measures to be taken without securing cooperation in the case of a 'failed State' that is clearly unable to execute a request;¹¹⁷ arguably these also include coercive measures. But considering the importance of on-site investigations, the scope under the Statute is very narrow and reflects the horizontal approach to cooperation; the ICC is seen as a separate entity, not an extension of the national jurisdiction, and the Court's activities on the State territory are therefore an intrusion on the sovereignty of the State. However, it is not ruled out that the Prosecutor may make a request for assistance in the form of an on-site investigation which goes further than what is explicitly set forth in the Statute.¹¹⁸

19.8.4 Assistance regarding coercive measures

An issue of controversy is whether the ICC may, or should, issue a warrant in connection with a request to national authorities for assistance involving coercive measures. The basic principle is that the request must be executed in accordance with national procedures in the requested State, while procedures prescribed in the request must also be followed.¹¹⁹ Normally, domestic law will require a judicial warrant for coercive measures, or a judicial review, and this should be sufficient. But there could be instances where there is no such judicial supervision or a review that departs from international human rights standards and the standards applicable to

¹¹³ Art. 18(2) of the ICTY Statute and Art. 17(2) of the ICTR Statute.

¹¹⁴ E.g. *Kordić and Čerkez* ICTY T.Ch. III 25.6.1999.

¹¹⁵ E.g. German, Norwegian and Swiss law (but special permission is required). Also without legislation, some States, e.g. Sweden, allow certain measures to be taken, such as obtaining voluntary witness statements.

¹¹⁶ Art. 99(4) of the ICC Statute. ¹¹⁷ *Ibid.*, Art. 57(3)(d), and r. 115 of the ICC RPE.

¹¹⁸ See Informal Expert Paper: *Fact-finding and investigative functions*, para. 57. ¹¹⁹ Art. 99(1) of the ICC Statute.

the international jurisdiction in question. Some therefore argue that all coercive measures taken on behalf of an international criminal tribunal or court ought to be subject to a warrant issued by that tribunal or court, or, in urgent cases, a subsequent review of the measure.¹²⁰ In Tribunal practice, judge-made warrants for coercive measures other than arrest have sometimes been issued when the measures were to be taken without the assistance of national authorities.¹²¹ However, no general requirement of international warrants or reviews in case of State cooperation has been adopted in written law or in practice.¹²²

19.9 Domestic implementation

When international law creates obligations for States, it is not permissible to raise the objection that national law, constitutional or otherwise, prevents the honouring of the obligations.¹²³ Therefore, States must make sure that national law allows them to comply with their international obligations, either by direct application of international rules or by implementing legislation. This is required with respect both to the Tribunals and the ICC;¹²⁴ a request cannot be refused with reference to the absence of procedures under national law.¹²⁵ It also corresponds with the principle that requests be executed in accordance with domestic procedures. But while national law may govern procedures, it will lead to violations of the respective Statutes if it inhibits the cooperation required.¹²⁶

In practice, however, only a few States have introduced implementing legislation or concluded that the cooperation rules have direct effect in the domestic system. Such legislation, where it exists, provides a basis, *inter alia*, for arrest and surrender, assistance concerning evidence and witnesses, and enforcement of penalties; but the scope of cooperation and the means for providing assistance vary and States have often resorted to inter-State practices and principles.¹²⁷ The lack of domestic legislation may create serious problems in practice. Reliance on the ordinary law on extradition and mutual legal assistance to other States may not be sufficient, in the light of the significant differences between the cooperation rules and normal inter-State practice. With respect to the ICC various efforts are being made to encourage and assist States to legislate.¹²⁸ It has been suggested that the ICC itself should provide

¹²⁰ See Sluiter, *International Criminal Adjudication*, 125–8. See also Christoph Safferling, *Towards an International Criminal Procedure* (Oxford, 2001) 108–14, 125–8.

¹²¹ E.g. *Kordić and Čerkez* ICTY T.Ch. III 25.6.1999.

¹²² Both principled and practical objections could be advanced. Pre-authorization may not be possible or time-consuming and post-authorization could be sensitive if it involves international judicial supervision of domestic measures, including the application of national law and perhaps even its compliance with international human rights standards.

¹²³ See *Blaskić* ICTY T.Ch. II 18.7.1997 para. 84. ¹²⁴ SC Res. 827(1993) and 955(1994), and Art. 88 of the ICC Statute.

¹²⁵ See, e.g. Kimberly Prost, 'Article 88' in Triffterer, *Observers' Notes*, 1070.

¹²⁶ See Broomhall, *International Justice*, 155.

¹²⁷ For criticism, see e.g. Antonio Cassese, 'On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2 at 13–14.

¹²⁸ For a collection of such legislation, see <http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php>.

such assistance, but great care is required since the Court is the counter-party and may have to assess compliance with the cooperation duties under the Statute.¹²⁹ It should be noted that States have provided substantive assistance also without domestic legislation on cooperation; for example, a number of African States have arrested and handed over accused persons to the ICTR.¹³⁰

The ICC Statute is a complex instrument and domestic implementation is a challenging task. Apart from legal-technical issues, the cooperation obligations have triggered questions concerning national constitutional compatibility.¹³¹ The debates have mainly taken place concerning the ICC, but many of the same issues are also relevant with respect to the Tribunals. Common problems relate to extradition of nationals and constitutional immunities, in relation to the obligation to arrest and surrender suspects to the Tribunal or the ICC. Other areas of controversy are the powers to conduct on-site investigations, life imprisonment, national amnesties and pardons. Importantly, the States cannot avoid such problems by making reservations to their obligations of cooperation.¹³² On the other hand, constitutional amendments are often difficult politically, if indeed they are possible at all, and require lengthy processes. A few States, such as France, Germany and Mexico, have amended their constitutions before ratifying the ICC Statute, but most States have not and have instead interpreted the international instruments and the constitution as compatible with each other.

19.10 An assessment

The dependence upon cooperation by States and others has led to the metaphorical description of each Tribunal as a 'giant without arms or legs'.¹³³

The distinction between 'horizontal' and 'vertical' cooperation schemes depicts a fundamental difference in approach; the 'vertical' model attributes greater powers to the international jurisdiction and imposes greater duties on the States. The scheme of the tribunals is more 'vertical' than that of the ICC.

One may ask, however, whether the differences are as large in practice as in theory. In view of the difficulties of conducting international investigations and trials, and the weak sanctions regimes, neither system can be effective unless States are truly willing (and able) to assist. A breach of international obligations may come with a price, but the alternative price for complying may be higher and more direct (for example in domestic public opinion). Both the Tribunals and the ICC are faced with instances of non-compliance or

¹²⁹ See Informal Expert Paper: *Fact-finding and investigative functions*, para. 16.

¹³⁰ See Broomhall, *International Justice*, 154.

¹³¹ See Helen Duffy, 'Overview of Constitutional Issues and Recent State Practice' in Claus Kress, Bruce Broomhall, Flavia Lattanzi and Valeria Santori (eds.), *The Rome Statute and Domestic Legal Orders* (Baden-Baden, 2005), vol. II, 498–514; Darryl Robinson, 'The Rome Statute and Its Impact on National Law' in Cassese, *Commentary*, 1849–60; and the Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Court*, 45th Plenary Meeting on 15–16.12.2000.

¹³² See Art. 120 of the ICC Statute. ¹³³ Cassese, 'On Current Trends', 13.

a bare minimum of cooperation. For example, the relationship between the ICTY and the Government of Rwanda has been troubled at times, with Rwanda suspending the cooperation when the Tribunal ordered the release of an accused.¹³⁴ In the former Yugoslavia, the willingness to cooperate with the ICTY has varied over time but more recent changes of government have improved the cooperation. Still, the international tribunals and courts are often cautious not to rush to depict States as uncooperative.¹³⁵

Further reading

Antonio Cassese, Paolo Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court* (Oxford, 2002) chs. 39–42.

Thomas Henquet, 'Mandatory Compliance Powers vis-à-vis States by the Ad Hoc Tribunals and the International Criminal Court: A Comparative Analysis' (1999) 12 *LJIL* 969.

Claus Kress, Bruce Broomhall, Flavia Lattanzi and Valeria Santori (eds.), *The Rome Statute and Domestic Legal Orders* (Baden-Baden, 2005), vol. II.

Roy S Lee (ed.), *States' Responses to Issues Arising From the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (New York, 2005).

Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation of States with the International Criminal Court' (2002) 25 *Fordham International Law Journal* 767.

Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Antwerp, 2002).

Dagmar Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2001) 5 *Max Planck Yearbook of United Nations Law* 249.

Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Baden-Baden, 1999).

¹³⁴ The decision in *Barayagwiza* ICTR A.Ch. 3.11.1999 was subsequently reversed (A.Ch. 31.3.2000); see sections 17.2.2 and 17.7.3.

¹³⁵ Although non-compliance has been reported, for example by the ICTY; see Gabrielle Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 *JICJ* 558 at 562–7.

20

Immunities

20.1 Introduction

20.1.1 Overview

The law of immunities has ancient roots in international law, extending back not hundreds, but thousands, of years.¹ In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.

While immunities are valuable in preventing interference with representatives, and thereby maintaining the conduct of international relations, they can also lead to serious injustice. In recent decades, with the advent of the human rights movement, States have taken stronger and stronger steps to prosecute international criminals. This emboldened State practice has brought to the fore many hidden or unresolved questions as to the boundaries between principles of accountability and immunity, and has engendered a reassessment and restriction of the scope of immunities.

The resulting jurisprudence and authorities may at first glance appear perplexing, contradictory, confused or incoherent.² This chapter will suggest that the authorities in fact present a consistent and coherent set of rules, and that those rules reflect an underlying balancing between competing international 'goods'. To understand the jurisprudence and its significance, it will be necessary (1) to appreciate the underlying principles and protected values, (2) to distinguish between 'functional' immunities and 'personal' immunities and (3) to distinguish between national and international courts.

¹ Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* (Columbus, 1999); J. Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth, 1996) 14–31; Montell Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington DC, 1936) 8–20; Grant V. McLanahan, *Diplomatic Immunity* (New York, 1989) 18–25.

² Rosanne van Alebeek, 'The Pinochet Case: International Human Rights Law on Trial' (2001) 71 *BYBIL* 29 at 47; J. Craig Barker, 'The Future of Former Head of State Immunity After *Ex Parte Pinochet*' (1999) 48 *ICLQ* 937 at 938.

This chapter discusses the immunities of individuals in relation to criminal prosecution for international crimes, in national and international courts. Personal immunities in civil proceedings and questions of State immunity are not discussed here. Nor does this chapter deal with immunities of heads of State or high officials in their own countries; those are governed by national law, and the position varies from country to country.

20.1.2 *Functional and personal immunity*

The fundamental distinction in relation to immunities from prosecution is that between ‘functional immunity’ (also known as immunity *ratione materiae* or subject matter immunity) and ‘personal immunity’ (also known as immunity *ratione personae* or procedural immunity).

Functional immunity protects *conduct* carried out on behalf of a State. It is linked to the maxim that a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal. If States allowed criminal proceedings to be brought against the individual officials who carried out the act of State, they would be doing indirectly what they cannot do directly namely setting themselves up as the arbiter of the conduct of another State. Functional immunity attaches to a comparatively large class of officials – all who carry out duties for the State. Significantly, functional immunity does not provide complete protection of the person, since the custodial authorities may inquire into whether the impugned acts were or were not official acts. For example, criminal activity carried out in a private capacity remains subject to prosecution.

Personal immunity is not limited to any particular conduct; it provides complete immunity of the *person* of certain office-holders while they carry out important representative functions. Personal immunity is granted only to a comparatively small set of people, such as heads of State and diplomats accredited to a host country. It is temporary, in that it lasts only for as long as the person is serving in that representative role. There is no exception based on the seriousness of the alleged crime, or whether the acts were private or official, since the rationale is unconnected to the nature of the act. The rationale was stated in 1740 by Wicquefort:

... if Princes had the Liberty of Proceeding against the Ambassador who negotiates with them on any Account, or under any Colour whatsoever, the Person of the Ambassador would never be in Safety; because those who should have a Mind to make away with Him would never want a Pretext.³

In short, personal immunity is absolute, but it attaches to a limited set of official roles and it endures only while the person enjoys the official position which attracts the

³ A. van Wicquefort, *The Ambassador and his Functions* (2nd edn, London, 1740) (translated into English by John Digby) 251, quoted in Ogdon, *Juridical Bases* 128–9.

immunity. Conversely, functional immunity protects only conduct carried out in the course of the individual's duties, but does not drop away when a person's role comes to an end, since it protects the conduct, not the person. For both types of immunity, the purpose is not to benefit the individual,⁴ but to protect official acts (functional immunity) or to facilitate international relations (personal immunity). It is the State which is the real beneficiary of the immunity, and it is the State which may waive it, irrespective of the wishes of the person claiming the immunity.

