

3-2006

# The 1998 Rome Statute of the International Criminal Court: Scope of the Subject Matter and Personal Jurisdiction of the Court Towards Individual Criminal Accountability

Remigius Oraeki Chibueze

Golden Gate University School of Law, [rchibueze@ggu.edu](mailto:rchibueze@ggu.edu)

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/theses>

 Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

Chibueze, Remigius Oraeki, "The 1998 Rome Statute of the International Criminal Court: Scope of the Subject Matter and Personal Jurisdiction of the Court Towards Individual Criminal Accountability" (2006). *Theses and Dissertations*. Paper 51.

This Dissertation is brought to you for free and open access by the Student Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

**GOLDEN GATE UNIVERSITY SCHOOL OF LAW  
SAN FRANCISCO**



**The 1998 Rome Statute of the  
International Criminal Court:  
Scope of the Subject Matter and  
Personal Jurisdiction of the Court -  
Towards Individual Criminal Accountability**

A dissertation submitted to Golden Gate University School of Law in partial fulfillment of the requirements for the degree of Scientiae Juridicae Doctor (S.J.D.)

**MARCH 23, 2006**

**By**

**© Remigius Oraeki Chibueze, Esq.**

Attorney-at-Law and Counselor, State Bar of California; Solicitor & Advocate of the Supreme Court of Nigeria; S.J.D., LL.M., Golden Gate University School of Law, San Francisco; LL.M., University of Alberta, Canada; B.L. Nigerian Law School; LL.B (Hons), University of Benin, Nigeria.



*This dissertation is dedicated to the memory of my mother – Catherine Chibueze*

*AND*

*My loving wife – Shannell LáMae Chibueze  
(Osodieme)*

## *ACKNOWLEDGEMENT*

To God be the glory. My profound appreciation goes to Golden Gate University School of Law for awarding me the International Legal Studies Merit Tuition Scholarship which provided me with the initial financial support that made it possible for me to commence this program.

I am very grateful to Professor Sompong Sucharitkul, Distinguished Professor of International and Comparative Law, Associate Dean and Director of S.J.D. and LL.M. in International Legal Studies for his support and for accepting to chair my dissertation committee. Also, I wish to express my appreciation to Professor Jon H. Sylvester, Associate Dean for Graduate Programs and Professor Christian Nwachukwu Okeke, Co-Director of S.J.D. and LL.M. in International Legal Studies for accepting to participate as members of my dissertation committee.

My deepest appreciation goes to my loving wife Shannell LáMae Chibueze for her love, kind heart, support and for constantly prodding me to complete this study. I thank her for her patience, devotion and sacrifices. I also thank the Chibueze family particularly my kid brothers Polycarp and Anthony Chibueze for your faith in me.

Finally, I wish to thank those who in one way or the other supported me throughout my program. My sincere appreciation to Professor Christian & Justina Okeke, Raphael & Mary-Jane Okafor, Mike & Chinwe Anigbogu, and Innocent & Ifeoma Okeke for your encouragement. Daniel Osunde, Nduka & Sheri Ukoha-Ajike, Maxwell & Carmen Njelita, my little friend Jada, Chika Nwoko, David & Nwayieze Iyalomhe, Dr. Emeka Duruigbo, George Oranuba and Oliver Orji for your friendship. To others I am unable to mention, I hold all of you dearly in my heart. Thank you.

## *ABSTRACT*

The principle of individual criminal responsibility evidences the recognition by the international community that crimes against international law are committed by individuals, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

This principle which was first propagated by the Nuremberg tribunal has now been confirmed and codified by the international community in the Rome Statute of the International Criminal Court. The Rome Statute established a *sui generis* permanent international criminal court and unequivocally provides that a person who commits a crime within the jurisdiction of the Court shall be held individually responsible and liable for punishment.

This study explores this undertaking by the international community to replace the culture of impunity with the culture of accountability. The study celebrates the historic establishment of the Court but suggests that it is not yet time for hurrah. The international community must demonstrate its support for the Court by mustering the political will to cooperate fully with the Court and free the Court from inherent bottlenecks in the Statute that may restrict the effectiveness of the Court.

## DESSERTATION TOPIC

The 1998 Rome Statute of the International Criminal Court:  
Scope of the Subject Matter and Personal Jurisdiction of the Court  
Towards Individual Criminal Accountability

By

**Remigius Oraeki Chibueze Esq.**

Attorney-at-Law and Counselor, State Bar of California; Solicitor & Advocate of the Supreme Court of Nigeria; S.J.D., LL.M., Golden Gate University School of Law, San Francisco; LL.M., University of Alberta, Canada; B.L. Nigerian Law School; LL.B (Hons), University of Benin, Nigeria.

## CHAPTER ONE

---

### INTRODUCTION

---

The genre of law referred to as international criminal law deals with the proscription and the prosecution of individuals who commit egregious crimes that threaten the peace and security of the international community.<sup>1</sup> The rationale for the prosecution of individuals who violate international crimes is to ensure an international criminal justice system that does not allow any safe heaven for an accused person.<sup>2</sup> Therefore, the goal of international criminal justice is to establish a system that ensures the prosecution of an accused regardless of his or her country of nationality or position.<sup>3</sup>

The agitation of international criminal justice was originally staunchly resisted by States which oppose the notion that international law should regulate behavior of governments over their nationals. Such notion of direct international regulation of nationals was considered a heresy, let alone the suggestion that international law should proscribe accountability for individuals accused of criminal infractions.<sup>4</sup> This is because the body of laws generally referred to as international law was conceptually designed to

---

<sup>1</sup>The term “international community” is used to refer to the group of countries as represented in the United Nations.

<sup>2</sup> United Nations (UN) Secretary General Kofi Annan echoed that the goal of the International Criminal Court (ICC) is to “ensure that *no ruler*, no State, no junta, and no army anywhere can abuse human rights with impunity.” See, United Nations, Rome Statute of the International Criminal Court: Overview, available at: <http://www.un.org/law/icc/general/overview.html> (last visited March 6, 2006) [hereinafter ICC Overview].

<sup>3</sup> *Id.* (indicating that we need international criminal court *inter alia*, “to achieve justice for all”, “to end impunity”, “to help end conflicts”, “to remedy the deficiencies of ad hoc tribunals”, “to take over when national criminal justice institutions are unwilling or unable to act”, and “to deter future war criminals”).

<sup>4</sup> Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 4 (Oxford, 2<sup>nd</sup> Ed. 2001).



provide rights and obligations primarily to States. Individuals were not regarded as subjects of international law but third party beneficiaries.<sup>5</sup>

The notion that States are the primary subjects of international law was entrenched by the Peace Treaty of Westphalia of 1648<sup>6</sup> which led to the disintegration of western Christendom and inspired a universalization of international relations and, therefore, of international law.<sup>7</sup> The Peace Treaty of Westphalia reflected the emergent political philosophy of statehood premised on the theory of political sovereignty as the cornerstone of the rights and duties of the various States that came into existence.<sup>8</sup> International law was therefore developed along statehood. Thus, according to the positive school<sup>9</sup> which overshadowed the field of international law from late eighteenth century, international law is concerned primarily with relations between States and between their sovereigns.<sup>10</sup> Under the positive school of thought, State sovereignty was absolute and inviolable.<sup>11</sup>

Accordingly, many States legislative practice recognizes that the first and best established jurisdictional principle is “territoriality.” Territoriality is considered the

---

<sup>5</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 4, at 4.

<sup>6</sup> The Peace Treaty of Westphalia is a peace settlement enacted in 1648. This treaty ended the war between Spain, the Dutch, and Germany and introduced international legal doctrine that is premised on non-interventionist concepts including sovereignty, self-determination, territorial integrity, and consent. Leo Gross, *The Peace of Westphalia, 1648-1948*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 25 (Leo Gross ed., 1969) [hereinafter *The Peace of Westphalia*].

<sup>7</sup> After the Peace Treaty of Westphalia, the French, the German, and the Swedish princes to form a slack confederation of independent states. See Benjamin B. Ferencz, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* 8 (Oceana Publications, Inc., 1<sup>st</sup> ed. 1980).

<sup>8</sup> Taslim O. Elias, *The Doctrine of Intertemporal Law*, 74 *AM. J. INT'L. L.* 285 (1980).

<sup>9</sup> The Positive school of thoughts displaced the Naturalist school of thoughts comprising legal commentators such as Hugo Grotius, Francisco de Vitoria, and Francisco Suarez in the sixteenth and seventeenth centuries. According to the Naturalist school of thoughts, law was “found, not made” as it was derived from abstract and universal principles of justice. Consequently, there was little distinction, if any, between national and international law because the same principles were supposed to bind all people in all places. See Peter Malanczuk, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 15-16 (Routledge, 7<sup>th</sup> rev. ed. 1997).

<sup>10</sup> *Id.*, 118; Steven R. Ratner & Jason S. Abrams, *supra* note 4, at 4.

<sup>11</sup> *Id.*

normal, and nationality the exceptional, basis for the exercise of jurisdiction.<sup>12</sup> Under this scheme, States have the primary responsibility to prosecute those responsible for grave breach of human rights abuses such as genocide, crimes against humanity, and war crimes violations in their own courts.<sup>13</sup>

While it is settled that States are the primary subject of international law, international law scholars have continued to query whether international law as a legal system recognizes other individuals and non-state actors as persons or subjects of international law.<sup>14</sup> As noted above, during the early stages of the development of international law, States were generally regarded as the only entity capable of possessing international legal personality. And international law was traditionally defined as the law that governs relations between States.<sup>15</sup> International law commentators were unwilling to accept that a non-state actor can be a subject of the international legal system.<sup>16</sup> On the other hand, where they acknowledge that non-state actors possess rights and obligations under international law, this was considered as emanating from their relation or dependence upon a State, that is, such rights and obligations are purely derivative.<sup>17</sup>

---

<sup>12</sup> Restatement (Third) of Foreign Relations of the United States, § 402 cmt. (American Law Institute, 1987). Note however that some states' legislative practice including the U.S. also recognize that a state may exercise universal jurisdiction to define and punish certain offenses of universal concern which are recognized by the community of nations, such as piracy, the slave trade, attacks on or hijacking of an aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in section 402 are present.

<sup>13</sup> Jules Deschenes, *Toward International Criminal Justice*, in *PROSECUTION OF INTERNATIONAL CRIMES*, 29, 32 (Rogers Clark & Madeleine Sann, eds., Transnational Publishers, 1<sup>st</sup> ed. 1996).

<sup>14</sup> Hugh M. Kindred et al. eds., *INTERNATIONAL LAW AS CHIEFLY INTERPRETED AND APPLIED IN CANADA* 4<sup>th</sup> ed. 271(1987).

<sup>15</sup> See L. Oppenheim, *INTERNATIONAL LAW: A TREATISE* 5 (7<sup>th</sup> ed. 1948); *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (Ser. A) No. 10, at 18.

<sup>16</sup> See D.P. O'Connell, *INTERNATIONAL LAW* 80 (2nd ed. 1970) (observing that "a half century ago the international lawyers could content themselves with the proposition that States only are subjects of international law").

<sup>17</sup> See Thomas Buergenthal & Harold G. Maier, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 1 (1990).

States played a pivotal role towards the formation of the international legal order, and international society was organized as a matter of law around the existence of States.<sup>18</sup> However, in the past 75 years, there have been increased opportunities for interaction between States and individuals mainly due to the improvement in technology especially in the area of computerized information; the end of World War II; and the disintegration of the Soviet Union which led to the end of the Communist government.<sup>19</sup> As States became to take active interest in commercial activities, States began to gradually embrace the concept of restrictive sovereign immunity.<sup>20</sup> Similarly, these period have witnessed increase in global problems in areas such as the environment, energy, migration, overpopulation, human rights and international crimes, natural resources, and trade. Also, from the early twentieth century, the grip of the positive school of thoughts' idea on the inviolability of State sovereignty began to dwindle.<sup>21</sup>

Thus, the continued propagation of the view that public international law applies only to States and therefore only States could be persons or subjects of international legal system is misleading and erroneous.<sup>22</sup> Equally mistaken is the argument that the rights and duties conferred on non-state entities under international law are solely derivative.<sup>23</sup>

---

<sup>18</sup> Ian Brownlie, A Rebirth of Statehood, in Malcolm D. Evans, ed., ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE 5 (1996).

<sup>19</sup> James E. Hickey, Jr., The Source of International Legal Personality in the 21<sup>st</sup> Century, 2 HOFSTRA L POL'Y SYM 1, 2 (1997).

<sup>20</sup> Peter Malanczuk, *supra* note 9, at 119. Restrictive sovereign immunity is generally referred to as qualified sovereign immunity under which a State retains immunity from lawsuits based on its official public acts, but may be subject to a foreign State's jurisdiction regarding claims arising out of its private acts, such as commercial behavior. See, Jerrold L. Mallory, Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings, 86 COLUM. L. REV. 169, 173 (1986).

<sup>21</sup> Ratner & Abrams, *supra* note 4, at 4.

<sup>22</sup> See, Hans Kelsen, GENERAL THEORY OF LAW AND STATE 342 (Anders Wedberg Trans., 1949); Barry Carter & Philip R. Trimble, INTERNATIONAL LAW 411 (1991).

<sup>23</sup> See, Pasquale Fiore, INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION OR THE LEGAL ORGANIZATION OF THE SOCIETY OF STATES 36, 51, 109 (5<sup>th</sup> ed. 1918) (noting as early as 1890 that the rights of the individual at international law are not solely those rights the individual enjoys as a citizen of a State. Fiore referred with approval Article 40 of the Act of Berlin of July 13, 1878 (which

As aptly observed by Oliver W. Holmes in 1881, “the life of the law has not been logic; it has been experience.”<sup>24</sup> And as noted by one of the leading authority on international criminal law:

the history of international criminal law is one derived by facts, characterized by practical experiences, dominated by pragmatism, and constantly gripped by the conflicting demands of *realpolitik* on the one hand, and those of justice on the other.<sup>25</sup>

The facts are that “more than 250 conflicts have occurred since the end of World War II, causing anywhere between 70 and 170 million casualties.”<sup>26</sup> It is also a fact that States have largely failed since the end of the Nuremberg and Tokyo trials to fulfill the responsibility to prosecute the perpetrators of these heinous crimes.<sup>27</sup> As a result, history is illustrative of the fact that those individuals responsible for committing crimes against mankind are rarely held accountable for their actions.<sup>28</sup>

On the other hand, experience has shown that the act of an individual in one country especially with respect to atrocious crimes has the capacity to resonate beyond the boundaries of his or her State of nationality. Also, experience has shown that some of the atrocious crimes are committed by individuals with the authority of the State.<sup>29</sup> Experience has equally shown that with exception of few examples, States have been reluctant to hold such individuals accountable for their actions.<sup>30</sup> Hence:

---

extended rights to subjects of Serbia and argued that some rights at international law ran directly to the individual human being) Id. See also, Hans Kelsen, *supra* note 21 at 345-48.

<sup>24</sup> Oliver W. Holmes, THE COMMON LAW 1(Little, Brown & Co.1881).

<sup>25</sup> M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, 18 (2003).

<sup>26</sup> M. Cherif Bassiouni, The Need for International Accountability, in INTERNATIONAL CRIMINAL LAW 3 (M. Cherif Bassiouni ed., 1986).

<sup>27</sup> Jules Deschenes, *supra* note 13, at 32.

<sup>28</sup> *Id.*

<sup>29</sup> Ratner & Abrams, *supra* note 4, at 1.

<sup>30</sup> *Id.*

for centuries, in tyrannical states, governmental officials could act with impunity; and while the rise of liberal government over the past some 300 years has led to an overall improvement in the human rights records of some states, it has not, until very recently, opened the door to punishment of those officials who might continue to violate fundamental individual rights.<sup>31</sup>

Therefore, there have been persistent and concerted agitation for international criminal justice founded on the principle of individual accountability for egregious conducts considered crimes under international law. This agitation for international criminal justice propels the development of international criminal law. The movement for international criminal justice is comprised of individuals from all walks of life, nongovernmental organizations with varied interests, and governments from different systems and parts of the world. The champions for this movement varied from time to time but at any time, there were always sufficient groups to keep the movement alive. At some point, champions of the movement include but are not limited to victims of atrocious crimes, survivors of genocidal wars, victor super powers, human rights nongovernmental organizations, and international governmental organizations.

Thus, notwithstanding States' initial rejection of international criminal law and creation of international criminal institution, nongovernmental organizations, international organizations, and other like minded institutions have continued to demand that justice be done to those responsible for egregious international crimes. As a result, the last decade has witnessed unprecedented determination to create norms and establish institutions of international criminal law of accountability for individuals responsible for violations of the most egregious crimes recognized by international law. As has been aptly stated by a commentator:

---

<sup>31</sup> Ratner & Abrams, *supra* note 4, at 1-2.



in these fields, the individual state is powerless, or at least limited, in its capacity to preserve peace and human rights effectively. Interstate cooperation in the form of international governmental organization has increased rapidly since the end of World War II. This international cooperation is reflected by the progressive formulation of an international public interest and by states acting “in the public interest.”<sup>32</sup>

The growing concerns of the international community resulted in a demand for international criminal prosecution in an international criminal tribunal for crimes recognized under customary international law as a threat to international peace and security. Due to the unending quest for justice, individual accountability for certain crimes, which is the catalyst for international criminal law, became established as general principle of international law. One area where the efforts to hold non-state actors accountable for violations of international law has been persistent and is now becoming successful is individual accountability to certain egregious crimes recognized under international law such as genocide, crimes against humanity, and war crimes.

Evidently, the influence of non-state actors in the last five decades towards the shaping of international law has resulted in a reconsideration of the view that under international law, States enjoy monopoly of international legal personality to the complete exclusion of all other entities operating on the international plane.<sup>33</sup> Many international law scholars are now willing to concede that non-state entities such as intergovernmental organizations,<sup>34</sup> non-governmental organizations,<sup>35</sup> human beings,<sup>36</sup>

---

<sup>32</sup> Stephan Hobb, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 *IND. J. GLOBAL LEG. STUD.* 191, 192 (1997).

<sup>33</sup> As separately observed by Justice Titunov and Dr. Okeke, early Soviet international law scholars held tenaciously to this view. See Oleg I. Titunov, *The International Legal Personality of States: Problems and Solutions*, 37 *ST. LOUIS U.L.J.* 323, 326-327 (1993); Christian N. Okeke, *International Law in the Nigerian Legal System*, 27 *Cal. W. Int'l L.J.* 311, 318-319 (1997).

<sup>34</sup> Intergovernmental organizations refer to organizations whose membership is reserved exclusively to States. This will include intergovernmental organizations of international character such as the United

and corporations<sup>37</sup> may be endowed with varying degrees of international legal personality.<sup>38</sup> Also, States have recognized the concept of individual criminal responsibility<sup>39</sup> even while rejecting that of State criminal responsibility.<sup>40</sup>

Modern definition of international law now recognizes the fact that it is no longer a legal system that concerns itself solely with affairs of States. But that it is a law that deals “with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”<sup>41</sup> Therefore, as noted by one of the commentators on subjects of international law, “to continue to maintain that international law regulates the affairs and relations of

---

Nations and its specialized agencies. It also includes regional organizations such as the European Union, Organization of African Unity, Organization of American States, etc.

<sup>35</sup> Nongovernmental Organizations (more commonly referred to as NGOs) is an association of like minded individuals directed towards pursuing a common objective. Examples of NGOs will include the International Red Cross Society; The International Olympic Committee; Amnesty International, and Greenpeace International. See generally, Karsten Nowrot, Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law, 6 *IND. J. GLOBAL LEG. STUD.* 579 (1999); Stephan Hobb, *supra* note 32; David J. Ettinger, The Legal Status of the International Olympic Committee, 4 *PACE Y.B. INT’L L.* 97 (1992).

<sup>36</sup> Myres S. McDougal et al., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 96 (1980), P.K. Menon, The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, 1 *J. TRANSNAT’L L. & POL’Y* 151 (1992)

<sup>37</sup> Corporations here will refer to multinational and/or transnational private business companies operating in more than two or more countries. It has been observed that these kinds of corporations exert great influence in shaping international law and policies. Thus, it is been argued that such corporations should enjoy international personality under international law and that they should be registered by the United Nations. See, Jonathan I. Charney, Transnational Corporations and Developing International Law, 1983 *Duke L.J.* 748 (1983). For a contrary opinion, see Francois Rigaux, Transnational Corporations, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 121, 129.

<sup>38</sup> Louis Henkin, et al., *INTERNATIONAL LAW* 242 (1993), Christian N. Okeke, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY* 18 (1974); James E. Hickey, *supra* note 19, at 2-3.

<sup>39</sup> Prakash Sinha, The Position of the Individual in an International Criminal Law in, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 122-34 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

<sup>40</sup> Fritz Munch, Criminal Responsibility of States, in M. Cherif Bassiouni, *supra* note 25, at 122-29; Farhad Malekian, *INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES* (1985).

<sup>41</sup> See ALL, Restatement of the Foreign Relations Law of the United States (Third), s. 101 (1987).

states alone, that states are therefore the sole subjects of international law ... ignores both reason and reality.”<sup>42</sup>

Consequently, the notion that international law should regulate only the behavior of States is no longer tenable. Rather, the realities of the global nature of the new world order favors the suggestion that international law should proscribe accountability for individuals accused of criminal infractions.<sup>43</sup> No where is this trend more pronounced and entrenched than in the 1998 Rome Statute of the International Criminal Court (ICC) which was signed on July 17, 1998, by 120 countries<sup>44</sup> and entered into force on June 20, 2002.<sup>45</sup>

The ICC Statute established a permanent international criminal court to prosecute individuals accused of committing the crimes of genocide, war crimes, and crimes against humanity which occurred after July 01, 2002.<sup>46</sup> The idea behind the establishment of ICC is to bring an end to the culture of impunity by holding individuals criminally accountable for committing crimes prohibited under international law. Thus, this study focuses on the 1998 Rome Statute of the international criminal court with respect to its ability to ferment the principle of individual criminal accountability under international criminal law. The objective of this study is to critically examine the personal jurisdictional scope of the ICC with a view to determine whether the ICC is capable of achieving the objective behind its establishment.

---

<sup>42</sup> Christian N. Okeke, *supra* note 38, at 18.

<sup>43</sup> Ratner & Abrams, *supra* note 4, at 4-5.

<sup>44</sup> The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998), *reprinted* in 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

<sup>45</sup> *Id.*, art. 126, provides that the Statute shall come into force when ratified by 60 countries.

<sup>46</sup> *Id.*, art. 1.

This study is divided into four major parts. Part I examines the evolution of the principle of individual criminal accountability in international criminal law. It traces the historical development of the principle of individual criminal accountability through the examination of the jurisdictional frameworks within which ad hoc tribunals were established up to World War II. In this wise, part one will include an examination of early attempts to try war criminals. Also, Part II includes a discussion on World War II trials by ad hoc tribunals such as the International Military Tribunal in Nuremberg,<sup>47</sup> the International Military Tribunal for the Far East,<sup>48</sup> and trials before the Military Tribunals in Germany and the Far East Countries.<sup>49</sup> Part II also discusses the development that followed the aftermath of World War II trials such as the conclusion of international criminal law conventions that include the Genocide Convention<sup>50</sup> and the four Geneva Conventions<sup>51</sup> and its additional protocols.<sup>52</sup>

---

<sup>47</sup> See Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Nuremberg, September 30 - October 1, 1946), 41 AM. J. INT'L L. 172 (1947) [hereinafter Nuremberg Judgment].

<sup>48</sup> Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 *Bevans* 27 [hereinafter IMTFE Charter].

<sup>49</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, *reprinted* in Benjamin B. Ferencz, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980) [hereinafter CCL No. 10].

<sup>50</sup> Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, 78 U.N.T.S. 277 (entered into force on January 12, 1951) [hereinafter Genocide Convention].

<sup>51</sup> The Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 U.N.T.S. 970 [hereinafter Geneva Convention I]; The Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea of August 12, 1949, 75 U.N.T.S. 971 [hereinafter Geneva Convention II]; The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. 972 (entered into force on October 21, 1950) [hereinafter Geneva Convention III]; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 973 [hereinafter Geneva Convention IV].

<sup>52</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 ILM 1391 (1977) [hereinafter Protocol I Additional to the Geneva Conventions]; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 16 ILM 1442 (1977) [hereinafter Protocol II Additional to the Geneva Conventions].

Part II will briefly discuss the establishment and the jurisdiction of the International Criminal Tribunals for the former Yugoslavia (ICTY)<sup>53</sup> and Rwanda (ICTR)<sup>54</sup> respectively. Furthermore, it will examine the establishment and jurisdiction of the Special and Mixed International Tribunals in Sierra-Leone,<sup>55</sup> Timor-Leste,<sup>56</sup> and Cambodia.<sup>57</sup>

Part III examines the history, the enabling environments, and the dynamics that lead to the creation of the international criminal court. It focuses on the subject matter and personal jurisdiction of the ICC. It examines the procedures for triggering the jurisdiction of the Court. Also, the study will discuss the ICC's exercise of jurisdiction and the grounds for challenging the admissibility of a case and ICC's personal jurisdiction.

Part IV highlights the inherent bottlenecks to the exercise of the ICC jurisdiction. In particular, this part of the study will analyze the principle of complementarity between the ICC and States Parties to the ICC Statute. Inevitable issues to be examined under the complementarity discussion will include the rationale for the primacy of a State's first

---

<sup>53</sup> See The Statute of the International Criminal Tribunal for the former Yugoslavia, 3217th mtg., U.N. Doc. S/25704 (1993), *reprinted* in 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute]. The ICTY Statute was unanimously adopted by the Security Council at its 3217th meeting, May 25, 1993, for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. See also S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827(1993), *reprinted* in 32 I.L.M. 1203 (1993).

<sup>54</sup> See Security Council Resolution Establishing the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), *reprinted* in 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute]. The ICTR was set up to prosecute those responsible for the genocidal war in Rwanda.

<sup>55</sup> The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter Sierra Leone Special Court Agreement], annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>

<sup>56</sup> Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET, 1.1, 1.3, 2.3, U.N. Doc. UNTAET/REG/2000/15 (2000) [hereinafter Regulation 2000/15].

<sup>57</sup> Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N. GAOR 3d Comm., 57th Sess., Annex, Agenda Item 109(b) U.N. Doc. A/57/806 (2003) [hereinafter March Agreement].



option to exercise jurisdiction; the bases for holding that a State is unable and/or unwilling to prosecute. Additionally, the legality of the so called article 98 immunity agreement will be discussed.

In conclusion, this study will argue that while the establishment of the ICC is one of the remarkable events of the twentieth century, the highlighted obstacles are capable of restricting the reach and effectiveness of the ICC as an institution designed to bring an end to the culture of impunity. Consequentially, this study will advocate the elimination of the said bottlenecks. Also, this study takes the position that while the idea behind the establishment of the ICC is laudable, a pursuit of retributive justice alone through the ICC may not bring about sustainable justice and political stability to the affected States or regions. The study takes the position that in deserving situations, military action may be necessary to end the killing of innocent civilians cut up in armed conflicts.

Lastly, this study argues that article 98 immunity agreement runs contrary to the spirit and purpose of the ICC Statute. Additionally, this study without equivocation contends that the conclusion of article 98 immunity agreement by ICC States Parties is a clear violation of their obligation to cooperate with the Court and to arrest and surrender suspects to the Court.

## PART I

### THE DEVELOPMENT OF THE PRINCIPLE OF INDIVIDUAL CRIMINAL ACCOUNTABILITY

## CHAPTER TWO

---

### 2.0. EARLY ATTEMPTS AT INDIVIDUAL CRIMINAL ACCOUNTABILITY

---

crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>1</sup>

#### 2.1. INTRODUCTION

The development of international criminal law first emanated from customs which were later transformed and elaborated into international legal frameworks. As would be discussed shortly, certain acts were considered abhorrent to mankind that individuals accused of committing such acts were prosecuted without a prior legal instrument detailing such acts as crimes. However, shortly after the early recorded trials, efforts were made to conclude legal instruments which detailed that certain acts are considered crimes against mankind and that individuals who commit these acts would be prosecuted. While the concept of individual criminal accountability was included in early international legal instruments, the contours of the principle of individual criminal accountability have been delineated and expanded by the decisions of ad hoc international tribunals, the agitation for the protection of human rights, and recent international legal frameworks.

During the early development of international law, States were initially the only subjects of international law. As such, only States were possessors of rights and obligations under international law. One major obligation of a State under international law is to prosecute individuals accused of committing crimes within its territory before its

---

<sup>1</sup> International Military Tribunal (Nuremberg) Judgment and Sentences, 41 AM. J. INT'L. L. 172, 220-21 (1947) [hereinafter Nuremberg Judgment].

national courts. However, even under this prevailing arrangement, allied States or States acting under the umbrella of the United Nations, had sometimes, set up an ad hoc tribunal comprised of nationals of two or more countries to prosecute individuals from other States who were accused of committing crimes that shock the conscience of the international community at the material time.

This part of the study analyzes the development of the principle of individual criminal accountability for acts which are considered as crimes within the international legal community. It is largely a discussion of the legal history of the establishment of ad hoc criminal tribunals. The analysis will be discussed in three major sections. The most doubtful precedents are discussed in section one. In section two, the discussion will concentrate primarily on the establishment and the trials of the Nuremberg and Tokyo International Military Tribunals. The circumstances and the judgments of these Tribunals marked the commencement of an important legal evolution of individual criminal accountability.<sup>2</sup> Section three discusses post Nuremberg and Tokyo era, and how the principles enunciated in those tribunals influenced the development of international criminal law, particularly, the principle of individual criminal accountability. In this respect, the discussion will examine how the principle of individual criminal accountability contributed to establishment of the ad hoc Tribunals for the former Yugoslavia, Rwanda, Sierra Leone, East Timor, and Cambodia.

---

<sup>2</sup> Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, in *INTERNATIONAL REVIEW OF THE RED CROSS*, No. 835, pp. 531-553 (1999) available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList106/911763EAA63170C0C1256B66005D85D0>.

## 2.2. The Trial of Peter Von Hagenbach

Commentators refer to the trial of Peter von Hagenbach in 1474 for war crimes before a tribunal of judges consisting of the 26 representatives of States compromising the Holy Roman Empire as the forerunner of individual criminal accountability on the international plane.<sup>3</sup> Von Hagenbach served as the governor of the fortified city of Breisach, on the Upper Rhine, under Charles the Bold, Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible.<sup>4</sup> Hagenbach ruled the occupied territory with brutal force in attempt to force the submission of the Breisach population to Burgundian rule.<sup>5</sup> In the process, murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices.<sup>6</sup>

The revolt of Hagenbach German mercenaries and local citizens as well as the siege of the city of Breisach by a large coalition made up of Austria, France, Bern and the towns and knights of the Upper Rhine lead to the defeat of Hagenbach.<sup>7</sup> Upon Hagenbach defeat, the Archduke of Austria, under whose authority von Hagenbach was captured, ordered the trial of Hagenbach by an ad hoc tribunal consisting of 28 judges of

---

<sup>3</sup> See Georg Schwarzenberger, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, Volume II: THE LAW OF ARMED CONFLICT 462 (Stevens, London, 1968); M. Cherif Bassiouni, The Time Has Come for an International Criminal Court, 1 *IND. INT'L & COMP. L. REV.* 1 (1991); M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* 197 (1992). It has however been noted that von Hagenbach atrocities cannot be labeled "war crimes" since the war did not start until 1476. See, Jordan J. Paust, *Selective History of International Tribunals and Efforts Prior to Nuremberg*, 10 *ILSA J INT'L & COMP. L.* 207 (2003); Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 *ALB. L. REV.* 681, 690-91 (1997).

<sup>4</sup> Edoardo Greppi, *supra* note 2 (citation omitted).

<sup>5</sup> William H. Parks, *Command Responsibility for War Crimes*, 62 *MIL. L. REV.* 1, 4-5 (1973) (discussing the Hagenbach trial and the historical background of military tribunals).

<sup>6</sup> See, Georg Schwarzenberger, *supra* note 3, at 462-66 (noting that Hagenbach was so cruel that both the local population and his own mercenaries revolted and took him into custody).

<sup>7</sup> Edoardo Greppi, *supra* note 2 (citation omitted).



the allied coalition of States and towns.<sup>8</sup> In his capacity as sovereign of the city of Breisach, the Archduke of Austria appointed the presiding judge. Given the composition of the ad hoc court, it can be argued that it was a real international tribunal.<sup>9</sup>

The prosecution charged Hagenbach for actions against the “laws of God and man,” including responsibility for murder, rape, perjury, and pillage arguing that he had “trampled under foot the laws of God and man”.<sup>10</sup> Hagenbach argued that he was complying with superior orders from the Duke and that he did not recognize any other judge and master but the Duke of Burgundy, whose orders he could not dispute. Hagenbach further argued that it is settled fact that “soldiers owe absolute obedience to their superiors?” and requested for an adjournment to ask for confirmation from the Duke.<sup>11</sup>

At the time of Hagenbach trial, punishment of the accused hinged on the question of compliance with superior orders. There was no question that a successful defense of superior order would have exonerated Hagenbach because the Duke himself had personally confirmed and ratified *ex post factum* “all that had been done in his name”.<sup>12</sup> The tribunal rejected von Hagenbach defense and request for an adjournment to ask for confirmation from the Duke because this request was considered contrary to the laws of God.<sup>13</sup> The tribunal noted that Hagenbach had committed crimes which he had the duty

---

<sup>8</sup> See Schwarzenberger, *supra* note 3, at 462-66; M. Cherif Bassiouni, *supra* note 3, at 1-2.

<sup>9</sup> The tribunal included judges from Alsace, Switzerland, and other States within the Holy Roman Empire. See, M. Cherif Bassiouni, *supra* note 3, at 1 (arguing that “it can be said that the first international criminal court was established in 1474 in Breisach, Germany, where 27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for his violations of the “laws of God and man” because he allowed his troops to rape and kill innocent civilians and pillage their property”); Jordan J. Paust, M. Cherif Bassiouni et al., *INTERNATIONAL CRIMINAL LAW* 622 (2d ed. 2000).

<sup>10</sup> Georg Schwarzenberger, *supra* note 3, at 465.

<sup>11</sup> Jordan J. Paust, *supra* note 3, at 207.

<sup>12</sup> Edoardo Greppi, *supra* note 2 (citation omitted).

<sup>13</sup> Jordan J. Paust, *supra* note 3, at 207.

to prevent. Therefore, the tribunal found him guilty and sentenced him to death and also stripped him of his rank of knighthood and related privileges.<sup>14</sup> Von Hagenbach was executed following the Marshal's order: "Let justice be done".<sup>15</sup>

### **2.3. The Leipzig Trials**

The first real international but unsuccessful attempt to prosecute individuals accused of war crimes occurred after the end of the World War I. In November 1918, after Germany had lost the war, Kaiser Wilhelm II abdicated and fled to Netherlands, which had remained neutral to the war and whose monarch then was the Kaiser's cousin.<sup>16</sup> After World War I, there was an enormous public outcry among the victims that those responsible for the war and commission of atrocities that violates the Hague Conventions and customs of war should be held to criminal account. As such, a Preliminary Peace Conference was convened in Paris in 1919 by the victorious "Great Powers", the Allied and the Associated Powers.<sup>17</sup> Germany was considered the principal perpetrator of the war and the objective of the Peace conference was to negotiate the terms of a peace treaty which will include the terms of Germany's surrender.<sup>18</sup> Also, the Allies saw the Peace Conference as an opportunity to prosecute German war criminals and particularly, Kaiser Wilhelm II, for war crimes and for starting the war.<sup>19</sup>

---

<sup>14</sup> Schwarzenberger, *supra* note 3, at 465.

<sup>15</sup> *Id.*

<sup>16</sup> M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 HARV. HUM. RTS. J. 11, 18 (1997).

<sup>17</sup> The five great powers were the United States of America, the British Empire, France, Italy, and Japan. The additional states composing the Allied and Associated Powers were Belgium, Bolivia, Brazil, China, Cuba, Czecho-Slovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay. See, THE TREATIES OF PEACE 1919-1923, Vol. I, at 3 (Carnegie Endowment For International Peace, New York, 1924).

<sup>18</sup> M. Cherif Bassiouni, *supra* note 16, at 15.

<sup>19</sup> *Id.* See also, James F. Willis, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 37, (1982).

The Allied powers appointed a committee of legal experts known as the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties.<sup>20</sup> The Commission was charged with the task of investigating and gathering information concerning those responsible for initiating the war and for committing war crimes to aid their criminal prosecution.<sup>21</sup> For about two months, the Commission investigated various acts of war crimes and in 1920 submitted its report which recommended 895 alleged war criminals to the Allied powers to be tried by the Allied tribunal.<sup>22</sup>

Meanwhile, on June 28, 1919, in Versailles, representatives of the Allied Powers concluded the Treaty of Peace between the Allied and Associated Powers and Germany.<sup>23</sup> The treaty mandated German disarmament and war reparations, and established the League of Nations.<sup>24</sup> Articles 228 and 229 of the treaty established the right of the Allied Powers to try and punish individuals responsible for “violations of the laws and customs of war” before Allied Military Tribunals or before the Military Courts of any of the Allies.<sup>25</sup> Specifically, Article 228 contains clear acceptance of the German

---

<sup>20</sup> The Commission was comprised of two members from each of the five Great Powers and one member from Belgium, Greece, Poland, Romania, and Serbia to represent the states having a special interest in the matter. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, 14 AM. J. INT’L L. 95, 96 (1920) [hereinafter 1919 Commission Report].

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* But see, M. Cherif Bassiouni, *supra* note 16, at 16, n. 12 (wherein he noted that there was conflict as to the number of alleged war criminals listed for prosecution); Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS 17 (1992) (stating that the Allies presented a list of 854 individuals, including political and military figures); M. Cherif Bassiouni, *supra* note 3, at 200 (stating that the Allies submitted a list of 895 named war criminals); Remigiusz Bierzanek, War Crimes: History and Definition, in 3 INTERNATIONAL CRIMINAL LAW 29, 36 (M. Cherif Bassiouni ed., 3 vols., 1987) [hereinafter ICL] (stating that 901 names appeared on the list).

<sup>23</sup> Treaty of Peace Between the Allied and Associated Powers and Germany, June 23, 1919, 2 BEVANS 43, 13 AM. J.I.L. (Supp) 151 (1919) (although the treaty was signed in Versailles, initial groundwork for the treaty was established at the Preliminary Peace Conference in Paris earlier that year) [hereinafter Treaty of Versailles].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, art. 228 & 229.

government's recognition of the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.<sup>26</sup> Furthermore, it stated that the German government had the duty to hand over "all persons accused", in order to permit them to be brought before an allied military tribunal.<sup>27</sup>

Where a person is accused of criminal acts against the nationals of one of the Allied and Associated Powers, the individual will be brought before the military tribunals of that Power concerned.<sup>28</sup> On the other hand, persons accused of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.<sup>29</sup> Thus, by implication, Article 229 provided for the possibility of setting up an ad hoc international tribunal to prosecute persons who are accused of criminal acts against the nationals of more than one of the Allied and Associated Powers.

Also, article 227 of the Treaty provided for the creation of an ad hoc international criminal tribunal solely to prosecute Kaiser Wilhelm II for waging a war of aggression over Belgium.<sup>30</sup> Realizing its inability to prosecute the Kaiser for aggression,<sup>31</sup> the

---

<sup>26</sup> Treaty of Versailles, *supra* note 23, art. 228.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, art. 229.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, art. 227.

<sup>31</sup> The Allies diplomatically requested that the Netherlands "make the Kaiser available for trial." Noting that there was no international court competent to try a sovereign Head of State and no one had ever been convicted for the crime of aggression before, the Dutch refused to extradite Kaiser. See Benjamin A. Ferencz, *The Evolution of International Criminal Law*, at <http://www.benferencz.org/hamburg.htm> (last visited August 31, 2005). Also, it has been suggested that the Netherlands reportedly denied that request, allegedly speculating that it was made as a political formality and that the Allies would not exert effort to secure his surrender. See, Telford Taylor, *supra* note 22, at 16. The legal grounds for denying the request were that the "offense charged against the Kaiser was unknown to Dutch law, was not mentioned in any treaties to which Holland was a party, and appeared to be of a political rather than a criminal character." *Id.* See also, Quincy Wright, *The Legality of the Kaiser*, 13 AM. POL. SCI. REV. 121 (1919). The Netherlands discouraged formal extradition requests because extradition treaties applied only to cases in

Allied Nations agreed to a face saving nebulous provision in article 227 of the Treaty of Versailles requiring Germany to hand the Kaiser over to stand trial for “a supreme offense against international morality and the sanctity of treaties.”<sup>32</sup>

The Allied Powers agreed to constitute a special tribunal composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused.<sup>33</sup> In arriving at its decision, the tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality.<sup>34</sup> The Powers agreed to submit a formal request to the government of the Netherlands for the ex-Emperor’s surrender for trial.<sup>35</sup> Perhaps because the Allied Powers knew that the Dutch government would not oblige a request to surrender the ex-Emperor, no such request was ever made and he lived famously as “the woodchopper of Doorn.”<sup>36</sup>

Similarly, the prosecution of the individuals envisioned in Article 228 did not materialize. By 1921, the goal of setting up joint or separate military tribunals was overtaken by the concerns for regional stability and political interest.<sup>37</sup> As a result, the Allied Powers decided not to undertake the prosecution of Germans accused of war crimes, rather, they transferred jurisdiction to the German Supreme Court

---

which a criminal act occurred. The Netherlands viewed the charge against the Kaiser as a “political offence” because a Head of State’s decision to go to war is within the prerogative of national sovereignty and, therefore, not a crime under Dutch Law. See, James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT’L. L. 70, 91 (1920). For a discussion of the political offense exception to extradition, see M. Cherif Bassiouni, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* Ch. VIII (3d ed. 1996); Christine Van Den Wingaert, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* (1980).

<sup>32</sup> Treaty of Versailles, *supra* note 23, art. 227.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Benjamin A. Ferencz, *supra* note 31 (citation omitted).

<sup>37</sup> M. Cherif Bassiouni, *supra* note 16, at 19.

(Reichsgericht).<sup>38</sup> This meant that the war criminals would be tried under German law. Thus, my implication, the Prosecutor General of the Court had the discretion to decide which cases would be tried.<sup>39</sup> Therefore, the Allied Powers had to turn over the cases and the evidence to the Prosecutor General.<sup>40</sup>

As a result of the concerns expressed by the German government regarding the difficulty of trying its citizens for war crimes, the Allied Powers agreed to submit only forty-five cases to the Prosecutor General out of the original list of 895 submitted by the Commission established in 1919 by the Allied Powers.<sup>41</sup> Out of the 48 cases submitted, the Prosecutor General tried only twelve. Those convicted received lenient sentences ranging from six months to four years, and only few actually served those sentences in prison.<sup>42</sup>

Although the Allied Powers had argued that while they deferred to the German Supreme Court the trials of the accused war criminals, that they reserved the right to set aside the German judgments and carry out the provisions of Article 228 of the Treaty of Versailles, they never exercised this option.<sup>43</sup> Thus, while World War I claimed the lives of hundreds of thousands individuals, only twelve were ostensibly held accountable for such degree of atrocity. The conduct of the Leipzig trials therefore “exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies”,<sup>44</sup> and

---

<sup>38</sup> M. Cherif Bassiouni, *supra* note 16, at 19.

<sup>39</sup> *Id.*, at 21.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, at 21, n.24.

<sup>44</sup> *Id.*, at 20.

a missed opportunity to establish an international system of justice that would have functioned independently of political considerations to ensure uncompromised justice.”<sup>45</sup>

#### **2.4. The Trials of World War II Criminals**

With the apparent failure of the Allied Powers to hold World War I criminals accountable for their criminal acts, and their complete abandonment of the objective of the League of Nations as a forum that would bring about a new world order that would prevent future wars, it was not entirely surprising that the world was soon engulfed in a World War II.<sup>46</sup> The Covenant of the League of Nations envisaged the use of economic sanctions to deter nations from war.<sup>47</sup> However, enforcement of the economic sanctions required consent of all the member States to the League.<sup>48</sup> It soon became clear that nations were still not ready to yield their sovereign prerogatives and thus remained unwilling to give up their right to go to war and to decide for themselves when sanctions against aggressors should be applied.<sup>49</sup> Thus, when Japan invaded Manchuria in 1931 and Italy brazenly attacked Ethiopia in 1935 in clear violation of the League’s covenant, member States to the League failed to take collective economic or military measures to halt the aggression.<sup>50</sup>

Similarly, the international community signaled its unwillingness to act when in 1931 Hitler defied the Peace Treaty of Versailles and marched his troops into the Rhineland and Japan launched another aggression against China in 1937.<sup>51</sup> The next

---

<sup>45</sup> M. Cherif Bassiouni, *supra* note 16, at 21.

<sup>46</sup> Benjamin A. Ferencz, *supra* note 31.

<sup>47</sup> Covenant of the League of Nations, adopted December 1924, art. 16., available at <http://www.yale.edu/lawweb/avalon/leagcov.htm> (last visited August 31, 2005).

<sup>48</sup> *Id.*, art. 5.

<sup>49</sup> Benjamin A. Ferencz, *supra* note 31.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

year, Germany continued its defiance of the Treaty of Versailles when it annexed Austria and moved against Czechoslovakia. World political leaders were still reluctant to act until September 1, 1939, when German planes launched a massive bombardment against Poland before Polish allies, France and the United Kingdom reluctantly declared that they were at war with Germany. The world soon became engulfed in World War II.<sup>52</sup>

The horrible crimes committed during World War II led to a swift conclusion of agreements among the Allied Powers to provide a forum to hold the individuals involved in committing such atrocities to account. Towards this objective, on January 13, 1942, representatives of the Allied Powers comprising nine European nations met at St. James Palace wherein they formulated the St. James Declaration.<sup>53</sup> A highlight of the declaration is the statement of the represented States that “international solidarity [is] necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilized world.”<sup>54</sup>

In furtherance of this commitment, on October 7, 1942, the four Major Allies announced that a United Nations War Crimes Commission (UNWCC) would be set up for the investigation of war crimes. However, the Commission was not established until October 20, 1943.<sup>55</sup> The UNWCC was saddled with the responsibility of investigating

---

<sup>52</sup> Benjamin A. Ferencz, *supra* note 18.

<sup>53</sup> The Inter-Allied Declaration, Jan. 13, 1942, *reprinted in* PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION, signed at St. James' Palace, London, on January 13, 1942, (Inter-Allied Information Committee, London, undated). See also, UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 89-92 (1948) [hereinafter History of the UNWCC].

<sup>54</sup> See the Resolution by the Allied Governments Condemning German terror and Demanding Retribution (January 13, 1942), *reprinted in* 144 Brit. & Foreign Papers, 1940-1942, at 1072 (Her Majesty's Stationary Office, 1952).

<sup>55</sup> Leila Sadat Wexler, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 COLUM. J. TRANSNAT'L L. 289, 301 (1994). Even though



and collating evidence of war crimes.<sup>56</sup> Notwithstanding the obstacles faced by the UNWCC such as limited financing and inadequate staff,<sup>57</sup> it managed to compile a decent record of war criminals, evidence, witnesses, and became a reference center among governments that later conducted their own investigation.<sup>58</sup>

At a meeting of the three Major Allied Powers (United Kingdom, United States, and USSR.) in Moscow, the Allied Powers reached an agreement to prosecute and punish war criminals, particularly the leaders of the Nazi regime. The agreement was contained in the Moscow Declaration of October 30, 1943, signed by President Roosevelt of United States, Prime Minister Churchill of Britain, and Premier Stalin of Soviet Union.<sup>59</sup> In signing the Moscow Declaration, the aforesaid three Allied powers, noting that they were speaking in the interest of the thirty-two member State of the United Nations, solemnly declared and gave full warning of their declaration as follows:

At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein .... for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done...without prejudice to the case

---

this Commission's name was preceded by "United Nations," it was unrelated to the world body founded in San Francisco in 1945. See M. Cherif Bassiouni, *supra* note 16, at n. 33.

<sup>56</sup> Since the UNWCC was limited to investigating war crimes only, it could not investigate the allegations of atrocities committed against the Jews, because such acts constituted "crimes against humanity" and not war crimes. M. Cherif Bassiouni, *supra* note 16, at 22 (citing Ann Tusa & John Tusa, *THE NUREMBERG TRIAL* 22 (1984)).

<sup>57</sup> M. Cherif Bassiouni, *supra* note 16, at 22 (citing UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 89-92 (1948) [hereinafter *HISTORY OF THE UNWCC*]).

<sup>58</sup> M. Cherif Bassiouni, *supra* note 16, at 22-23.

<sup>59</sup> Declaration of German Atrocities, Nov. 1, 1943, 3 BEVANS 816, 834; 9 DEP'T ST. BULL. 308 (1943), reprinted in 38 AM. J. INT'L L. 5 (1944) [hereinafter "Declaration of German Atrocities"].

of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.<sup>60</sup>

Although the Allied Powers agreed that “the major criminals, whose offences have no particular geographical localization,” would be punished “by the joint decision of the Governments of the Allies”, they disagreed on the method by which the prosecution should be carried out.<sup>61</sup> The proposal by Britain that major war criminals should simply be taken out and shot because their guilt was taken for granted and “beyond the scope of any judicial process”<sup>62</sup> was rejected by the United States and France which insisted upon fair trials for the war criminals before an international tribunal.<sup>63</sup> But Britain was afraid that the war criminals may hijack the prosecution as a forum for propaganda and self-justification.<sup>64</sup> On the other hand, the United States and France were mindful of the historical implication of the proposal by Britain and wanted to set a precedent of judicial fairness.<sup>65</sup> In the end, Allies agreed to try the war criminals before an international criminal tribunal.

#### **2.4.1. Trials of World War II Criminals by the International Military Tribunal at Nuremberg (IMT)**

The agreement to establish an international criminal tribunal was drafted at a conference held in London from June 26 to August 8, 1945. At the end of the conference, the London Agreement of August 8, 1945, was signed by the representatives

---

<sup>60</sup> See Declaration of German Atrocities, *supra* note 59.

<sup>61</sup> See John F. Murphy, NORMS OF CRIMINAL PROCEDURE AT THE INTERNATIONAL MILITARY TRIBUNAL, THE NUREMBERG TRIAL AND INTERNATIONAL LAW 62 (Ginsburgs & Kudriavstev eds., 1990).

<sup>62</sup> *Id.*, referring to the brief of Sir Malkin of the British Foreign Office entitled “Against the Establishment of an international Court”).

<sup>63</sup> Telford Taylor, *supra* note 22, at 32.

<sup>64</sup> M. Cherif Bassiouni, *supra* note 16, at 24.

<sup>65</sup> *Id.*

of the four Allied Powers.<sup>66</sup> The London Agreement provided for the establishment of an international military tribunal “for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.”<sup>67</sup> The Charter creating the International Military Tribunal (IMT) was annexed to the London Agreement.<sup>68</sup>

#### **2.4.1.a. The *Ratione Materiae* of the International Military Tribunal**

Article 6 of the IMT Charter conferred jurisdiction on the IMT to try individuals accused of (i) crimes against peace, (ii) war crimes, and (iii) crimes against humanity.

##### **(i) Crimes Against Peace:**

This is 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.<sup>69</sup> Perhaps, other than the article 227 of the Treaty of Versailles which provided for the failed prosecution of the Kaiser, there was no other legal precedent in international law for the prosecution of individuals for crimes against peace, which meant the preparation and waging of a war of aggression.<sup>70</sup>

However, in contrast to the ambiguity inherent in article 227 of the Treaty of Versailles reference to “international morality and the sanctity of treaties”, Article 6(a) of

---

<sup>66</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544 [hereinafter the London Agreement]. The London Agreement was signed by Robert H. Jackson, U.S.A.; Robert Falco, French Republic; Jowitt C., United Kingdom of Great Britain and Northern Ireland, and I. T. NIKITCHENKO, Union of Soviet Socialist Republics

<sup>67</sup> Id., art. 1.

<sup>68</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, the Charter of the International Military Tribunal, 82 U.N.T.S. 279, 284, 59 Stat. 1544, 1546 [hereinafter the IMT Charter]. Nineteen other nations adhered to the Nuremberg Charter.

<sup>69</sup> Id., art. 6(a).

<sup>70</sup> Benjamin B. Ferencz, *supra* note 31.

the IMT Charter referred to the waging of war in violation of “international treaties.”<sup>71</sup> This was a remarkable clarification in that it explained the basis of the crime against peace. Also, by prohibiting the waging of war in violation of international treaty, article 6(a) made the crime of aggression a universal crime which can be applied against any nation.<sup>72</sup>

It is however noteworthy that no international convention has explicitly made aggression an international crime.<sup>73</sup> The main reason for this development has been attributed to the inability of States to agree definitively on what constitutes aggression,<sup>74</sup> as States continue to shift positions based on political expediency.<sup>75</sup> The last attempt at defining aggression was made during the Preparatory Committee on the Establishment of an International Criminal Court.<sup>76</sup> The effort proved unsuccessful resulting in the exclusion of the crime of aggression in the Rome Statute of the International Criminal Court.<sup>77</sup>

---

<sup>71</sup> IMT Charter, *supra* note 68, art. 6(a).

<sup>72</sup> M. Cherif Bassiouni, *supra* note 16, at 29 (citing the REPORT OF Robert H. Jackson, United States Representative to the International Conference on Military Trials at vii-viii (U.S. Gov’t Prtg. Off. 1949) [hereinafter Jackson Report]).

<sup>73</sup> M. Cherif Bassiouni, *supra* note 16, at n. 69 (observing that while the U.N. Charter prohibits aggression, and the Security Council has the power under Chapter VII to take measures, including sanctions, to preserve and maintain peace in accordance with the Charter’s articles 2(3), 2(4), 39-51, there has never been an international convention explicitly making aggression an international crime).

<sup>74</sup> M. Cherif Bassiouni, *supra* note 16, at n. 69 (noting that other than the General Assembly’s 1974 Resolution, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974), defining aggression which was adopted by consensus, there is no definition of that crime).

<sup>75</sup> M. Cherif Bassiouni, *supra* note 16, at 29 (noting that the United States has held different positions on the matter between World War I, World War II, and the Cold War era).

<sup>76</sup> M. Cherif Bassiouni, *supra* note 16, at n. 69 (citing the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, paras. 212-93, U.N. Doc. A/51/22 (1996)) [hereinafter Preparatory Committee Report].

<sup>77</sup> *Id.*

**(ii) War crimes:**

War crimes are defined as violations of the laws and customs of war.<sup>78</sup> Article 6(b) of the IMT Charter lists war crimes to include, murder, ill-treatment or deportation into slave labor or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>79</sup>

From the list of crimes, it is evident that the IMT Charter set out to prohibit acts which violate the traditional laws and customs of war. In compiling the list of war crimes, the drafters of the IMT Charter looked to The Hague Conventions of 1899 and 1907 on the Laws and Customs of War<sup>80</sup> and the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War.<sup>81</sup> However, it should be noted that the referenced Hague Conventions and the Geneva Convention had no provisions on the punishment of individuals who violated their rules. Originally, prisoners of war were considered as war booty, treated as slaves, and oftentimes slaughtered. The 1899 Hague Peace Conference which was widened by the 1907 Hague Convention was directed at ensuring a humane treatment of prisoners of war. These rules proved insufficient in World War I, and were elaborated in the 1929 Geneva Convention.

**(iii) Crimes Against Humanity:**

This is defined as murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or

---

<sup>78</sup> IMT Charter, *supra* note 68, art. 6(b).

<sup>79</sup> *Id.*, art. 6(b).

<sup>80</sup> The 1899 Hague Convention II and The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, July 29, 1899 and October 18, 1907 respectively which entered into force on September 4, 1900 and January 26, 1910, respectively, 36 Stat. 2277, I Bevans 631.

<sup>81</sup> The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, entered into force on June 19, 1931, 118 L.N.T.S. 343, 47 Stat. 2021, 2 Bevans 932.

persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>82</sup>

The objective of the crimes against humanity was to protect the civilian population from extermination and enslavement. Until the IMT Charter, crime against humanity was not a treaty law and it is doubtful whether they originated from international conventions, custom, and/or general principles of law.<sup>83</sup> Thus, while article 6(c) of the IMT Charter conferred the IMT with jurisdiction over crimes against humanity committed “before or during the war” the fact that crimes against humanity has not been proscribed before the war led the drafters of the Charter to circumscribe the application of Article 6(c) only in situations where it could be linked to war crimes.<sup>84</sup>

The connection of crimes against humanity to war crimes was necessary to obviate the possibility of a successful attack of crimes against humanity committed before the war as *ex post facto* law.<sup>85</sup> However, this requirement eviscerated the scope of Article 6(c) because it effectively excluded the prosecution of individuals for crimes committed before the outbreak of the war in 1939.<sup>86</sup> Also, in some instances, the IMT was not able to differentiate between the crimes against humanity and war crimes.<sup>87</sup>

#### **2.4.1.b. The *Ratione Personae* of the International Military Tribunal**

The International Military Tribunal exercised personal jurisdiction over the “leaders, organizers, instigators and accomplices” who participated in the formulation or

---

<sup>82</sup> IMT Charter, *supra* note 68, art. 6(c).

<sup>83</sup> M. Cherif Bassiouni, *supra* note 16, at 26.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Leila Sadat Wexler, *supra* note 55, at 307-08.

execution of a common plan or conspiracy to commit any of crimes under the IMT's Charter.<sup>88</sup> The IMT Charter stated that all of them are responsible for all acts performed by any persons in execution of such plan.<sup>89</sup>

Article 7 of the IMT Charter stripped the accused of any immunity they may enjoy as a result of their official position, whether as Heads of State or responsible officials in government departments.<sup>90</sup> In addition, the IMT Charter for the first time abrogated the defense of "obedience to superior" order as an absolute defense from liability.<sup>91</sup> Rather, the IMT Charter provided that it may be considered in mitigation of punishment if the Tribunal determines that justice so requires.<sup>92</sup>

Although the IMT Charter limited "obedience to superior order" as a mitigating factor, it should be noted that in some instances, the IMT did not follow the proscription of the defense of obedience to superior order to the letter of article 8. In those instances, the IMT allowed the defense as a complete bar to responsibility in situations where the junior officer had no alternative moral choice in refusing to carry out the superior order.<sup>93</sup> This approach may be rationalized on the basis that the abrogation of the defense of obedience to superior order was contrary to what most military laws provided for at the time World War II started.<sup>94</sup>

---

<sup>88</sup> IMT Charter, *supra* note 68, art. 6.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*, art. 7.

<sup>91</sup> *Id.*, art. 8.

<sup>92</sup> *Id.*

<sup>93</sup> See generally, Nico Keijzer, *MILITARY OBEDIENCE* (1978); Leslie C. Green, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); Yoram Dinstein, *THE DEFENCE OF OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW* (1965).

<sup>94</sup> M. Cherif Bassiouni, *supra* note 16, at 28 (citing Lassa Oppenheim, *INTERNATIONAL LAW* 264-65 (1st ed. 1906)). The *BRITISH MANUAL OF MILITARY LAW*, No. 443 (1914) relied upon Oppenheim in its formulation. Oppenheim's recognition of the defense remained in the first five editions up to 1940, when it changed to become the basis for the IMT's article 8 which denied the defense. U.S. Dep't of the Army, *Field Manual 27-10* (1940) reflected the same position in § 345(1). On November 15, 1944, a revision of § 345(1) limited, but retained, a qualified defense. But see, U.S. DEPT OF THE ARMY,

As a result of the agreement between the Allies that the IMT will only prosecute the major war criminals and that the German municipal and military courts would try the minor war criminals in the jurisdiction where the crime took place, only twenty-four war criminals were brought before the IMT.<sup>95</sup> Eventually, only twenty-two of the twenty-four war criminals stood trial before the IMT.<sup>96</sup> The Tribunal sitting at Nuremberg, Germany commenced trial on November 20, 1945, and completed on October 1, 1946.<sup>97</sup> Twelve of the war criminals were convicted and sentenced to death by hanging,<sup>98</sup> three were sentenced to life imprisonment,<sup>99</sup> four were sentenced to serve between ten to twenty years in prison,<sup>100</sup> and the other three were acquitted.<sup>101</sup> However, there freedom

---

FIELD MANUAL 27-10: THE LAW OF LAND WARFARE (1956). For a historical evolution of the question, see Leslie C. Green, Superior Orders and Command Responsibility, 27 CAN. Y.B. INT'L L. 167 (1989); Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

<sup>95</sup> Leila Sadat Wexler, *supra* note 42, at 306.

<sup>96</sup> Two of the defendants who were not brought to trial are Robert Ley (who committed suicide on October 25, 1945, before the trial began) and Gustav Krupp von Bohlen und Halbach (who was unable to stand trial because of mental illness). See the International Military Tribunal Judgment and Sentence, October 1, 1946, 41 Am. J. Int'l L. 172, 252 (1947) [hereinafter IMT Judgment].

<sup>97</sup> *Id.*

<sup>98</sup> Those sentenced to death and hung on October 16, 1946 include: Hans Frank, Governor-general of Nazi-occupied Poland, called the "Jew butcher of Cracow" was hanged wearing a beatific smile, Alfred Jodl, Chief of Operations for the German High Command, Ernest Kaltenbrunner, Chief of RSHA (an organization which includes offices of the Gestapo, the SD, and the Criminal Police) and Chief of Security Police, Wilhelm Keitel, Chief of Staff of the German High Command, Wilhelm Frick, Minister of the Interior, Joachim von Ribbentrop, Foreign Minister, Alfred Rosenberg, Chief Nazi Philosopher and Reich-minister for the Eastern Occupied Territories, Fritz Sauckel, Chief of Slave Labor Recruitment, Arthur Seyss-Inquart, Austrian Chancellor, then Reich, Commissioner for the Netherlands, Julius Streicher, Anti-Semitic Editor of *Der Sturmer*, Martin Bormann, and Hermann Goering, Reichsmarschall and Luftwaffe (Air Force) Chief; President of Reichstag; Director of "Four Year Plan" who committed suicide on the day before his scheduled hanging by taking a cyanide pill that was smuggled into his cell. Goering wrote in his suicide note, "I would have no objection to getting shot," but he thought hanging was inappropriate for a man of his position. IMT Judgment, *supra* note 84. Also see available at: <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/meetthedefendants.html>, (visited on February 4, 2005).