The existence of immunity does not mean that there is a lack of substantive legal responsibility, but rather that a foreign State is procedurally prevented from bringing proceedings against the alleged offender. As merely procedural bars, immunities may be waived by the State concerned. A claim to functional immunity may also bring with it a claim under the 'act of State doctrine', under which national courts of one State may decline to examine the acts of another State.⁵

While this chapter is focused on criminal proceedings, a brief word should be offered with respect to State immunity from civil proceedings. Under the customary law principle of State immunity, a State (and hence its assets) may not be subjected to proceedings in foreign courts, unless it chooses to submit to such courts. However, this immunity is subject to many exceptions. For example, a State is not immune in relation to its commercial activities, or death or injury in the territory of the forum State. There have been many proposals for a 'human rights' or 'international crime' exception to State immunity, although such proposals have met with little success at this time.⁶

20.1.3 Examples of immunities

The most well-developed and well-defined area of immunities is that of diplomatic immunities. Centuries of State practice with diplomatic relations have produced considerable precision as to the rules. The law is now codified in the Vienna Convention on Diplomatic Relations 1961. While serving in a host country, diplomatic agents enjoy personal immunity: they are immune from criminal jurisdiction, their person is inviolable and they may not be arrested or detained.⁷ Diplomats also enjoy immunity in third States while in transit between their sending State and host State.⁸ After their term of service in the host country has ended, diplomats continue to

⁴ Vienna Convention on Diplomatic Relations ('VCDR') 1961, preamble, paras. 2–4.

⁵ This is a matter of substantive law and, along with the fact that it applies only to particular conduct, probably explains why functional immunity is sometimes referred to as a substantive defence: Hazel Fox, *The Law of State Immunity* (Oxford, 2002) 510–13.

⁶ *Princz v. Federal Republic of Germany* 26 F. 3d 1166 (DC Cir. 1994); *Al-Adsani v. Government of Kuwait* (1996) 107 ILR 536, England CA; *Al-Adsani v. United Kingdom* App. No. 35763/97, (2002) 34 EHRR 11; *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (SDNY, 2001); *Jones v. Kingdom of Saudi Arabia* [2006] UKHL 26, [2006] 2 WLR 1424; but see the anomalous Greek case concerning the Distomo massacre, discussed in Illias Bantekas, 'Prefecture of Voiotia v. Federal Republic of Germany' (1998) 92 *AJIL* 765, which was doubted in subsequent Greek cases and rejected by the German Supreme Court in *Distomo Massacre* (2003) 42 *ILM* 1030.

⁷ Arts. 29 and 31 of the VCDR. ⁸ *Ibid.*, Art. 40.

enjoy functional immunity for acts in the exercise of their functions.⁹ If the diplomat commits a serious crime, the options for the host State are to request a waiver of immunity from the sending State,¹⁰ or to declare the diplomat *persona non grata*.¹¹ After his or her term is over (and after reasonable time for a departure), the diplomat enjoys only functional immunity, and thus the host authorities may prosecute the diplomat for any crimes committed in a non-official capacity, if they can acquire custody of him or her. Other members of a diplomatic mission enjoy lesser degrees of immunity,¹² as do consular officials.¹³

The contours of head of State immunity are less well defined. There is no codifying convention and scant State practice on point. The lack of State practice is probably in part a reflection of the immunity and in part due to the reluctance of States to interfere with heads of State. Even the conceptual foundations of the immunity are unclear.¹⁴ It is widely accepted however that heads of State enjoy at least the same immunities as ambassadors: absolute personal immunity while in office¹⁵ and afterwards, functional immunity for official acts carried out while in office.¹⁶

While head of State immunity is well established, the position of heads of government and other ministers has not always been so clear.¹⁷ The International Court of Justice has upheld personal immunity for ministers of foreign affairs, analogous to that of heads of State.¹⁸ This conclusion is understandable in that the post fulfils similar representative roles. Similar principles undoubtedly apply to a head of government, such as a prime minister – whose representative function is more sensitive than a minister of foreign affairs and, in many systems, the head of State.¹⁹ But whether other ministers enjoy personal immunity is not so clear;²⁰ like all agents of a State however they will enjoy functional immunity for their official acts.

State representatives travelling to participate in meetings of international organizations enjoy immunities provided in the relevant Conventions, which typically include personal immunity.²¹ In addition, when a State hosts a major summit or meeting outside the context of an international organization (such as a G8 summit), it is typical practice to extend immunity to visiting delegates.²² The Convention on Special

⁹ *Ibid.*, Art. 39(1). ¹⁰ *Ibid.*, Art. 32. ¹¹ *Ibid.*, Art. 9. ¹² *Ibid.*, Art. 37(3).

¹³ Vienna Convention on Consular Relations 1963.

¹⁴ Some treat it as a type of State immunity and others as a type of diplomatic immunity, but neither of these analogies is entirely apt, so it seems most accurate to regard head of State as a separate category. Diplomatic immunity provides the closer analogy, although a head of State is not posted in the host State. See, e.g. Jerrold Mallory, 'Resolving the Confusion Over Head of State Immunity: The Defined Right of Kings' (1986) 86 *Columbia Law Review* 169; Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff, 1997) at 29–32.

¹⁵ Charles Lewis, *State and Diplomatic Immunity* (3rd edn, Lloyd's of London Press, 1999) 125; *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, HL at 111, 119–20, 152, 168–9, 179 and 181.

¹⁶ *Satow's Guide to Diplomatic Practice*, Lord Gore Booth (ed.) (5th edn, Longman, 1979) 9.

¹⁷ Arthur Watts, 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers' (1994–III) 247 *Hague Recueil* 97–113.

¹⁸ See section 20.4.2. ¹⁹ Watts, 'Legal Position', 97–113.

²⁰ See discussion of *Yerodia* in section 20.3.2; and see the *Mofaz* case, concluding that a Minister of Defence enjoys personal immunity but expressing doubts with respect to several other types of minister, reproduced (2004) 53 *ICLQ* 769.

²¹ See, e.g. in the context of the UN, the Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15.

²² See, e.g. a typical Canadian regulation, the G8 Summit Privileges and Immunities Order, 2002, PC 2002-828.

Missions 1969 sought to provide a general regime for visits of officials to another State, with the consent of that State, 'for the purpose of dealing with it on specific questions or performing in relation to it a specific task'.²³ That Convention has not been widely ratified.²⁴

Certain officials of international organizations, such as the United Nations or the International Criminal Court, enjoy immunities as provided in specific Conventions.²⁵ In general, personal immunity is granted sparingly and reserved for the highest officials. Most officials receive only functional immunity even while on official missions.²⁶

20.1.4 Underlying rationales and values

Historically, various rationales have been put forward in support of immunities. Some of these were legal fictions, such as 'extraterritoriality' (the fiction that the premises of the mission represented an extension of the sending State's territory), 'personal representation' (that the ambassador is equivalent to his or her head of State), or 'personification' (that the head of State personifies the State).²⁷ Respect for the 'dignity' of the head of State or the sending State has also been a major consideration,²⁸ as has political expediency – the desire to avoid controversy with other nations.²⁹

In the last century, and especially in the last decades, there has been a considerable 'demystification' in this area, such that legal fictions are no longer accepted bases for immunities.³⁰ Moreover, with increasing emphasis on human rights, neither dignity nor political expediency is a compelling reason to exclude *a priori* accountability for serious international crimes.

Thus, the one remaining rationale for immunities is 'functional necessity', that is, their value in facilitating international relations. This rationale is not insignificant; it has been described by the ICJ as the most fundamental prerequisite for the conduct of relations between States.³¹ The existing system of diplomatic relations has enabled representatives of States with historical antipathies and very different viewpoints to interact, to learn about each other and to reach mutual understandings. The system has made possible global summits, the creation of international organizations, and

²³ Convention on Special Missions 1969, Art. 1(a).

²⁴ The immunities are analogous to those in the VCDR: Convention on Special Missions 1969, Arts 29 and 31. While some commentators believe that aspects of it may reflect customary law (Watts, 'Legal Position', 38), others have concluded that it goes beyond State practice in the extent of immunity it confers: *United States v. Sissoko* (1997) 121 IR 599.

²⁵ See, e.g. Convention on the Privileges and Immunities of the United Nations 1946; Agreement on Privileges and Immunities of the International Criminal Court 2002.

²⁶ See, e.g. Convention on the Privileges and Immunities of the United Nations 1946, Art. V, ss. 18–19, granting full diplomatic immunities to the Secretary-General and Assistant Secretary-Generals and functional immunity to other staff.

²⁷ See Ogdon, *Juridical Bases*, 63–165; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, London, 1992) 1034.

²⁸ See *Schooner Exchange v. M'Fadden* 11 US 116 (1812) at 137.

²⁹ See, e.g. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (SDNY, 2001) at 290–1. ³⁰ See, e.g. Watts, 'Legal Position', 35–6.

³¹ *United States Diplomatic and Consular Staff in Iran (US v. Iran)*, Merits, 1980 ICJ Rep 3 para. 91.

development of treaties creating today's corpus of laws. It has enabled diplomats to work in antagonistic States to protect nationals and to avert escalating conflicts. It also enables UN human rights rapporteurs and international prosecutors to carry out their work in States that do not welcome their activities.³²

On the other hand, immunities have also had many perverse effects, shielding persons responsible for spectacular abuses and crimes. This has often led to public outcry. In the past, the limits of immunity law were rarely tested. Recently, with the increased prioritization of human rights and the rule of law, governments have become more assertive and immunities have rightly come under scrutiny and pressure, such that they are being pared down to what is strictly required by functional necessity.

20.1.5 *A balancing of values, not a trumping*

The interests of the international community in the smooth functioning of international relations must be set against the interests of bringing international criminals to justice. Different approaches have been taken to characterize the tension between the two interests.

Some commentators have suggested that no immunity of any kind may be raised in response to allegations of genocide, crimes against humanity or war crimes.³³ However, such a view seems to neglect the different nature of functional and personal immunity, and is contradicted by the great bulk of State practice and jurisprudence.³⁴ Even the landmark precedents, relied upon by those arguing against immunities, explicitly affirm that there *are* some immunities which apply despite allegations of serious international crimes.³⁵

A recurring argument against immunity is that the requirement to prosecute international crimes such as torture is a rule of *ius cogens*, and therefore overrides immunities from prosecution, including personal immunity.³⁶ Such arguments were considered and rejected in an extensive line of national cases in various countries as well as at the European Court of Human Rights and the International Court of Justice.³⁷ As was recently observed by the House of Lords in the *Jones* case,³⁸ the

³² See e.g. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ Rep 100.

³³ See, e.g. Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case', (1999) 10 *EJIL* 237. See also the comprehensive study by Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Sept. 2001, AI Index IOR 53/2001, ch. 14, available at www.web.amnesty.org/web/web.nsf/pages/legal_memorandum

³⁴ See sections 20.3 and 20.4.

³⁵ Art. 27 of the ICC Statute is often cited as declaring there are no immunities, yet Art. 98 explicitly contemplates that some persons will not be surrendered to the ICC because of their immunities, unless a waiver is obtained. In the *Pinochet* decision, each one of the seven law lords emphasized that had Pinochet been a *current* head of State, he would have received absolute immunity *ratione personae*, even against charges of torture or crimes against humanity. Even the Belgian arrest warrant against the foreign minister of the DRC – later rejected by the ICJ as overreaching – expressly recognized that the foreign minister would have had complete immunity if he had come to Belgium for official business.

³⁶ See, e.g. Bianchi, 'Immunity', 265.

³⁷ See, e.g. the line of cases mentioned in n. 6 above, considering and rejecting arguments based on *ius cogens*, as well as the ICJ *Yerodia* decision, discussed in section 20.3.2.