<sup>99</sup> *Id.* The three individuals sentenced to life imprisonment are Walther Funk, Minister of Economic, (he was released in 1957 because of poor health and died in 1959), Rudolf Hess, Deputy to the Fuhrer and Nazi Party Leader (he remained lost in his own mental fog in Spandau prison for many years as its only prisoner until he committed suicide in 1987 at age 93), and Erich Raeder, Commander in Chief of the German Navy (he served nine years before his release in 1955 and he died in 1960 at age 84).

<sup>100</sup> *Id.* The war criminals sentenced to various prison sentences are Karl Doenitz, German admiral (sentenced to 10 years, and died 1981), Konstantin von Neurath, Minister of Foreign Affairs until 1938, then Reich Protector for Bohemia and Moravia Neurath (sentenced to 10 years in prison, was released because of poor health in 1954, and died two years later) Baldur von Schirach, Hitler Youth Leader



was short-lived as each of them were subsequently tried and convicted to various prison terms by the German court.<sup>102</sup>

The IMT judgment was not subject to appeals and at trial some defendants were frequently denied the right to confront and cross-examine witnesses that were relied upon by the prosecution.<sup>103</sup> Also, IMT has been criticized for its failure to indict or prosecute non German war criminals, especially Allied Military personnel, an omission which has dogged the IMT proceedings as a “victor’s justice.”<sup>104</sup> Notwithstanding these deficiencies, “that four great nations flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason”.<sup>105</sup>

---

(sentenced to 20 years in prison, was released from Spandau Prison in 1966 and died in 1974 at age 67), and Albert Speer, Reichminister of Armaments and Munitions (sentenced and served his 20-year sentence, he wrote two books about his life and died in 1981 at age 76).

<sup>101</sup> *Id.* Those acquitted by the IMT are Franz von Papen, Ambassador to Turkey was acquitted, Hjalmar Schacht, Reich bank President and Minister of Economics before the War (was found not guilty by the IMT was later convicted by a German court and sentenced to eight years, freed in 1950 and died in 1970 at age 93) and, Hans Fritzsche, Head of the Radio Division, (was acquitted by the IMT and was later tried and convicted by a German court, then freed in 1950 and died in 1953).

<sup>102</sup> Howard S. Levie, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 56-57 (1993).

<sup>103</sup> There was no appeal, a right now guaranteed in the 1966 International Covenant on Civil and Political Rights. Even Justice Jackson noted these mistakes in his report to the President, wherein he admits to mistakes in the “proceedings of this novelty.” *Id.* at 440. Since World War II, however, the impact of international and regional human rights norms and standards have significantly affected criminal procedures in most countries of the world. *See, e.g.*, M. Cherif Bassiouni, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS* (1994); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *DUKE J. COMP. & INT’L L.* 235 (1993).

<sup>104</sup> For a critical perspective of the IMT, see, August Von Knierem, *THE NUREMBERG TRIALS* (1959); Hans Ehard, *The Nuremberg Trial against the Major War Criminals and International Law*, 43 *AM. J. INT’L L.* 223 (1949); A. Frederick Mignone, *After Nuremberg*, *Tokyo*, 25 *TEX. L. REV.* 475 (1947); Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 *TEMPLE L.Q.* 27 (1947); Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 *TUL. L. REV.* 329 (1947); Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law*, 1 *INT’L L.Q.* 153 (1947); Gordon W. Forbes, *Some Legal Aspects of the Nuremberg Trial*, 24 *CAN. B. REV.* 584 (1946).

<sup>105</sup> Justice Robert H. Jackson, *Prosecutor’s Address of Nov. 21, 1945 to the International Military Tribunal*, in 2 *Trial of the Major War Criminals* 99 (1947).

#### **2.4.2. Trials of World War II criminals by the International Military Tribunal For The Far East, 1946-1948 (IMTFE)**

Pursuant to the request of the U.S.S.R. which was acceded to by the other three Allied Powers, the Far Eastern Commission (FEC) was established in Moscow in December 1945.<sup>106</sup> The FEC was comprised of representatives of the eleven Allied States including the four Major Allies having veto powers.<sup>107</sup> The FEC was based in Washington and was responsible for the formulation and coordination of Allied occupational policies for Japan.<sup>108</sup> General Douglas MacArthur who was the Supreme Commander for the Allied Powers (SCAP) was in charge of occupational matters and therefore controlled the activities of the FEC.<sup>109</sup> The Allied Council for Japan located in Tokyo which was comprised by the four Major Allies was responsible for carrying out the directives of the FEC.<sup>110</sup>

Although the FEC was a political body without any investigative powers, it however, was instrumental to the prosecution of suspected Japanese war criminals.<sup>111</sup> It was evident that the U.S.S.R. interest in Japan went beyond a say in occupational control, but included a desire to prosecute suspected Japanese war criminals.<sup>112</sup> Thus, in furtherance of this objective, on January 19, 1946, General McArthur promulgated the Charter establishing the International Military Tribunal for the Far East (IMTFE).<sup>113</sup> The

---

<sup>106</sup> See Activities of the Far Eastern Commission, Report by the Secretary General, February 26 – July 10, 1947, 16 DEP'T ST. BULL. 804-6 (1947) (hereinafter FEC Report).

<sup>107</sup> *Id.* The eleven Allied nations are: Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States of America.

<sup>108</sup> M. Cherif Bassiouni, *supra* note 16, at 31.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, at 32 (citing the Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 *Bevans 20* [hereinafter IMTFE Proclamation]. On the same day General MacArthur issued his proclamation, the Charter for the IMTFE was adopted. Pursuant to a policy decision by the FEC, the Charter was later amended by General's Order No. 20, issued by

Tribunal was comprised of the representatives of the Allied powers that defeated Japan and members of the FEC.<sup>114</sup>

With few exceptions, the IMTFE Charter like the IMT Charter conferred on the IMTFE jurisdiction over individuals accused of committing (a) crimes against peace, (b) war crimes, and (c) crimes against humanity. Some of the exceptions are found in article 5(c) of the IMTFE Charter which limited “crimes against humanity” to persecution on political and racial grounds, thereby omitting persecution on religious ground which is included in Article 6(c) of the IMT Charter. Such an inclusion was factually necessary in the IMT Charter because of the Holocaust.<sup>115</sup> Also while the IMT Charter provided that inhumane acts committed “against any civilian population” constitute “crimes against humanity,” that phrase was deleted from Article 5(c) of the IMTFE Charter, thereby expanding the class of persons beyond civilians only. The expansion was influenced by the desire “to make punishment possible for large-scale killing of military personnel in an unlawful war.”<sup>116</sup>

The IMTFE trials lasted two and a half years, from May 3, 1946, to November 11, 1948. In all, 28 Japanese officials who had overseen Japanese military aggression throughout Asia in World War II were arraigned before the Tribunal on 55 counts of

---

MacArthur. *See* Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 *Bevans* 27 [hereinafter IMTFE Amended Charter].

<sup>114</sup> The IMTFE consisted of 11 members. Nine were representatives from countries which had signed Japan’s surrender agreement: Australia, Canada, China, France, the Netherlands, New Zealand, the Soviet Union, the United Kingdom, and the United States. *See* Instrument of Surrender by Japan, Sept. 2, 1945, 59 Stat. 1733, 1735, 3 *Bevans* 1251, 1252. India and the Philippines were subsequently added as members due to their status as members of the FEC. *See* IMTFE Amended Charter, *supra* note 113.

<sup>115</sup> *See*, M. Cherif Bassiouni, International Law and the Holocaust, 9 CAL. W. INT’L L.J. 202 (1979).

<sup>116</sup> Bernard V.A. Roling and Antonio Cassese, *THE TOKYO TRIAL AND BEYOND* 3 (Oxford, 1993). *See also*, Bernard V.A. Roling, *The Nuremberg and Tokyo Trials in Retrospect*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 590 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

'Class A' crimes.<sup>117</sup> Seven of the 28 defendants were sentenced to death while the remaining defendants received prison sentences. The defendants include individuals accused of crimes stemming from their political positions in Japan during the Second World War. They also include foreign ministers, chiefs of staff, prime ministers, etc. The one notable exemption was the Emperor of Japan, who was excluded because he was regarded as a kind constitutional monarch whose only intention was to establish peace and prosperity for his people.

#### **2.4.3. Trials of World War II Criminals Before Military Tribunals in Germany and the Far East Countries (Control Council Law No. 10 Tribunals)**

Other war criminals were tried in the respective victim countries. Pursuant to the Allied Control Council Law No. 10 which was promulgated by the Allies as the sovereign powers in Germany, each of the Allies had jurisdiction to try German nationals in the territory under their control.<sup>118</sup> Each of the four Major Allies proceeded separately to try the German war criminals as they deem fit.<sup>119</sup> The Tribunals set up under the CCL

---

<sup>117</sup> For a complete historical record of the IMTFE, see generally, THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); THE TOKYO WAR CRIMES TRIAL: THE COMPREHENSIVE INDEX AND GUIDE TO THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN FIVE VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); YUK TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II (1996).

<sup>118</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, *reprinted* in Benjamin B. Ferencz, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980) [hereinafter CCL No. 10].

<sup>119</sup> The nature of the separate proceedings was different. The U.S. proceedings were before civilian judges, while the British, French, and Russian trials were before military courts. See M. Cherif Bassiouni, *supra* note 16, at 30 (citing Frank M. Buscher, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955 (1989); Telford Taylor, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949)).

No. 10 like the IMT and IMTFE had jurisdiction to try individuals accused of “crimes against peace,” “war crimes,” and “crimes against humanity.”<sup>120</sup>

However, the category, requirement, and scope of the “crimes against humanity” in Article II(c) of the CCL No. 10 differed from the IMT and IMTFE Charters.<sup>121</sup> The categories of “crimes against humanity” under Article II(c) were expanded to include imprisonment, torture, and rape. Also, article II(c) removed the requirement that “crimes against humanity” be connected to war by omitting the words “before or during the war” contained in Article 6(c) of the IMT’s Charter.<sup>122</sup> Finally, by eliminating the requirement that “persecution,” as a crime against humanity should be in the “execution of or in connection with any crime within the jurisdiction of the Tribunal,” article II(c) ostensibly extended the scope of the Tribunals to cover persecutions not executed or connected with any crime within the Tribunal’s jurisdiction. Be that as it may, there is no evidence that the Tribunal utilized this provision to extend its jurisdiction but it has been suggested that such extension of the Tribunals’ jurisdiction “strained the principles of legality.”<sup>123</sup>

Lastly, war criminals were tried throughout the Far East before separate military tribunals which were sanctioned by the FEC. Each Allied Power which include Australia, China, France, the Netherlands, the Philippines, the United Kingdom, the United States, and the U.S.S.R. set up its own military tribunal and invested it with the powers of prosecuting its prisoners of war who were Japanese and persons of other

---

<sup>120</sup> CCL No. 10, *supra* note 118, art. II(c).

<sup>121</sup> M. Cherif Bassiouni, *supra* note 16, at 38.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

nationalities.<sup>124</sup> The field military tribunals dispensed justice to the war criminals in accordance with the military laws and/or practice of the constituting States.

Although these trials were supposed to be controlled by the individual Allied Powers, the FEC still exerted some form of control on the activities of the Military Tribunals. Thus, in 1949, the FEC issued a formal advisory to all nineteen Allied powers in the Far East that Japanese war crimes trials should be concluded by September 30, 1949.<sup>125</sup> Thereafter, on September 8, 1951, forty-eight States signed the Treaty of Peace with Japan at San Francisco. Article II of the Treaty of Peace provided that all convicted war criminals should be repatriated to Japan to serve the remainder of their sentences under the SCAP's control.<sup>126</sup> In consonance with Article II of the Treaty of Peace, Japan passed Law No. 103 of 1952 which established a commission to supervise the repatriation and release of Japanese convicted war criminals.<sup>127</sup> Like the IMTFE convicted war criminals, all the convicted war criminals by the Allied military tribunals in the Far East had their sentences commuted or were released between 1951 and 1957 before they could complete their sentence.<sup>128</sup>

## **2.5. Observations and Commentary**

By way of comparison, the IMT was a treaty creation while the IMTFE was promulgated by General MacArthur. While no official reason was supplied for this

---

<sup>124</sup> For example, from 1946 to 1948, the British Army held 305 war crimes trials in the Pacific Theater. A total of 889 suspected war criminals were tried in 931 prosecutions, of whom 553 were convicted. See, M. Cherif Bassiouni, *supra* note 16, at 35-6.

<sup>125</sup> R. John Pritchard, The Gift of Clemency Following British War Crimes Trials in the Far East, 1946-1947, 7 CRIM. L.F. 15, 18 (1996).

<sup>126</sup> *Id.*, at 37.

<sup>127</sup> *Id.*, at 38.

<sup>128</sup> *Id.*, at 37-49; John Mendelsohn, War Crimes Trials and Clemency in Germany and Japan, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952, 226 (Robert Wolfe ed., 1984).

difference in approach, it has been suggested that it was borne out of the United States desire to checkmate the influence of the Soviet Union in the Far East and the prosecution of Japanese war criminals.<sup>129</sup> In addition, it was also suggested that the United States was equally concerned about Japan's post-World War II course of conduct.<sup>130</sup> It is also plausible to suggest that the United States considered it politically expedient to maintain control of post World War II Japan. In order to achieve these objectives, General MacArthur exerted undue influence and control over the activities of the FEC and the IMTFE.<sup>131</sup> General MacArthur's influence was also visible in the "United States Military Commissions that tried Japanese Military personnel in the Philippines and other areas of the Far East Military Theater of Operations that he subsequently established pursuant to his authority as the SCAP in that Pacific Japan Theater."<sup>132</sup>

The end result of General MacArthur's overbearing control was that the proceedings of the IMTFE were a mockery of the IMT. First, the IMTFE lasted three times longer than the IMT trial of the Major German War Criminals. Secondly, the objectivity of the FEC and the IMTFE members was compromised by the fact that they were not chosen in their individual capacity but as representative of their country's

---

<sup>129</sup> The political and military tensions between the United States and the Soviet Union during the IMTFE proceedings affected the proceedings in many ways. For instance, all information related to the existence of a bacteriological weapons research lab located in Manchuria during World War II was purposely kept from the IMTFE. Professor Bernard Roling believed that this information was withheld by American military authorities who wanted to reap the benefits of the research and keep the information from the Soviets. Professor Howard Levie has a differing view, however, believing that the information was withheld by both the Americans and the Soviets because both countries had access to the information and wanted to prevent the other from obtaining research results. *See* Howard Levie, *supra* note 103, at 141. Professor Levie highlights Soviet criticisms of the IMTFE, including accusations that the IMTFE displayed anti-Soviet tendencies and was influenced by the overwhelming American presence in its administration. *Id.*, at 145.

<sup>130</sup> M. Cherif Bassiouni, *supra* note 16, at 32.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

government.<sup>133</sup> As political representatives of their respective country's government, it was impossible for them to act as impartial arbiters of justice. Consequently, there were glaring abuses of procedural due process in the proceedings of the FEC and the IMTFE.<sup>134</sup> For instance, on April 3, 1946, the FEC issued a policy decision on the "Apprehension, Trial and Punishment of War Criminals in the Far East." Article 6(a) of the FEC's policy decision empowered General MacArthur, to establish an agency, acting under his command, to investigate reports of war crimes, collect and analyze evidence, and arrange for the apprehension of suspects. Pursuant to the authority conferred on General MacArthur by Article 6(a), he created the International Prosecution Section charged with the responsibility of preparing documents for the indictment of the War Criminals. Also, by virtue of Article 6(a), General MacArthur had the sole discretion to decide what individuals or organizations would be prosecuted and before which court they would appear.<sup>135</sup>

It was apparent that this arrangement would create room for subjective decision as to which of the war criminals should be selected for prosecution.<sup>136</sup> In the end, no Allied

---

<sup>133</sup> M. Cherif Bassiouni, *supra* note 16, at 32 (noting that while the choice of judges at the IMT was made by the respective of the Four Major Powers, the U.S., British, and French judges and their alternates were highly qualified and known for their personal integrity and independence. The judges from the USSR, who were military officers, were believed to be less knowledgeable than their western counterparts and subject to their government's directives, though their performance on the bench paralleled that of their western counterparts. Professor Bassiouni notes that this was not the case at the IMTFE. With the exception of Roling (Netherlands), Pol (India), and Bernard (France), many of the judges appeared politically motivated, especially the president, and General MacArthur's influence seemed rampant. See, John A. Appleman, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES*, 239-44 (1954) (referring to page numbers in the transcript evidencing prejudice and unfairness, particularly by Presiding Judge Sir William Webb of Australia)).

<sup>134</sup> *Id.*

<sup>135</sup> Accused war criminals were divided into Class A, B, and C. The first IMTFE proceedings were against 28 senior Japanese officials considered Class A suspected war criminals, though clearly some of them did not deserve being placed in that category, according to most experts on the subject. For an early appraisal, see Solis Horwitz, *The Tokyo Trial*, 465 *INT'L RECONCILIATION* 473 (1950); Howard Levie, *supra* note 102, at 141.

<sup>136</sup> See, M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY*, *supra* note 3, at 211-12.



military personnel were prosecuted for war crimes. Also conspicuously absent from prosecution is Emperor Hirohito of Japan which was effectuated by the FEC policy decision on February 3, 1950, not to prosecute him for war criminal.<sup>137</sup> The FEC sought to rationalize the decision not to prosecute Emperor Hirohito on the basis that it was necessary to preserve his image as Japan's Emperor and as a reward for his unconditional surrender of Japan. It was believed that the decision not to prosecute the Emperor would ensure better political cooperation by the post-World War II Japanese ruling elite and obtain their support for the administration of the occupied Japanese territories.<sup>138</sup> This "exemplifies how political considerations resulted in the release of convicted war criminals and in condemnation of those whose role in the atrocities was negligible or non-existent."<sup>139</sup>

Similarly, the IMTFE arbitrarily set its own rules and standards by deciding what evidence may or may not be entered as exhibits. The trials were generally marred by procedural irregularities and abuse of judicial discretion.<sup>140</sup> An example of such travesty of justice that permeated the IMTFE proceedings is the fact that while it was mandatory for the accused to make a written application in advance before seeking to produce any evidence in the form of documents or witnesses, the prosecution was not required to make similar prior disclosure. Also, the application of the law to some of the defendants was at least dubious, if not erroneous.<sup>141</sup> For instance, the execution of sentences was

---

<sup>137</sup> M. Cherif Bassiouni, *supra* note 16, at 36 (citing 22 DEP'T ST. BULL. 244 (1950) (suggesting that MacArthur reportedly instigated the decision because he felt that prosecuting the Emperor would make pacification of Japan a difficult task, costing the United States many casualties at the hands of Japanese guerrillas).

<sup>138</sup> William Manchester, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964*, 484-91 (1978).

<sup>139</sup> M. Cherif Bassiouni, *supra* note 16, at 36.

<sup>140</sup> John Appleman, See, John A. Appleman, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES*, 239-58 (1954).

<sup>141</sup> M. Cherif Bassiouni, *supra* note 16, at 34 (Citing Bernard V.A. Roling, *supra* note 116, at 605-07).

inconsistent, and could be unilaterally reduced or competently discharged by General MacArthur.<sup>142</sup>

Thus, unlike the IMT convicts, none of the twenty-five convicted war criminals by the IMTFE served their full prison term as they were all released by the end of the 1950s.<sup>143</sup> Just as some critics regard the IMT trials as victor's justice, the Japanese considered the IMTFE and the Military tribunals' trials in the Far East as victors' vengeance couched in terms of victors' justice.<sup>144</sup> On the other hand, while the convicted German war criminals "were for the most, pariahs in their society, the Japanese did not view such persons as criminals but as victims."<sup>145</sup>

On the other hand, a remarkable difference between the Allied Military prosecutions in the Far East and the trials by the IMT, IMTFE, and the Tribunals under CCL No. 10, was that the Military Tribunals proceedings in the Far East had jurisdiction only for war crimes.<sup>146</sup> Also, the IMT and IMTFE are considered international in nature due to their composition. However, the CCL No. 10 Tribunal and the Allied Military

---

<sup>142</sup> Howard Levie, *supra* note 102, at 142.

<sup>143</sup> See John Mendelsohn, *supra* note 128, at 226.

<sup>144</sup> M. Cherif Bassiouni, *supra* note 16, at 34 (Citing A.C. Brockman, *THE OTHER NUREMBERG, THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); *THE TOKYO WAR CRIMES TRIAL* (C. Hosoya et al. eds., 1986); Philip R. Piccigallo, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST 1945-1951* (1979); Saburo Shiroyama, *WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI* (1977); Richard H. Minear, *VICTOR'S VENGEANCE: THE TOKYO WAR CRIMES TRIAL* (1971).

<sup>145</sup> M. Cherif Bassiouni, *supra* note 16, at 34-5 (citing a letter from Dr. R. John Pritchard to him dated Jan. 30, 1996, noted that Class A war criminals convicted by the IMTFE became members of Cabinet, and one became Prime Minister, Shigemitsu Mamoru, a career diplomat, who was Foreign Minister in Tojo Midelki's Wartime Cabinet and who signed on behalf of Japan the Instrument of Surrender on September 2, 1945, on board the USS Missouri, was sentenced by the IMTFE to seven years imprisonment. He was released on parole 21 November 1950, and in November 1951 he was given clemency. Shigemitsu became Foreign Minister in December 1954. During his two years as Minister, he was instrumental in obtaining the Allies' clemency and ultimately, in 1957, the release of all Japanese held in captivity. On 7 April 1957, the Japanese Government announced that with the concurrence of a majority of the Allied Powers represented on the IMTFE, all major Japanese war criminals were granted clemency and unconditionally released forthwith. Kishi Nobusake, another Class A criminal suspect, was tried and convicted in further proceedings after the first Tokyo Trial, but later became Prime Minister in January 1956 and served until July 1960. He also held the portfolio of the Ministry of Foreign Affairs for some time in 1956).

<sup>146</sup> M. Cherif Bassiouni, *supra* note 16, at 36.

Tribunals for the Far East are domestic in nature because the Tribunals were individually constituted by the Allied Powers in exercise of sovereign rights over the territory that they control following the unconditional surrender of Germany and Japan.<sup>147</sup>

Regardless of the shortcomings highlighted above, the Nuremberg and subsequent war crimes trials were the foundation stones on which a new world order of international justice was to be built. The prosecutions were positive revolutionary steps because they represented the first organized attempt to apply principles of international law to punish people accused of war crimes and crimes against humanity. Before the Nuremberg trials, jurisdiction over such offenses was limited to individual countries' military courts. The Nuremberg trials therefore, confirmed that when cruelties, such as genocide, reached a magnitude that shocked the conscience of humankind, it should and could be punished as a crime against all of humankind. According to Justice Jackson, "crimes against International law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the promise of international law be enforced."<sup>148</sup>

The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgments, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law.<sup>149</sup>

---

<sup>147</sup> M. Cherif Bassiouni, *supra* note 16, at 36.

<sup>148</sup> IMT Judgment, *supra* note 1, at 447.

<sup>149</sup> See, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg, 1947. See also, Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 22; R.H. Jackson, *THE NUREMBERG CASE*, (New York, 1948), R.H. Jackson, *THE CASE AGAINST THE NAZI WAR CRIMINALS* (New York, 1945); Bernard V.A. Roling and Antonio Cassese, *THE TOKYO TRIAL*, *supra* note 116.

## CHAPTER THREE

---

### 3.0. THE FOUNDATIONAL LEGAL FRAMEWORKS FOR MODERN INTERNATIONAL CRIMINAL LAW

---

#### 3.1. INTRODUCTION

One of the visible aftermaths of World War II experiences and trials was the rapid development of international criminal law. The Nuremberg trials helped to expose the degree of atrocities committed by the Germans during World War II. It also exposed the lack of and/or inadequate legal instruments proscribing such conducts as crimes under international law. These revelations galvanized the development of the legal frameworks for modern international criminal law. The International Committee of the Red Cross and the newly formed United Nations<sup>1</sup> became the vanguard for codification of rules of armed conflict and prohibition of certain conducts as crimes against humanity into treaties and other legal instruments.<sup>2</sup>

#### 3.2. The United Nations Adoption of the Nuremberg Principles

Shortly after the completion of the Nuremberg trials, the UN General Assembly on December 11, 1946, adopted by unanimous vote Resolution 95(I), entitled

---

<sup>1</sup> See Charter of the United Nations, June 26, 1945, arts. 51, 59, Stat. 1031, 1044, 3 Bevens 1153, 1165. With the demise of the League of Nations for its failure to prevent the World War II, the United Nations was established on October 24, 1945, as an international organization to maintain peace and security. On April 25, 1945, representatives of 50 countries met in San Francisco to draft the United Nations Charter which established the UN. The Charter was signed on June 26, 1945 by the representatives of the 50 countries that took part in the San Francisco Conference. Poland which was not represented at the Conference later signed the Charter and became one of the original 51 Member States of the United Nations. The United Nations officially came into existence on October 24, 1945, and has currently 199 Member States. See <http://www.un.org> [visited on February 9, 2005] [hereinafter the

<sup>2</sup> For a detailed discussion of international criminal law conventions see M. Cherrif Bassiouni, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* (1997).

“Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.”<sup>3</sup> Through Resolution 95(1), the UN affirmed the principles of international law recognized by both the IMT Charter<sup>4</sup> and espoused in the Judgment of the Nuremberg Tribunal.<sup>5</sup> This meant that in the General Assembly’s view, the IMT had taken into account already existing principles of international law, which the tribunal had only to “recognize”. Thus, by Resolution 95, the UN confirmed the principle of individual criminal responsibility under international criminal law. Also, through Resolution 95, the UN General Assembly mandated the International Law Commission (ILC), a subsidiary organ of the United Nations to codify the Nuremberg Principles into a criminal code and to create an international criminal jurisdiction where such offenses, including the crime of genocide, could be punished.<sup>6</sup>

By adopting Resolution 95, the United Nations confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgment had “recognized”. Also, the United Nations expressed the need to incorporate the principles into a major instrument of codification either by way of a “general codification of offences against the peace and security of mankind” or as an

---

<sup>3</sup>Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, U.N. Doc. A/64/Add Sess. 1, pt. 2, 55th Plen. Mtg. at 188 (1946) [hereinafter UN Resolution 95]. For a discussion of the legislative history of this resolution, see The Charter and Judgment of the Nuremberg Tribunal: History and Analysis, U.N. Doc. A/CN 4/5, at 11-33.

<sup>4</sup>Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, the Charter of the International Military Tribunal, 82 U.N.T.S. 279, 284, 59 Stat. 1544, 1546 [hereinafter the IMT Charter].

<sup>5</sup>The Nuremberg Tribunal noted 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.” See Trial of Major War Criminals before the International Military Tribunal, Judgement, Nuremberg, 14.11.1945 – 1.10.1946, Official Documents, 1947, Vol. I, s. 223.

<sup>6</sup>UN Resolution 95, *supra* note 3, at 188.

“international criminal code”. By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement.<sup>7</sup>

In 1950, the ILC followed up the U.N. affirmation with its report entitled the “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.”<sup>8</sup> Principle I which expressly recognizes the principle of individual criminal responsibility, states that “any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”.<sup>9</sup> In essence, Principle 1 constitutes official recognition of the fact that an individual in the broadest sense (“any person”) may be held responsible for having committed a crime. And this may be the case even if the act is not considered a crime under domestic law.<sup>10</sup>

Principles III and IV provide that a person who acts in his capacity as Head of State or as a government official and one who acts on the orders of the government or of a superior are not thereby relieved of responsibility.<sup>11</sup> These two principles affirm what was established in Articles 7 and 8 of the Nuremberg Charter regarding the prohibition of the defense of superior order as absolute defense.<sup>12</sup> However, while article 8 of IMT Charter on superior orders, accepted the possibility of mitigation of punishment “if the Tribunal determines that justice so requires”, Principle IV of the ILC text modifies the

---

<sup>7</sup>“Article 6 of the Nuremberg Charter has since come to represent general international law.” See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 562 (Oxford, 1991); M. Shaw, *INTERNATIONAL LAW* 471 (Cambridge, 1998).

<sup>8</sup> See Report of the International Law Commission to the General Assembly, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 374-78, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (reporting the Commission's findings for The Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal) [hereinafter Nuremberg Principles].

<sup>9</sup> Id., Principle I.

<sup>10</sup> Id., Principle II.

<sup>11</sup> Id., Principles III & IV.

<sup>12</sup> IMT Charter, *supra* note 4, arts. 7 & 8.

approach by stating that the individual is not relieved of responsibility “provided a moral choice was in fact possible to him”.<sup>13</sup> Thus, unlike article 8 of the IMT Charter, Principle IV leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual had a “moral choice” to refuse to comply with an order given by a superior.

Principle VI codifies the three categories of crime established by article 6 of the Nuremberg Charter. What was defined in the London Agreement as “crimes coming within the jurisdiction of the Tribunal” has now been formulated as “crimes under international law”, using the same wording found in article 6 of the IMT Charter.<sup>14</sup> To this extent, Principle VI represents the core of a possible international criminal code.

The affirmation of the Nuremberg principles by the 1946 General Assembly resolution and their formulation by the ILC were important steps toward the establishment of a code of international crimes entailing individual responsibility.<sup>15</sup> Thus, individual criminal responsibility for violations of the international crimes is now

---

<sup>13</sup> Nuremberg Principles, *supra* note 8, Principle IV.

<sup>14</sup> See discussions and accompanying text on IMT subject matter jurisdiction in Chapter two.

<sup>15</sup> See article 2 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind which provides:

#### Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression in accordance with article 16.
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
  - (a) Intentionally commits such a crime;
  - (b) Orders the commission of such a crime, which in fact occurs or is attempted;
  - (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
  - (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
  - (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
  - (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;
  - (g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

See, International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind, 1996, art. 2, available at: <http://www.un.org/law/ilc/texts/dcodefra.htm>.

undisputed part of contemporary customary international law.<sup>16</sup> Criminal responsibility now extends to individual combatants, government officials, and Heads of State.<sup>17</sup> Furthermore, it is now a recognized principle of international law that “leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit ... [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.”<sup>18</sup>

### **3.3. The Genocide Convention of 1948**

On December 9, 1948, the UN General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>19</sup> The Genocide Convention was an agreement which condemned genocide as an international crime, regardless of where it took place. It sought to prevent and punish genocides and actions leading to genocide. Importantly, the Genocide convention severed the connection of genocide with war by declaring that genocide is a crime under international law “whether committed in time of peace or in time of war”.<sup>20</sup>

The convention defined genocide by listing prohibited genocidal acts which if committed with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group” is punishable as genocide under international law.<sup>21</sup> The criminal acts of

---

<sup>16</sup> See Nuremberg Principles, *supra* note 8, Principle I.

<sup>17</sup> *Id.*, Principles III-IV.

<sup>18</sup> Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 T.M.W.C. 411.

<sup>19</sup> Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, 78 U.N.T.S. 277 (entered into force on January 12, 1951) [hereinafter Genocide Convention].

<sup>20</sup> Genocide Convention, art. 1.

<sup>21</sup> *Id.*, art. 2. Such acts are: (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



genocide which are punishable under the Genocide Convention include the act of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.<sup>22</sup>

Thus, it is a crime to plan or incite genocide, even before killing starts, and to aid or abet genocide.<sup>23</sup> It follows that genocidal acts need not kill or cause the death of members of a group. Causing serious bodily or mental harm, prevention of births and transfer of children are acts of genocide when committed as part of a policy to destroy a group's existence.<sup>24</sup> Similarly, perpetrators need not intend to destroy the entire group, an intention to destroy only part of a group will suffice as genocide. It is disputable whether there is a requirement of intent to destroy a substantial number of group members or whether an individual may be guilty of genocide even if he or she kills only one person. It would appear that the individual is guilty of genocide so long as the person knew that he or she was participating in a larger plan to destroy the group.<sup>25</sup>

The protected groups under the genocide Convention are national, ethnical, racial or religious groups.<sup>26</sup> A national group means a set of individuals whose identity is defined by a common country of nationality or national origin. On the other hand, an ethnical group is a set of individuals whose identity is defined by common cultural traditions, language or heritage. A racial group means a set of individuals whose identity is defined by physical characteristics. And a religious group is a set of individuals whose identity is defined by common religious creeds, beliefs, doctrines, practices, or rituals.

---

its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group.

<sup>22</sup> Genocide Convention, *supra* note 19, art. 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, art. 2.

<sup>25</sup> For further discussion on genocide, see part II, chapter six, *infra*.

<sup>26</sup> Genocide Convention, *supra* note 19, art. 2.

Contracting Parties to the Genocide Convention undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention.<sup>27</sup> Also, because the Convention did not provide the penalties for persons convicted of genocide, Contracting Parties are free to enact domestic legislation which should provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3.<sup>28</sup> It follows that the punishment of genocide in one Contracting Party may be more or less severe than is provided in another Contracting Party.

The Genocide Convention applies equally to “rulers”, “public officials” and “private individuals”,<sup>29</sup> thereby reinforcing the principle of individual criminal liability. The jurisdiction to try individuals charged with genocide or any of the other acts enumerated in article 3 is placed on the State in the territory of which the act was committed, or on such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>30</sup> However, the International Court of Justice has jurisdiction between Contracting Parties with respect to the interpretation or application or responsibilities of Contracting Parties under the Convention.<sup>31</sup>

The Genocide Convention which was adopted on the eve of the Universal Declaration of Human Rights by the UN General Assembly was an important

---

<sup>27</sup> Genocide Convention, *supra* note 19, art. 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, art. 4.

<sup>30</sup> *Id.*, art. 6.

<sup>31</sup> *Id.*, art. 9.

development in the proscription of acts against humanity.<sup>32</sup> The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.<sup>33</sup> The Convention introduced genocide as a new crime under international law distinct from its classification as crimes against humanity under article 6 of the Nuremberg Charter.<sup>34</sup> However, in the case of *Prosecutor v. Dusko Tadic*,<sup>35</sup> the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that “genocide [is] itself a specific form of crime against humanity”.<sup>36</sup> This has led to the suggestion that in future cases it may be necessary only to charge perpetrators with crimes against humanity with genocide as part of the *res gestae*.<sup>37</sup> This suggestion is inappropriate because elements of the crime against humanity and genocide are not the same at least as contained under the Elements of Crimes for the International Criminal Court.<sup>38</sup>

#### **3.4. The Geneva Conventions on Laws and Customs of War, 1949**

Shortly after the Genocide Convention, the International Committee of the Red Cross conscious of the atrocities of World War II initiated the drafting of four Conventions in Geneva on August 12, 1949, aimed at strengthening the rights of civilians and prisoners of war during armed conflict. The Conventions were adopted on August 12, 1949, by the Diplomatic Conference for the Establishment of International

---

<sup>32</sup> Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J.I.L., 145 (1947); Josef L. Kunz, *The United Nations Convention on Genocide*, 43 AM. J.I.L., 738 (1949); Nehemiah Robinson, *THE GENOCIDE CONVENTION: A COMMENTARY* (New York, 1960).

<sup>33</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 18 May 1951, I.C.J. Reports, 23 (1951).

<sup>34</sup> See discussions on the subject matter jurisdiction of the IMT, *supra* chapter two, at pp 15-18.

<sup>35</sup> *Prosecutor v. Tadic (Sentencing Judgment)* Case No. IT-94-1-T, July 14, 1997.

<sup>36</sup> *Id.*, at para. 8.

<sup>37</sup> Leslie C. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, 2<sup>nd</sup> Ed., 43 (2000).

<sup>38</sup> See discussions on the International Criminal Court, *infra* at Part III.

Conventions for the Protection of Victims of War, held in Geneva from April 12, to August 12, 1949. The four Geneva Conventions are: the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field<sup>39</sup>; the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea<sup>40</sup>; the Geneva Convention Relative to the Treatment of Prisoners of War<sup>41</sup>; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>42</sup>

World War II highlighted the lack of clarity and inadequacy of the existing laws of armed conflict that protected victims of war and the need for more specific provisions on punishing violations of the law.<sup>43</sup> Thus, Geneva Conventions I, II, and III revised the first Geneva Convention of 1864 on the treatment of battlefield casualties, the Second Geneva Convention of 1906 which extended the principles from the first convention to apply also to war at sea, and the third Geneva Convention of 1929 on the treatment of prisoners of war respectively. On the other hand, Geneva Convention IV of 1949 for the first time, provided for the protection of civilians in enemy territory during armed conflict. Convention IV was as a result of the treatment suffered by civilian populations of occupied territories during World War II.<sup>44</sup> Together, the Geneva Conventions reshaped the entire treaty-based system dealing with the protection of war victims and a

---

<sup>39</sup> The Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 U.N.T.S. 970 [hereinafter Geneva Convention I].

<sup>40</sup> The Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea of August 12, 1949, 75 U.N.T.S. 971 [hereinafter Geneva Convention II].

<sup>41</sup> The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. 972 (entered into force on October 21, 1950) [hereinafter Geneva Convention III].

<sup>42</sup> The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 973 [hereinafter Geneva Convention IV].

<sup>43</sup> See DOCUMENTS ON THE LAWS OF WAR 169 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

<sup>44</sup> Leslie C. Green, *supra* note 37, at 43.

significant development in the law of armed conflict since 1907 and have been adhered to by more States than any other agreement on the laws of armed conflict.<sup>45</sup>

The extensive provisions of the Geneva Conventions are linked by certain general principles and “common articles” which are applicable to all four Conventions. Under Common article 1 applicable to all four Conventions, the High Contracting Parties (used to refer to member States to the Geneva Conventions), to these Conventions undertake the basic general treaty obligation “to respect and to ensure respect for the present Conventions in all circumstances”.<sup>46</sup> Common Article 1 is reflective of the principles of good faith and *pacta sunt servanda*,<sup>47</sup> which have deep historical and jurisprudential roots in international law. The principle imposes on a State party to a convention not only a duty to perform its own obligations as a party to the convention but also a duty not to encourage others to violate the convention.<sup>48</sup> Hence, in the merits phase of Military and Paramilitary Activities in and against Nicaragua,<sup>49</sup> the International Court of Justice (ICJ) concluded that:

[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, .... the United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . . .<sup>50</sup>

---

<sup>45</sup> Currently, there are 191 States Parties to the Conventions. See Int’l Comm. of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at < [http://www.icrc.org/eng/party\\_gc](http://www.icrc.org/eng/party_gc) > (documenting 191 ratifications as of October 2004).

<sup>46</sup> Geneva Conventions, common Article 3.

<sup>47</sup> See Article 26 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>48</sup> Theodor Meron, The Geneva Conventions as Customary Law, 81 AM. J. I. L. 348, 354-5 (1987).

<sup>49</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

<sup>50</sup> Id., at 114, para. 220.

The Geneva Conventions created two types of armed conflicts: international and non-international. The bulk of the Conventions apply to international armed conflicts whether declared or not.<sup>51</sup> International armed conflict exists between two States even if one of the parties does not recognize the existence of a state of war.<sup>52</sup> Also, international armed conflict exists whenever there is a partial or total occupation of another State's territory and even when the occupation has met with no armed resistance.<sup>53</sup> Furthermore, the Geneva Conventions are applicable as between Contracting Parties in all international armed conflicts even where one of the States to the conflict is not a party to the Conventions. In addition, the Contracting Parties shall be bound to observe the Convention in their relation to the said State if the latter subsequently accepts and applies the Convention.<sup>54</sup> Thus, under common article 2, the Geneva Conventions apply to almost every armed conflict between States.<sup>55</sup>

On the other hand, common article 3 applies to "armed conflict not of an international character".<sup>56</sup> Non-international armed conflict refers to conflicts that are

---

<sup>51</sup> See the Geneva Conventions, common Article 2.

<sup>52</sup> The Geneva Conventions, common Article 2.

<sup>53</sup> The Geneva Conventions, common Article 2.

<sup>54</sup> Geneva Conventions, common Article 2.

<sup>55</sup> David D. Caron & David L. Sloss, Availability of U.S. Courts to Detainees at Guantanamo Bay Naval Base - Reach of Habeas Corpus - Executive Power in War on Terror 98 AM. J. INT'L L. 788, 789 (2004).

<sup>56</sup> Common Article 3 of the Geneva Conventions, provides that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

not between States and includes conflicts between a State and a non-state entity.<sup>57</sup> Article 3 marks a new step in the development of humanitarian law as it was without antecedent because international law and prior conventions relating to armed conflict generally did not regulate the conduct of internal armed conflict.<sup>58</sup> However, in 1949, the ICRC considered it necessary to adopt minimum rules of protection for the parties involved in a non-international conflict.<sup>59</sup> In the merits phase of the *Military and Paramilitary Activities in and against Nicaragua*,<sup>60</sup> the International Court of Justice (ICJ) noted that common Article 3 defines:

certain rules to be applied in the armed conflicts of a non-international character. . . . [I]n the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; . . . they . . . reflect what the Court in 1949 called “elementary considerations of humanity” (Corfu Channel..).<sup>61</sup>

The ICRC Commentary on Geneva Convention No. I states that common article 3 demands respect for rules “already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed.”<sup>62</sup> The ICRC’s position has received judicial support from the ICJ which noted that the Geneva Conventions are part of “the general principles of humanitarian law to

---

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for . . .

<sup>57</sup> Derek Jinks, September 11 and the Laws of War, 28 YALE J. INT’L L. 1, 38-41 (2003).

<sup>58</sup> Leslie C. Green, *supra* note 37, at 44.

<sup>59</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 26 (J. Pictet ed. 1952)

<sup>60</sup> *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 49, at 14.

<sup>61</sup> *Id.*, at 114, paras. 218-19.

<sup>62</sup> *Id.* at 50.

which the Conventions merely give specific expression”.<sup>63</sup> In *Prosecutor v. Tadic*,<sup>64</sup> the Appeals Chamber of the International Criminal Court for the Former Yugoslavia upheld the decision of the Trial Chamber 1<sup>65</sup> which held that common article 3 applies to both international and internal armed conflicts.<sup>66</sup> The Appeals Chamber further observed that common article 3 covered “all violations of international humanitarian law other than the grave breaches of the four Geneva Conventions.”<sup>67</sup>

Another remarkable novation of the Geneva Conventions is the introduction of a clear obligation on Contracting Parties to prosecute those who commit “grave breaches”<sup>68</sup> of the Convention.<sup>69</sup> Common articles 49, 50, 129, and 146 provide that:

---

<sup>63</sup> Military and Paramilitary Activities in and against Nicaragua, *supra* note 49, at 114, para. 220

<sup>64</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, (May 7, 1997) reprinted in I.H.R.R. vol. 4, No. 3 (1997).

<sup>65</sup> See *Prosecutor v. Tadic*, Trial Chamber, Decision on the Defense Motion on Jurisdiction, Case No. IT-94-1-T (August 10, 1995).

<sup>66</sup> See *Prosecutor v. Tadic*, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-AR72 (October 2, 1995) reprinted in 35 I.L.M. 32 (1996) [hereinafter Decision of the Appeals Chamber].

<sup>67</sup> *Id.*, 87.

<sup>68</sup> See Geoffrey Best, *WAR AND LAW SINCE 1945*, 166 (1994); Leslie Green, *supra* note 37, at 43. Each of the four Conventions lists what constitutes grave breaches which are identical and only differs in context of the specific subject matter addressed by each convention.

Art. 50 of the 1949 Geneva Convention I and Art. 51 of the 1949 Geneva Convention II contain identical provisions that define grave breaches with respect to the wounded and sick in the field and at sea. These two articles provide as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention I, *supra* note 39, art. 50; Geneva Convention II, *supra* note 40, art. 51.

Art. 130 of the 1949 Geneva Convention III defines grave breaches with respect to the protection of prisoners of war as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

*Id.* art. 130.



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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.<sup>70</sup>

The Commentary to the Geneva Convention IV, Article 146 elaborates on the obligation imposed on Contracting States to prosecute persons accused of grave breaches of the Conventions. The Commentary provides as follows:

The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.<sup>71</sup>

The text of common articles 49, 50, 129, & 146 did not place any jurisdictional limit on the obligation of States to apprehend and prosecute individuals who commit

---

Art. 147 of the 1949 Geneva Convention IV defines grave breaches with respect to the protection of civilians as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id. art. 147.

<sup>69</sup> See Geneva Convention I, *supra* note 39, art. 49; Geneva Convention II, *supra* note 40, art. 50, Geneva Convention III, *supra* note 41, art. 129, and Geneva Convention IV, *supra* note 4, art. 146.

<sup>70</sup> Id.

<sup>71</sup> See COMMENTARY ON THE GENEVA CONVENTION of 12 August, 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (Jean S. Pictet ed., 1958) [hereinafter 1949 Geneva Convention IV Commentary].

great breaches of the Conventions.<sup>72</sup> On the contrary, the Geneva Conventions clearly obligate States to search for and prosecute any person accused of violating common articles 49, 50, 129, & 146 without regard to the person's nationality.<sup>73</sup> However, a State may in accordance with its laws, differ jurisdiction to another Contracting State that has made out a *prima facie* case against the accused.<sup>74</sup> While the Geneva Conventions did not expressly provide that a Contracting State may demand from another Contracting State to fulfill its obligation to prosecute or surrender the accused to a willing State, the Commentary to common article 1 of the Geneva Conventions appears to support this proposition.<sup>75</sup> Furthermore, the 1958 Commentary on the Geneva Convention IV added that:

[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.<sup>76</sup>

In view of the above, it has been suggested that since war crimes are universal crimes, suspected war criminals may be prosecuted by any State.<sup>77</sup> Thus, by implication, Contracting States' obligation to prosecute is absolute for grave breaches of the Geneva

---

<sup>72</sup> See Geneva Convention I, *supra* note 39, art. 49; Geneva Convention II, *supra* note 40, art. 50, Geneva Convention III, *supra* note 41, art. 129, and Geneva Convention IV, *supra* note 4, art. 146.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 26 (J. Pictet ed. 1952) (emphasis added). The Commentary adds that "in the event of a Power failing to fulfil its obligations, the other Contracting Parties . . . may, and should, endeavour to bring it back to an attitude of respect for the Convention."

<sup>76</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 16 (O. Uhler & H. Coursier eds. 1958).

<sup>77</sup> See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 305 (3d ed. 1979).

Conventions.<sup>78</sup> Furthermore, it has also been advocated by commentators that the Geneva Conventions introduced the concept of universal jurisdiction through common articles 49, 50, 129, & 146.<sup>79</sup> According to one commentator:

... under the 1949 Geneva Conventions ... all States Parties to the Conventions ... are currently obligated to search out persons who have committed “grave breaches” of the Conventions and to either try them or extradite them for trial pursuant to the Conventions. This obligation is a major procedural mechanism under the Conventions for enforcement of their important humanitarian principles. The obligation applies to all States Parties whether or not they were parties to the conflict or the “grave breaches” took place in their jurisdiction, and it applies now with no need for further legal predicates.<sup>80</sup>

However, the obligation to search for and arrest persons suspected of committing grave breaches should not be construed to bestow on a State the universal obligation or *carte blanche* to search for alleged war criminals in the sovereign territory of foreign countries.<sup>81</sup> Rather, the obligation to prosecute persons accused of grave breaches of the Geneva Conventions must be exercised within the limits of international law.<sup>82</sup>

### **3.5. Additional Protocols I & II to the Geneva Conventions**

While the Geneva Conventions were considered a major legal framework for the development of rules of war, with time, it was noted that the Conventions did not provide adequate protection in certain areas such as the conduct of combatants and protection of

---

<sup>78</sup> See Michael P. Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? 31 TEX. INT’L L.J. 1, 20 (1996).

<sup>79</sup> Leslie Green, *supra* note 37, at 43; Geoffrey Best, *supra* note 68, at 165 (1994); John Norton Moore, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 302-03, 310 (1992); M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 503-26 (1992); See Ian Brownlie, *supra* note 77, at 563; Denise Plattner, The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts, 278 INT’L REV. of the RED CROSS 409, 413 (1990).

<sup>80</sup> John Norton Moore, *supra* note 79, at 299.

<sup>81</sup> See Paul S. Stevens, An Interview with Defense Department General Counsel Judith A. Miller, (Standing Comm. on Law and Nat. Security, Washington D.C.), 18 A.B.A. NAT’L SECURITY L. REP. 1 (1996).

<sup>82</sup> See Ian Brownlie, *supra* note 77, at 243-57

civilians from the effects of hostilities. In order to address the deficiency, the International Conference on Human Rights after its meeting in Tehran in 1968 invited the ICRC to study the possibility of updating the Conventions.<sup>83</sup> Accepting the invitation, the ICRC organized and chaired the consultations between experts drawn from governments and from National Red Cross and Red Crescent Societies.<sup>84</sup> The ICRC used the reports of these conferences to prepare the draft of the Additional Protocols.<sup>85</sup> The ICRC presented the reports of the conferences on Additional Protocols to the Twenty-Second International Conference of the Red Cross.<sup>86</sup>

Thereafter the draft Protocols were considered by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977.<sup>87</sup> The Conference was convened by the Swiss government in February, 1974 and was attended by 115 States that signed the Geneva

---

<sup>83</sup> International Conference on Human Rights (Tehran, Apr 22-May 13, 1968), Resolution XXIII, in Final Act of the International Conference on Human Rights, Doc A/CONF 32/41 at 18 (UN 1968).

<sup>84</sup> Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (The Hague, Mar 1-6, 1971), Report on the Work of the Conference, Doc D-O-1195b (ICRC 1971) (cyclostyled document); Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, May 24-June 12, 1971), Report on the Work of the Conference (ICRC 1971); Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2d Sess (Vienna, Mar 20-24, 1972), Report on the Work of the Conference, Doc D-1254b (ICRC 1972) (cyclostyled document); Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2d Sess (Geneva, May 3-June 3, 1972), Report on the Work of the Conference (ICRC 1972) (two volumes).

<sup>85</sup> International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973); International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (1973).

<sup>86</sup> Resolution XIII, in Resolutions Adopted by the XXIInd International Conference of the Red Cross, 14 Intl Rev Red Cross 19, 30 (1974); International Committee of the Red Cross, Report on the Study by the XXIIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Doc CDDH/6 (1974) (cyclostyled document).

<sup>87</sup> See Resolutions of The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, available at: ICRC, <http://www.icrc.org/IHL.NSF/385ec082b509e76c41256739003e636d/cff3695d633af7d5c125641e0052bb78?OpenDocument>.

Conventions and/or are member States of United Nations Organization.<sup>88</sup> The Conference was also observed by national liberation organizations as well as intergovernmental and non-governmental organizations.<sup>89</sup> The Diplomatic Conference ended on June 8, 1977 with the adoption of two additional Protocols to the Geneva Conventions.<sup>90</sup>

Protocol I extends the Geneva Conventions' definition of international armed conflict to include wars of national liberation.<sup>91</sup> By clearly prohibiting what constitutes indiscriminate attacks, Protocol I specifies what constitutes a legitimate target of military attack.<sup>92</sup> Attacks or other acts carried out in violation of the prohibition against indiscriminate attacks and attacks or reprisals directed against the civilian population and individual civilians or civilian objects or objects indispensable to the survival of the civilian population are, subject to certain provisos, considered grave breaches of humanitarian law and classified as war crimes.<sup>93</sup> Article 90 of Protocol I provides for the

---

<sup>88</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977) (Federal Political Department, Bern 1978) (seventeen volumes).

<sup>89</sup> *Id.*

<sup>90</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 ILM 1391 (1977) [hereinafter Protocol I Additional to the Geneva Conventions]; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 16 ILM 1442 (1977) [hereinafter Protocol II Additional to the Geneva Conventions].

<sup>91</sup> Protocol I Additional to the Geneva Conventions, *supra* note 90, art. 1(4).

<sup>92</sup> Specifically, Protocol I:

a) prohibits indiscriminate attacks and attacks or reprisals directed against: the civilian population and individual civilians (art. 48 and 51); civilian objects (art. 48 and 52); objects indispensable to the survival of the civilian population (art. 54); cultural objects and places of worship (art. 53); works and installations containing dangerous forces (art. 56); and the natural environment (art. 55);

b) extends the protection accorded under the Geneva Conventions to all medical personnel, units and means of transport, both civilian and military (art. 8-31);

c) lays down an obligation to search for missing persons (art. 33);

d) strengthens the provisions concerning relief for the civilian population (art. 68-71);

e) protects the activities of civil defence organizations (art. 61-67);

f) specifies measures that must be taken by the States to facilitate the implementation of humanitarian law (art 80-91).

<sup>93</sup> Protocol I Additional to the Geneva Conventions, *supra* note 90, art. 85.

establishment of an International Fact-Finding Commission to investigate alleged grave breaches or other serious violations of the Conventions and of Protocol I.<sup>94</sup> All States Parties to Protocol I may accept the competence of this Commission.<sup>95</sup>

Protocol I was necessary to strengthen the Geneva Conventions because new methods of combat had been developed and the rules applicable to the conduct of hostilities had become outdated. Protocol I provides a reminder that the right of the parties to a conflict to choose methods and means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles, material or tactics of a nature to cause superfluous injury or unnecessary suffering.<sup>96</sup>

Protocol II seeks to extend the application of the main rules of the law of war to internal conflicts.<sup>97</sup> This was in recognition of the fact that most conflicts since World War II have been non-international.<sup>98</sup> Prior to Protocol II, the only provision in the Geneva Conventions of 1949 which is applicable to non-international armed conflict is article 3 common to all four Conventions. Although common article 3 sets out basic principles for protecting people in wartime, it was not enough to solve the serious problems of humanitarian concern that arise in internal conflicts. Thus, while common article 3 planted the seed of humanitarian considerations in law relating to civil war, Protocol II expanded the scope of prohibitions and protections.<sup>99</sup>

---

<sup>94</sup> Protocol I Additional to the Geneva Conventions, *supra* note 90, art. 90.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*, art. 35.

<sup>97</sup> See, Protocol II Additional to the Geneva Conventions, *supra* note 90, art. 3.

<sup>98</sup> Lindsay Moir, *THE LAW OF INTERNAL ARMED CONFLICT 1* (2002). The Red Cross estimates that eighty percent of victims of violence are victims of “non-international armed conflicts.” available at [www.icrc.org](http://www.icrc.org).

<sup>99</sup> For example, Protocol II:

(a) strengthens the fundamental guarantees enjoyed by all persons not, or no longer, taking part in the hostilities (Art. 4);

Also, unlike common article 3 to the four Geneva Conventions, which fails to set criteria for the definition of internal conflict to which it applies, Protocol II describes its own field of application in considerable detail, excluding situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.<sup>100</sup> Thus, the kind of internal armed conflict covered by Protocol II are non-international conflicts that take place on the territory of a State between the armed forces of that state and rebel armed forces that are under responsible command and control part of the national territory.<sup>101</sup> However, Protocol II unlike Protocol I failed to expressly provide for individual criminal responsibility for persons in a position of authority during an armed conflict and do not criminalize omissions by persons in authority to prevent crimes being committed under their command.<sup>102</sup>

### **3.6. Observations and Commentary**

The Genocide Convention and the Geneva Convention and its Additional Protocol I & II laid the foundation for international criminal law. These legal instruments pioneered the codification of international prohibition of acts which are repugnant to a civilized society and inimical to the survival of humankind. As discussed in chapters

- 
- b) lays down rights for persons deprived of their freedom and provides judicial guarantees for those prosecuted in connection with an armed conflict (art. 5-6);
  - c) prohibits attacks on the civilian population and individual civilians (art. 13);
  - d) prohibits attacks on objects indispensable to the survival of the civilian population (art. 14);
  - e) prohibits attacks on works and installations containing dangerous forces (art. 15);
  - f) prohibits attacks on cultural objects and places of worship (art. 16);
  - g) regulates the forced movement of civilians (art. 17);
  - h) protects the wounded, sick and shipwrecked (art. 7);
  - i) protects religious personnel and all medical personnel, units and means of transport (art. 9-11);
  - j) limits the use of the red cross and red crescent emblems to those persons and objects duly authorized to display it (art. 12).

<sup>100</sup> Protocol II Additional to the Geneva Conventions, *supra* note 90, art. 1.

<sup>101</sup> *Id.*, art. 1(1).

<sup>102</sup> See, Protocol I Additional to the Geneva Conventions, *supra* note 90, art. 86 applicable to international conflicts criminalizes omissions and provide for individual criminal responsibility.

four and six of this study, the Genocide Convention and the Geneva Conventions have been incorporated wholly or with modifications in the Statutes of the ad hoc tribunals in the former Yugoslavia and Rwanda respectively, the Statutes of the special or mixed tribunals for Sierra-Leone, Timore-Leste, and Cambodia as well as the ICC Statute.

The two Additional Protocols were intended to supplement, but do not replace, the Geneva Conventions of 1949. The Protocols have strengthened the rules governing the conduct of hostilities by the addition of more precise rules aimed at limiting the use of violence and protecting the civilian population.<sup>103</sup> However, these instruments are not without limitations, prominent of which is the failure to provide an effective enforcement mechanism and in some situations, limited protection. Therefore, in spite of these rules, States rarely fulfilled their duty to provide for or exercise their jurisdiction. While concerned organizations such as the ICRC and others have appealed to States to comply with their obligations under the Geneva Conventions and Additional Protocol I & II, the situation remained static. Thus, until the mid-1990s, the vast majority of war crimes trials were limited to crimes committed during the World War II.<sup>104</sup>

Apart from the legal instruments discussed above, there are other conventions which have been adopted over the years that contribute directly or indirectly to the development of international criminal law. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954,<sup>105</sup> which was adopted

---

<sup>103</sup> Y. Sandoz, C. Swinarski & B. Zimmermann, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (ICRC/Martinus Nijhoff, Geneva, 1987).

<sup>104</sup> Knut Dormann and Louis Maresca, The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments, 5 CHI. J. INT'L L. 217, 225 (2004).

<sup>105</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, (entered into force on August 7, 1956). The Convention has been ratified or acceded to by 114



in the wake of massive destruction of the cultural heritage in World War II, commits the contracting parties to protect the “cultural heritage of all mankind” in the event of armed conflict.<sup>106</sup> The Convention obligates contracting parties “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions” upon those persons “who commit or order to be committed a breach” of the Convention.<sup>107</sup>

Also, the the Universal Declaration of Human Rights (UDHR) of December 10, 1948,<sup>108</sup> adopted by the United Nations General Assembly in response to World War II, outlined United Nations’ view on the human rights guaranteed to all mankind.<sup>109</sup> The formation of the United Nations (“U.N.”) and the passing of the UDHR were important milestones in the contemporary history of human rights.<sup>110</sup> The UDHR was conceived as a statement of objectives to be followed by governments, and therefore not legally binding.<sup>111</sup> The UDHR however, served as the foundation for the adoption of two

---

States. See <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E#1> (last visited March 9, 2006).

<sup>106</sup> The Hague Convention, *supra* note 105, preamble, art. 4.

<sup>107</sup> *Id.*, art. 28. Note also that Article . 85(4)(d) of the 1977 Protocol I makes also attacks against historic monuments, works of art or places of worship under certain conditions a war crime. See, Additional Protocol I, *supra* note 90, art. 85(4)(d). See also, J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Paris, 1996).

<sup>108</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

<sup>109</sup> See, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 290 (1996) (suggesting that the UDHR remains the primary source of global human rights standards and is the basis for most human rights instruments).

<sup>110</sup> See, Henry Steiner & Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 705 (Oxford U. Press, 2d ed. 2000) (reviewing the formation of international human rights); Anne Gallagher, *Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners*, in *THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING* 201 (Philip Alston & James Crawford, eds., 2000) (expressing that the effectiveness of the U.N. human rights treaty system rests on “its ability to encourage and cultivate national implementation of, and compliance with, international human rights standards”).

<sup>111</sup> Note however that in 1968 United Nations International Conference on Human Rights decided it “constitutes an obligation for the members of the international community” to all persons. See also, *INTERNATIONAL LAW* 262, (Barry E. Carter & Phillip R. Trimble eds., 3rd ed. 1999) (noting scholars’ recognition of the UDHR as “binding, customary international law”); and at 848 (observing that “One oft-

legally-binding UN human rights Covenants;<sup>112</sup> the International Covenant on Civil and Political Rights,<sup>113</sup> and the International Covenant on Economic, Social, and Cultural Rights.<sup>114</sup> The UDHR, the ICCPR, and the ICESCR which are jointly referred to as the International Bill of Human Rights provides for and sets forth general standard for fundamental human rights protection.<sup>115</sup>

The ICCPR offers in more detail the civil and political rights enumerated earlier in the UDHR and is legally binding on those countries that have ratified it.<sup>116</sup> The ICCPR includes *inter alia*, the right to life,<sup>117</sup> to be free from torture and slavery,<sup>118</sup> to liberty and security, to freedoms of movement and association, thought, religion and expression, to

---

stated argument is that at least some standards set by the Universal Declaration of Human Rights, although initially only recommendatory and nonbinding, have now become legally binding as customary law through their wide acceptance by nations as having normative effect.”). Thus, some scholars have argued that the UDHR has a legally binding effect on all United Nations members since it is “an authoritative interpretation of the general human rights commitments contained in the [United Nations] Charter.” *Id.*, at 848.

<sup>112</sup>The Universal Declaration of Human Rights could not garner the international consensus necessary to become a binding treaty because it contained both first-generation civil and political rights and second-generation economic, social, and cultural rights. This led to a divide between developed capitalist nations such as the USA, which favored civil and political rights, and communist nations which favored economic, social and cultural rights. To solve this problem, two binding Covenants were created instead of one: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

<sup>113</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. As at January 26, 2006, about 155 members of the international community are States Parties to the ICCPR, making it one of the most fundamental expressions of human rights at the international level. See Office of the United Nations Commissioner for Human Rights, Ratifications and Reservations, available at: <http://www.ohchr.org/english/countries/ratification/4.htm> (visited March 10, 2006).

<sup>114</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1966), (entered into force Jan. 3, 1976) [hereinafter ICESCR]. As at January 26, 2006, the ICESCR has been ratified by 152 States. <http://www.ohchr.org/english/countries/ratification/3.htm> (visited March 10, 2006).

<sup>115</sup> See Mary Ann Glendon, Knowing the Universal Declaration of Human Rights, 73 NOTRE DAME L. REV. 1153, 1164 N.53 (1998) (explaining how the UDHR formed the foundations of human rights law).

<sup>116</sup> See Restatement (Third) of Foreign Relations Law 111 cmt. h (2002).

<sup>117</sup> ICCPR, *supra* note 113, art. 6

<sup>118</sup> *Id.*, art. 7

equality before the law,<sup>119</sup> to privacy, to equality within marriage, to the enjoyment of culture, the right to a fair trial<sup>120</sup> and provides for principle of *nullum crimen sine lege*.<sup>121</sup>

States Parties to the ICCPR are obligated to adopt legislative, administrative, and other measures necessary for ensuring that individuals within their jurisdiction enjoy the rights and freedoms contained in the ICCPR without discrimination.<sup>122</sup> The Covenant establishes the U.N. Human Rights Committee (HRC)<sup>123</sup> to monitor its implementation by considering periodic reports from States Parties.<sup>124</sup> Should a State Party violate an individual's rights and fails to provide an effective remedy, that person may communicate a complaint to the United Nations Human Rights Committee pursuant to the Optional Protocol to the ICCPR.<sup>125</sup> In certain circumstances, the HRC may consider

---

<sup>119</sup> Id., art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).