³⁸ *Jones v. Kingdom of Saudi Arabia* [2006] UKHL 26, [2006] 2 WLR 1424 at paras. 24–8 and 43–63.

ius cogens argument depends on a false conflict – *ius cogens* concerns the prohibition on committing the act, not the manner or timing of prosecution.³⁹

As was explained by three judges on the ICJ, the principle that serious crimes must be punished:

... does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome ... [I]mmunities serve other purposes which have their own intrinsic value and ... [i]nternational law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations ...⁴⁰

Thus, a more sophisticated theory is needed to understand the law. International criminal law has not simply eradicated immunities law; instead, the law reflects a balancing. It is also clear that international priorities are shifting in favour of justice and accountability, and the balance in the law is tracking this with a corresponding evolution, with the scope of immunities becoming gradually narrower.

The Nuremberg precedent foreshadowed the two main methods for rebalancing these competing international ‘goods’. It is only recently that international practice has followed up on these ideas. The first method was to declare that functional immunity, which protects State conduct from scrutiny, does not extend to international crimes. The problem is more difficult with respect to personal immunity, which is not based on any authorization of the act, but rather the need to enable international discourse by precluding any pretext to interfere with representatives. However, Nuremberg serves as a precedent on how to deal with this problem as well: the creation of international criminal tribunals authorized to set aside even personal immunity. After five decades of neglect, the international community has rather suddenly started to make impressive strides in both of these avenues.

20.2 Functional immunity

The question of immunities in respect of the prosecution of international crimes may arise before national courts on various occasions. First, the judicial authorities of the host State may wish to prosecute a person who is carrying out his functions in the territory of that State, for example an accredited diplomat or a visiting head of State. Second, the host State may be asked for the extradition of that person by another State. Third, the State may wish to request extradition from another State of a person with immunities in order to institute criminal proceedings.⁴¹ Traditionally, national governments and courts

³⁹ Hazel Fox, *The Law of State Immunity* (Oxford, 2004); Lee Caplan, ‘State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory’ (2003) 97 AJIL 741.

⁴⁰ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 79, in the *Yerodia* judgment, discussed in section 20.3.2.

⁴¹ Examples of the first scenario include the *Mofaz* and *Mugabe* cases; an example of the second scenario is the *Pinochet* case, and the Belgian case against Yerodia is an example of the third scenario.

were so cautious and deferential in the area of immunities that controversial efforts at prosecution simply did not arise; in recent times, this has begun to change.⁴²

20.2.1 *The Pinochet precedent*

In 1998, Senator Augusto Pinochet, former head of State of Chile, was visiting the UK for medical treatment, when Spain issued a request for his extradition. The charges included torture and conspiracy to torture. Pinochet was arrested by British authorities. He applied to have the warrants quashed, inter alia on the ground that as a former head of State he was entitled to immunity.

In the first hearing of the immunity issue, at the level of the Divisional Court, three judges, applying a classically deferential approach to immunities, unanimously upheld Senator Pinochet's claim and quashed the warrant.⁴³ The court applied the established proposition that a former head of State 'ceases to enjoy any immunity in respect of personal or private acts but continues to enjoy immunity in respect of public acts performed by him as head of State'.⁴⁴ Since Pinochet was charged 'not with personally torturing or murdering victims or causing their disappearance, but with using the power of the State of which he was head to that end',⁴⁵ the judges concluded that they could hardly be described as 'private' acts and therefore had to be official acts. They rejected the argument that serious international crimes could not be functions of a head of State.⁴⁶ Immunity from criminal jurisdiction must include criminal acts, as such immunity would otherwise be entirely pointless.⁴⁷ The court considered the possibility of an exception restricted to serious international crimes, but rejected it as it would be unclear where to draw the line.⁴⁸ The Nuremberg Charter, ICTY Statute and ICTR Statute were distinguished on the grounds that 'these were international tribunals, established by international agreement. They did not therefore violate the principle that one sovereign State will not implead another in relation to its sovereign acts.'⁴⁹

At the first House of Lords hearing, following the intervention of *amicus curiae* and a more detailed review of developments in international law, three out of five judges were persuaded that former head of State immunity did not cover such serious international crimes.⁵⁰ The essence of the decision was that the commission of certain serious international crimes, contrary to *ius cogens*, is condemned by all States as illegal and therefore cannot also be protected by international law as an 'official function'. However, a rehearing was necessitated by the possible appearance of bias of one of the

⁴² Michael Byers, 'The Law and Politics of the Pinochet Case' (2000) 10 *Duke Journal of Comparative and International Law* 415.

⁴³ *Re Pinochet Ugarte* [1998] All ER (D) 629; [1998] EWLJ No. 2878 (QB Div Ct 1998) (Quicklaw).

⁴⁴ *Ibid.*, at para. 56 (Quicklaw citation). ⁴⁵ *Ibid.*, at para. 58. ⁴⁶ *Ibid.*, at paras. 63–5 and 80. ⁴⁷ *Ibid.*, at para. 63.

⁴⁸ *Ibid.*, at para. 63. ⁴⁹ *Ibid.*, at para. 68.

⁵⁰ *R. v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No. 1)* [1998] 4 All ER 897, HL.

judges in the first hearing, who had some (fairly slender) affiliations with Amnesty International, one of the intervenors.⁵¹

At the third and final House of Lords hearing (the second appeal hearing on the merits of the claim for immunity), six out of seven judges confirmed that the immunity of a former head of State did not prevent his extradition for torture.⁵² Each of the judges in the third hearing issued a separate opinion, and the reasoning within each opinion was not always clear. As a result, the judgment is one of those gems of the common law system in which, however important the decision, it is difficult to identify the *ratio decidendi*. Commentators emphasize different passages and offer different interpretations, and arrive at different views as to the basis of the decision. It is beyond the scope of this introductory text to provide a detailed analysis, but the following observations illustrate the open questions concerning the rationale as well as the scope of the decision.

One reading would be that the crimes in question did not constitute 'official functions' and hence do not give rise to functional immunity. Such a reading may be supported from passages of Lord Browne-Wilkinson and Lord Hutton.⁵³ However, this proposition does not appear to find support among a majority of the judges. Many judges noted that the fact that conduct is criminal does not per se change its governmental character, nor can it lead automatically to a removal of immunity, as otherwise the immunity would be without purpose.⁵⁴ In any event, such an approach would raise its own problems, given that for the crime of torture, where official participation is an element of the crime, official character must be asserted in order to gain jurisdiction but must then be denied in order to avoid immunity; it is also counter-factual when the crimes are in fact committed through the apparatus of the State; and it could obscure issues of State responsibility.⁵⁵

A more sophisticated variation on that reading is that international crimes are not a kind of official conduct that attracts functional immunity.⁵⁶ In other words, functional immunity does not protect certain international crimes because international law does not protect the same acts that it prohibits and condemns. On this view, one would interpret the speeches of Lords Browne-Wilkinson and Hutton not as denying any official character of the acts, but as indicating that these acts 'could not rank for immunity purposes as performance of an official

⁵¹ *R. v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577, HL.

⁵² *R. v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, HL (hereafter '*Pinochet 3*').

⁵³ *Ibid.*, at 113 (Browne-Wilkinson) and 166 (Hutton).

⁵⁴ *Ibid.*, at 172 (Millett), 147 (Hope), 119 (Goff), and 187 (Phillips).

⁵⁵ Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 EJIL 853; Marina Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur*?' (2002) 13 EJIL 895; J. Craig Barker, 'The Future of Former Head of State Immunity After *Ex Parte Pinochet*' (1999) 48 ICLQ 937 esp. at 943 and 948.

⁵⁶ See, e.g. Christine Chinkin, 'Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)' (1999) 93 AJIL 703; Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute' (2001) 12 CLF 429; Claus Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook on Human Rights* 103 at 158–9.

function'.⁵⁷ Lord Phillips appears to come into this camp: 'where international crime is concerned, that principle [that one State cannot judge another] cannot prevail'; 'no immunity *ratione materiae* could exist for . . . a crime contrary to international law'.⁵⁸ Lord Hope may also be interpreted as not permitting functional immunity for serious international crimes: 'the obligations which were recognised by customary law in the case of such serious international crimes . . . are so strong as to override any objection . . . on the ground of immunity *ratione materiae*'.⁵⁹ This would constitute the 'broader' reading of the *Pinochet* precedent. Lord Millett may also be interpreted in this camp, as he cites with approval the *Eichmann* case as authority that official authority is no bar to the exercise of jurisdiction for certain international crimes, and then refers to *ius cogens* crimes on a large scale, including murder.⁶⁰

A more cautious reading, restricted to the terms of the Torture Convention 1984, is that, where official involvement is a necessary element of a crime, there cannot be immunity by reason of official involvement; otherwise the crime would be vacated of content.⁶¹ As noted by Lord Millett, '[t]he offence is one which could only be committed in circumstances which would normally give rise to the immunity . . . International law cannot be supposed to have established a crime having the character of *ius cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.'⁶² Support for this reading can be found in the opinions of Lords Browne-Wilkinson, Saville and Phillips.⁶³

There are many possible variations on these two major readings. Most of the judges found that the entry into force of the Torture Convention 1984 (or its ratification by Chile or the UK, or its incorporation into UK law) was significant, although one may discern many possible reasons for this significance: creating an obligation upon Chile, authorizing UK courts to act or establishing dual criminality.⁶⁴ Yet, at the same time, the judges also referred extensively to customary international law and *ius cogens*, and the reasoning they employed would encompass not only torture under the Torture Convention but other crimes. For example, on the broader reading, the rationale would seem to apply to all core crimes. On the narrower reading, the rationale would seem to apply at least to other crimes that require official involvement (such as enforced disappearance),⁶⁵ or possibly all core crimes in that they frequently involve official actors.⁶⁶

Some judges indicated that a single act of torture would not suffice to override functional immunity, and that it would have to constitute a crime against humanity, that is to say 'widespread or systematic torture as an instrument of State

⁵⁷ *Pinochet* 3 at 114 (Browne-Wilkinson), 166 (Hutton). ⁵⁸ *Ibid.*, at 190. ⁵⁹ *Ibid.*, at 152. ⁶⁰ *Ibid.*, at 176–7.

⁶¹ See, e.g. Colin Warbrick, Elena Martin Salgado and Nicholas Goodwin, 'The Pinochet Cases in the United Kingdom' (1999) 2 *Yearbook of International Humanitarian Law* 91; Barker, 'Future of Former Head of State Immunity'; Eileen Denza, 'Ex Parte Pinochet: Lacuna or Leap?' (1999) 48 *ICLQ* 949; van Alebeek, 'Pinochet Case'; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407 at 415.

⁶² *Pinochet* 3 at 179. ⁶³ *Ibid.*, at 114–15 (Browne-Wilkinson), 169 (Saville) and 190 (Phillips).

⁶⁴ See, e.g. *ibid.*, at 144 (Hope), 164 (Hutton); but see 178 (Millett) and see discussion in Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford, 2003) 133ff.

⁶⁵ Warbrick *et al.*, 'The Pinochet Cases', 113–14. ⁶⁶ Akande, 'International Law Immunities', 415.

policy'.⁶⁷ At least one judge felt that a single act of torture would suffice (presumably with respect to States Parties to the Torture Convention).⁶⁸

The basis of the *Pinochet* decision, and thus the extent of its implications, remains shrouded in some uncertainty. It may be that for the purposes of UK law, operating within the strictures of *stare decisis*, it may well stand only for the narrower proposition,⁶⁹ whereas in international law it may be recalled as an illustration of the broader proposition, as discussed further in section 20.2.2.

20.2.2 Other authorities

Whatever may be the best interpretation of the *Pinochet* decision, it is widely accepted that functional immunity does not preclude prosecution for serious international crimes. As the Nuremberg Judgment observed:

The principle of international law which, under certain circumstances, protects the representative of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment . . . [I]ndividuals have duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.⁷⁰

The doctrinal basis for this proposition is compelling. First, the purpose of functional immunity is to protect State conduct from being scrutinized by another State; however, it would be incongruous for international law to protect the very same conduct that it condemns as the most serious of international crimes, and for which it calls for prosecution. Second, from the perspective of the perpetrator, State agents are normally able to pass responsibility for dubious activities to the State that authorized them, but in the case of serious international crimes, international law imposes a duty to disobey, so they are rightly held to account.⁷¹ Finally, it is also sound in terms of balancing the underlying values; where an individual possesses only functional immunities, international law already reflects that such an individual is no longer playing a representative role which necessitates absolute immunity.