<sup>120</sup> Id., art. 14

<sup>121</sup> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. ICCPR, *supra* note 113, art. 15.

<sup>122</sup> ICCPR, *supra* note 113, art. 2(1).

<sup>123</sup> Id., art. 28 (providing for the establishing the Human Rights Committee).

<sup>124</sup> The Human Rights Committee is comprised of 18 experts who meet three times a year to consider periodic reports submitted by member States on their compliance with the treaty. Members of the Human Rights Committee are elected by member states, but do not represent any State. Id., art. 28. See Louis Henkin et al., HUMAN RIGHTS 491-92 (1999) observing that the Human Rights Committee:

may be described as the guardian of the [ICCPR], with responsibility for monitoring its implementation. Its two main functions ... are to consider reports from, and complaints against, the State Parties. The former is obligatory for all State Parties, while the latter is optional and exists in two forms: interstate “communications” under the Covenant, as well as individual “communications” under the Optional Protocol. The basic obligation of States Parties is to implement the rights provided for in Parts I and III of the [ICCPR].

Id.

<sup>125</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *reprinted* in 999 U.N.T.S. 302 (1966) [hereinafter Optional Protocol] (establishing a committee with authority to review alleged human rights violations). As at January 26, 2006, the Protocol has been ratified by 105 States Parties. See Office of the United Nations Commissioner for Human Rights, Ratifications and Reservations, available at: <http://www.ohchr.org/english/countries/ratification/5.htm> (visited March 10, 2006). Article 1 of the Protocol provides that:

complaints from other countries that have ratified the Covenant and from individuals who believe their rights under the Convention have been violated. The HRC also formulates General Comments (GC) that may help to clarify what countries must do to comply with the ICCPR.<sup>126</sup>

The ICESCR is a legally binding treaty that protects in more detail, a range of economic, social, and cultural rights without discrimination based on creed, political affiliation, gender, or race enumerated earlier in the Universal Declaration on Human Rights.<sup>127</sup> The ICESCR obligates States Parties to work toward the granting of economic, social, and cultural rights to individuals.<sup>128</sup> In 1987, the U.N. Economic and Social Council established the U.N. Committee on Economic, Social and Cultural Rights (CESCR) to monitor the progress of countries towards fully implementing their obligations under the ICESCR.<sup>129</sup> The Committee also formulates General Comments (GC) that clarifies what countries must do to comply with the ICESCR.

---

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Id.

<sup>126</sup> See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudications*, 107 *YALE L.J.* 273, 338-40 (1997) (explaining how the UNHCR monitors States' adherence to the ICCPR).

<sup>127</sup> The ICESCR includes the right to work, to just and favorable conditions of work, to form and join trade unions, to family life, to an adequate standard of living, to the highest attainable standard of health, to education, and to take part in cultural life. It prohibits all forms of discrimination in the enjoyment of these rights, including on the basis of sex, and requires that countries ensure the equal rights of women and men. See ICESCR, *supra* note 114.

<sup>128</sup> *Id.*, art. 2.

<sup>129</sup> The Committee is composed of eighteen independent experts, chosen with regard to equitable geographical distribution, who serve in their personal capacities. See E.S.C. Res. 1985/17, U.N. ESCOR, para. B, U.N. Doc. E/1985/85 (1985). See Philip Alston & Bruno Simma, *First Session of the U.N. Committee on Economic, Social and Cultural Rights*, 81 *AM. J. INT'L L.* 747 (1987).

In addition to the above international legal frameworks is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>130</sup> The Torture Convention establishes a complete ban on any form of torture or other inhuman or degrading treatment.<sup>131</sup> The Torture Convention defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes 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, when such pain or suffering is 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.<sup>132</sup>

The Committee Against Torture (Committee) acts as an oversight of the Convention.<sup>133</sup> The Committee is authorized to receive complaints from individuals against States for alleged violations of the Convention.<sup>134</sup> Also, the Committee reviews communications submitted by a State Party alleging that another State Party is not fulfilling its obligations under the Torture Convention.<sup>135</sup> On receipt of reliable information that torture is being practiced within the territory of a State Party, the Committee may initiate an investigation to determine whether the Convention has or is

---

<sup>130</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force on June 26, 1987) [hereinafter Torture Convention]. The Torture Convention has been ratified by 141 States Parties as at January 26, 2006, see Office of the United Nations Commissioner for Human Rights, Ratifications and Reservations, available at: <http://www.ohchr.org/english/countries/ratification/9.htm> (visited March 10, 2006).

<sup>131</sup> Torture Convention, *supra* note 130, art. 2.

<sup>132</sup> *Id.*, art. 1(1).

<sup>133</sup> *Id.*, art. 17 (creating a Committee Against Torture and establishing selection procedures). See generally Office of the High Commissioner for Human Rights, Committee Against Torture, Fact Sheet No. 17 (providing committee materials, including sessions, notes, complaints, and press releases), at <http://www.unhchr.ch/html/menu6/2/fs17.htm> (last visited May 20, 2004).

<sup>134</sup> See *id.* at art. 22 (explaining the individual complaint process); see also Office of the High Commissioner for Human Rights, Committee Against Torture: Overview and Procedure, at <http://www.unhchr.ch/html/menu2/8/overcat.htm> (last visited May 20, 2004).

<sup>135</sup> See *id.* at art. 21 (delineating the requirements for State Party complaints regarding another State Party's failure to abide by CAT provisions).

being violated.<sup>136</sup> A dispute between the States Parties concerning the interpretation of the Convention which cannot be resolved through arbitration may be referred to the International Court of Justice by either party.<sup>137</sup>

Furthermore, there are other legal instruments that have been adopted at the regional level that reflects the spirit of the International Bill of Rights. These legal frameworks include the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),<sup>138</sup> the American Convention on Human Rights (“ACHR”),<sup>139</sup> together with the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Inter-American Convention on Violence Against Women”),<sup>140</sup> and the African Charter on Human and Peoples’ Rights (“African Charter”).<sup>141</sup> The following is a summary of applicable provisions from the aforementioned documents as well as a brief explanation of how the various human rights bodies operate.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) guarantees and seeks to provide the same protection contained in the international bill of rights to all persons within its jurisdiction.<sup>142</sup> The enforcement and oversight of the ECHR is carried out by the European Court of Human

---

<sup>136</sup> See Torture Convention, *supra* note 130, art. 20 (outlining investigatory procedures comprised of confidential inquiries, reports, and visits). The Committee’s decision is not binding on States Parties to the Convention. However, the Committee’s decision serves as important points of reference for State Parties as they enforce the Torture Convention domestically.

<sup>137</sup> *Id.*, art. 30(1).

<sup>138</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

<sup>139</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

<sup>140</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, [hereinafter Inter-American Convention on Violence Against Women].

<sup>141</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 (1981) (entered into force on October 21, 1986) [hereinafter African Charter].

<sup>142</sup> ECHR, *supra* note 138, art 1 (requiring all States Parties to secure the rights and freedoms delineated within the ECHR “to everyone within their jurisdiction”).

Rights (“ECtHR”) European Commission of Human Rights (“European Commission”),<sup>143</sup> respectively.

Similarly, the American Convention on Human Rights (“ACHR”) and Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Inter-American Convention on Violence Against Women”) recognize and extend the rights guaranteed under the international bill of rights to persons within its jurisdiction.<sup>144</sup> Both the ACHR and the Inter-American Convention on Violence Against Women are interpreted and enforced by the Inter-American Commission on Human Rights (“IACHR”)<sup>145</sup> and the Inter-American Court of Human Rights (“IACtHR”)<sup>146</sup> with respect to members of the Organization of American States<sup>147</sup> who are States Parties to the two instruments.

The African Charter on Human and Peoples’ Rights (“African Charter”)<sup>148</sup> is another regional instrument which implements the rights guaranteed under the international bill of rights and imposes a general duty upon its States Parties to “recognize the rights, duties and freedoms enshrined in [the] Charter and ... to adopt

---

<sup>143</sup> See The European Court of Human Rights, Historical Background, Organization and Procedure (2003) [hereinafter ECtHR Background] (explaining how the European Commission of Human Rights (“European Commission”) and the original European Court of Human Rights were replaced by a full-time court on Nov. 1, 1998), at <http://www.echr.coe.int/Eng/Edocs/HistoricalBackground.htm> (last visited May 18, 2004).

<sup>144</sup> ACHR imposes upon its State Parties the obligation to respect and ensure the rights and freedoms included in the convention, for “all persons subject to their jurisdiction ... without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” Furthermore, the ACHR guarantees that “all persons are equal before the law”. See ACHR, *supra* note 139, arts. 1, 24.

<sup>145</sup> See generally Inter-American Commission on Human Rights (“IACHR”), at <http://www.oas.org/> (last visited March 10, 2006). See Louis Henkin et al., HUMAN RIGHTS 319 (1999)

<sup>146</sup> See generally Inter-American Court of Human Rights (“IACtHR”), at <http://www.oas.org/> (last visited March 10, 2006).

<sup>147</sup> See ACHR, *supra* note 139, at pmb1.

<sup>148</sup> See African Charter, *supra* note 141.

legislative or other measures to give effect to them.”<sup>149</sup> The African Commission on Human and Peoples’ Rights (“African Commission”)<sup>150</sup> and the African Court on Human and Peoples’ Rights<sup>151</sup> were established in order to protect the rights delineated in the African Charter (as well as in other pertinent documents).<sup>152</sup>

Although the international bill of rights and the regional human rights treaties essentially address and belong to international human rights law, they however impact international criminal law.<sup>153</sup> The Human Rights Commission established by the above named regional human rights treaties are assisted in their works by National Human Rights Institutions (NHRIs).<sup>154</sup> While it is the primary responsibility of States to observe

---

<sup>149</sup> See African Charter, *supra* note 141, art 1. Article 2 of the ACH which provides that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter,” while Article 3 declares that “every individual shall be equal before the law” and “every individual shall be entitled to equal protection of the law.” The AFC guarantees the right to life and integrity of the person in Article 4 of the Charter. Article 5 guarantees the right to be free from torture and cruel, inhuman or degrading treatment.

<sup>150</sup> Id., art. 30 (providing for the establishment of the Commission.). The Commission’s three central functions include the promotion and protection of human rights, and the interpretation of the provisions of the African Charter. Id., art. 45. Also, the Commission is charged with overseeing inter-State complaints and “other communications,” which include individual petitions. Id., arts. 47-58.

<sup>151</sup> See Protocol to the African Charter on Human And Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). available at: [http://www.africa-union.org/organs/orgCourt\\_of\\_Justice.htm](http://www.africa-union.org/organs/orgCourt_of_Justice.htm) (visited March 10, 2006). The protocol received the requisite number of ratifications and came into force on January 25, 2004. See, Press Release, African Union, The Protocol on the African Court on Human Rights and Peoples’ Rights to Come Into Force Soon (Dec. 30, 2003), at <http://www.pict-pecti.org/pdf/APHRC%20coming%20into%20force.pdf> (last visited March 10, 2006).

<sup>152</sup> See, Louis Henkin et al., Human Rights 319 (1999) (stating that customary human rights law is slightly different from customary international law); see also *infra* Part II.E (discussing the incorporation of domestic violence norms within customary international law).

<sup>153</sup> See, Louis Henkin et al., Human Rights 319 (1999) (stating that customary human rights law is slightly different from customary international law); Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935, 1977-78 (2002) (observing that countries that have ratified human rights treaties have better human rights ratings than those countries that have not).

<sup>154</sup> See generally, Linda C. Reif, Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, 13 HARV. HUM. RTS. J. 1, 10 (2000) (explaining the role of NHRIs suggested that the “human rights commission has as its express mandate the protection and promotion of human rights.”).



and enforce human rights, non-governmental organizations, and individuals should also ensure that these rights are observed.<sup>155</sup>

---

<sup>155</sup> See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1408-16 (1999) (noting how States, non-governmental organizations, and individuals all play a role in enforcing international human rights).

## PART II

INDIVIDUAL CRIMINAL ACCOUNTABILITY AND AD HOC  
INTERNATIONAL AND SPECIAL CRIMINAL TRIBUNALS

## CHAPTER FOUR

---

### 4.0. ESTABLISHMENT OF AD HOC INTERNATIONAL AND SPECIAL CRIMINAL TRIBUNALS

---

#### 4.1. INTRODUCTION

As noted in Chapter three, the horrific experiences of World War I & II and the trials that followed lead to the adoption of international conventions proscribing rules of armed conflict and prohibiting certain conducts. The expectation therefore was that States and the international community at large are now poised to ensure that such atrocious conducts reminiscent of World War I & II should never be repeated. Conversely, where such atrocity is committed, that States and the international community will move swiftly to checkmate the situation and promptly hold the perpetrators criminally responsible. Unfortunately, when it came time for States and the international community to make good on this expectation, they neglected to do so. Rather, States and the international community showed a preference for self preservation and a lack of political will to prosecute individuals accused of committing egregious crimes. In the same vein, attempts to create a permanent international court to hold war criminals individually accountable were sometimes truncated and at other times proceeded at a snail speed.<sup>1</sup>

Thus, while international human rights law did develop quickly, its monitoring mechanisms at the international level remained primarily political or quasi-judicial at best. Consequently, armed conflicts and genocidal acts in violations of international law particularly, the Geneva and the Genocide conventions progressed openly with impunity

---

<sup>1</sup> See Report of the Committee on International Criminal Jurisdiction, 1-31 August 1951, UN Doc. A/2136 (1952); Report of the 1953 Committee on International Criminal Jurisdiction, 27 July 27- August 20, 1953, UN Doc. A/2645 (1954).

in Europe, Asia, and Africa.<sup>2</sup> However, with the unrelenting activities of the print and electronic media that brought the genocide in the former Republic Yugoslavia into our homes,<sup>3</sup> the international community realized that it can no longer bury its ostrich head in the sand and decided to respond to public outcry against the despicable acts of ignoble conducts.<sup>4</sup>

Thus, after several decades of hardly any progress, the UN Security Council in 1993 and 1994 respectively, established two ad hoc criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to punish those responsible for the situations in Yugoslavia and Rwanda. In essence, it took about four decades after the end of the prosecutions of World War II to set up another international criminal tribunal in the former Yugoslavia. However, once the jinx of inaction was broken,<sup>5</sup> it took only 10 years to establish one more ad hoc tribunal and three special tribunals as well as a permanent criminal court. The ad hoc tribunals and the special tribunals are briefly

---

<sup>2</sup> See Gideon A. Moor, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 *FORDHAM INT'L L.J.* 870, 897-98 (1995) (“Taking note of the continued reports of human rights atrocities within Bosnia ... the Security Council expressed alarm at continuing reports of human rights violations.”); Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia*, 22 *DENVER J. INT'L L. & POL'Y* 235 (1994), and Human Rights Watch, *Rwanda - Human Rights Developments* (observing that the international community was shamefully absent at the moment of the killings in Rwanda and is moving slowly to bring those guilty to justice); available at: <http://www.hrw.org/reports/1995/WR95/AFRICA-08.htm>; (last visited September 1, 2005).

<sup>3</sup> See Roy Gutman, *Prisoners of Serbia's War: Tales of Hunger, Torture at Camp in North Bosnia*, *Newsday* (N.Y.), July 19, 1992, at 7. Gutman's report helped to expose the horrible treatment of Croat and Muslim detainees in Serb camps in the Bosnian cities of Banja Luka and Trnopolje and in the Manjaca and Omarska camps. *Id.*; Physicians for Human Rights, *MEDICINE UNDER SIEGE IN THE FORMER YUGOSLAVIA: 1991-1995* 24 (1996) [hereinafter *Medicine Under Siege*] (noting that television cameras showed pictures of “hundreds of emaciated men behind barbed wire, their eyes hollow from hunger and despair”).

<sup>4</sup> Virginia Morris & Michael P. Scharf, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* xxi (Virginia Morris & Michael P. Scharf eds., 1995) [hereinafter *Insider's Guide Volume One*]. See also David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 *CRIM. L. F.* 401 (1994).

<sup>5</sup> M. Cherif Bassiouni, *Combating Impunity For International Crimes*, 71 *U. COLO. L. REV.* 409, 420 (2000).

examined in this part of the study while the creation of the permanent international criminal court will be discussed in Part II.

## **4.2. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA**

### **4.2.1. History of the Conflict in former Yugoslavia**

The former Republic of Yugoslavia was comprised of three major ethnic/political/religious groups; the Croats, Bosnian, and Serbs, who harbored historical hatreds among themselves.<sup>6</sup> This deep rooted ethnic animosity was a potential threat to peace in the Balkans which became apparent with collapse of the Soviet threat<sup>7</sup> and the death of Croatian Marshal Tito (who had ruled the Republic since 1945 and had managed to suppress opposition from the Serbs and Bosnians) in 1980.<sup>8</sup> In 1989, Slobodan Milosevic became president of Serbia and Montenegro, the truncated Yugoslavia.<sup>9</sup> His nationalist quest for a greater Serbia incited anti-Serb sentiments and support for the secession of Serbians in Croatia and Bosnia which eventually led to the dissolution of the Republic of Yugoslavia in 1991.<sup>10</sup>

Fighting in Yugoslavia broke out in June 1991 when the predominantly Serb forces of the Yugoslav Peoples' Army (JNA) invaded Slovenia and Croatia after both

---

<sup>6</sup> Michael P. Scharf & William A Schabas, *MILOSEVIC ON TRIAL* 14 (The Continuum International Publishing Group, Inc., 2002).

<sup>7</sup> *Id.*, at 18.

<sup>8</sup> Roger Thurow, *Tito's Legacy: Political Drifting, An Economy in Chaos Prevail in Yugoslavia; Question is Whether Nation Will Turn More to Soviets Out of Economic Need; Sharpening Ethnic Rivalries*, *Wall St. J.*, May 8, 1986, available in 1986 WL-WSJ 258991.

<sup>9</sup> Makau Mutua, *Open Forum: Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 *TEMP. INT'L & COMP. L.J.* 167, 173 (1997).

<sup>10</sup> Michael P. Scharf & William A Schabas, *supra* note 6, at 11-19 (noting that Franjo Tudjman and Milian Kucan, leaders of Croatia and Slovenia respectively, sought to weaken Serbian influence in Yugoslavia by pursuing for the creation of a loose federation of States, leading to the dissolution of Republic of Yugoslavia in 1991), see also *MEDICINE UNDER SIEGE*, *supra* note 3, at 15-17.

Republics declared independence on June 25, 1991.<sup>11</sup> The fighting ended temporarily on July 7, 1991, but resumed into a “full-scale warfare in August 1991 and continued until 2 January 1992, when a ceasefire was signed in Sarajevo under the auspices of the United Nations.”<sup>12</sup> Meanwhile, the UN Security Council had invited all States to impose a “general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise.”<sup>13</sup> Subsequently, after the ceasefire of January 2, 1992, the Security Council on February 21, 1992, adopted Resolution 743 which authorized the deployment of United Nations Protection Force (UNPROFOR) to carry out peacekeeping operations in the region.<sup>14</sup>

The UNPROFOR was established on March 13, 1992, but was largely ineffective as it was unable to stop Serbian forces from attacking the Croats and Bosnian Muslims in Bosnia-Herzegovina (BiH) in April 1992 following the recognition of their independence by the European Community and the United States of America on April 6 & 7, 1992, respectively.<sup>15</sup> On May 10, 1992, the JNA reluctantly withdrew from Bosnia and Herzegovina but continued to provide military, financial, logistic, and other kinds of support to Serbian forces (BSA) made up largely of Bosnian Serbs who reside in the Serb dominated area of BiH which the Serbs referred to as the “Republika Srpska.”<sup>16</sup>

---

<sup>11</sup> Michael P. Scharf & William A Schabas, *supra* note 6, at 19; MEDICINE UNDER SIEGE, *supra* note 3, at 16. See Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, at para. 10., Gen. Ass. 54 Sess. November 15, 1999, U.N. Doc. A/54/549, at [www.un.org/peace/srebrenica/pdf](http://www.un.org/peace/srebrenica/pdf). (visited March 2, 2005) [hereinafter The Fall of Srebrenica].

<sup>12</sup> See the Fall of Srebrenica, *supra* note 11, at para. 11.

<sup>13</sup> See Security Council Resolution 713 adopted in September 1991, S.C. Res. 713, U.N. SCOR, 3009<sup>th</sup> mtg., U.N. Doc. S/Res/713 (1991).

<sup>14</sup> See S.C. Res. 743, U.N. SCOR, 3055<sup>th</sup> mtg., U.N. Doc. S/Res/743 (1992).

<sup>15</sup> Michael P. Scharf & William A Schabas, *supra* note 6, at 22; MEDICINE UNDER SIEGE, *supra* note 3, at 16-17; The Fall of Srebrenica, *supra* note 11, at para.15.

<sup>16</sup> See The Fall of Srebrenica, *supra* note 11, at para.18; Norman Cigar & Paul Williams, INDICTMENT AT THE HAGUE: THE MILOSEVIC REGIME AND CRIMES OF THE BALKAN WAR 25 (New York University Press 2002); Steve Terret, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER

For the next three years, the BSA and the Serb paramilitary groups sporadically mounted pockets of attacks on the civilian population with the objective of terrorizing and forcing them to flee the self declared territory of the Republika Srpska.<sup>17</sup> This deliberate arms attack on the civilian population was infamously referred to as “ethnic cleansing” wherein Bosnian Muslims and Croats are either forced into exile as refugees, held as hostages for use in prisoner exchanges, or placed in concentration camps and many summarily executed.<sup>18</sup> An estimated 20,000 Muslim women and girls were thrown into rape camps. Bosnian-Muslim and Bosnian-Croat political leaders were arrested, imprisoned and in many cases murdered. It is estimated that the war in Bosnia led to the death of 200,000 or more lives, as many as three million people displaced, and tens of thousands missing.<sup>19</sup>

Although it was apparent that the peacekeeping mission and embargo has failed to stop the war, the Security Council was hesitant to take decisive action to end JNA’s military action and the attendant human casualty. Rather, the UN Security Council decided to continue the failed political action by voting to impose another round of sanctions on Serbia.<sup>20</sup> However, when in July 1992 the scale of atrocities occurring in the former Yugoslavia was published in the print and television media all over the world, public opinion was stimulated and pressure was mounted on the international community to take decisive action to hold those responsible for the atrocities to account.<sup>21</sup>

---

ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST COLD WAR WORLD 33 (Ashgate Publishing Co. 2000).

<sup>17</sup> See the Fall of Srebrenica, *supra* note 11, para. 19.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Paul Lewis, UN Votes 13-0 for Embargo on Trade with Yugoslavia; Air Travel and Oil Curbed, N.Y. Times, May 31, 1992, at 1.

<sup>21</sup> M. Cherif Bassiouni, *supra* note 5, at 416-417.

Consequently, UN Security Council passed Resolution 771 which invited States to collect and present to the Security Council with information regarding the violations in the former Yugoslavia.<sup>22</sup> On October 6, 1992, the UN Security Council established the Commission of Experts charged with the responsibility of investigating and collecting evidence of “grave breaches of the Geneva Conventions and other violations of international humanitarian law” committed during the conflict in the Former Yugoslavia.<sup>23</sup> The Commission eventual chairman was Professor M. Cherif Bassiouni, who at that time, directed the International Human Rights Law Institute (IHRLI) of DePaul University in Chicago, U.S.A.<sup>24</sup> The Commission submitted its First Interim Report on February 22, 1993.<sup>25</sup>

While the process of establishing an international criminal tribunal for the former Yugoslavia was ongoing and even after the tribunal was established, fighting continued

---

<sup>22</sup> S.C. Res. 771, U.N. SCOR, 3106th mtg. U.N. Doc. S/RES/771 (1992).

<sup>23</sup> See S.C. Res. 780, U.N. SCOR, 47<sup>th</sup> Sess., U.N. Doc. S/RES/780 (1992), reprinted in 31 I.L.M. 1476 (1992) [hereinafter SC Resolution 780]. Resolution 780 provides as follows:

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

<sup>24</sup> On October 25, 1992, the UN Secretary-General appointed five members to the Commission of Experts. Initial members of the Commission were: Professor Frits Kalshoven (Netherlands) as Chairman; Professor M. Cherif Bassiouni (Egypt); Commander William J. Fenrick (Canada); Judge Keba M’Baye (Senegal); and Professor Torkel Opsahl (Norway). In August 1993 Professor Kalshoven resigned from the Commission due to medical reasons and Professor Opsahl who acted as Chairman from July-August died in September. Thus, on October 19, 1993, the UN Secretary-General appointed Professor Bassiouni as Chairman and also appointed Professor Christine Cleiren (Netherlands) and Judge Hanne Sophie Greve (Norway) to replace Professors Kalshoven and Opsahl respectively. See M. Cherif Bassiouni, *supra* note 5, at n. 128.

<sup>25</sup> See Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 48<sup>th</sup> Sess., Annex, at 20, U.N. Doc. S/25274 (1993).



over the Serb dominated area in BiH and the United Nations designated “safe areas”.<sup>26</sup> In March 1994, Bosnia and Croatia reached an agreement to form a joint federation and end their hostilities. Thereafter, in April 1994, the Croatian and Bosnian-Muslim forces joined in opposition to the Serbs, launching an offensive in April and May. However, it was not until December 1994 that temporary relief came to Bosnia as a result of the North Atlantic Treaty Organisation (NATO) forces enforced a cease-fire and the withdrawal of the Serbian artillery.<sup>27</sup>

The cease-fire lasted only until March 1995 because the Serb forces refused to comply with a UN ultimatum to remove all heavy weapons from a 12-mile exclusion zone around Sarajevo. Bosnian-Serb militias led by Mladic and aided by Yugoslav Army troops took over the UN “safe areas” of Srebrenica and Zepa. The Yugoslav Army expelled over 40,000 Bosnian-Muslims who had sought safety at Srebrenica. Between 5,000 and 8,000 were executed, allegedly on Mladic’s order. Eventually, in May 1995, the North Atlantic Treaty Organization (NATO) with the support of the United States launched air strikes against Serb targets in the area. Simultaneously, a joint Croatian-Bosnian forces operation against the Serbian forces was also on-going.<sup>28</sup>

After several months of air strikes, the Serbian forces were ejected from large areas of western Bosnia. This led to the Dayton Peace Accords which was signed on December 14, 1995, in Paris.<sup>29</sup> The Accord established BiH as a sovereign State, consisting of two entities: the Federation of Bosnia and Herzegovina on the one hand,

---

<sup>26</sup> Michael P. Scharf & William A Schabas, *supra* note 6, at 26-27. The “safe areas” for Bosnian-Muslims are: Bihac, Tuzla, Srebrenica, Zepa, Gorazde, and Sarajevo. The UN peacekeeping soldiers were deployed to defend the areas.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The Dayton Peace Accord was signed by Serbian president Slobodan Milosevic, Bosnian president Alija Izetbegović, and Croatian president Franjo Tudjman. *Id.*

and on the other hand, the Republika Srpska (RS).<sup>30</sup> It was expected that the Dayton Peace Accords would end the violence in the area but this hope was short lived when in 1996, the Kosovo Liberation Army (KLA) actuated with the desire for self-determination attacked Serbian positions.<sup>31</sup> The Serbian government responded by killing and relocating ethnic Albanians from the territory of Kosovo.<sup>32</sup> NATO responded with another round of air strikes against Serbia to end the forced evacuation of ethnic Albanians from Kosovo.<sup>33</sup> The Serbian government under Slobodan Milosevic responded by ordering a program of ethnic cleansing of the Kosovo-Albanian, forcing hundreds of thousands to flee as refugees.<sup>34</sup> In June 1999, Milosevic finally surrendered to the superior firing power of NATO and ended his attack on the Albanians.<sup>35</sup>

#### **4.2.2. Establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)**

After the Commission of Experts submitted its first Interim Report, the UN Security Council passed Resolution 808 which authorized the creation of an international criminal tribunal to prosecute those individuals responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>36</sup>

---

<sup>30</sup> See Steve Terrett, *supra* note 16, at 96.

<sup>31</sup> Michael P. Scharf & William A Schabas, *supra* note 6, at 33.

<sup>32</sup> See Todd A Salzman, Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victim in the Former Yugoslavia, 20 HUM. RTS. Q. 348, 363 (1998).

<sup>33</sup> Michael P. Scharf & William A Schabas, *supra* note 6, at 34.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/RES/808 (1993), reprinted in 32 I.L.M. 1159, 1163-1205 (1993) [hereinafter Resolution 808]. Resolution 808 states that the UN Security Council:

Decided that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

Resolution 808 further mandated the UN Secretary-General to within 60 days submit a report on the establishment of an ad hoc international tribunal to the Security Council.

*Id.*, at preamble.

Pursuant to Resolution 808, UN Secretary-General on May 3, 1993, submitted his report on the establishment of the ad hoc tribunal and a draft Statute for the tribunal to the Security Council.<sup>37</sup>

Following the submission of the Secretary-General's report, the Security Council pursuant to article 39 of the United Nations Charter unanimously adoption Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) on May 25, 1993.<sup>38</sup> Also, the Security Council approved the draft Statute of the Tribunal as presented by the Secretary-General.<sup>39</sup> According to Resolution 827, the Security Council determined that the "situation [in Yugoslavia] continues to constitute a threat to international peace and security" and in order to put an end to the crimes, is convinced that the "establishment of an ... international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace."<sup>40</sup>

---

<sup>37</sup> See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/25704 (1993) [hereinafter Report of the Secretary-General].

<sup>38</sup> See Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law and Humanitarian Law Committed in the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/RES/827 (1993), *reprinted* in 32 I.L.M. 1192 [hereinafter Resolution 827]. See also Peter Burns, AN INTERNATIONAL CRIMINAL TRIBUNAL: THE DIFFICULT UNION OF PRINCIPLES AND POLITICS, 125 (for insights into the establishment of the ICTFY and the politics surrounding it); David P. Forsythe, POLITICS AND THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 185; Roman A. Kolodkin, An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia, in THE PROSECUTION OF INTERNATIONAL CRIMES, 165, 165-66 (Roger S. Clark & Madeleine Sann eds., 1996) (analyzing the legal aspects of prosecution in the ICTY); Patricia M. Wald, The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court, 5 WASH. U. J.L. & POL'Y 87 (2001) (discussing the ICTY from a firsthand perspective).

<sup>39</sup> Resolution 827, at paras 1-2. See Statute of the International Criminal Tribunal for the Former Yugoslavia, appended to the Security Council Resolution 827 of May 25, 1993, S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTFY Statute].

<sup>40</sup> Resolution 827, *supra* note 38, at preamble.