The proposition was applied in subsequent cases⁷² and was endorsed by the International Law Commission and the General Assembly.⁷³ In *Eichmann*, the

⁶⁷ *Pinochet* 3 at 144–5 and 150–1 (Hope); see also 177 (Millet), 188 (Phillips). ⁶⁸ *Pinochet* 3 at 166 (Lord Hutton).

⁶⁹ See *Jones v. Kingdom of Saudi Arabia* [2006] UKHL 26, [2006] 2 WLR 1124, paras. 19 and 79–81.

⁷⁰ Judgment of the International Military Tribunal (Nuremberg) 41 *AJIL* (1947) 172 at 221.

⁷¹ As discussed subsequently in *In re Goering* 13 *ILR* (1946) 203 at 221.

⁷² See e.g. *In re Goering* 13 *ILR* (1946) 203 at 221.

⁷³ Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946; Principles of the Nuremberg Tribunal, Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950, Document A/1316, pp. 11–14 and commentaries in *Yearbook of the International Law Commission*, 1950, vol. II, pp. 374–8; see also *Princeton Principles on Universal Jurisdiction* (Princeton University, 2001) 48–50; Paola Gaeta, 'Official Capacity and Immunities' in Cassese, *Commentary*, 981; and *Furundžija* ICTY T. Ch. II 10.12.1998 para. 140.

Israeli Supreme Court rejected the plea by Eichmann that he was carrying out official activities and held that:

There is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of ‘crimes against humanity’ (in the wide sense). [S]uch acts . . . are completely outside the ‘sovereign’ jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission . . .⁷⁴

Indeed, out of all of the international crimes cases that have been conducted to date, most of the defendants were acting on behalf of a State and yet not one has successfully pleaded functional immunity for international crimes.⁷⁵ More recently, in *Bouterse*, the Amsterdam Court of Appeal held with respect to the former head of State of Suriname that serious international crimes such as the crime against humanity of torture did not constitute ‘official functions’ for the purpose of functional immunity (an appeal was granted by the Supreme Court on other, jurisdictional, grounds).⁷⁶ The current efforts in Senegal to prosecute Hassan Habré, former head of State of Chad, appear to be predicated on a similar proposition.⁷⁷

The ICTY has also recognized functional immunity as a ‘well-established rule of customary international law’, with the exception that those responsible for ‘war crimes, crimes against humanity and genocide . . . cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.’⁷⁸

While the trend of these authorities seems clear, the fact that many of the law lords in *Pinochet 3* confined themselves to a narrower basis, and the fact that the International Court of Justice did not refer to the proposition in the *Yerodia* case,⁷⁹ suggests that the proposition is not universally accepted or that its contours may remain to be clarified.

The foregoing observations apply only to the most serious international crimes; if one were to attempt to extend the proposition to all activity illegal under national or international law, this would negate the purpose and utility of functional immunity.⁸⁰ Furthermore, the foregoing rationales apply only to functional immunity, which is based on purported State authorization, but not to personal immunity – for the latter, the rationale is not based on the nature or authorization of the conduct, but rather the separate imperative of enabling international relations.

⁷⁴ *A.G. of Israel v. Eichmann* (1968) 36 ILR 277 at 308–10. The discussion was in the context of ‘act of State’ but, as noted by Lord Millet in *Pinochet 3*, the principles are the very same (*Pinochet 3* at 176).

⁷⁵ For an overview of national prosecutions, see section 4.2. ⁷⁶ *Bouterse* (2000) 51 *Nederlandse Jurisprudentie* 302.

⁷⁷ See www.hrw.org/justice/habre/ ⁷⁸ *Blaskić* ICTY A. Ch. 24.10.1997 para. 41. ⁷⁹ See section 20.3.2.

⁸⁰ *Pinochet 3* at paras. 119 (Goff), 147 (Hope), 172 (Millet), 187 (Phillips); *Jones v. Kingdom of Saudi Arabia* [2006] UKHL 26, [2006] 2 WLR 1424 at para.12 (‘The fact that conduct is unlawful or objectionable is not, of itself, a ground for refusing immunity.’)

20.2.3 Denial of functional immunity applies equally in international courts

The reasoning in the foregoing authorities concerning the inapplicability of functional immunity to core crimes is based on the nature of the immunity and not the nature of the jurisdiction trying the crime. Thus the same reasoning would apply before international courts, and functional immunity would pose no bar to prosecution of international crimes, since international law cannot privilege and sanctify the same acts that it prohibits and condemns.⁸¹ The ICTY has held that international law offers no functional immunity for genocide, crimes against humanity or war crimes.⁸²

In addition to benefiting from any inherent inapplicability of functional immunity to international crimes, international tribunals are also granted certain powers to set aside immunities, as is discussed in section 20.4.

20.3 Affirmation of personal immunity before national courts

20.3.1 State practice and jurisprudence

While inroads have been made into *functional* immunity, State practice and jurisprudence have consistently upheld *personal* immunity, regardless of the nature of the charges. To understand this divergent treatment, one must recall the fundamental difference between functional and personal immunity. Functional immunity relates to the conduct and its authorization by a State, whereas personal immunity flows from a completely different rationale unconnected with the alleged conduct. On the contrary, its purpose is to provide absolute inviolability, denying any pretext for interference with a State representative, in order to allow international relations between potentially distrustful States. The value underlying personal immunity is also far more sensitive than that underlying functional immunity.⁸³

The possibility of creating exceptions to personal immunity was considered and rejected even in situations of great pressure or incentive to prosecute, including cases of espionage, drug smuggling, murder,⁸⁴ and plots against monarchs.⁸⁵ In each case, the conclusion reached was that, despite all of the problems with immunities, the

⁸¹ If a more cautious view were taken, such that functional immunity might cover some international crimes, then it would become necessary to rely on either the power granted to tribunals to supersede immunities (see section 20.4) or, alternatively, to attempt to develop an independent rationale for non-application of functional immunity before international courts: see Paola Gaeta, 'Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case' (2003) 1 *JICJ* 186.

⁸² But the Tribunal has decided that State officials may not be ordered to produce documents 'in their custody in their official capacity'; see *Blaskić* ICTY A. Ch. 29.10.1997 para. 38 and section 19.2.3.

⁸³ Wirth, 'Immunities, Related Problems' 432.

⁸⁴ The murder of policewoman Yvonne Fletcher in the UK in 1984 provoked a massive outcry and a parliamentary review of diplomatic immunities. The review concluded, however, that attempts to renegotiate the Vienna Convention would create more problems than they would solve. See Barker, *A Necessary Evil?*, 135–52.

⁸⁵ In 1571 and in 1584, when ambassadors in England were detected in plots against the Crown, some urged that foreign ambassadors should lose their immunity for treason and high crimes. In the end, these arguments did not prevail and the diplomats were expelled. Similar practices were followed in other countries. See Ogdon, *Juridical Bases*, 56–9.

benefits of upholding the existing system of diplomatic immunities and diplomatic communication outweighed the disadvantages.⁸⁶

Judicial decisions have confirmed that there is no exception to personal immunity. In 1946, a Canadian case held that a foreign diplomat could not be arrested or detained even after threatening the security of the State, because '[i]f the diplomat violates the law of nations, it does not follow that the other State has the right to do likewise'.⁸⁷

This view has been upheld in recent cases in the context of serious international crimes. In March 2001, the French *Cour de cassation* held in the *Qaddafi* case that a serving head of State is immune from prosecution in national courts in relation to serious acts of terrorism.⁸⁸ The Spanish *Audiencia Nacional* reached a similar conclusion with respect to allegations of international crimes by Castro,⁸⁹ and the same result was reached in a UK court in a case against President Mugabe.⁹⁰ In the *Pinochet* decision, each of the law lords agreed that a serving head of State or diplomat could still claim immunity *ratione personae* for serious international crimes such as torture: for such an official, '[t]he nature of the charge is irrelevant; his immunity is personal and absolute'.⁹¹ 'He is not liable to be arrested or detained on any ground whatever.'⁹² Recent State practice has adhered to the same line. Denmark refused to arrest the serving Israeli ambassador, Carmi Gillon, despite accusations that he was previously responsible for torture, on the grounds that specific obligation of diplomatic immunity superseded the general obligation under the Torture Convention 1984.⁹³ Similarly, with the exception of Belgium, States implementing the ICC Statute have generally declined to claim a power to set aside the personal immunity of foreign officials in national proceedings.

20.3.2 The ICJ Yerodia decision

In April 2000, a Belgian judge issued an international arrest warrant *in absentia* against Abdulaye Yerodia Ndombasi, who was at the time serving as the minister for foreign affairs for the Democratic Republic of Congo (DRC). The DRC brought the matter to the ICJ, arguing that Belgium had failed to recognize the immunity of a serving minister of foreign affairs. The ICJ held, by thirteen votes to three, that Belgium had breached its international legal duties to the DRC 'in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law'.⁹⁴ The immunities *ratione personae* enjoyed by a foreign minister could not be set

⁸⁶ In the United States, proposals for legislation to remove diplomatic immunity for drunk driving and violent crimes have been rejected, on the grounds that complete immunity is essential for diplomatic relations, as otherwise other States could bring false charges. See Barker, *A Necessary Evil?*, 232.

⁸⁷ *Rose v. R.* [1947] 3 DLR 618 at 645. ⁸⁸ *Qaddafi* (2001) 125 ILR 456. ⁸⁹ *Castro* (1999) 32 ILM 596.

⁹⁰ Reproduced in Colin Warbrick, 'Immunity and International Crimes in English Law' (2004) 53 *ICLQ* 769.

⁹¹ *Pinochet* 3 at 179 (Millet). ⁹² *Ibid.*, at 171 (Millet).

⁹³ Jacques Hartmann, 'The Gillon Affair' (2005) 45 *ICLQ* 745.

⁹⁴ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002; ICJ Rep 2002 (hereafter '*Yerodia*') at para. 75.

aside by a national court by charging them with war crimes or crimes against humanity.⁹⁵ The ICJ examined the non-immunity provisions of the Nuremberg Charter, and the Statutes of the ICTY, ICTR and ICC, and found that these did not suggest any exception in customary international law in regard to national courts.⁹⁶

The judgment emphasized that the temporary status of personal immunity did not mean *impunity* for serious crimes. First, persons may be tried in their home courts; second, they may be prosecuted if the State waives the immunity; third, they may be prosecuted, once they cease to hold office, for crimes committed in a private capacity; and fourth, they may be prosecuted before international criminal courts where such courts have jurisdiction.⁹⁷

The outcome of the decision is consistent with the line of national decisions and State practice upholding absolute personal immunity. Nevertheless, there are elements of the decision which are questionable.

Two preliminary observations may be made about the analytical approach followed by the ICJ. First, rather than conduct a review of State practice and *opinio iuris*, the Court instead deduced the law from an abstract consideration of the functions of a foreign minister.⁹⁸ After a one-paragraph analysis, the ICJ concluded that the functions of a foreign minister require full immunity on all visits, including not only official visits but also private visits.⁹⁹ A more thorough review of State practice might have led to some more nuanced conclusions. Second, in terms of balancing the underlying international values, the judgment started by accepting immunities as a first, sacred principle, and then dealt with accountability only briefly at the end as an afterthought.¹⁰⁰ As a result it failed to reflect and balance competing legitimate international values.¹⁰¹

Extension of personal immunity to an unknown range of ministers

The judgment has been criticized on three main grounds. First, in the view of some commentators, it unjustifiably extended head of State immunity to what may be a wide range of ministers, without sufficient argument or reference to authority.¹⁰² If the test is one based on the need for travel in order to carry out one's role, then many ministers, including ministers of culture, sport or education, would seem to qualify. In the *Mofaz* case, a UK court expressed doubt that such a range of ministers would acquire personal immunity, but found that the role of a minister of defence was one attracting immunity.¹⁰³

Omission of the principle that functional immunity does not include core crimes

In listing the ways in which accountability can still be served, the judgment notes that a former foreign minister may be tried for acts committed during his or her period of office in a *private capacity*. Startlingly, the judgment omitted to mention the celebrated

⁹⁵ *Yerodia* paras. 56–8. ⁹⁶ *Ibid.*, para. 58. ⁹⁷ *Ibid.*, para. 61.