#### 4.2.3. Scope of the ICTY Jurisdiction and Composition

Recognizing that conflict in the former Yugoslavia was on-going at the time of establishing the ICTY, the Tribunal was granted temporal jurisdiction “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”<sup>41</sup> The Tribunal’s subject matter jurisdiction covers grave breaches of the Geneva Conventions,<sup>42</sup> violations of the laws or customs of war,<sup>43</sup> genocide,<sup>44</sup> and crimes against humanity.<sup>45</sup>

The Statute established individual criminal responsibility, including that of a Head of State for violations of any of the tribunal’s subject matter jurisdiction during the existence of the tribunal.<sup>46</sup> The ICTY Statute also grants the Tribunal primacy jurisdiction over national courts with respect to the prosecution of individuals concerning the subject matter jurisdiction of the tribunal.<sup>47</sup> Where a national court has begun prosecution, the tribunal may request the national court to defer jurisdiction to the tribunal.<sup>48</sup> However, unlike the Nuremberg trials, the ICTY cannot try accused persons in absentia and recognizes that defendants may choose not to testify.<sup>49</sup>

The ICTY is structured to ensure its independence and impartiality. The tribunal consists of three branches: (1) the judicial chambers; (2) the office of the prosecutor and;

---

<sup>41</sup> ICTFY Statute, *supra* note 39, arts. 1, 8.

<sup>42</sup> *Id.*, art. 2.

<sup>43</sup> *Id.*, art. 3.

<sup>44</sup> *Id.*, art. 4.

<sup>45</sup> *Id.*, art.5.

<sup>46</sup> *Id.*, art. 7. See M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 11 HARV. HUM. RTS. J. 11, 43 (1997).

<sup>47</sup> ICTFY Statute, *supra* note 39, art. 9.

<sup>48</sup> *Id.*, art. 9(2)..

<sup>49</sup> *Id.*, art. 20 which requires that an accused should be in custody before the commencement of a trial. *Id.* See also Ruth Wedgewood, War Crimes: Bosnia and Beyond, 34 VA. J. INT’L L. 267 (1994); Patricia Wald, *supra* note 38, at 98

(3) the Registry.<sup>50</sup> The judicial chamber composed of sixteen permanent judges is divided into two trial chambers and one appeals chamber. The trial chambers are composed of three judges each while the appeals chamber is composed of 5 judges at each sitting.<sup>51</sup> The judges are elected by the UN General Assembly, with no more than one judge from any single country.<sup>52</sup> The Chief Prosecutor of the ICTY is appointed by the Security Council for a four year term. Remarkably, the ICTY Statute clearly provides that the Prosecutor shall be independent of the Security Council and the General Assembly.<sup>53</sup> Thus, the Prosecutor has absolute discretion to bring charges against any person provided that the Prosecutor has “reasonable grounds for believing that a subject has committed a crime.”<sup>54</sup> However, while the tribunal is independent of the Security Council, the tribunal’s Registry is subject to the U.N.’s administrative rules.<sup>55</sup>

#### **4.2.4. Assessment of the ICTY**

The ICTY through its judgments has contributed to the development of the jurisprudence of international criminal law system. The tribunal has helped to clarify certain legal principles and is spearheading the shift from impunity to accountability by holding individuals accountable regardless of their position. On May 24, 1999, the ICTY made history as the first international criminal tribunal to indict a serving Head of State, former Yugoslav President Slobodan Milosevic, for violations of the laws and customs of

---

<sup>50</sup> ICTFY Statute, *supra* note 39, art.11.

<sup>51</sup> *Id.*, art. 12.

<sup>52</sup> *Id.*, art. 12(1) and 13(bis).

<sup>53</sup> *Id.*, arts. 16 - 20.

<sup>54</sup> *Id.*, art. 18; Patricia Wald, *supra* note 38, at 100 (quoting ICTY Rule of Procedure and Evidence 47, U.N. Doc. IT/32 (1994)).

<sup>55</sup> M. Cherif Bassiouni, *supra* note 46, at 43; Patricia Wald, *supra* note 38, at 88.

war and crimes against humanity committed against the Kosovo Albanian population in 1998-99.<sup>56</sup>

The tribunal's high point has been the arrest and well-publicized transfer of Milosevic to the Detention Unit at The Hague on June 29, 2001, for prosecution by the ICTY for his role in the atrocities committed by Serbian forces during the Kosovo conflict. Milosevic is charged with the murder of 900 Kosovo-Albanians and the deportation of 740,000 more. Since then he has also been separately indicted for grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity committed against the Croatian and other non-Serb populations in the Republic of Croatia. In addition, Milosevic is also charged with genocide and complicity in genocide during the war in Bosnia and Herzegovina.<sup>57</sup>

As at March 3, 2006, of about 161 persons were indicted by the tribunal for violations of international humanitarian law committed in the territory of the former Yugoslavia, 133 have appeared in proceedings before the ICTFY.<sup>58</sup> Of this number, 40 have been found guilty, 44 accused persons are at pre-trial stage, 9 accused persons are currently at trial, and 48 of the accused are currently in custody at the Tribunal's detention unit.<sup>59</sup>

Despite the achievements recorded by the ICTY, the tribunal has been criticized for its slow progress and for the fact that some of the highest ranking government

---

<sup>56</sup> See Prosecutor v. Slobodan Milosevic, et al., Case No. IT-99-37, May 24, 1999, available at: <http://www.un.org/icty/cases-e/index-e.htm>.

<sup>57</sup> See Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, April 21 and July 28, 2004; Prosecutor v. Slobodan Milosevic, Case No. IT-99-37-PT, May 24, 1999, available at: <http://www.un.org/icty/cases-e/index-e.htm>.

<sup>58</sup> See ICTY at a Glance, Key Figures, available at: <http://www.un.org/icty/glance-e/index.htm>. (visited March 10, 2006) [hereinafter ICTY at a Glance].

<sup>59</sup> Id.

officials indicted by the tribunal have yet to be taken into custody.<sup>60</sup> The ICTY judges were all elected by November 1993 with Antonio Cassese, an Italian professor of international law, as its first President.<sup>61</sup> However, it was not until July 1994 that Judge Richard Goldstone of South African was elected the first Chief Prosecutor of the ICTY.<sup>62</sup> While the appointment of the officers of the tribunal was completed in July 1994, the ICTFY did not start sitting until November 1994 when it held its first public hearing.<sup>63</sup> Apart from structural shortcomings, the delay may not be unconnected with the tribunal's financial reliance on the United Nations.<sup>64</sup> Also, as noted by the former ICTY Prosecutor Louise Arbour, the ICTY's limitations are based, in part, on the uncertain and developing nature of international criminal law.<sup>65</sup>

---

<sup>60</sup> Human Rights Watch, Human Rights News, Progress on War Crimes Accountability, the Rule of Law, and Minority Rights in Serbia and Montenegro, HRW Statement to the U.S. Commission on Security and Cooperation in Europe (June 4, 2003), at <http://www.hrw.org/backgrounder/eca/serbiatestimony060403.htm> (last visited Oct. 30, 2004) (stating: "The past year has seen continued stutter-step progress toward cooperation with the ICTY and accountability for war-time atrocities. Still missing is the clear political leadership to ensure that all those responsible for war crimes are held accountable").

<sup>61</sup> *Id.* at 148. The current president is Fausto Pocar of Italy. See ICTY at a Glance, *supra* note 58, at Organs of the Tribunal.

<sup>62</sup> See INSIDER'S GUIDE, *supra* note 4, at 161-63 (suggesting that the embarrassing delay was occasioned by the interest shown by different states to have their nationals appointed for the job). Even though the ICTY Statute provided that the Prosecutor shall serve for a four year term, there has been two change of guards within five years. On October 1, 1996, Judge Louise Arbour of Canada succeeded Judge Goldstone. On September 15, 1999, Carla Del Ponte, former Switzerland's attorney general and chief federal prosecutor, who was unanimously approved by the U.N Security Council in the summer of 1999 succeeded Judge Arbour.

<sup>63</sup> Lawyers Committee for Human Rights, PROSECUTING WAR CRIMES IN THE FORMER YUGOSLAVIA - THE INTERNATIONAL TRIBUNAL, NATIONAL COURTS AND CONCURRENT JURISDICTION: A GUIDE TO APPLICABLE INTERNATIONAL LAW, NATIONAL LEGISLATION AND ITS RELATION TO INTERNATIONAL HUMAN RIGHTS STANDARDS iii (May 1995) [hereinafter Prosecuting War Crimes in the Former Yugoslavia].

<sup>64</sup> ICTY Statute, *supra* note 39, art. 32 which provides that the UN is obligated to fund the tribunal. *Id.* See also Craig Topper, And Justice for All? An Ad Hoc Tribunal for the Former Yugoslavia, 8 N. Y. INT'L L. REV. 48 (1995); See Lawyers Committee for Human Rights, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 33 (April 1995) [hereinafter "Criminal Tribunal in Yugoslavia] (noting the inability of the UN to appropriate funds for the tribunal thereby compelling the UN Secretary General to allocate money without the proper appropriations processes). *Id.*

<sup>65</sup> Jordan J. Paust, Book Review, 96 AM J. INT'L L. 1006 (2002) (reviewing SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF THE INTERNATIONAL AND NATIONAL COURTS (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000)).

Furthermore, the difficulties in surrendering indictees and other forms of non-cooperation of national authorities remain one of the major obstacles to the fulfillment of the Tribunal's mandate of trying key figures in the conflict in former Yugoslavia.<sup>66</sup> As at March 3, 2006, 6 arrest warrants have been issued against accused persons that are currently at large including former Bosnian Serb leader Radovan Karadzic and former Bosnian Serb army commander General Ratko Mladic.<sup>67</sup>

However, it should be noted that the ICTY depends on the cooperation of UN member States to arrest indictees and gain access to evidence.<sup>68</sup> UN member States have not shown demonstrable enthusiasm in tracking down suspects. In some cases, States have explicitly refused to cooperate.<sup>69</sup> Unfortunately, there is no established independent enforcement mechanism by which the ICTY Prosecutor can rely to bring apprehend indictees. Short of imposing economic or other sanctions, a course of action that is unlikely, the United Nations cannot force compliance by a recalcitrant State. Thus, the tribunal's greatest failure has been its inability to apprehend major suspects and bring them to trial. Given the fact that the tribunal cannot try a suspect in absentia,<sup>70</sup> some commentators have suggested that shaming through identification could turn indicted war

---

<sup>66</sup> See Address to the United Nations Security Council by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Ms. Carla Del Ponte, 27 November 2001, <http://www.icty.org/ENGLISH/speeches/delponte271101sc.htm>.

<sup>67</sup> Others include Stojan Zupljanin, Vlastimir Djordjevic, Goran Hadzic, and Zdravko Tolimir. See ICTY at a Glance, *supra* note 58, at Key Figures.

<sup>68</sup> ICTY Statute, *supra* note 39, art. 29.

<sup>69</sup> Croatia Defies Tribunal, Independent (London), Feb. 20, 1997, available in LEXIS, News Library, CURNWS File (stating that Croatia recently refused to turn over information on suspects). See also Christopher C. Joyner, Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia, 6 DUKE J. COMP. & INT'L L. 79 (1995); Jeri Laber & Ivana Nizich, The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects, 18 FLETCHER F. OF WORLD AFF. 7 (1994).

<sup>70</sup> ICTY Statute, *supra* note 39, art. 20. Article 20 require an accused person to be in custody before the commencement of a trial. *Id.* See also Ruth Wedgewood, War Crimes: Bosnia and Beyond,



criminals into pariahs and deprive them of the freedom of movement.<sup>71</sup> On the other hand, the better approach is for the international community to take the step from having established international accountability mechanisms to endowing them with enforcement capacity.

Another recent development that threatens the credibility of the Tribunal is the deaths of Milan Babic and Slobodan Milosevic. On 5 March, 2006, Milan Babic, the Serb nationalist war criminal who pleaded guilty on January 27, 2004, and testified against Slobodan Milosevic, was found dead in his prison cell at the United Nations Detention Unit in Scheveningen. After conducting an investigation, Mr. Babic was presumed to have committed suicide.<sup>72</sup> On, March 11, 2006, Slobodan Milosevic was found dead in his cell at the U.N. Detention Unit in Scheveningen. The circumstances surrounding his death are still uncertain.<sup>73</sup>

The death of Mr. Milosevic before the completion of his trial is a profound disappointment which calls to question the credibility of the Tribunal.<sup>74</sup> Mr. Milosevic's

---

<sup>71</sup> Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 243-44 (1995). See U.N. SCOR, 48th Sess., 3217th mtg. at 13, U.N. Doc. S/PV.3217 (1993) (Madeleine Albright, then US ambassador to the UN, declaring that war crimes suspects will become international pariahs and prisoners in their own lands - Serbia, Bosnia, and Croatia - even if their own states do not hand them over for trial). See also *War Criminals to Become International Pariahs*, Agence France Presse, May 26, 1993, available in LEXIS, News Library, ARCNWS File.

<sup>72</sup> Press Release, Milan Babic Found Dead in Detention Unit, The Hague, AM/MOW/1046e, March 6, 2006, available at <http://www.un.org/icty/pressreal/2006/p1046-e.htm> (visited March 12, 2006).

<sup>73</sup> Press Release, Slobodan Milosevic Found Dead in His Cell at the Detention Unit The Hague, CC/MOW/1050ef, March 11, 2006, available at: <http://www.un.org/icty/pressreal/2006/p1050-e.htm>

<sup>74</sup> See Jon Silverman, *Worst Outcome for Milosevic Tribunal*, 11 March 2006, available at: <http://news.bbc.co.uk/2/hi/europe/4797696.stm> (visited March 12, 2006) (Mr. Silverman, BBC Legal Affairs Analyst, suggesting that Mr. Milosevic's death raises questions which may tarnish the reputation of the International Criminal Tribunal for Yugoslavia (ICTY) and undermine confidence in war crimes justice generally).

death forecloses the opportunity for victims and their families to have a final answer in this case on his criminal responsibility.<sup>75</sup>

The tribunal is expected to complete its sitting by 2008.<sup>76</sup> The completion strategy is predicated on ICTY focusing on trials involving “the highest-ranking political, military, paramilitary and civilian leaders and . . . referring certain cases to national courts.”<sup>77</sup> Pursuant to the strategy, the ICTY must complete its investigations by the end of 2004, and all trials and appeals must be completed by December 31, 2008. Thus, ICTY need to focus its efforts towards the trial of senior perpetrators while strengthening the local courts so that they are in a position to assume responsibility for trying relatively minor offenders.<sup>78</sup> However, the courts in the former Yugoslavia, including the war crimes chamber of the State Court of BiH are not yet in a position to assume responsibility for trying large numbers of cases.<sup>79</sup>

The ICTY is expected to adhere to its completion strategy, notwithstanding any judicial and practical challenges that may arise in fulfilling them as it is unlikely that the Security Council will extend the deadline. For the common strategy to work, it would be

---

<sup>75</sup> See Statement of the President of the Tribunal, The Hague, March 12, 2006, available at <http://www.un.org/icty/pressreal/2006/speech/poc-060312e.htm> (visited March 12, 2006).

<sup>76</sup> ICTY President Claude Jorda submitted the ICTY completion strategy on June 10, 2002. Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Doc. S/2002/678 (2002) enclosure [hereinafter Jorda Report]. On February 23, 2003, Judge Theodor Meron was elected president of the ICTY. Judge Theodor Meron and Judge Fausto Pocar Elected as President and Vice-President Respectively, ICTY Press Release CC/PIS/735-e (Feb. 27, 2003). See also the remarks delivered by ICTY president Meron and ICTY prosecutor Carla Del Ponte, respectively, to the Security Council on October 9, 2003. UN Doc. S/PV.4838, at 3-7, 9-13 (2003) [hereinafter Meron Speech and Del Ponte], also available as Statement of Judge Theodor Meron to the United Nations Security Council, ICTY Press Release JL/P.I.S./788-e (Oct. 9, 2003), and Address by Ms. Carla Del Ponte to the United Nations Security Council, ICTY Press Release FH/PIS/791-e (Oct. 10, 2003). ICTY press releases are available at the ICTY Website, <<http://www.un.org/icty>>.

<sup>77</sup> Judge Claude Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002).

<sup>78</sup> Daryl A. Mundis, Note and Comment: The Judicial Effects of the “Completion Strategies” on the ad hoc International Criminal Tribunals, 99 AM. J. INT’L.L. 142, 158 (2005).

<sup>79</sup> Id.

necessary for the international community to ensure timely arrests of outstanding indictees and timely access to evidence if the indictees were to be prosecuted within time frame of the completion strategy.<sup>80</sup>

### **4.3. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

#### **4.3.1. Background on the Rwandan Genocide**

Ethnic and political rivalry between the majority Hutus and the minority Tutsis of Rwanda was a product of Belgium colonial mal-administration.<sup>81</sup> As at February 10, 2005, Rwanda population which is estimated at about eight million people is made up of eighty-four percent Hutus, fourteen percent Tutsis, and one percent of Twas.<sup>82</sup> Although the Hutus and the Tutsis have distinct physical characteristics which made them distinguishable, they did not exist as segregated tribes, commonly intermarried and spoke the same language (Kinyarwanda).<sup>83</sup> However, the Belgium colonial government of Rwanda considered it necessary to introduce ethnic classifications for its administration

---

<sup>80</sup> Jorda Report, *supra* note 76, para. 15 (the ICTY prosecutor noting that it would not be possible to complete the ICTY's mandate by the anticipated date unless those indicted individuals at liberty were arrested); *see also* Del Ponte, Address to the United Nations Security Council, ICTY Press Release JJJ/PIS/709-e, 3-4 (Oct. 30, 2002); Judge Claude Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/708-e 1, 2 (Oct. 30, 2002) [hereinafter Jorda, Oct. 2002 Speech].

<sup>81</sup> For an in-depth history of the ethnic, social and political factors leading to Rwandan genocidal war of 1994, *see generally* Gerard Prunier, THE RWANDA CRISIS 1959-1994: HISTORY OF GENOCIDE (1995); Human Rights Watch, Leave None to Tell the Story: Genocide in Rwanda, at <http://www.hrw.org/reports/1999/rwanda/index.htm> (visited March 3, 2005) [hereinafter History of Genocide in Rwanda].

<sup>82</sup> *See* CIA: The World Factbook, available at <http://www.cia.gov/cia/publications/factbook/geos/rw.html> (visited March 3, 2005) [hereinafter World Factbook]. The Hutus has always been the majority tribe and the population distribution in 2005 is the same as at 1994. *See* Letter Dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, Annex, P 59, U.N. Doc. S/1994/1405 (1994) [hereinafter Final Report of the Commission of Experts].

<sup>83</sup> Gerard Prunier, *supra* note 81, at 5; *also see* History of Genocide in Rwanda, *supra* note 81, at 2.

of Rwanda.<sup>84</sup> Also, the Belgian colonial government preferred the Tutsis for political positions almost at the exclusion of the majority Hutus.<sup>85</sup>

With these colonial policies, the seed of ethnic hatred was advertently or inadvertently planted in the physic of average Rwandan.<sup>86</sup> Thus, even after the exit of the colonial government, succeeding Rwandan governments especially that of President Juvenal Habyarimana pursued policies that highlighted ethnic differences such as the classification of Rwandans according to their ethnicity<sup>87</sup> and recordation of their ethnicity on their identity cards and in the census.<sup>88</sup> As a result of the established ethnic categorization, violent ethnic rivalry manifested itself in 1959, three years before independence from Belgium when the Hutus attacked the Tutsis in retaliation of Tutsis attack on a Hutu sub-chief.<sup>89</sup> Over the next several years, thousands of Tutsis were either killed or driven into exile in neighboring countries.<sup>90</sup>

For the next 30 years or so, the exiled Tutsis were unable to return to Rwanda. In the meantime, the Hutus have taken control of the governance of Rwanda. General Juvenal Habyarimana, a Hutu, who came to power in 1973 through a coup d'etat, transformed himself into a civilian president.<sup>91</sup> President Habyarimana resorted to a one party system and abhorred any opposition effectively precluding the integration of Tutsis

---

<sup>84</sup> See History of Genocide in Rwanda, *supra* note 81, at 2

<sup>85</sup> Gerard Prunier, *supra* note 81, at 26-27.

<sup>86</sup> See Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, 35 (May 21, 1999) [hereinafter Prosecutor v. Kayishema and Ruzindana] (developing a historical background on the conflict prior to the proceedings).

<sup>87</sup> Rwandans are considered to have the ethnicity of their father, despite the heritage of their mother. See Final Report of the Commission of Experts, *supra* note 82, at 59.

<sup>88</sup> See Final Report of the Commission of Experts, *supra* note 82, at 61.

<sup>89</sup> See World Factbook *supra* 82; Gerard Prunier, *supra* note 81, at 48-54; United States Institute for Peace, Rwanda: Accountability for War Crimes and Genocide (1995), available at <http://www.usip.org/oc/sr/rwanda1.html> (visited March 4, 2005) [hereinafter Accountability for War Crimes and Genocide].

<sup>90</sup> See Final Report of the Commission of Experts, *supra* note 82, at 55; Gerard Prunier, *supra* note 78, at 61-64.

<sup>91</sup> Prosecutor v. Kayishema and Ruzindana, *supra* note 86, at 41.

in Rwandan politics.<sup>92</sup> While in exile, the Tutsis formed a rebel group, the Rwandan Patriotic Front (RPF), to champion their cause with a military wing, the Rwandan Patriotic Army (RPA). On October 1, 1990, the RPF launched an attack on Rwanda from Uganda in an attempt to invade Rwanda by force.<sup>93</sup>

The invasion started a three year civil war between the Hutus and the Tutsis. President Habyarimana who was becoming increasingly unpopular took advantage of the situation to arrest or exterminate his political opponents.<sup>94</sup> Also, by early 1992, Habyarimana and the extremist elements in Rwanda who rejected the Arusha Accords, allowed the creation of militia groups known as the “*Interahamwe*” (those who stand together or those who attack together)<sup>95</sup> and the “*Impuzamugambi*” (“those with a single purpose”). The Rwandan army and the Interahamwe were instrumental to the several attacks and massacres of Tutsis and moderate Hutus opposed to Habyarimana’s government or sympathetic to the cause of RPF.<sup>96</sup> On the other hand, ordinary Hutus whose patriotic zeal was fanned by the propaganda of Radio Télévision Libre des Mille Collines (RTLM) quickly identified with the mass movement called the “Hutu Power.”<sup>97</sup>

The message of the Hutu power was built on the platform of a possible renewed Tutsi political dominance and attendant consequences to the Hutus.<sup>98</sup> This message resonated with vigor following the October 21, 1993, assassination of Burundian

---

<sup>92</sup> Prosecutor v. Kayishema and Ruzindana, *supra* note 86, at 44.

<sup>93</sup> Gerard Prunier, *supra* note 81, at 93.

<sup>94</sup> Accountability for War Crimes and Genocide, *supra* note 89, at 2.

<sup>95</sup> History of Genocide in Rwanda, *supra* note 81, at 2; also see William A. Shabas, Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems, 7 CRIM. L.F. 523, 524 (1996); Human Rights Watch/Africa, GENOCIDE IN RWANDA APRIL-MAY 1994, vol. 6, no 4, at 2 (May 1994), available at <http://hrw.org/reports/world/rwanda-pubs.php> [hereinafter Genocide in Rwanda].

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

president Melchior Ndadaye, a Hutu, by Tutsi soldiers in Burundi.<sup>99</sup> President Ndadaye's assassination sparked off another round of massive killings of both Hutu and Tutsi.<sup>100</sup> In the face of all these massacres, none of those implicated in the killings were prosecuted. On the contrary, they continued to exercise power as they had before.<sup>101</sup>

In a last attempt at a peaceful resolution of the civil war, the Rwandan government and the RPF agreed to a negotiated political settlement, the Arusha Peace Accords, which they signed on August 4, 1993.<sup>102</sup> The Accords includes a cease-fire agreement and six detailed Protocols which provided for power-sharing, repatriation of refugees and resettlement of displaced persons, integration of armed forces, establishment of demilitarized zone, and miscellaneous issues were painstakingly negotiated between 1990 and 1993 under the auspices of the Organization of African Unity (OAU) and United Nations.<sup>103</sup> In the spirit of the Accords, on October 5, 1993, the Security Council adopted Resolution 872 which established the United Nations Assistance Mission in Rwanda ("UNAMIR") to supervise the implementation of the Accords.<sup>104</sup>

Within months of the signing of the Accords and the establishment of UNAMIR, there were obvious signs that Hutu extremists were less enthusiastic about honoring the terms of the Accords.<sup>105</sup> On the other hand, the RPF anticipating that the Rwandan government may renege on the Accords increased the number of their soldiers and

---

<sup>99</sup> See Genocide in Rwanda, *supra* note 95.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*; Report on the Situation of Human Rights in Rwanda submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, U.N. ESCOR, Comm'n on Hum. Rts., 51st Sess., Prov. Agenda Item 12, P 25, U.N. Doc. E/CN.4/1995/71 (1995) [hereinafter Situation of Human Rights in Rwanda].

<sup>102</sup> Madeline H. Morris, The Trials of Concurrent Jurisdiction: The Case of Rwanda, 7 DUKE J. COMP. & INT'L L. 349, 351 (1997);

<sup>103</sup> *Id.*

<sup>104</sup> See S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg., U.N. Doc. S/RES/872 (1993).

<sup>105</sup> Madeline H. Morris, *supra* note 102, at 351.

firearms in Kigali in violation of the Arusha Peace Accords.<sup>106</sup> All hopes for a peaceful resolution of the civil war ended on April 6, 1994, when the plane carrying presidents Habyarimana and Cyprien Ntaryamira of Burundi, a Hutu, was shot down in mysterious circumstances as it was about to land in Rwanda, killing both presidents and others on board.<sup>107</sup> Both presidents were returning from a meeting of African Heads of States in Dar es Salaam, Tanzania where president Habyarimana had allegedly agreed to form a broad-based transitional government in compliance with the Accords.<sup>108</sup>

The death of president Habyarimana provided the “spark” for the Rwandan army, presidential guards, the Interahamwe, and those Hutus who identified with the message of “Hutu power” to renew the killings of Tutsis and moderate Hutus.<sup>109</sup> On the other hand, the RPF continued its advancement to Kigali and in the process the RPF permitted its soldiers to kill persons whom they took to be Interahamwe, “genocidaires”, or other supposed participants in the genocide and persons close to Habyarimana’s political party.<sup>110</sup> RPF soldiers also “massacred unarmed civilians, many of them women and children, who had assembled for a meeting on their orders.”<sup>111</sup>

---

<sup>106</sup> History of Genocide in Rwanda, *supra* note 81, at 3.

<sup>107</sup> Human Rights Watch, World Report 1995, 41 (1994) [hereinafter World Report].

<sup>108</sup> *Id.*

<sup>109</sup> History of Genocide in Rwanda, *supra* note 78.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* Human Watch notes that:

The RPF was commonly acknowledged by military experts to be a highly disciplined force, with clear lines of command and adequate communication. Although it may have become less disciplined during the months of the genocide due to the incorporation of new recruits, RPF commanding officers like General Paul Kagame maintained the authority necessary to ensure compliance with their orders. The crimes committed by RPF soldiers were so systematic and widespread and took place over so long a period of time that commanding officers must have been aware of them. Even if they did not specifically order these practices, in most cases they did not halt them and punish those responsible.

*Id.*

Amidst the skirmish, the international community failed to take decisive measure to end the atrocity.<sup>112</sup> On the contrary, 2,500 soldiers attached to the UNAMIR forces began to pull out and within weeks were left with only about 450 troops, with no mandate to stop the violence or protect the civilians.<sup>113</sup> The killings finally ended on July 17, 1994, after the RPF defeated the Rwandan army and took control of the government. However, by the time the killings stopped, between half a million and a million men, women and children were killed on both sides, the Tutsis accounting for majority of the dead.<sup>114</sup> Also, about two million Hutu refugees many fearing Tutsi retribution fled to neighboring Burundi, Tanzania, Uganda, and the former Zaire (now Democratic Republic of the Congo).<sup>115</sup> The Rwandan prison facilities were also filled three times beyond normal capacity.<sup>116</sup>

On July 19, 1994, RPF established a transitional government of National Unity together with seven other political parties. The transitional government named Pasteur

---

<sup>112</sup> Madeline H. Morris, *supra* note 102, at 351.

<sup>113</sup> See S.C. Res. 912, U.N. SCOR, 49th Sess., 336th mtg., U.N. Doc. S/RES/912 (1994); World Report, *supra* note 107, at 46. See also History of Genocide in Rwanda, *supra* note 81, at 2. United Nations inactivity and acquiescence to genocide was equally damning. There were credible reports that the United Nations peace-keeping force in Rwanda (UNAMIR), which had been present to facilitate the peace negotiations between the Hutu government and the RPF, apparently knew that a genocide might take place but the UN took no preventive action. See World Report, *supra* note 107, at 41. See generally Joint Evaluation of Emergency Assistance to Rwanda, The International Response to Conflict and Genocide: Lessons From the Rwanda Experience, Vols. I-V (March 1996).

<sup>114</sup> Sources differ on estimates of the number of people killed in 1994. The independent Commission of Experts established by the U.N. Security Council reported that on the conservative side, 500,000 people were killed. See Final Report of the Commission of Experts, *supra* note 82, at 57. The Special Rapporteur of the U.N. Commission on Human Rights stated that some reliable sources estimate that close to one million people were killed. See Situation of Human Rights in Rwanda, *supra* note 101, at 24; History of Genocide in Rwanda, *supra* note 81, at 2; World Report, *supra* note 107, at 39-48.

<sup>115</sup> See Situation of Human Rights in Rwanda, *supra* note 101, at 38; John Prendergast & David Smock, Postgenocidal Reconstruction: Building Peace in Rwanda and Burundi (1999), available at <http://www.usip.org/oc/sr/sr990915/sr990915.html> (visited March 5, 2005). See Comm. on Int'l Relations U.S. House of Representatives and the Comm. on Foreign Relations U.S. Senate, 104th Cong., 2d Sess., Country Reports On Human Rights Practices For 1995, at 211 (1996) [hereinafter 1995 Country Reports on Human Rights].

<sup>116</sup> See United Nations High Commissioner for Human Rights Field Operation in Rwanda, The Administration of Justice in Post-Genocide Rwanda 3, para. 18, U.N. Doc. HRFOR/JUSTICE/June 1996/E (1996) [hereinafter Human Rights Field Operation in Rwanda].



Bizimungu, a moderate Hutu and RPF member, the President while General Paul Kagame, a Tutsi and RPF leader, was appointed Vice-President and Minister of Defense.<sup>117</sup>

#### **4.3.2. The Establishment of the International Criminal Tribunal for Rwanda (ICTR)**

The groundwork for the creation of an international criminal court for Rwanda started with the Security Council Resolution 935 which established a Commission of Experts to investigate grave violations of international humanitarian law committed during the Rwandan genocidal civil war.<sup>118</sup> While the Commission was conducting its investigation, the Rwandese government on September 28, 1994, formally requested for the establishment of an international criminal tribunal to try those responsible for the atrocities in Rwanda.<sup>119</sup> The Commission's preliminary report was submitted to the Security Council on October 4, 1994,<sup>120</sup> and the final report on December 9, 1994.<sup>121</sup>

Meanwhile, on October 6, 1994, the President of Rwanda while addressing the U.N. General Assembly reiterated its government request to the Security Council to

---

<sup>117</sup> Gerard Prunier, *supra* note 81, at 300. On March 23, 2000, Mr. Bizimungu resigned as president of Rwanda following a disagreement with General Kagame. In April 2000, General Kagame was appointed the new president. In June 2000, Bizimungu formed his own political Party for Democracy and Renewal (PDR). The Rwandan government banned the party and arrested Bizimungu. On June 7, 2004, he was found guilty of embezzlement, inciting violence and associating with criminals but cleared on charges of threatening state security. See, From President to Prison, BBC News World Edition, Monday, 7 June, 2004, at: <http://news.bbc.co.uk/2/hi/africa/3728807.stm>, (visited March 14, 2005). Meanwhile, on August 26, 2003, General Kagame won the first presidential election since the 1994 genocide. See Rwandan President Claims Landslide, BBC News World Edition, 26 August, 2003, available at: <http://news.bbc.co.uk/2/hi/africa/3178611.stm>, (visited March 14, 2005).