⁹⁸ *Ibid.*, para. 53. ⁹⁹ *Ibid.*, para. 55. ¹⁰⁰ *Ibid.*, paras. 60 and 61.

¹⁰¹ *Ibid.*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 70–85.

¹⁰² Akande, 'International Law Immunities', 412. ¹⁰³ *Mofaz*, reproduced (2004) 53 *ICLQ* 769.

principle from Nuremberg (and *Pinochet*, on the broader reading): that former officials can be tried for any acts which constitute serious international crimes.¹⁰⁴ The omission was conspicuous, and it was extensively criticized by commentators.¹⁰⁵ The omission was also puzzling in that both parties to the dispute – DRC and Belgium – were in agreement that the official character of the act does not excuse it.¹⁰⁶

As discussed in section 20.2.1, one solution could be to say that international crimes are not ‘official’ acts but rather ‘private’ acts,¹⁰⁷ but such a solution raises its own problems.¹⁰⁸ Perhaps the tidiest solution is to regard the omission as an oversight, in a paragraph that was simply *obiter dicta*, providing a series of examples rather than a closed list.

Recognition of immunities on private visits

The *Yerodia* judgment indicated that personal immunity must be recognized even on private visits, on the grounds that the consequences of being arrested for the performance of one’s functions would be the same.¹⁰⁹ There are difficulties with this finding. First, it is doubtful that State practice supports a sweeping rule relating to private visits; the sparse authorities refer to such immunities *on an official visit*.¹¹⁰ If analogy is drawn from the law of diplomatic immunities (where usages have been worked out and defined over the centuries), personal immunity is not accorded during holidays in third countries, but only when *en poste* and during transit between the home country and the host country.¹¹¹

Second, where a host State has invited or consented to an official visit, it may be argued that there is an undertaking that full immunity will be bestowed,¹¹² as was recognized even in the arrest warrant issued by Belgium:

[I]mmunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on ‘official visits’) . . . [S]uch welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerns in what would then have to be labelled a trap.¹¹³

Where the host State has not invited or consented to the visit, this consideration is absent.

¹⁰⁴ *Yerodia* para. 61.

¹⁰⁵ See, e.g. Antonio Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case’ (2002) 13 *EJIL* 853; Steffen Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v. Belgium* Case’ (2002) 13 *EJIL* 877; David Koller, ‘Immunities of Foreign Ministers: Paragraph 61 of the *Yerodia* Judgment as it Pertains to the Security Council and the International Criminal Court’, (2004) 20 *American University International Law Review* 7; Gaeta, ‘Ratione Materiae Immunities’; Chanakra Wickremasinghe, ‘Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)’ (2003) 52 *ICLQ* 775.

¹⁰⁶ Cassese, ‘Senior State Officials’, 872.

¹⁰⁷ The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 85 suggests that international crimes should not be seen as ‘official acts’.

¹⁰⁸ See section 20.2.1. ¹⁰⁹ *Yerodia* para. 55.

¹¹⁰ Convention on Special Missions 1969, Art. 21; US Restatement (Third) of Foreign Relations Law § 464, note 14.

¹¹¹ VCDR 1961, Art. 40. ¹¹² *Oppenheim’s International Law* (9th edn, 1992) 1034. ¹¹³ Quoted in *Yerodia* at para. 68.

Third, the extension of full immunity to private visits is not supported by the rationale on which the ICJ founded its decision, which was that exposure to proceedings ‘could deter the Minister from traveling internationally *when required to do so for the purposes of his or her official functions*’ (emphasis added). This rationale is inapplicable to holiday travel. The ICJ reasoned that being arrested on holiday travel would impede one’s functions, but resolving this problem by extending immunities does not reflect a proper balancing of competing international values. Instead, an official fearful of such an arrest could be well advised to curtail his or her holiday travel, particularly to countries where he or she may be under indictment.

The comments were *obiter dicta*, and many judges dissented from or distanced themselves from this particular finding. Thus, this issue is still open for clarification in State practice; it may be for example that only heads of State are entitled to personal immunity during non-official visits, but State practice is unsettled even on that point.¹¹⁴

20.4 Relinquishment of personal immunity in international courts

As may be seen from the foregoing, authorities have consistently rejected any exception to personal immunity. For personal immunity, the nature of the charge is irrelevant; the purpose is to protect safe passage among certain office-holders charged with the conduct of international relations. This raises the unsettling prospect of an accountability gap with respect to such persons while they are in office. Fortunately, the international community has devised means of reducing this accountability gap: to create international tribunals and to empower them to supersede even their personal immunities.

In the case of the Nuremberg and Tokyo Tribunals, both Japan and Germany had surrendered. Hence the Allies stood in the position of national legislators and, in that position, they could legislate away immunity before the Tokyo and Nuremberg Tribunals.

In the case of the ad hoc Tribunals, immunities are relinquished by virtue of the paramount obligation to comply with Chapter VII decisions of the Security Council. In the case of the ICC, States Parties relinquish their immunities by treaty.

An alternative theory is that international courts are able to supersede personal immunities not because of the relinquishment of such immunities, but because their inherent international character empowers them to do this, or because immunities were only ever relevant to national courts and inapplicable to international courts; however, as will be discussed in section 20.4.3, it is challenging to reconcile this theory with existing principles of international law.

¹¹⁴ Watts, ‘Legal Position’, 72–4; Salvatore Zappala, ‘Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French *Cour de Cassation*’ (2001) 12 *EJIL* 595 at 606.

20.4.1 *Tribunals created by the Security Council*

The UN Charter grants the Security Council a broad discretion to determine what measures are appropriate to maintain or restore international peace and security, whether involving use of force (Article 42) or not (Article 41), and all UN Member States are obliged to carry out such measures (Article 20).¹¹⁵ When creating the tribunals, the Security Council incorporated the principle that the official position of a defendant is no bar before the tribunals,¹¹⁶ and ordered all States to comply with requests from the tribunals, including requests for surrender. No exception was created for surrender requests relating to persons otherwise enjoying immunities. A State's obligation to the Security Council is paramount over all other obligations.¹¹⁷ Thus, a UN Member State receiving a request for the surrender of a person is obliged to comply with that request, even if the request conflicts with a duty to respect immunities. By the same token, the State otherwise enjoying the immunities is estopped from raising those immunities as a shield, by virtue of its obligations under the UN Charter.¹¹⁸

The situation is less straightforward with respect to the Federal Republic of Yugoslavia (FRY), the recipient of orders to surrender its head of State, because it was not recognized as a UN Member State. However, it was a party to the Dayton Accords, which imposed an obligation to cooperate with the ICTY.¹¹⁹

Both tribunals have carried out proceedings with respect to high governmental officials. In 1998, the ICTR convicted former Prime Minister Jean Kambanda, sentencing him to life imprisonment for genocide and crimes against humanity.¹²⁰ In 1999, the ICTY issued the first indictment against a serving head of State, Slobodan Milošević.¹²¹ Although Slobodan Milošević died of a heart attack before the completion of his trial,¹²² his indictment, arrest and trial remain a decisive precedent on the jurisdiction of a Security Council tribunal over heads of State.

20.4.2 *The International Criminal Court*

The ICC Statute offers another solution to the problem of personal immunity. States may, in the present stage of development of international relations, be unwilling to recognize a general exception to personal immunities that would allow all other States to prosecute their highest officials; however, a great many States have been willing to

¹¹⁵ Art. 25. For further discussion on the power of the Security Council to create Tribunals, see chapter 7.

¹¹⁶ ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(2).

¹¹⁷ See UN Charter, Arts. 25, 41, 49 and esp. 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

¹¹⁸ See, e.g. Paola Gaeta, 'Official Capacity and Immunities' in Cassese, *Commentary*, 989.

¹¹⁹ Dayton Peace Accords, 21 November 1995, Art. IX. On approaches to this question, as well as the interpretation that the UN Charter is of a *sui generis* character that binds third party States, see ch. 7.

¹²⁰ *Kambanda* ICTR T. Ch. I 4.9.1998. ¹²¹ *Milošević* Indictment ICTY (Judge Hunt) 24.05.1999. ¹²² See ch. 7.

create an impartial international court with jurisdiction over serious international crimes, and to relinquish even their personal immunities to the court.

ICC States Parties are obliged to cooperate with the ICC and to surrender individuals in accordance with the terms of the Statute, without reservation.¹²³ Article 27(2) specifies that '[i]mmunities or special personal rules which may attach to the official capacity of a person . . . shall not bar the Court from exercising its jurisdiction . . .'.¹²⁴ Thus, States Parties accept that the immunities their officials may enjoy under international law will not bar prosecution before the ICC. This provision has required many States to amend domestic legislation and even their constitutions in order to ratify the ICC Statute.¹²⁵

However, that is not the only provision on immunities in the ICC Statute. Article 98(1) provides that the ICC will not proceed with requests for surrender:

which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.¹²⁶

Article 27 and Article 98(1) must be read together to understand the Statute regime.¹²⁷ At first glance, they appear contradictory, with one rejecting immunities and the other upholding immunities.¹²⁸ The provisions apply however at different stages. Article 98(1) deals with a specific situation where a State Party (or other cooperative State) is requested to surrender a person, but that person is protected by immunities bestowed by a third State. In such a case, the requested State would be placed in a position of conflicting obligations: for example, either to breach a duty to carry out ICC requests or to breach a duty to respect immunities of a State not party to the ICC Statute.

The interplay of Articles 27 and 98(1) therefore creates a regime wherein States Parties agree to relinquish all immunities in relation to ICC requests concerning their own nationals, representatives or officials, while still respecting the existing immunities of States which have not joined the ICC Statute system. It is worth recalling here that the only relevant immunities would be personal immunities, since functional immunity does not protect conduct which amounts to a core crime.¹²⁹

In relation to a request for surrender of a State's own nationals, Article 98(1) does not apply, since it refers to obligations to a 'third State'.

¹²³ ICC Statute Art. 86 (obligation to cooperate), Art. 89 (surrender of persons to the court), Art. 120 (no reservations).

¹²⁴ *Ibid.*, Art. 27(1): 'official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute'. See Otto Triffterer, 'Article 27' in Triffterer, *Observers' Notes*, 501.

¹²⁵ See, e.g. Claus Kress and Flavia Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders* (Rome, 2000), vol. I; Darryl Robinson, 'The Rome Statute and its Impact on National Laws' in Cassese, *Commentary*.

¹²⁶ Similarly, Art. 98(2) of the ICC Statute respects obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the court. The controversy over the interpretation of Art. 98(2) is discussed in ch. 8. See generally Kimberly Prost and Angelika Schlunck, 'Article 98' in Triffterer, *Observers' Notes*, 1131.

¹²⁷ Triffterer, 'Article 27', 509. ¹²⁸ Gaeta, 'Official Capacity', 992–6. ¹²⁹ See section 20.2.

If the request for surrender relates to a person who enjoys immunities bestowed by *another* State Party, it is generally accepted that it would not be necessary for the requested State first to obtain the waiver of the other State Party.¹³⁰ Interestingly, there are different interpretive routes by which this conclusion is reached. Some interpret ‘third State’ in Article 98(1) as referring only to non-party States. Another view is that ICC States Parties have already relinquished any immunities against ICC proceedings by virtue of ratifying Articles 27 and 88, and hence there are no ‘obligations under international law’ hindering surrender.¹³¹

In relation to a request concerning an official enjoying immunities of a *non-State Party*, Article 98(1) requires respect for any immunities existing under international law. This does not mean there can be no prospect for surrender. First, prosecution is possible if the non-State Party agrees to waive the immunity. Second, even non-States Parties will lose their immunity if the Security Council under Chapter VII decides that immunities will not be a bar (for example, through a referral to the ICC with corresponding obligations on States in the Security Council resolution). Third, once the official is no longer serving in the capacity that entails personal immunity, he or she will only have functional immunity, and hence be liable to prosecution for core crimes.

Finally, an intriguing scenario may arise where an official, enjoying personal immunities of a non-State party, nonetheless arrives before the ICC – for example, through voluntary surrender, such that Article 98(1) was not engaged.¹³² One possibility would be for the Court to conclude that Article 98 protects *States Parties* from conflicting obligations, but that the Court itself is bound to apply Article 27 and hence proceed despite any immunity. Another possibility would be for the Court to look at the underlying international rules – including its own basis in treaty – and to conclude that it does not have authority to ignore the personal immunity of an office-holder of a non-State Party. This dilemma would not arise for personal immunities that exist on a strictly bilateral basis; for example, diplomatic immunity obliges only the host State and transit States, not the ICC itself.