<sup>118</sup> See S.C. Res. 935, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc. S/RES/935 (1994).

<sup>119</sup> See Letter from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council (Sept. 28, 1994), UN Doc. S/1994/1115.

<sup>120</sup> See Letter dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc. S/1994/1125 (1994).

<sup>121</sup> See Letter dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc. S/1994/1405 (1994).

establish an international criminal tribunal for Rwanda as a matter of urgency.<sup>122</sup> The Rwandan government considered an international criminal tribunal a necessary tool for justice, in view of the fact that most of the criminals had sought refuge in other countries.<sup>123</sup> In that statement, the President stated that:

Rwanda requests the Security Council to adopt a resolution to facilitate the arrest and trial of the murderers who were hiding in the refugee camps outside the country. The resolution will grant authority to hold persons who are suspected in the genocide. Six months after the crimes were committed, there must be action.<sup>124</sup>

Both the Commission's preliminary and final reports as well as the October 13, 1994, report of Rene Degni-Sequi (special rapporteur appointed on recommendation of the Commission of Human Rights) concerning human rights situation in Rwanda, recommended the establishment of an international criminal tribunal.<sup>125</sup> Thus, in November 1994, the Security Council by thirteen votes to two (China abstained, while Rwanda voted against) adopted Resolution 955 establishing the International Criminal Tribunal for Rwanda (ICTR).<sup>126</sup> The ICTR was created to prosecute serious violations of international humanitarian law, to establish law and order, and thereby to contribute to the restoration and maintenance of peace and national reconciliation in Rwanda.<sup>127</sup>

---

<sup>122</sup> See Underlying Problems in Caribbean Continue To Be 'Unnoticed and Unattended,' Prime Minister of Antigua and Barbados Tells General Assembly, Fed. News Serv., Oct. 7, 1994, available in LEXIS, World Library, ALLWLD File [hereinafter Underlying Problems Continue] (indicating that Rwandan President Pasteur Bizimungu expressed to the General Assembly the "urgency" of prosecuting through an international tribunal those responsible for genocide).

<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> See, Final Report of the Commission of Experts, *supra* note 81, at 177-80; Situation of Human Rights in Rwanda, *supra* note 101, at 75; Christina M. Cerna, A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner of Human Rights, 10 AM. U.J. INT'L L. & POL'Y 1265, 1270 (1995).

<sup>126</sup> Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

<sup>127</sup> ICTR Statute, *supra* note 123.

### 4.3.3. Jurisdiction and Composition of the ICTR

The ICTR has the jurisdictional competence to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”<sup>128</sup> The ICTR subject matter jurisdiction covers the crimes of genocide,<sup>129</sup> crimes against humanity,<sup>130</sup> and violations of article 3 common to the Geneva Conventions and Protocol II<sup>131</sup> committed during the temporal jurisdiction of the tribunal.<sup>132</sup> Unlike the ICTY, the ICTR has no jurisdiction over violations of the laws and customs of war and the Geneva Conventions of 1949 regarding international conflicts because the Rwandan civil war was considered an internal conflict.<sup>133</sup>

Following the precedents of the IMT Charter and the Statute of the ICTY, article 6 of the Statute of the ICTR provided for the principle of individual criminal responsibility.<sup>134</sup> The ICTR jurisdiction is concurrent with the jurisdiction of the

---

<sup>128</sup> ICTR Statute, *supra* note 126, art. 1.

<sup>129</sup> *Id.*, art. 2.

<sup>130</sup> *Id.*, art. 3.

<sup>131</sup> *Id.*, art. 4.

<sup>132</sup> *Id.*, art. 7 provides that “the temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.”

<sup>133</sup> See M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 431-32 (Transnational Publishers, 2003).

<sup>134</sup> See ICTR Statute, *supra* note 126, art. 6 which provides as follows:

- (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
- (2). The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
- (3). The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.
- (4). The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Rwandan national courts.<sup>135</sup> However, ICTR has primacy over Rwandan national courts.<sup>136</sup> Consequently, at any stage before judgment is rendered, the ICTR may formally request Rwandan national courts to defer its jurisdiction to the ICTR.<sup>137</sup>

The ICTR is composed of the Tribunal Chambers, the office of the Prosecutor and the Registry. The Chambers is comprised of three Trial Chambers with three judges each and a five member Appeals Chamber.<sup>138</sup> The ICTR share the same Appeals Chamber and Prosecutor with the ICTY which are based in The Hague.<sup>139</sup> The ICTR however has its own Registry located at Arusha, Tanzania.<sup>140</sup> The decision by the Security Council that the ICTR and ICTY should share some common personnel and infrastructure was based on the Secretary-General's report that such institutional links would "ensure a unity of legal approach, as well as economy and efficiency of resources."<sup>141</sup> The decision to link the two tribunals has however been criticized as lacking legal reasoning and that it was based mainly on political convenience and cost saving consideration.<sup>142</sup> On August 28, 2003, the UN Security Council citing the need to ensure adherence to the completion

---

<sup>135</sup> ICTR Statute, *supra* note 126, art. 8(1).

<sup>136</sup> *Id.*, art. 8(2).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*, arts. 10 & 11. The statute provides for two trial chambers, but an additional one was later created to accommodate the large caseload. See S.C. Res. 1165, U.N. SCOR, 53rd Sess., 3877th mtg., U.N. Doc. S/RES/1165 (1998).

<sup>139</sup> See ICTR Statute, *supra* note 126, arts. 12(2) & 15(3).

<sup>140</sup> *Id.*, art. 16.

<sup>141</sup> See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), P 9, U.N. Doc. S/1995/134 (1995) (The report argued that "The establishment of the Rwanda Tribunal at a time when the Yugoslav Tribunal was already in existence, dictated a similar legal approach to the establishment of the Tribunal. It also mandated that certain organizational and institutional links be established between the two Tribunals to ensure a unity of legal approach, as well as economy and efficiency of resources.").

<sup>142</sup> M. Cherif Bassiouni, *supra* 133, at 432.

strategies as a primary reason, passed Resolution 1503 which bifurcated the Office of the Prosecutor for the ICTY and ICTR.<sup>143</sup>

#### **4.3.4. Rwandan Government Opposition to the ICTR**

Although the Rwandan government supported the creation of the ICTR, it voted against Security Council Resolution 955 which established the ICTR.<sup>144</sup> At the time of negotiation of the ICTR Statute, Rwanda was a non permanent member of the Security Council and was therefore fortunate to participate in the deliberation of the Security Council regarding the creation of the ICTR.<sup>145</sup> In the course of the negotiations over the provisions of the ICTR, the Rwandan government disagreed with a number of the provisions of the ICTR Statute.<sup>146</sup>

The Rwandan government opposed the ICTR because it considered the dates set for the *ratione temporis* competence of the tribunal from January 1994 to December 1994 inadequate as it leaves out those individuals who had for a long time planned the extermination that finally began on April 1994.<sup>147</sup> Also, the Rwandese government was not in support of the idea that the ICTR and the ICTY should have a common Appeals

---

<sup>143</sup> See, S.C Res. 1503, U.N. SCOR, 4817<sup>th</sup> mtg., U.N. Doc. S/RES/1503, para. 8 (Aug. 28, 2003). But see UN Doc. S/2003/794, in which Rwanda indicated that it preferred that the ICTR be given a separate prosecutor, citing what it considered to be problems at the Tribunal and about which Rwanda had previously complained. As a result of Resolution 1503, Article 15 of the ICTR Statute was amended to delete the provision that the ICTY prosecutor also serves as prosecutor of the ICTR. See SC Res. 1503, *supra*, Annex 1

<sup>144</sup> See S.C. Res. 955, *supra* note 126.

<sup>145</sup> See Raymond Bonner, Shattered Nation: A Special Report; Rwanda Now Faces Painful Ordeal of Rebirth, N.Y. Times, Dec. 29 1994, at A1.

<sup>146</sup> For a detail discussion on the grounds for the Rwandan government objection to the ICTR, see Payam Akhavan, The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment, 90 AM. J. INT'L L. 501 (1996); *see also*, Ambassador Manzi Bakuramutsa, Why the Government of Rwanda Called for an International Tribunal and Yet Opposed the United Nations Security Council Resolution, 12 N.Y.L. SCH. J. HUM. RTS. 631, 640 (1995) (paper delivered by Ambassador Bakuramutsa to the Fifth Annual Ernst C. Steifel Symposium: 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability: Panel III: Identifying and Prosecuting War Crimes: Two Case Studies - The Former Yugoslavia and Rwanda).

<sup>147</sup> Manzi Bakuramutsa, *supra* note 146, at 640.

Chamber and Prosecutor because in its view, this arrangement will not facilitate quick dispensation of justice.<sup>148</sup>

Furthermore, the Rwandese government wanted the Security Council to prohibit some States that allegedly took a very active part in the civil war in Rwanda from participating in the nomination and election of ICTR judges.<sup>149</sup> The location of ICTR outside of Rwanda was also not acceptable to the Rwanda government.<sup>150</sup> In addition, the Rwandese government objected to the ICTR Statute because of its inability to impose the death sentence.<sup>151</sup> Under Article 23 of the ICTR Statute, the tribunal is only authorized to impose imprisonment.<sup>152</sup> The Rwandese government stressed that the absence of the death penalty against those guilty of genocide was the main reason for its opposition to the ICTR.<sup>153</sup>

None of the above stated objection of the Rwandan government was acceded to by the Security Council.<sup>154</sup> In some situations, such as the issue of death penalty, the Security Council has its hands tied because having previously decided that the ICTY cannot impose death penalty, it found itself in a difficult position acceding to the Rwandan government's request that the ICTR should be allowed to impose the death

---

<sup>148</sup> Manzi Bakuramutsa, *supra* note 146, at 640.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Philippe Naughton, Rwandan Minister Defends "No" Vote on Tribunal, Reuters World Service, Nov. 9, 1994, available in LEXIS, News Library, ARCNWS File. Alphonse Nkubito, the Rwandan Minister of Justice emphasized that those guilty of genocide must suffer the death penalty since it was part of Rwandan law. He cited public pressure among the Rwandese for the death penalty as the primary reason for RPF's opposition to the tribunal. *Id.* See also, Raymond Bonner, Rwandan Leader, Calling U.S. Envoy "A Disaster," Hopes for a Replacement, Int'l Herald Trib., Nov. 9, 1994, available in LEXIS, News Library, PAPERS File (arguing that unequal justice will result from tribunal's lack of power to impose death penalty); Raymond Bonner, Rwandans Divided on War-Crimes Plan, N.Y. Times, Nov. 2, 1994, at A10 (noting that defendants tried before the tribunal will get lighter sentences than those tried before Rwandan courts).

<sup>154</sup> However, on the issue of the trial chamber, the Security Council has increased the trial chambers to three. See S.C. Res. 1165, U.N. SCOR, 53rd Sess., 3877th mtg., U.N. Doc. S/RES/1165 (1998).

penalty.<sup>155</sup> Notwithstanding the decision of the Rwandan government to vote against the ICTR Statute, the government pledged its willingness to cooperate with the United Nations on the matter and assist the ICTR with its work.<sup>156</sup>

#### **4.3.5. Assessment of the ICTR**

The tribunal was established in November 1994 but it was not until June 1995 that its judges were sworn in at The Hague.<sup>157</sup> An administrator for the tribunal was not appointed until September 1995.<sup>158</sup> Six months after the judges were sworn in and just one year after the tribunal was established, the ICTR on December 12, 1995, issued its first indictments.<sup>159</sup> The indictments accused eight Rwandans of genocide and conspiracy to commit genocide in the mass killing of several thousand men, women and children in the Kibuye Prefecture of western Rwanda.<sup>160</sup> Unlike ICTY, the Rwandan tribunal, through the assistance of the Rwandan government and neighboring States, has many of its indictees including several high-ranking officials of the former regime in custody.<sup>161</sup> However, nine of the accused remain at large.<sup>162</sup>

---

<sup>155</sup> M. Cherif Bassiouni, *supra* note 133, at 433.

<sup>156</sup> See Richard D. Lyons, U.N. Approves Tribunal on Rwandan Atrocities, N.Y. Times, Nov. 9, 1994, at A12. (noting that the Rwandan government has stated it will cooperate with the tribunal and quoting Representative Bakuramutsa as saying “Rwanda fully supports the tribunal, although we might not yet be satisfied with the resolution”).

<sup>157</sup> Julian Bedford, Judges to Set Rules for Rwanda Genocide Tribunal, Reuters, Jun. 26, 1995, available in LEXIS, News Library, ARCNWS File. Judge Laity Kama of Senegal and Judge Yakov Ostrovsky of Russia were elected president and vice-president of the tribunal respectively. *Id.* See UN Panel Opens Inquiry on Rwanda, N.Y. Times, Jun. 28, 1995, at A5.

<sup>158</sup> Kenyan Appointed to Top Job on War Crimes Tribunal, Reuters, available in LEXIS, News Library, CURNWS File. Andronico Adede, a Kenyan UN bureaucrat was appointed the tribunal’s register on September 12, 1995. *Id.*

<sup>159</sup> Prosecutor v. Kayishema, et al, Case No. ICTR-95-1-I (1995).

<sup>160</sup> Payam Akhavan, *supra* note 146 at 509. See also Melissa Gordon, Justice on Trial: the Efficacy of the International Tribunal for Rwanda, 1 ILSA J. INT’L & COMP. L. 217 (1995).

<sup>161</sup> Payam Akhavan, *supra* note 146, at 509. As at March 1997, it was estimated that about 90,000 genocide suspects were held in Rwandan jails. See Corinne Dufka, Irish Leader Expresses Concern at Rwanda Justice, Reuters, Mar. 3, 1997, available in LEXIS, News Library, CURNWS File.

<sup>162</sup> They include: BIZIMANA, Augustin (ICTR-98-44); KABUGA, Félicien (ICTR-98-44); MPIRANYA, Protais (ICTR-2000-56); NDIRIMBATI, Aloys (ICTR-95-1); NIZEYIMANA, Idelphonse (ICTR-2000-55);

The ICTR does not have the resources to try even a substantial number of the reported ninety-thousand suspects in Rwandan jails. Thus, as at March 9, 2006, the ICTR assumed jurisdiction for only 81 detainees.<sup>163</sup> Of these detainees, 28 are on trial while 15 are awaiting trial.<sup>164</sup> The trial chamber has concluded 23 cases, 8 of which are currently on appeals.<sup>165</sup> Of the 15 convicted, 6 have been sent to Mali to serve their prison sentences and 9 are awaiting transfer.<sup>166</sup> The trial chamber handed out 14 life sentences and between 6 to 35 years prison sentences.<sup>167</sup> One of the detainees was acquitted, two has their charges dropped and were released, one died in detention, and the other two were conditionally released.<sup>168</sup> With the *Prosecutor v. Akayesu*<sup>169</sup> decision, the ICTR became the first international war crimes tribunal to convict an official for genocide and to declare that rape could constitute genocide.<sup>170</sup>

Thus, from a practical standpoint, many of the suspects will have to be tried by the national courts of Rwanda, although those trials raise serious questions of due process protections.<sup>171</sup> On February 23, 2005, Hassan Bubacar Jallow, the Prosecutor of the

---

NTAGANZWA Ladislas (ICTR-96-9); NZABONIMANA, Callixte (ICTR-98-44); RYANDIKAYO (ICTR-95-1); and SIKUBWABO Charles (ICTR-95-1). See *Accused at Large*, available at:

<http://www.ictr.org/ENGLISH/cases/inprogress.htm>

<sup>163</sup> See *Status of Detainees*, available at <http://www.ictr.org/ENGLISH/factsheets/detainee.htm> (visited March 11, 2005).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-I, Amended Indictment (June 1997), paras. 12A-12B, available at: [www.ictr.org/ENGLISH/cases/Akayesu/indictment/actamond.htm](http://www.ictr.org/ENGLISH/cases/Akayesu/indictment/actamond.htm) (last visited Mar. 3, 2004).

<sup>170</sup> See, e.g., Press Release, Amnesty International, Rwanda: Amnesty International Welcomes Historic Rulings of the International Criminal Tribunal for Rwanda. Sept. 4, 1998, available at:

[www.amnestyusa.org/news/1998/14703098.htm](http://www.amnestyusa.org/news/1998/14703098.htm) (last visited Mar. 26, 2004) (explaining that Akayesu's conviction was the first time an international court had applied the Genocide Convention of 1948).

<sup>171</sup> As of March 1997, Rwanda was reported to hold in its jails over 90,000 genocide-related suspects. Many of the suspects have not been accorded due process protections by the RPF Rwandan government. Rwandan courts have started their own war crimes trials and had handed down ten death sentences by February 1997. See Corinne Dufka, *supra* note 161; Despite UN Tribunal, Rwanda Plans to Try Suspects



ICTR during a visit to the Rwandan capital handed 15 of its cases under investigation to the Rwandan state prosecutor in a first such move since the establishment of the tribunal.<sup>172</sup>

In order to speedy the prosecution of other accused persons who took less significant role in the civil war, the Rwandan government has turn to community courts, known as the gacaca.<sup>173</sup> So far 118 of such courts have been established and by the time the gacaca system is up and running, there will be 12,000 of the courts.<sup>174</sup> Each gacaca court is comprised of nine judge panel elected among the local people and the court can imposed prison sentences up to life imprisonment.<sup>175</sup> Suspects who confess and seek forgiveness from surviving victims receive lighter sentences. On March 10, 2005, the first gacaca judgment of 30 years imprisonment was handed to Saddam Nshimiyimana who was accused of killing people stopped at a roadblock during the genocide and others who sought refuge from the slaughter in a Roman Catholic Church in central Kigali.<sup>176</sup>

Some survivors have expressed concerned about the slow pace of gacaca trials and what they say are lenient sentences for those who confess.<sup>177</sup> On the other hand, human rights groups are worried that the proceedings do not meet international standards for criminal courts.<sup>178</sup> However, the Rwandan officials have argued that if the national courts are going to handle all the people accused of taking part in the genocide, about

---

for War Crimes, Chicago Tribune, Nov. 10, 1994, at A6. A Rwandan official estimated in 1994 that national courts could try as many as 30,000 suspects. *Id.*

<sup>172</sup> See UN War Crimes Court Hands over 15 Cases to Rwanda, available at

<http://www.rwanda.net/english/News/2005/022005/news02232005d.htm>, (visited March 11, 2005).

<sup>173</sup> See Edward Rwema, Rwanda Launches New Phase of Genocide Trials at Traditional Courts, available at: <http://www.rwanda.net/english/News/2005/032005/news03102005c.htm>, (visited March 11, 2005).

<sup>174</sup> *Id.* (quoting Johnston Busingye, secretary general in Rwanda Justice Ministry).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

63,000 of them, it could take decades before their cases would be heard.<sup>179</sup> The Rwandan officials also suggest that gacaca courts, by bringing together survivors and perpetrators, will promote reconciliation.<sup>180</sup>

The ICTR has come under serious criticism for its failure to charge Tutsis suspected of killing Hutus in the 1994 genocide.<sup>181</sup> Thus, Filip Reyntjens, a Belgian historian and expert witness on genocide has said he would stop cooperating with the tribunal because no Tutsis from the RPF rebel army had been indicted.<sup>182</sup> Professor Reyntjens stated that prosecuting only Hutus amounted to victor's justice, because the Tutsi force which ended the genocide by overthrowing the extremist Hutu regime also committed atrocities. He noted that the tribunal was supposed to foster reconciliation but was doing the opposite because its one-sided approach alienated ordinary Hutus.<sup>183</sup> Before Carla del Ponte was removed as the prosecutor of the ICTR, she had promised to charge members of the RPF.<sup>184</sup> Unfortunately, Ms. Del Ponte's successor, Hassan Bubacar Jallow has not shown any zeal in going after members of the RPF.<sup>185</sup>

The ICTR is expected to complete its sitting by 2010.<sup>186</sup> Pursuant to the strategy, the ICTR must complete its investigations by the end of 2004, and all trials and appeals

---

<sup>179</sup> Edward Rwema, *supra* note 173 (reporting that government officials suggest that the gacaca courts will speed up the huge number of trials allowing the national courts to concerned itself with the cases of only the leaders of the genocidal war).

<sup>180</sup> *Id.*

<sup>181</sup> See, Rory Carroll, Genocide Tribunal 'Ignoring Tutsi Crimes', *The Guardian*, January 13, 2005, available at: <http://www.guardian.co.uk/rwanda/story/0,14451,1389194,00.html>, (last visited March 15, 2005).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* See also, Steven Edwards, Del Ponte Says UN Caved to Rwandan Pressure National Post, September 17, 2003, at <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0918ponte.htm>

<sup>185</sup> Rory Carroll, *supra* note 181.

<sup>186</sup> See ICTR Completion Strategy dated 19 November, 2004, available at <http://www.ictor.org/ENGLISH/completionstrat/191104.pdf>, (visited March 11, 2005). The first version of the ICTR completion strategy was submitted to the UN on July 14, 2003. See ICTR, for the Biennium 2004-2005, annex, UN Doc. A/58/269 (2003). That document was prepared notably within the context of

must be completed by December 31, 2010. In order to achieve the completion date, the ICTR on March 1, 2005, inaugurated its fourth courtroom which is expected to boost its judicial output and ensure that the Tribunal will meet its projected completion date.<sup>187</sup>

With this move, the ICTR hopes to complete the remainder of the cases before the Tribunal within the estimated completion date.<sup>188</sup>

#### **4.4. SIERRA LEONE SPECIAL COURT**

##### **4.4.1. History of the Sierra Leonean Conflict**

The Sierra Leone conflict was triggered by decades of misrule and corruption on the part of the government of President Joseph Momoh and the desire by the rebel forces to control the Sierra Leonean diamond market. The conflict which quickly degenerated into a civil war began in March 1991 when the Revolutionary United Front (RUF) headed by Foday Sankoh (a former Corporal in the Sierra Leone Army), aided by President Charles Taylor's National Patriotic Front of Liberia (NPFL) attacked Sierra Leone from

---

General Assembly resolution 57/289 (2003) para. 15 (a), which provided that the proposed budget of the ICTR for 2004-2005 should include "detailed information as to how the resources requested for the biennium would support the development of a sound and realistic completion strategy". A second version of the ICTR Completion Strategy was submitted to UN September 29, 2003, the ICTR president Erik Mose. See Completion Strategy of the International Criminal Tribunal for Rwanda, enclosure, in Letter Dated 29 September 2003 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General, UN Doc. S/2003/946 (2003) [hereinafter ICTR Completion Strategy]. This document formed the basis of the request to increase the number of *ad litem* judges sitting "at any one time" from four to nine. By resolution 1512 (2003), the Security Council granted the request. See also remarks made by President Mose and ICTR prosecutor Hassan Bubacar Jallow, respectively, before the Security Council on October 9, 2003. UN Doc. S/PV.4838, *supra* note 5, at 7-9, 13-16. Following his address to the Security Council, Prosecutor Jallow undertook to review all cases and investigations pursued by his office and compiled a document on February 28, 2004, entitled, Completion Strategy of the Office of the Prosecutor, UN Doc. S/2004/341, at 1 n.2. The third version of the document was submitted to the President of the Security Council on 30 April 2004 and formed the basis of the assessments provided by the ICTR President and Prosecutor during the Council's meeting on 29 June 2004.

<sup>187</sup> See Fourth ICTR Courtroom Inaugurated, available at <http://www.ictt.org/ENGLISH/PRESSREL/2005/421.htm>, (visited March 11, 2005).

<sup>188</sup> See ICTR Completion Strategy dated 19 November, 2004, available at <http://www.ictt.org/ENGLISH/completionstrat/191104.pdf>, (visited March 11, 2005).

Liberia.<sup>189</sup> The Sierra Leonean government responded by drafting young men and children to counter the RUF offensive. The highly unmotivated Sierra Leonean army in April 1992 staged a successful coup against the government of President Joseph Momoh and named a young army captain, Valentine Strasser as the new Head of State of Sierra Leone.<sup>190</sup>

After the coup, RUF continued to attack the government of Captain Strasser and other successive Sierra Leonean governments as well as regional and international forces. Child soldiers, mass killings, signature mutilations, and sex crimes were symbolic of the civil war which went on sporadically between 1991 and 2002.<sup>191</sup> In 1994, Nigeria led a peacekeeping force of West African States known as the Economic Community of West African States Monitoring Group (ECOMOG) to repel the RUF forces from overrunning the Sierra Leonean government. In February 1995, the United Nations appointed Berhanu Dinka as its Special envoy to work with the then Organization of African Unity (“OAU”) and the Economic Community of West African States (“ECOWAS”) to return Sierra Leone to a democratic government.<sup>192</sup>

A multi party election was held in 1996 and Ahmad Tejan Kabbah, a former U.N. official was elected president under the Sierra Leone People’s Party. In order to appease the RUF which did not participate in the election and refused to recognize the election result, president Kabbah entered into negotiations with RUF which resulted in the

---

<sup>189</sup> The RUF is a loosely organized guerrilla group that started the war in 1991, seeking to topple the government of Sierra Leone and to retain control of the lucrative diamond-producing regions of the country. It was headed by a former Corporal in the Sierra Leone Army, Foday Sankoh.

<sup>190</sup> See Karen Gallagher, No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone, 23 T. JEFFERSON L. REV. 149, 156, (2000).

<sup>191</sup> Nicole Fritz & Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, 25 FORDHAM INT’L L.J. 391, 393 (2001).

<sup>192</sup> See United Nations Mission in Sierra Leone, Sierra Leone – UNAMSIL – Background, available at: <http://www.un.org/Depts/dpko/missions/unamsil/background.html>), (last visited March 15, 2005).

November 1996 Abidjan Peace Accord.<sup>193</sup> The Abidjan Accord offered amnesty to RUF members in return to RUF agreement to an immediate cease-fire, disarmament, and demobilization.<sup>194</sup> Before the parties' commitment to the Abidjan Accord could be tested, president Kabbah's government was overthrown in May 1997 by the Armed Forces Revolutionary Council (AFRC).<sup>195</sup> Major Johnny Paul Koroma became the next Head of State of Sierra Leone and invited the RUF to share power with his ARFC. Thus, rather than establish peace, the hallmark of the coalition government of the AFRC/RUF was the breakdown of the rule of law evidenced by killings and looting of public and private properties.<sup>196</sup>

The Security Council responded by adopting Resolution 1132 which imposed an oil and arms embargo as well as travel restrictions against the military government of Major Koroma.<sup>197</sup> In February 1998, ECOMOG responded to an attack by the AFRC forces and in the process depose the military junta and restored president Kabbah to office. However, president Kabbah's government and the ECOMOG only controlled Freetown while the RUF by the end of 1998, controlled well over half the country, particularly in the major diamond mining areas.

In 1999, RUF and members of the AFRC launched an offensive towards Freetown code-named "Operation No Living Thing."<sup>198</sup> Although ECOMOG was able to

---

<sup>193</sup> See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), November 30, 1996 (hereinafter Abidjan Accord), available at: <http://www.sierra-leone.org/abidjanaccord.html>. (last visited March 15, 2005).

<sup>194</sup> Karen Gallagher, *supra* note 190, at 157.

<sup>195</sup> The AFRC is a group of senior military officers lead by Major Johnny Paul Koroma.

<sup>196</sup> Abdul Tejan-Cole, Note From the Field: The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, 6 YALE H.R. & DEV. L.J. 139, 141 (2003).

<sup>197</sup> See S.C. Res. 1132, U.N. SCOR, 51<sup>st</sup> Sess., U.N. Doc. S/RES/1132 (1997).

<sup>198</sup> See Steve Coll, The Other War: The Gratuitous Cruelties Against Civilians in Sierra Leone Last Year Rivalled Those Committed in Kosovo at the Same Time, Washington Post Magazine, January 9, 2000, at

push the rebel forces out of Freetown, the resulting human rights violations and casualties lived up to the code name of the offensive. It was estimated that about six thousand civilians were killed, thousands more were displaced, mutilated and limbless, raped, and much of Freetown was destroyed.<sup>199</sup> Also, about 3,000 children were taken captive by RUF during its retreat from Freetown.<sup>200</sup>

After the retreat, ECOMOG facilitated a peace negotiation between the Sierra Leonean government and the RUF which resulted in the Lome Peace Accord signed in Lome, Togo on July 7, 1999.<sup>201</sup> The Lome Accord offered complete amnesty to RUF members including its leader Foday Sankoh, who had been convicted and sentenced to death for treason.<sup>202</sup> Mr. Sankoh was appointed vice-president of Sierra Leone and Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development which oversee the diamond mines.<sup>203</sup> However, the U.N. added a reservation to the amnesty provision which precluded the amnesty from applying to “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.”<sup>204</sup> The Lome Accord also provided for immediate cessation of all hostilities and disarmament as well

---

W8, available at <http://www.washingtonpost.com/wpsrv/photo/galleries/sierraleone>; Abdul Tejan-Cole, *supra* note 196, at 141.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999 [hereinafter Lome Accord], available at <http://www.sierra-leone.org/Lomeaccord.html>.

<sup>202</sup> Abdul Tejan-Cole, *supra* note 196, at 141.

<sup>203</sup> *Id.*, at 142.

<sup>204</sup> See Human Rights Watch, The Sierra Leone Amnesty Under International Law (August 3 1999), available at: <http://www.hrw.org/campaigns/sierra/int-law2.htm>.

as the creation of a Truth and Reconciliation Commission (TRC) to facilitate the healing process for all Sierra Leoneans.<sup>205</sup>

In October 1999, the Security Council adopted resolution 1270 which established the United Nation's Mission in Sierra Leone (UNAMSIL) to monitor the implementation of the Lome Accord.<sup>206</sup> The RUF refused to abate all hostilities as required by the Lome Accord, responded to the disarmament with less enthusiasm and took about 500 UNAMSIL peacekeeping troops hostage when they attempted to take control of the diamond-rich areas of the country in accordance with the Lome Accord.<sup>207</sup> Also, the

---

<sup>205</sup> Abdul Tejan-Cole, *supra* note 196, at 142. Pursuant to On February 22, 2000, Article XXVI of the Lome Peace Agreement, the President and Members of Parliament of Sierra Leone established the Truth and Reconciliation Commission. See The Truth and Reconciliation Commission Act, section 2(1) (2000), (Sierra Leone) [hereinafter TRC Act], at: <http://www.sierra-leone.org/trcact2000.html> (last visited March 24, 2005). The object of the TRC is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to 1999 (the date of signing the Lome Peace Agreement) and to address impunity, respond to the needs of the victims, promote healing and reconciliation, and to prevent a repetition of the violations and abuses. *Id.*, sec. 6(1). It is expected that the TRC will create an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences in a climate which fosters constructive interchange between victims and perpetrators with the aim that such arrangement will help restore the human dignity of victims and promote reconciliation. *Id.*, sec. (6)(2)(b). On April 14, 2003, President Kabbah launched the commencement of the public hearings of TRC. See President Ahmad Tejan Kabbah Kabbah - Speech on Launch of TRC Public Hearings Phase, available at: <http://www.sierra-leone.org/trc-documents.html>, (last visited March 24, 2005). In the course of discharging its functions, the TRC has engaged in statement taking, public hearings, and research and investigations, and presented its final report to President Kabbah on October 5, 2004, and to the United Nations Security Council October 27, 2004. See Sierra Leone Truth and Reconciliation Commission Final Report, available at: <http://www.ictj.org>, (last visited March 24, 2005); Marian Samu, Truth and Reconciliation Commission Presents Report, available at: <http://www.statehouse-sl.org/trc-fin-rep-oct5.html>, (last visited March 24, 2005); Final Report on ten-year Sierra Leone conflict published; seeks to set out historical record, offer guidance for future, Press Release ECOSOC/6140 GA/10287 SC/8227, available at: <http://www.un.org/News/Press/docs/2004/ecosoc6140.doc.htm>, (last visited March 24, 2005).