20.4.3 *The situation of hybrid courts*

In June 2003, the Special Court for Sierra Leone (SCSL)¹³³ issued a warrant for the arrest of Charles Taylor, who at the time was the head of State of Liberia, engaged in

¹³⁰ The relationship between Art. 27 and 98 was discussed in informal meetings at the ICC Preparatory Commission, on the basis of an informal paper by Canada and the UK, with the conclusion being reached that: ‘Having regard to the terms of the Statute, the Court shall not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party’. See Broomhall, *International Justice*, 144.

¹³¹ The former interpretation seems inconsistent with the term used elsewhere in the Statute (‘State not party to this Statute’), and a more plausible view is that ‘third State’ has the same meaning as in extradition treaties (i.e. a State other than the requesting or requested State). Thus the latter interpretation may be more convincing. See Broomhall, *International Justice*, 144–5; Wirth, ‘Immunities’, 456–7; Gaeta, ‘Official Capacity’, 993–5.

¹³² One must furthermore assume that there was no Chapter VII order from the Security Council or a waiver from the State.

¹³³ See ch. 9.

peace talks in Ghana. Ghana allowed Taylor to return to Liberia. (In August 2003, Taylor accepted an offer from Nigeria to grant him asylum if he stepped down as head of State and stopped participating in Liberian politics. Following repeated breaches of the latter undertaking, Taylor was eventually arrested in 2006 and transferred to the custody of the SCSL.)

In July 2003, lawyers for Charles Taylor made an application to declare the warrant null and void, on the grounds that he was a serving head of State, enjoying absolute immunity; that exceptions to this immunity can only be derived from other rules of international law such as Security Council resolutions under Chapter VII; and that the SCSL did not have Chapter VII powers.

In May 2004, the SCSL issued its decision, siding with the prosecution and several *amici curiae*, and holding that the SCSL was an international court and as such not barred from prosecuting serving heads of State.¹³⁴ The SCSL relied on passages in *Pinochet* and *Yerodia* which made reference to the possibility of prosecution before international courts; for example, 'an incumbent ... Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction'.¹³⁵ Although the Security Council imposed no Chapter VII obligations upon States to cooperate with the SCSL, the SCSL held that it was created by an agreement between the UN and Sierra Leone, and therefore it was an international court.¹³⁶

The *Taylor* case brings out in stark relief the question of what those passages meant. Were they simply observing that there are international courts with the power to supersede personal immunities in accordance with known principles of law (for example relinquishment through treaty or Chapter VII powers)? Or were they positing a general rule that all personal immunities are eliminated before any court that may be characterized as 'international'? If the latter, what is the legal basis for this exception? This raises some fundamental questions about the underlying legal theory of how and why personal immunity is lost before international courts.

The *Taylor* judgment highlights some arguments for a general 'international courts exception' to personal immunity, including that international courts have limited jurisdiction and safeguards against abuse, and that their collective judgment reduces the potential destabilizing effects of unilateral action.¹³⁷ These may be good *policy* arguments as to why such an exception might be desirable, but it does not explain the *legal* basis or origin for the alleged exception. As one commentator has noted, not only does this purported exception 'violate the principle of *pacta tertiis*, but it also ignores the fact that fairness [of the tribunal] has nothing to do with the creation of immunities'.¹³⁸ The safeguards and stability may help explain why States are willing to relinquish immunities, but they do not in themselves override immunities.

¹³⁴ *Taylor* Decision on Immunity from Jurisdiction SCSL A. Ch. 31.05.2004 (hereafter '*Taylor*') paras. 51–3.

¹³⁵ *Yerodia* para. 61. ¹³⁶ *Taylor* paras. 34–42.

¹³⁷ See, e.g. *Taylor* para. 51; similar possibilities are suggested in Ryszard Piotrowicz, 'Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction' (2002) 76 *Austin Law Journal* 290 at 293.

¹³⁸ Koller, 'Immunities of Foreign Ministers', 32.

Moreover, while the purported exception has attractions, it is very difficult to reconcile with fundamental legal principles. By what legal mechanism did international courts obtain this general power? If neither State A nor State B have the power to ignore the personal immunity of State C, how can the two together create an 'international court' and bestow upon it a power that they do not possess? The problem remains whether it is two States, or twenty, or sixty. They cannot bestow a power that they do not possess.¹³⁹

A related, but slightly different, argument would be that personal immunity was always opposable to national courts, and never to international courts. If this were the case, then States would not be bestowing powers upon courts that they do not have. The SCSL suggested this basis when it observed that the 'principle that one sovereign State does not adjudicate on the conduct of another State has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community'.¹⁴⁰ The difficulty however is that this principle (also known as *par in parem non habet iudicium*) may be a basis for functional immunity, but it has no bearing on personal immunity. Personal immunity exists to protect international relations by precluding any basis to interfere with high representatives without consent of their sending State. If a State cannot set aside the personal immunity of another State without consent, then it is hard to see how a creation of a State (or several States) can have that power. The arguments seem to assume that international courts are in a vertical relationship with States; however, international courts acquire a vertical relationship (that is to say the ability to issue orders) in so far as States grant them that position, by treaty or other means such as Chapter VII.

It seems doubtful that personal immunity contains an 'international court exception'.¹⁴¹ The unclear contours of such a rule (how many States must participate before a court becomes 'international' and is able to erase immunities of other States? Must it have jurisdiction limited to serious crimes? Must it have safeguards against abuse?) raise further doubts that a principled exception is in play. Moreover, State practice seems to have been predicated on the need for relinquishment of personal immunity (hence the existence of Article 98 in the ICC Statute and the emphasis on the Chapter VII powers of the ad hoc Tribunals).¹⁴²

Another (more plausible) way to have reached the result might have been to have found binding consent given by Liberia to the SCSL Statute, and hence a relinquishment of personal immunity. However, even this is not straightforward. The SCSL opined that 'the Agreement between the United Nations and Sierra Leone is thus an

¹³⁹ *Nemo dat quod non habet*. ¹⁴⁰ Taylor para. 51.

¹⁴¹ Zsuzsanna Deen-Racsmány, 'Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and its Implications for Immunity' (2005) 18 *LJIL* 299; Micaela Frulli, 'The Question of Charles Taylor's Immunity' (2004) 2 *JICJ* 1118; Koller, 'Immunities of Foreign Ministers'.

¹⁴² Another indicator of State practice is national legislation such as the UK International Criminal Court Act 2001, s. 23(1) and (2). The legislation of some other countries (such as Canada) is consistent with this position but defers the issue entirely to the ICC.

agreement between all members of the United Nations and Sierra Leone',¹⁴³ but this is open to doubt. The agreement was with the UN organization, which has a distinct legal personality; it was not put to the individual Member States for ratification.¹⁴⁴

Thus, while it is understandable that the SCSL would issue a decision affirming its powers and facilitating the bringing to justice of international criminals, the reasoning used is open to doubt. The court had no specific grant of power enabling it to set aside personal immunities and thus it required a waiver from Liberia in order to exercise jurisdiction over its head of State. If this is correct, then Ghana was within its rights (and indeed carrying out its international legal duty) not to act on the warrant.¹⁴⁵ The SCSL would have been on sounder ground to have observed that Taylor was no longer a head of State at the time of the decision (having stepped down in August 2003), and hence he no longer enjoyed personal immunity and was liable to arrest and prosecution for international crimes.

What may be learned from this example is that 'it is not the international nature of the court as such but the waiver by the parties (and the Security Council's Chapter VII powers . . .) that accounts for the irrelevance of immunities before it'.¹⁴⁶

20.5 Conclusion

The shift in the law toward the narrowing of immunities is readily seen. Many authorities recognize that functional immunity does not protect conduct that amounts to a serious international crime. Personal immunity has proved more resilient, allowing no exception based on the nature of the crimes alleged. States have however relinquished personal immunity to some international jurisdictions; for example, by ratifying the ICC Statute, or by virtue of their obligations to the Security Council under Chapter VII of the UN Charter. An alternative view is that personal immunity is never opposable to an 'international court'.

As priorities continue to shift, there may be more developments to limit further the negative effects of immunities. Possibilities include increased ratification of the ICC Statute, more assertive Security Council action (such as referrals to the ICC calling for cooperation), and more robust action in declaring international criminals *persona non grata*, seeking waiver of immunity or pressing for national prosecution. International law may be developed or clarified so that personal immunity is clearly limited to official visits and a smaller range of ministers and officials. The day may come when States agree to exceptions even for personal immunity before national courts. After all, as was noted by three judges in *Yerodia*, the law reflects a balancing of different community interests, and therefore is in constant evolution, with a discernible trend to limiting immunity and strengthening accountability.¹⁴⁷

¹⁴³ *Taylor* para. 38. ¹⁴⁴ Frulli, 'Question of Taylor's Immunity', 1124; Deen-Racsmány, 'Prosecutor v. Taylor', 307–11.

¹⁴⁵ *Taylor* para 57, acknowledges as much, albeit on the ground that any warrant is merely a *request* for assistance.

¹⁴⁶ Deen-Racsmány, 'Prosecutor v. Taylor', 318.

¹⁴⁷ *Yerodia*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal para. 75.

Further reading

- Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407 at 415.
- Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford, 2003) ch. 7.
- J. Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth, 1996).
- J. Craig Barker, 'The Future of Former Head of State Immunity After *Ex Parte Pinochet*' (1999) 48 *ICLQ* 937.
- Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 *EJIL* 853.
- Zsuzsanna Deen-Racsmany, 'Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and its Implications for Immunity' (2005) 18 *LJIL* 299.
- Eileen Denza, 'Ex Parte Pinochet: Lacuna or Leap?' (1999) 48 *ICLQ* 949.
- Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* (Columbus, 1999).
- Micaela Frulli, 'The Question of Charles Taylor's Immunity' (2004) 2 *JICJ* 1118.
- Paola Gaeta, 'Official Capacity and Immunities' in Cassese, *Commentary*.
- Paola Gaeta, 'Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case' (2003) 1 *JICJ* 186.
- David Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court' (2004) 20 *American University International Law Review* 7.
- Colin Warbrick, 'Immunity and International Crimes in English Law' (2004) 53 *ICLQ* 769.
- Colin Warbrick, Elena Martin Salgado and Nicholas Goodwin, 'The Pinochet Cases in the United Kingdom' (1999) 2 *Yearbook of International Humanitarian Law* 91.
- Arthur Watts, 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers' (1994–III) 247 *Hague Recueil*.
- Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute' (2001) 12 *CLF* 429.
- Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case' (2002) 13 *EJIL* 877.

21

Conclusions: The Future of International Criminal Law

21.1 Introduction

International criminal law has developed at an unprecedented rate since the early 1990s. It is too early for us to issue any final judgments but it is the purpose of this chapter to evaluate recent developments as far as possible, and to look to the future of international criminal law.

21.2 International courts and tribunals

It is a commonplace, because it is largely correct, that the catalyst for the revival of international criminal law was the creation of the ad hoc Tribunals by the Security Council in the early to mid 1990s. Although the project for an international criminal court had received some increased attention since its reinclusion on the General Assembly's agenda in 1989, this was not seen as likely to bear fruit. The creation of the ad hoc Tribunals, on the other hand, showed that such tribunals could be established in a reasonably short time, and the focus of debate shifted from the question whether such tribunals were a realistic possibility to how they could be improved.

The ad hoc Tribunals have been criticized almost from the start as being expensive and bureaucratic,¹ as well as producing what some consider show trials.² Nonetheless, these experiments (as that is what they were at their beginnings)³ have to be credited not only with a reasonable level of success in their own proceedings,⁴ but also with providing the impetus for the creation of what many thought was a near impossibility in the international legal order, a permanent international criminal court.⁵

The progression from Nuremberg to the ICC has been described as a long road ending in the triumph of the Rome Conference, hence the frequent use of the title 'From Nuremberg to The Hague' in writings on international criminal law.⁶ It has often been

¹ Ralph Zacklin, 'The Failings of the *ad hoc* Tribunals' (2004) 2 *JICJ* 541 at 542–3.

² See the discussion in Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

³ Which many thought would never get beyond the paper stage, see Antonio Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 *JICJ* 585 at 585–6.

⁴ See sections 7.2.5 and 7.3.4. ⁵ Ian Brownlie, *Principles of International Law* (5th edn, Oxford, 1998) 568.

⁶ Koskenniemi, 'Between Impunity' 34–5.

thought that the ICC will lead to the 'end of impunity' and it has been hailed as something of a panacea for international ills.⁷ But the euphoria which accompanied the adoption of the ICC Statute has given way to a hard-headed, sometimes cynical, realism about what can be achieved by an international court. The prosecutor will typically have to investigate and prosecute cases in situations of extreme practical and political difficulty.⁸ Furthermore, the ICC Statute has not been universally ratified and a number of States including, but not limited to, the US are either ambivalent about or opposed to the ICC.⁹ Various international initiatives, not the least those culminating in Security Council resolutions 1422(2002), 1487(2003) and 1497(2003), reflect the opposition of the US to the ICC.

That said, even many supporters of the ICC would not have predicted that 100 States would have ratified the ICC Statute by 2005, and early fears that only stable Western democracies would ratify, leaving the Court with little to investigate, have proved unfounded. The referral of the situation in Darfur, Sudan to the Court by the Security Council¹⁰ reflected unexpected Security Council support for the ICC¹¹ and the willingness of the US not to prevent reliance on the court where its own interests are not directly affected.

21.3 Developments in national prosecutions of international crimes

It ought not to be forgotten that the site of most international criminal law enforcement is not intended to be international courts. International tribunals have arisen because of the failure, or the absence, of national justice efforts, but they are not meant to replace them. One of the major roles which international judicial mechanisms have is the promotion of the more effective use of national criminal justice systems. The international courts and tribunals cannot deal with any but a handful of cases, and national systems must take a greater part in the prosecution of international crimes if international criminal law is to be effectively enforced.

This is particularly the case for the ICC. Owing to the principle of complementarity,¹² it is sometimes said that the ICC will have succeeded if it never has to prosecute anyone itself.¹³ Such assertions are overstated: if all the court did was to oversee domestic jurisdictions it would rapidly be seen as an extremely expensive way of doing so. Nonetheless, there is a great deal of truth in the claim that a major role of the ICC is to ensure that domestic jurisdictions act against international crimes. The role of the

⁷ On this discussion, see Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford, 2003) 1–2.

⁸ Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, 1–2 (hereafter 'Policy Paper'); and see ch. 8.5.

⁹ See section 8.4.3. ¹⁰ In resolution 1593(2005); see section 8.10.3.

¹¹ Few, even in 2004, would have quibbled with William Schabas's statement that a Security Council referral to the ICC 'now seems unthinkable': William Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 *EJIL* 701 at 702.

¹² See section 8.5. ¹³ Policy Paper, 4; and see section 8.5.

prosecutor is structured so that the court can act as a considerable incentive to States in ensuring that they prosecute international crimes and, where it is appropriate, assist them in doing so. This includes the passing of evidence and expertise. The prosecutor has already stated that the policy of the office of the prosecutor is to engage with governments to ensure prosecution of crimes within the jurisdiction of the ICC.¹⁴ In addition, ratification of the ICC Statute has prompted a reasonable number of States (although not enough) to adopt domestic criminal legislation covering the core international crimes.¹⁵ Against a background of States traditionally failing to implement international crimes into their domestic law,¹⁶ this in itself is a development worthy of note.

Universal jurisdiction has come under attack in recent years, and this has led, to some extent, to a retrenchment of universal jurisdiction in theory and in practice.¹⁷ Nonetheless, this retrenchment has occurred because of, with notable exceptions such as the *Eichmann* case, a move for universal jurisdiction from the warmth of the greenhouse of suggestion to the cold light of day-to-day international law. Universal jurisdiction, in some form or another, has been implemented into more States' domestic law than was the case in 1998. The existence of such jurisdiction and its possible exercise have plausibly had some impact on other States, who have looked to prosecute the commission of international crimes by their own nationals, in part to pre-empt such claims. There have also been some significant exercises of universal jurisdiction at the domestic level, which are sometimes forgotten in the debate over the precise ambit of the permission international law grants to States to assert it.¹⁸ The problems States have in cooperating with one another in prosecuting international crimes may, it is hoped, become less significant with the conclusion of new and more effective agreements on inter-State cooperation, including those at the regional level. The situation at present though cannot be described as satisfactory.¹⁹

One continued area of controversy is that of immunities. The ICJ in the *Yerodia* case has shown that international criminal law is, rightly or wrongly, still subject to aspects of the law on immunity.²⁰ Therefore, national (and international) courts have recognized that certain immunities still exist under general international law²¹ and this limits the possibilities for prosecuting international crimes in some instances, especially on the basis of extraterritorial jurisdiction. Immunities, which reflect some aspects of the international legal order, show that international criminal law has not established itself as a trump card in international law.²² As a result triumphalism about international criminal law would be misplaced.

¹⁴ Policy Paper, 3. ¹⁵ See section 4.4.

¹⁶ Menno Kamminga, 'Final Report on the Exercise of Universal Jurisdiction in Relation to Gross Human Rights Abuses' in International Law Association, *Report of the Sixty-Ninth Conference* (London, 2000) 403 at 412–14.

¹⁷ See section 3.5.4 ¹⁸ *Ibid.* ¹⁹ See chs. 5 and 19. ²⁰ On the ambit of these, see ch. 20. ²¹ *Ibid.*

²² As Judge *ad hoc* van den Wyngaert noted, the majority opinion in *Yerodia* did not even use the term: *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)* 14.2.2002, ICJ Rep 2002, Dissenting Opinion of Judge *ad hoc* van den Wyngaert, para. 6.

21.4 The trend towards accountability

In a statement released just after the Rome Conference, which adopted the statute for the ICC, Amnesty International claimed:

[t]he true significance of the adoption of the statute may well lie, not in the actual institution itself in its early years, which will face enormous obstacles, but in the revolution in legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves, or, if they fail to fulfil this duty, by the international community in accordance with the rule of law.²³

This assertion contains more than a grain of truth. The creation of the ICC reflects, and contributes greatly to, a significant cultural turn to accountability. Fifteen years ago, most of those accused of international crimes could sleep soundly, fairly sure that they would not be required to stand trial for their conduct. It is unlikely that Augusto Pinochet or Hissene Habré thought that international law would be brought to bear upon them. Both of them, to different extents, have been proved wrong, even if, on the basis of what had occurred since Nuremberg and Tokyo, their opinion had an empirical basis.

The ad hoc international criminal tribunals may well have been created out of motives that were, at best, mixed,²⁴ but the idea they contained, that of accountability for international crimes, was one which caught on. Ideas are important in international relations,²⁵ and this one caught the eye both of States and many non-governmental actors. As has been said, '[w]hat started out in 1993 as mostly a public relations ploy, namely to create an *ad hoc* tribunal to appear to be doing something about human rights violations in Bosnia without major risk, by 1998 had become an important global movement for international criminal justice.'²⁶

The existence of international criminal law is now challenging States to determine the place of justice in their foreign relations policy. It is notable that criminal justice has been structured into the work of the relevant UN agencies, and whenever the UN has a say in a post-conflict situation, accountability for international crimes appears on the agenda. This does not guarantee a particular response, but the fact that justice weighs in the scales is a transformation from the politics of impunity from which even the UN was not immune as recently as 1994.²⁷ The importance of international justice has been accepted by what some consider to be the primary international organ of *realpolitik*, the Security Council. For example, in resolution 1265(1999) the Security Council emphasized 'the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of

²³ Quoted in William Pace and Mark Thieroff, 'Participation of Non-Governmental Organizations' in Lee, *The Making of the Rome Statute* 396.

²⁴ See section 2.2.8. ²⁵ See Alexander Wendt, *Social Theory of International Relations* (Cambridge, 1999).

²⁶ David Forsythe, *Human Rights in International Relations* (Cambridge, 2000) 221.

²⁷ See Michael Scharf, 'Swapping Amnesty for Peace, Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 1.

international humanitarian law ... and [the Security Council] acknowledge[d] the historic significance of the adoption of the ICC Statute of the International Criminal Court'.²⁸ It must be conceded, by way of reminder, that 'present signals are not universally positive'²⁹ and the power of ideas is not always determinative. Nor should the capacity for States to bear a distinction between their public rhetoric and private positions be underestimated.

However, many of the criticisms of international criminal law which bedevilled it before, especially that of 'victor's justice', have been blunted, if not eradicated. It is true that selectivity remains a problem in international criminal law, but this is less so than before.³⁰ Also, selective justice is probably preferable to no justice at all, even though the legitimacy of international criminal law will be ensured only when it is clear that such crimes are prosecuted wherever, and by whomever, they are committed. The more States that ratify the ICC Statute, the less this critique will have purchase in relation to the applicability of the substantive law of the ICC.³¹

Having asserted the importance of international criminal law, States and others may, and will, according to a constructivist account, begin to internalize the values they have espoused, even if initially only rhetorically, and act upon them.³² Once States prosecute international crimes, even if it is on the basis that if they do not do so the ICC will or that they will be criticized internationally or domestically, this will have an effect on the way they perceive their interests. The more that international crimes are prosecuted, the more that doing so becomes normalized and States are likely to do so simply on the basis that it is what is done in relation to international crimes.³³

There have been suggestions that the current trend towards international criminal liability runs the risk of removing focus for liability from States.³⁴ There are a number of answers to such critiques. Where the conduct of those committing international crimes is attributable to a State, through the normal rules of State responsibility,³⁵ such responsibility is concurrent, rather than exclusive.³⁶ Pragmatically speaking, the reason for the rise of individual liability is also that State responsibility has not proved efficacious in achieving any of the specific aims of international criminal law; hence Leila Sadat's view that individual criminal liability has been revived, at least as much as for any other reason, out of a frustration with other mechanisms of ensuring

²⁸ 17.9.1999. ²⁹ Broomhall, *International Justice*, 3.

³⁰ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) 327–30.

³¹ Although on the limitations of this law see *ibid.*, chs. 4–6.

³² Robert Cryer, 'State Sovereignty vs International Criminal Law: Another Round?' (2005) 16 *EJIL* 979 at 994–6.

³³ *Ibid.*

³⁴ See the careful case made in Hazel Fox, 'The ICJ's Treatment of Acts of the State, and in Particular, the Attribution of Acts of Individuals to the State' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds.), *Liber Amoricum Shigeru Oda* (The Hague, 2001) 147.

³⁵ Which is frequently, although not inevitably, the case. For details on such rules see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, 2002).

³⁶ See, e.g. André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615.

responsibility.³⁷ Such a view is more than adequately supported by the classic statement of the Nuremberg IMT that ‘crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.³⁸ In the end, the critique ought to be seen not as undermining the importance of individual liability, but a reminder that it is not the only form of responsibility relevant to international crimes.

21.5 The development of international criminal law

International criminal law is a relatively new discipline and it does not pretend to be a complete system of criminal law. It is not intended to be a replacement for the totality of domestic criminal law; and there is no reason why it ought to be. It has inconsistencies and incoherencies that are the result of its formation in political negotiations.³⁹ Furthermore, within the parameters of international criminal law the ICC Statute is not the final word. Some have presented it as something close to definitive, even where it is controversial,⁴⁰ but Article 10 of the statute itself recognizes that the law may continue to develop. There is scope for further development, within limits, by courts including the ICC, although that court’s interpretive mandate is more ‘hemmed in’ than others have been.⁴¹

These considerations raise the possibility that different bodies of international criminal law will apply before different tribunals and there will be consequent problems not only of coherence but also in determining the precise customary position of controversial parts of international criminal law. This problem arises not only with the criminal tribunals but also in relation to the International Court of Justice in the context of State responsibility.⁴² There are already areas of divergence on substantive law between the ad hoc Tribunals and the ICC Statute,⁴³ and between all of those documents and some national laws.⁴⁴ This is unfortunate, although it must be said that there is far more evidence in support of propositions of customary international law than was previously the case. Some of the remaining problems can be mitigated by careful study of the law, which involves an appreciation of the relative authoritative-ness of the various sources and evidences of custom on point.

³⁷ Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (New York, 2002) ch. 3.

³⁸ Nuremberg IMT: Judgment and Sentences (1947) 41 *AJIL* 221.

³⁹ Broomhall, for example, correctly notes that ‘[b]ecause the judgement of states, individually and collectively, is subject to diverse extra-legal influences, the process of international criminalization will always be less orderly than its conceptual formulation’ (*International Justice*, 39).

⁴⁰ Robert Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Impact of the International Criminal Tribunals on the ICRC Customary Law Study’ (2006) 11 *Journal of Conflict and Security Law* 239 at 257–62.

⁴¹ See William Schabas, ‘Interpreting the Statutes of the ad hoc Tribunals’ in Lal Chand Vohrah *et al.* (eds.), *Man’s Inhumanity to Man: Essays in Honour of Antonio Cassese* (The Hague, 2003) 847 at 887.

⁴² For discussion of the different rulings of the ICJ (in the *Nicaragua* case) and ICTY (in *Tadić*) on the meaning of ‘effective’ or ‘overall’ control for the purpose of responsibility for the acts of others, see Report of the Study Group of the ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (GAOR A/CN.4/L.682 13 April 2006) paras. 49–52.

⁴³ Compare, for example Art. 7 of the ICC Statute with Art. 5 of the ICTY Statute, Art. 3 of the ICTR Statute and Art. 2 of the SCSL Statute.

⁴⁴ See, e.g. Australia and the International Criminal Court (Consequential Amendments) Act 2002, s. 268.115.

Such appraisals are not made simpler by suggestions that humanitarian law is inadequate to deal with the 'war on terror' or assertions that that law is already otiose.⁴⁵ These suggestions have been rejected by high authorities, including the US Supreme Court,⁴⁶ but they do raise relevant questions of the extent to which international criminal law norms (including those contained in the ICC Statute) ought to be revised.

Apart from discussion of terrorism, this issue arises perhaps most clearly with respect to the question of the extent to which the law of non-international armed conflict ought to be assimilated to that applicable in international armed conflict. Some take a very broad approach to the extent to which the two have already coalesced.⁴⁷ The ICTY has implied such a view, by suggesting that:

elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.⁴⁸

On the other hand, not all of the rules applicable to international armed conflict are easily applied to their civil war counterparts,⁴⁹ as the ICTY, in the same case averred:

only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and ... this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.⁵⁰

Where it is possible to do so, however, the case for unifying the law relating to international and non-international armed conflicts, both in treaty and customary international law, is very strong.⁵¹

There are other areas of international criminal law where there have been suggestions for growth or harmonization. One such area is the distinction between war crimes and crimes against humanity. An eminent authority in the area, Leslie Green, has suggested that the two crimes ought to be amalgamated.⁵² The fact that the contextual elements for the two crimes reflect different (if overlapping) situations militates against the advisability of this position.⁵³ Still, there may be room for harmonization of the

⁴⁵ See the discussion in Marco Sassoli, 'The Use and Abuse of the Laws of War in the "War on Terror"' (2004) 22 *Law and Inequality* 219–21.

⁴⁶ *Hamdan v. Rumsfeld*, 126 S Ct 2749 (2006). ⁴⁷ See Henckaerts and Doswald-Beck, *ICRC Customary Law*.

⁴⁸ *Tadić* ICTY A. Ch. 2.10.1995 para. 119.

⁴⁹ Marco Sassoli and Laura Olsen, 'Prosecutor v. Tadić' (1999) 93 *AJIL* 571 at 575–7.

⁵⁰ *Tadić* ICTY A. Ch. 2.10.1995 para. 126.

⁵¹ Colin Warbrick and Peter Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case' (1996) 45 *ICLQ* 691 at 698.

⁵² Leslie Green, 'Grave Breaches or Crimes Against Humanity?' (1997–1998) 8 *US Air Force Academy Journal of Legal Studies* 19.

⁵³ William Fenrick, 'Should Crimes Against Humanity Replace War Crimes' (1999) 37 *Columbia Journal of Transnational Law* 767.

physical elements of similar offences, such as unlawful confinement and arbitrary imprisonment. The expansion of international criminal law into some areas that it does not adequately cover, such as the intentional or reckless creation of mass starvation, would also seem appropriate,⁵⁴ and go some way to accepting the reality of structural, as well as direct violence. That said, further expansion should be supported by credible legal methods, and one must also recall that ‘there might be a fundamental incompatibility between the political agendas of States and the process of codifying, in a progressive manner . . . [international criminal law]’.⁵⁵

Another area in which there may be further development is that of corporate liability for criminal conduct. The ad hoc Tribunals and the ICC have jurisdiction only over natural persons; there was strong support at the Rome Conference for including legal entities, but it did not prove possible to reach agreement.⁵⁶ Financial gain – whether from the acquisition of natural resources or from arms trading – may be either the cause of atrocities committed in conflicts or the reason for their continuation, and accountability would be increased if it were possible to prosecute directly the companies participating in such atrocities. This is an area which deserves more study in relation to both international and national jurisdictions.

As we approach the first Review Conference of the ICC in 2009 or 2010 there is a possibility of adding new crimes to the ICC Statute. This represents an opportunity to improve the substantive law included in the ICC Statute, but, at the risk of being confounded by developments (and international criminal law has a history of overshooting, as well as falling short of hopes and expectations), it is unlikely that significant changes will be made to the substantive law of the ICC Statute at the review conference.⁵⁷ There is little more agreement on the ambit of terrorism than there was in 1998.⁵⁸ The question of including aggression within the jurisdiction of the ICC will probably prove similarly controversial, in spite of the efforts of the Special Working Group on the Crime of Aggression.⁵⁹ Even if there were to be agreement on additions to the ICC Statute, the heavy strictures of the amendment provisions of the statute⁶⁰ will make rapid expansion of the jurisdiction of the ICC highly unlikely.

21.6 The path forward (or back?)

In one respect, international criminal law has probably reached the end of an era. That era is the era of ad hoc international tribunals. The critiques of ad hoc tribunals, not least of having to reinvent, to various extents, the wheel, have taken hold. The referral of

⁵⁴ So long as it is carefully defined. See David Marcus, ‘Famine Crimes in International Law’ (2004) 97 *AJIL* 245.

⁵⁵ Sadat, *Justice for the New Millennium*, 261; see also Broomhall, *International Justice*, 18, 131.

⁵⁶ See Per Saland, ‘International Criminal Law Principles’ in Lee, *The Making of the Rome Statute*, 199.

⁵⁷ There may however be a successful move to delete Art. 124.

⁵⁸ See section 14.2.3. For a view to the contrary, see Antonio Cassese, ‘Terrorism as an International Crime’ in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford, 2004) 213.

⁵⁹ See section 13.5. ⁶⁰ ICC Statute, Arts. 121, 122.

the situation in Darfur to the International Criminal Court rather than setting up an ad hoc tribunal at the global or local level represents a watershed, if an ambiguous one.

As the ICC Statute only entered into force in July 2002, it is too early to assess its work critically at a general level. The ICC's first trial has yet to take place, and it has yet to issue significant decisions on fundamental aspects of its law equivalent to the seminal *Tadić* and *Blaskić* decisions of the ICTY.⁶¹ In some ways, the environment, both political and practical, which the ICC faces for its work is worse than that faced by the ad hoc Tribunals. It does not have the strong powers and the clear (if at times rhetorical) support of the Security Council which the ad hoc Tribunals had at their outset. On the other hand, the ICC operates against a background of increased acceptance of international criminal law, far greater than existed in 1993.

An optimistic forecast for the ICC would look to the diminution of opposition to the court in the next decade or so, as it proves that it is able to deal with some of the world's greatest atrocities, and fears of political prosecutions die down in the light of experience. This will require, inter alia, careful but objectively justifiable action on the part of the ICC prosecutor and sound reasoning by its judicial chambers. Procedures must be applied in a manner that is perceived as fair, yet efficient, and representing a proper balance of sometimes competing interests.⁶² An outcropping of such action would, it could be hoped, lead to States trusting the court, thus becoming more willing to cooperate with it. The Court will be, to a very considerable extent, reliant on the willingness of States to assist the Court in every form of cooperation and enforcement, including provision of intelligence, arrest of suspects and acceptance of convicted persons for imprisonment.⁶³ The ICC will fail unless it is properly resourced.⁶⁴ If it is to make any difference, the role of the Court and its needs and capabilities will have to become a part of the general policy of States in strengthening or restoring international peace and security.

The ICC should not however be the cynosure of international criminal law. Domestic proceedings have many advantages over international ones, including the benefit for the victims of having the trial in their own country, and local enforcement mechanisms such as police and prison systems; but they may need the legitimacy that an international imprimatur can ensure. The best way forward for international criminal law, in our view, is for there to be a synergy between international and domestic efforts to ensure accountability for international crimes.⁶⁵ International assistance for national prosecutions of international crimes will continue and, it is to be hoped, lead to further entrenchment of international criminal law in the area, and maybe even globally.

Too much should not be claimed for international criminal law. The purposes of an international trial which are sometimes advanced – for example, recording history,

⁶¹ See sections 7.2.4 and 19.1 ⁶² See ch. 17.

⁶³ See, e.g. Hans-Peter Kaul, 'Construction Site for More Justice: The International Criminal Court After Two Years' (2005) 99 *AJIL* 370 at 383.

⁶⁴ A serious failure in this respect is the refusal of the Security Council to allow UN funding of the Darfur referral; see Robert Cryer, 'Sudan, Resolution 1593 and International Criminal Justice' (2006) 19 *LJIL* 195 at 206–8.

⁶⁵ See also William W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 *Michigan Journal of International Law* 1.

reconciling communities, telling the victims' story – may sometimes run counter to the interests at the centre of a criminal trial, namely to determine guilt or innocence while respecting the rights of the accused; further, history may actually be distorted in the process.⁶⁶ The necessary selection of serious cases also means that ambitions of this kind will only partially be satisfied. There are additional approaches to bringing reconciliation in conflict situations and post-conflict societies.⁶⁷ The ICC indictments of the LRA leaders illustrate the problems of taking decisions in the context of apparently conflicting requirements of peace and justice. More work needs to be done on the particular difficulties of delivering non-judicial forms of justice and how to calibrate criminal justice mechanisms with other forms of justice. The broader aspects of this programme require a detailed examination of the complex causes of mass crimes, including the role of those financing and profiting from atrocities.⁶⁸ This will not be a simple task.

International courts and tribunals operate in an international legal system which is made up of sovereign States. Just as it is still only an aspiration that all States should accept the rule of law in international relations generally (and thus, for example, subordinate their policy on the use of force to international law), so there are still huge difficulties in achieving the rule of law in international criminal justice, in the sense of the consistent and impartial enforcement of the law.⁶⁹ That would require more States accepting that their policy be shaped 'on a basis that is less responsive to geopolitical realism, and more in line with legal/moral factors and a genuine commitment to global humane governance as a long-term goal'.⁷⁰ In many ways the development of international criminal law is a metonym for the extent to which an international community can be said to exist.⁷¹ The evidence of whether international society has developed into an international community is mixed.⁷²

All that said, between the late 1940s and the early 1990s international criminal law was a field of law which was rarely seen as relevant by many international lawyers or governments, and which was rarely studied or written on, let alone taught as a separate subject.⁷³ Now it is a major area of study and practice. Fifteen years ago few would have thought that a textbook like this would be useful, or necessary. It is our hope that, by aiding understanding of the law, this book will contribute in a small way to the objectives of international criminal law as a whole, the bringing to justice, and finally the deterrence, of those responsible for the atrocities that continue to plague our world.

⁶⁶ Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, 1997). ⁶⁷ Section 2.3.

⁶⁸ For acceptance of such a view see, e.g. Security Council resolution 1306 5.7.2000 on 'blood diamonds'.

⁶⁹ Broomhall, *International Justice*, 53–4.

⁷⁰ Richard Falk, 'Telford Taylor And The Legacy Of Nuremberg' (1999) 37 *Columbia Journal of Transnational Law* 693 at 716.

⁷¹ Frédéric Megrét, 'Epilogue to an Endless Debate, The International Court's Third Party Jurisdiction and the Looming Revolution of International Law' (2001) 12 *EJIL* 247.

⁷² See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd edn, London, 1995).

⁷³ The most notable exception to this trend were the voluminous writings on the subject by M. Cherif Bassiouni.

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