<sup>206</sup> See S.C. Res. 1270, U.N. SCOR, 4054<sup>th</sup> mtg., U.N. Doc. S/RES/1270 (1999).

<sup>207</sup> See Human Rights Watch, Sierra Leone: Getting Away With Murder, Mutilation, Rape-New testimony from Sierra Leone, in World Report 1999 (July 1999), at <http://www.hrw.org/hrw/reports/1999/sierra>; Christopher S. Wren, U.N. Says Leone Rebels Now Hold 92 Peacekeepers, N.Y. Times, May 5, 2000, at A14; James Rupert and Douglas Farah, Liberian Leader Urges Sierra Leone Rebels to Free Hostages, Wash. Post, May 20, 2000, at A20; see also Sierra Leone Web News Archives, May 5, 2000, available at <http://sierra-leone.org/slnews0500.html>.

RUF renewed its offensive against the government and Sankoh's security guards did not hesitate to kill several civilians during a demonstration in front of Sankoh's residence.<sup>208</sup>

As a result of RUF breach of the Lome Accord, the Sierra Leonean government authorized the arrest of several RUF leaders including the arrest of Mr. Sankoh on May 17, 2000.<sup>209</sup> Also, in June 2000, President Kabbah wrote to the Secretary-General of the United Nations, requesting the assistance of the United Nations to establish a court to try people who have committed atrocities in Sierra Leone.<sup>210</sup>

#### **4.4.2. Establishment of the Sierra Leonean Special Court**

Following President Kabbah's request, the Security Council in August 2000 passed Resolution 1315 which recognized "that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region" and therefore mandated the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent Special Court.<sup>211</sup> Also, the Security Council requested the Secretary-General to submit a report on the implementation the recommendations of the Resolution.<sup>212</sup> Pursuant to Resolution 1315, the Secretary-General on October 4, 2000, forwarded his report to the Security Council on October 4, 2000,<sup>213</sup> with the draft

---

<sup>208</sup> See Norimitsu Onishi, Gunmen Fire on Protesters in Sierra Leone, N.Y. Times, May 9, 2000, at A6. The Sierra Leone Web cited Medecins Sans Frontieres (Doctors Without Borders) estimate of approximately 40 civilian casualties. Sierra Leone Web News Archives, May 10, 2000, available at: <http://sierra-leone.org/slnews0500-B.html>.

<sup>209</sup> Karen Gallagher, *supra* note 191, at 167.

<sup>210</sup> See Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, 10 August 2000.

<sup>211</sup> S.C. Res. 1315, U.N. SCOR, 4168th mtg., U.N. Doc S/RES/1315 (2000) [hereinafter Security Council Resolution 1315].

<sup>212</sup> *Id.*

<sup>213</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000) [hereinafter Report of the Secretary-General on Sierra Leone Special Court], available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>.



agreement between the U.N. and the government of Sierra Leone<sup>214</sup> and the draft statute for the court annexed thereto.<sup>215</sup> The Secretary-General's report recommended a treaty-based *sui generis* court of mixed jurisdiction and composition would have the power to prosecute persons "most responsible" for serious violations of "international humanitarian law and Sierra Leonean law committed in the territory" of that country since November 1996.<sup>216</sup>

From December 2000 to July 2001, the Security Council and the Secretary-General exchanged correspondence which contained suggested amendments and revisions to the draft statute of the court submitted by the Secretary-General.<sup>217</sup> By letter dated February 9, 2001, the Sierra Leonean government conveyed its acceptance of the amendments to the Secretary-General who in-turn, communicated this acceptance to the Security Council.<sup>218</sup> Thus, by July 2001, the final text of the Sierra Leone Court statute was accepted by all parties and on January 16, 2002, the government of Sierra Leone and the United Nations signed the Agreement establishing the Special Court and officially

---

<sup>214</sup> The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter Sierra Leone Special Court Agreement], annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>

<sup>215</sup> The draft Statute for the Special Court for Sierra Leone, as amended [hereinafter Sierra Leone Special Court Statute], annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>, also available at: <http://www.sc-sl.org/scsl-statute.html>.

<sup>216</sup> Secretary-General's Sierra Leone Report, *supra* note 213, at para. 9.

<sup>217</sup> See Annex to the Letter Dated 22 December 2000 from the President of the Security Council Addressed to the Secretary-General, UN Doc. S/2000/1234 [hereinafter Sierra Leone Statute Amendment]. By letter dated January 12, 2001, UN Doc. S/2001/40, the Secretary-General responded to the Security Council concerning the suggested amendment. The Security Council responded to the Secretary-General's letter on January 31, 2001, UN Doc. S/2001/95. These documents and other letters dated 2000 and 2001 are available online at: <http://www.un.org/Docs/sc/letters/2000/> and <http://www.un.org/Docs/sc/letters/2001/>, respectively.

<sup>218</sup> This agreement was communicated to the Secretary-General in a letter dated February 9, 2001. See Letter Dated 13 July 2001 from the Secretary-General to the President of the Security Council, UN Doc. S/2001/693, available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/455/50/PDF/N0145550.pdf?OpenElement>.

ending the civil war.<sup>219</sup> The agreement was ratified in March 2002 by the Parliament of Sierra Leone.

Thus, unlike the ICTY and the ICTR, which were established under Security Council resolutions pursuant to Chapter VII of the UN Charter and have jurisdiction only over international offenses, the Sierra Leone Special Court (Special Court) is a “treaty-based *sui generis* court of mixed jurisdiction and composition having jurisdiction over violations of international humanitarian law and cognate Sierra Leonean law.”<sup>220</sup>

#### **4.4.3. Jurisdiction and Composition of the Special Court of Sierra Leone**

Although the Sierra Leonean civil war started in 1991, the Special Court has jurisdiction to prosecute only “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”<sup>221</sup> Financial consideration and the desire not to overburden the Special Court’s Prosecutor were instrumental for the decision not to extend the Court’s temporal jurisdiction to March 23, 1991, which was the date the civil war started.<sup>222</sup> On the other hand, May 25, 1997, the date of the AFRC coup was rejected to avoid the impression that the Special Court was created to target the coupsits.<sup>223</sup> Similarly, January 6, 1999, the date of RUF last incursion into Freetown was

---

<sup>219</sup> See “Sierra Leone: UN Government Sign Historic Accord to Set up Special War Crimes Court”, UN NewsCenter, 16 January 2002, available at: <http://www.un.org/apps/news/story.asp?NewsID2639&CrSierra&CrCourt> (last visited March 16, 2005).

<sup>220</sup> Secretary-General’s Sierra Leone Report, *supra* note 213, para. 9.

<sup>221</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 1.

<sup>222</sup> See generally, Report of the Secretary-General on Sierra Leone Special Court, *supra* note 213, paras. 26-27.

<sup>223</sup> *Id.*

rejected because it would exclude the period within which serious crimes were committed in the rural and provincial areas.<sup>224</sup>

In the end, the Secretary-General recommended November 30, 1996, the date which corresponds with the first failure of the Abidjan Peace Accord between the government of Sierra Leone and the RUF. According to the Secretary-General, the November 30, 1996 date “would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court.”<sup>225</sup> Also, while the Court’s temporal jurisdiction is based on the fact that all hostilities has not ceased at the time of drafting the Statute of the Court, it may be argued that the Court’s jurisdiction covers only November 30, 1996 to January 12, 2002, which is the date hostilities was officially declared over.

In view of the fact that child soldiers played a significant part in the Sierra Leonean civil war, the question whether the Court should exercise jurisdiction over children was considered during the drafting stages of the Court’s Statute.<sup>226</sup> In the end, it was agreed that the “Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.”<sup>227</sup> With respect to any person who was at the time of the alleged commission of the crime between 15 and 18 years of age, the Special Court’s objective should be to rehabilitate and reintegrate the juvenile offender back to the society.<sup>228</sup> Also, article 19 of the Statute precludes the

---

<sup>224</sup> Report of the Secretary-General on Sierra Leone Special Court, *supra* note 213, paras. 26-27.

<sup>225</sup> *Id.*

<sup>226</sup> See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/ 1234, 22 December 2000; see also Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, 12 January 2001.

<sup>227</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 7(1).

<sup>228</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 7(1). See also, Article 15(5) requiring the Prosecutor to “ensure that the child-rehabilitation programme is not placed at risk and that, where

Special Court from imposing any prison term on a juvenile offender.<sup>229</sup> Thus, under this arrangement, the prosecution of child soldiers is highly unlikely.<sup>230</sup> They would also probably not qualify under the express personal jurisdiction of the Special Court to prosecute only those “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”<sup>231</sup> Thus, the Prosecutor has declared that he does not intend to indict anyone for crimes committed while under the age of 18.<sup>232</sup>

The Special Court subject matter jurisdiction covers crimes against humanity;<sup>233</sup> violations of article 3 common to the Geneva Conventions and Additional Protocol II;<sup>234</sup> and other serious violations of international humanitarian laws.<sup>235</sup> Also, in consideration

---

appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.”

<sup>229</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 19(1).

<sup>230</sup> Daryl A. Mundis, Current Development: New Mechanisms for the Enforcement of International Humanitarian Law, 95 AM. J. INT’L. L. 934, 937 (2001).

<sup>231</sup> See, Sierra Leone Special Court Statute, *supra* note 215, art. 1.

<sup>232</sup> See Thierry Cruvellier and Marieke Wierda, The Special Court for Sierra Leone: The First Eighteen Months, March 2004, 5 available at: [www.ictj.org/downloads/SC\\_SL\\_Case\\_Study\\_designed.pdf](http://www.ictj.org/downloads/SC_SL_Case_Study_designed.pdf).

<sup>233</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 2. The following crimes are crimes against humanity if committed as part of a widespread or systematic attack against any civilian population:

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecution on political, racial, ethnic or religious grounds; and (i) Other inhumane acts. *Id.*

<sup>234</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 3. These violations shall include:

- a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and (h) Threats to commit any of the foregoing acts. *Id.*

<sup>235</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 4. The following crimes are considered serious violations of international humanitarian law:

- a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; and

of the nature of the conflict, and giving the hybrid character<sup>236</sup> of the Special Court's applicable law, the Special Court has jurisdiction to prosecute persons who have committed crimes relating to the abuse of girls under 14 years of age as provided under the Sierra Leonean Prevention of Cruelty to Children Act, 1926 (Cap. 31).<sup>237</sup> In addition, the Court has jurisdiction to try those accused of committing crimes relating to the wanton destruction of property under the Sierra Leonean Malicious Damage Act, 1861.<sup>238</sup> Significantly, the Special Court unlike the ICTY and ICTR does not have jurisdiction over the crime of genocide because there was no evidence that the killings in Sierra Leone targeted individuals based on national, ethnic, racial or religious group nor was there any intent to annihilate persons belonging to any of the above groups.

In consonance with the IMT, ICTY, and ICTR, the Statute of the Special Court provides for the principle of individual criminal responsibility.<sup>239</sup> However, the Statute

---

(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. *Id.*

<sup>236</sup> The Special Court is often referred to as a "hybrid tribunal" because of its mixed jurisdiction and composition. UN administrations in Kosovo and East Timor have established other hybrid tribunals, but the Court is the first example of this particular model. See discussion on Cambodia Court, *infra*.

<sup>237</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 5(a). Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31) for which the Special Court may prosecute are:

(i) Abusing a girl under 13 years of age, contrary to section 6; (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7; and (iii) Abduction of a girl for immoral purposes, contrary to section 12.

<sup>238</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 5(b). Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861 for which the Special Court may prosecute are:

(i) Setting fire to dwelling - houses, any person being therein, contrary to section 2; (ii) Setting fire to public buildings, contrary to sections 5 and 6; and (iii) Setting fire to other buildings, contrary to section 6. *Id.*

<sup>239</sup> See Sierra Leone Special Court Statute, *supra* note 215, art. 6 which provides as follows:

- (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
- (2). The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
- (3). The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to

notes that the “individual criminal responsibility for the crimes under the Sierra Leonean law shall be determined in accordance with the respective laws of Sierra Leone.”<sup>240</sup> Also, the Special Court Statute invalidated “an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute...”<sup>241</sup> On the other hand, the Statute did not indicate whether the blanket amnesty given to all parties by the 1999 Lomé Accord should be recognized by the Court for crimes under the Sierra Leonean law. In view of the limitation of article 10 to international crimes under articles 2-4 and in accordance with statutory construction, it seems that the application of the amnesty to crimes under the Sierra Leonean law should be determined also by resort to the respective laws of Sierra Leone.

Also, like the ICTY and the ICTR, the Special Court has concurrent jurisdiction with the domestic courts of Sierra Leone.<sup>242</sup> However, the Special Court has primacy over Sierra Leonean national courts<sup>243</sup> and by implication, the Sierra Leonean Truth and Reconciliation Commission (TRC). Consequently, at any stage before judgment is rendered, the Special Court may request Sierra Leonean national courts and the TRC to defer their jurisdiction to the Special Court.<sup>244</sup>

By contrast, the Special Court primacy over the Sierra Leonean national courts and the TRC is not over reaching like the power of the ICTY and ICTR which can assert primacy over national courts of third States or order the surrender of an accused located

---

know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

(4). The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

<sup>240</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 6(5).

<sup>241</sup> *Id.*, art. 10.

<sup>242</sup> *Id.*, art. 8(1).

<sup>243</sup> *Id.*, art. 8(2).

<sup>244</sup> *Id.*

in any third State. This is because unlike the ICTY and ICTR, the Special Court was not established by the Security Council pursuant to its Chapter VII powers but by an agreement between the United Nations and Sierra Leone.<sup>245</sup> However, the implication of this on the Court's jurisdiction is negligible since most of the accused are already in custody in Sierra Leone. Besides, the mere effect of an indictment by the Court will put pressure on third States harboring the indicted person(s) to surrender him or her to the Court even without the inherent power of the Security Council.<sup>246</sup>

The Special Court is comprised of two Trial Chambers, one Appeals Chamber, the Office of the Prosecutor and the Registry.<sup>247</sup> Each trial chamber shall be composed of two judges appointed by the Secretary-General and one judge appointed by the government of Sierra Leone.<sup>248</sup> The five-member Appeals Chamber shall be composed of three judges appointed by the Secretary-General and two judges appointed by the government of Sierra Leone.<sup>249</sup> The Secretary-General appoints the Prosecutor and the Registrar, while the Deputy Prosecutor who should be Sierra Leonean is appointed by the government of Sierra Leone in consultation with the United Nations.<sup>250</sup>

Thus, unlike the ICTY and ICTR, which are composed exclusively of third State nationals elected by the U.N. General Assembly, and a Prosecutor selected by the Security Council, the Special Court is to be composed of both international and Sierra

---

<sup>245</sup> See Sierra Leone Special Court Agreement, *supra* note 214.

<sup>246</sup> One notable exception is Nigeria's continued refusal to extradite the former president of Liberia, Charles Taylor to Sierra Leone for trial despite pressure from the international committee. Charles Taylor was indicted by the Court for war crimes and is presently in exile in Nigeria. See Nigeria: Surrender Charles Taylor to Special Court for Sierra Leone, Amnesty International Press Release 8/11/2005 available at: <http://news.amnesty.org/index/ENGAFR440182005> (visited September 8, 2005).

<sup>247</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 11.

<sup>248</sup> *Id.*, art. 12.

<sup>249</sup> *Id.* As at March 12, 2006, the President of the Court is Justice A. Raja N. Fernando, a Sri Lankan national.

<sup>250</sup> Sierra Leone Special Court Statute, *supra* note 215, arts. 15 & 16(3). Although the Statute provides that the Deputy Prosecutor should be a Sierra Leonean, the current Deputy Prosecutor Desmond da Silva appointed by the government of Sierra Leone is from the UK.

Leonean judges, prosecutors and staff.<sup>251</sup> Also, unlike the ICTY and ICTR, the Special Court will be seated at the headquarters of the U.N. peacekeeping operation in Freetown, Sierra Leone's capital city. However, unlike the ICTY and ICTR, the Special Court is funded by voluntary contributions from a group of interested States,<sup>252</sup> and a Management Committee comprising a small number of States oversees all non-judicial activities of the Court.<sup>253</sup> Matters of cooperation with the government of Sierra Leone are regulated by the Special Court Agreement (Ratification) Act, 2002.<sup>254</sup>

#### **4.4.4. Assessment of the Sierra Leonean Special Court**

In April 2002, three months after the Government of Sierra Leone and the UN signed the agreement establishing the Special Court, UN Secretary-General Kofi Annan appointed the Registrar and the Chief Prosecutor. The Registrar and the Prosecutor arrived in Freetown in late July and early August 2002, respectively. They began operations in difficult conditions. The Special Court had to build its own staff offices, courtrooms, and prison facilities because there were no convenient pre-existing offices for the Court to use.<sup>255</sup>

---

<sup>251</sup> The decision to create a mixed tribunal of national and international judges was due primarily to practical considerations and fears about the neutrality of national trials. The Sierra Leonean judicial system has been largely decimated as a result of the war. It is only functional in Freetown and lacks the enormous human and financial resources required to undertake post-conflict trials. For the effect of the war on the Sierra Leone judiciary see, The Commonwealth Human Rights Initiative, *In Pursuit of Justice: A Report on the Judiciary in Sierra Leone Report*, (2002) at: <http://www.humanrightsinitiative.org/publications/Sierra%20Leone%20Report.pdf>.

<sup>252</sup> This model of funding was opted for in the wake of the ICTY and ICTR, each of which costs the international community in excess of \$100 million in assessed contributions yearly.

<sup>253</sup> The management committee comprises representatives from Canada (chair), the United States, the United Kingdom, the Netherlands, Lesotho, Nigeria, the UN Office of Legal Affairs, and the Government of Sierra Leone.

<sup>254</sup> See The Special Court Agreement 2002 (RATIFICATION) ACT, (2002) (Sierra Leone) [hereinafter Special Court Agreement], available at: [www.specialcourt.org/documents/SpecialCourtAct.html](http://www.specialcourt.org/documents/SpecialCourtAct.html) (last visited March 24, 2005).

<sup>255</sup> Thierry Cruvellier and Marieke Wierda, *supra* note 232, at 2 (noting that until January 2003, the Registry had to work in provisional offices owned by the Bank of Sierra Leone, while the Office of the



On March 10, 2003, the Court issued its first set of indictments and arrests known by the Office of the Prosecutor as “Operation Justice,” and by November 2003, 13 individuals had been indicted.<sup>256</sup> From its outset, the jurisdiction of the Special Court was restricted to “those who bear the greatest responsibility.”<sup>257</sup> Thus, the indictments targeted individuals on the highest level command positions in the three main armed groups - the AFRC, the RUF, and the CDF involved in the Sierra Leone civil war.<sup>258</sup> By virtue of their leadership positions, the indictees allegedly knew or should had reason to know about the commission of the crimes and may have also participated in directly committing atrocities. With Sankoh and Bockarie dead, Koroma allegedly dead or missing, and Taylor presently out of reach, the Court may be unable to try its four most prominent suspects. Unlike the other ad hoc tribunals, it has no procedure for hearing

---

Prosecutor operated from a private residence a few kilometers away until August 2003 when it was transferred to the permanent site).

<sup>256</sup> The individuals indicted include 10 of those in the Special Court’s custody: Foday Sankoh, the RUF founder and former leader (Sankoh died on July 29, 2003); Issa Sesay, who succeeded Foday Sankoh as leader of the RUF; Morris Kallon and Augustine Gbao, senior RUF commanders; Alex Tamba Brima, Ibrahim “Bazzy” Kamara, and Santigie Kanu, senior members of the AFRC; Sam Hinga Norman, national coordinator of the CDF and Minister of Internal Affairs and National Security at the time of this arrest; Moinina Fofanah, Director of War for the CDF; and Allieu Kondewa, Chief Initiator and High Priest of the Kamajors. The other three accused who were at large, dead, or allegedly dead are: Sam “Mosquito” Bockarie, former Battlefield commander of the RUF (On June 1, 2003, Bockarie’s body was flown to Freetown by the government of Liberia and given to the Special Court for final identification and he was positively identified); Johnny Paul Koroma, head of the AFRC; and Charles Taylor, former President of Liberia (who was granted asylum in Nigeria). Thierry Cruvellier and Marieke Wierda, *supra* note 484, at 4-5. The CDF is largely composed of traditional hunters, some of whom are known as Kamajors. President Kabbah called on the CDF to assist in fighting the RUF.

<sup>257</sup> Sierra Leone Special Court Statute, *supra* note 215, art. 1. Also see, War Crimes Court Loses Steam, The Analyst (Monrovia) March 2, 2005, available at: <http://allafrica.com/stories/200503020699.html> (noting that “It was always recognized by the UN and the Sierra Leone government - and, indeed, by Amnesty International - that the court proposed by the UN Security Council in August 2000 would not be able to try all those who had committed crimes under international law).

<sup>258</sup> See Bringing Justice: the Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support, at Limited Interpretation of “Those Who Bear the Greatest Responsibility”, Human Rights Publication available at: <http://hrw.org/reports/2004/sierraleone0904/> (last visited March 29, 2005) [hereinafter Brining Justice].

evidence in cases where the accused is not in custody.<sup>259</sup> Thus, the prosecutorial strategy to narrowly construe the Court's jurisdiction has come under attack.<sup>260</sup>

Although the Special Court is supposed to be staffed by a mixture of domestic and international personnel, all key personnel of the Court are internationals. Judge Geoffrey Robertson who serves as the first President of the Court is an Australian national. The current president Justice A. Raja N. Fernando is from Sri Lanka.<sup>261</sup> The Office of the Prosecutor<sup>262</sup> was initially headed by an American, David Crane and from May 2005, by Desmond de Silva, from the United Kingdom who was Mr. Crane's deputy.<sup>263</sup> Until October 3, 2005, the Registry<sup>264</sup> was led by Robin Vincent, a British national who was succeeded by Lovemore G. Munlo.<sup>265</sup> During the Court's start-up period, most of the key posts in the Office of the Prosecutor were filled by U.S. nationals, which attracted some criticism. Although the Prosecutor explained that his key motivation in selecting his staff was to get to work quickly, critics perceived the Special Court as under undue American influence.

The Special Court limited temporal jurisdiction has also been criticized because it will not be able to try the massive violations of human rights and humanitarian law that

---

<sup>259</sup> Special Court Statute, *supra* note 215, art. 17(4)(d).

<sup>260</sup> For instance, Human Rights Watch has expressed the believe that the mandate should be interpreted to include other perpetrators who, while not at the top of the chain of command, were regional or mid-level commanders who stood out above similarly ranking colleagues for the exceedingly brutal nature of the crimes they committed that terrorized civilians. See Bringing Justice, *supra* note 512.

<sup>261</sup> See The Chambers, available at: <http://www.sc-sl.org/chambers.html> (visited March 12, 2006).

<sup>262</sup> The Office of the Prosecutor has about 40 staff members, including investigators and trial and appeals counsel.

<sup>263</sup> See Office of the Prosecutor, available at: <http://www.sc-sl.org/prosecution.html> (visited March 12, 2006).

<sup>264</sup> The Registry performs the following functions: management of detention; witness protection; court management; legal support to the Chambers; filing of court records and exhibits; public information and outreach; security; financial and procurement matters; support to the Defence Office; and witness support and protection.

<sup>265</sup> See The Registry, available at: <http://www.sc-sl.org/registry.html> (visited March 12, 2006).

were committed by all the parties to the conflict between March 23, 1991 and November 30, 1996.<sup>266</sup>

#### **4.5. TIMOR-LESTE HYBRID SPECIAL PANEL**

##### **4.5.1. Background of the Conflict**

East Timor was a Portuguese colony for more than four centuries. After the overthrow of Portuguese dictator Marcello Caetano by a group of Portuguese army officers in 1974, the military junta began to divest Portugal of its colonies including East Timor.<sup>267</sup> In readiness for self rule, the Portuguese Colonial government in East Timor authorized the formation of political parties and the conduct of some local government elections. The neighboring Indonesian government considered the possibility of self rule in East Timor as a threat to its influence in the region and decided to pursue the integration of East Timor with Indonesia.<sup>268</sup> The integration of East Timor with Indonesia was resisted by some of the political parties resulting in Indonesia invasion of East Timor in December 1975.<sup>269</sup> By July 1976, Indonesia completed its annexure of East Timor by declaring it as Indonesia's twenty-seventh province.<sup>270</sup> Between 1975 and 1980, about 200,000 East Timorese were killed as a result of the invasion of East Timor by the Indonesian military.<sup>271</sup>

---

<sup>266</sup> For a critique of the temporal jurisdiction of the Court, see Abdul Tejan-Cole, *supra* note 196.

<sup>267</sup> Don Greenlees & Robert Garran, *DELIVERANCE: THE INSIDE STORY OF EAST TIMOR'S FIGHT FOR FREEDOM* 4 (2002).

<sup>268</sup> Jose Ramos-Horta, *FUNU: THE UNFINISHED SAGA OF EAST TIMOR* 64-71 (1987).

<sup>269</sup> Don Greenlees & Robert Garran, *supra* note 267, at 10-15.

<sup>270</sup> *Id.*, at 15. *See generally* Australian National Command Element, Department of Defence, "A Short History of East Timor," available at: <http://www.defence.gov.au/army/asnce/history.htm>.

<sup>271</sup> Damien Kingsbury, East Timor to 1999, in *GUNS AND BALLOT BOXES: EAST TIMOR'S VOTE FOR INDEPENDENCE*, 17, 20 (Damien Kingsbury ed., 2000); Richard Tanter et al., East Timor Faces the Future, in *BITTER FLOWERS, SWEET FLOWERS: EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY* 243, 260 (Richard Tanter et al. eds., 2001). *See JUDICIAL SYSTEM MONITORING PROGRAMME, THE GENERAL PROSECUTOR v. JONI MARQUES AND 9 OTHERS (THE LOS PALOS CASE)* 4 (Mar. 2002), available at: <http://www.jsmp.minihub.org/Resources.htm> [hereinafter

The Indonesian government continued to govern East Timor as a province of Indonesia until the fall of Haji Mohammad Soeharto (Suharto) regime in 1998. On January 27, 1999, the new government of Indonesia headed by President B. J. Habibie announced its intention to hold a referendum which would allow the East Timorese to choose between broad autonomy within Indonesia and transition to independence.<sup>272</sup> On May 5, 1999, the UN, Indonesia and Portugal entered into a Tripartite Agreement which detailed the conditions for the referendum.<sup>273</sup> In furtherance of the Tripartite Agreement, the United Nations Mission in East Timor (“UNAMET”) arrived in East Timor in May 1999 to prepare for the referendum. Meanwhile, the Indonesian military and the civilian leadership that were opposed to the referendum began a campaign of intimidation and violence aimed at disruption of the referendum.<sup>274</sup> Notwithstanding the intimidation and violence by the Indonesian military and the East Timorese militias that it commanded, on September 5, 1999, the East Timorese turned out in a record 98.5% for the referendum.<sup>275</sup> By an overwhelming majority of 78.5%, the East Timorese choose self independence in place of special autonomy under the Indonesian government.<sup>276</sup>

Within hours of the announcement of the referendum results, the Indonesian military and the militias responded by launching a systematic destruction of East Timorese infrastructure, killing of civilians and forcing hundreds of thousands to flee to

---

JSMF, LOS PALOS]. *See also*, East Timor Action Network, “Backgrounder for East Timor’s May 20 Independence Day” (May 2002), available at: <http://etan.org/news/2002a/05back.htm> (noting that scarce food and medical supplies led to thousands of deaths in forced resettlement camps).

<sup>272</sup> See Don Greenlees & Robert Garran, *supra* note 267, at 101.

<sup>273</sup> *Id.* at 147.

<sup>274</sup> Damien Kingsbury, *supra* note 271, at 189-90.

<sup>275</sup> Geoffrey Robinson, With UNAMET in East Timor - An Historian’s Personal View, in BITTER FLOWERS, SWEET FLOWERS: EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY, *supra* note 271, at 55, 58.

<sup>276</sup> *Id.*

the hills and across the Indonesian.<sup>277</sup> On September 20, 1999, the United Nations dispatched a peacekeeping force called the International Force in East Timor (“INTERFET”), which was led by Australian soldiers to maintain law and order in East Timor.<sup>278</sup> After East Timor came under the effective control of INTERFET,<sup>279</sup> on October 25, 1999, the Security Council pursuant to Chapter VII of the U.N. Charter passed Resolution 1272, which established the United Nations Transitional Administration in East Timor (“UNTAET”).<sup>280</sup>

UNTAET was charged with the responsibility of administering East Timor for three years within which time East Timor will transition to self-rule.<sup>281</sup> East Timor transition to a sovereign State was completed on April 14, 2002, when it conducted its presidential elections and was formally declared an independent State on May 20, 2002. Following Timor-Leste’s independence,<sup>282</sup> UNTAET’s mandate was terminated and replaced by the United Nations Mission of Support in East Timor (“UNMISSET”).<sup>283</sup> The UNMISSET is responsible for transitioning United Nations gradual withdrawal from East Timor and provide support to the East Timorese authorities in the areas of stability,

---

<sup>277</sup> “This was no spontaneous outburst or flare-up of civil war but a one-sided campaign of terror and destruction aimed at those who voted for succession from Indonesia.” Human Rights Watch, UNFINISHED BUSINESS: JUSTICE FOR EAST TIMOR 5 (August 2000), at <http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm>. See Don Greenlees & Robert Garran, *supra* note 267 at 202.

<sup>278</sup> U.N. S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999), at <http://www.un.org/peace/etimor/docs/UntaetDrs.htm> (authorizing the creation of a multinational force for East Timor). Don Greenlees & Robert Garran, *supra* note 267, at 270.

<sup>279</sup> See Report of the Secretary-General on the United Nations Transitional Administration In East Timor, U.N. S.C., 55th Sess., U.N. Doc. S/2000/53 (2000) (reporting on the restoration of law and order following the arrival of INTERFET). Don Greenlees & Robert Garran, *supra* note 267, at 270.

<sup>280</sup> United Nations Transitional Administration in East Timor, U.N. S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999) [hereinafter S.C. Res. 1272].

<sup>281</sup> *Id.*

<sup>282</sup> On May 20, 2002, East Timor swore in its first government and held an inaugural session of Parliament which changed the name of the country to Timor-Leste.

<sup>283</sup> See United Nations Mission of Support in East Timor, U.N. S.C. Res. 1410, U.N. SCOR, 57th Sess., 4534th mtg., U.N. Doc. S/RES/1410 (2002) [hereinafter S.C. Res. 1410].

democracy, justice, internal and external security, law enforcement and border control.<sup>284</sup>

Also, the UNMISSET took over UNTAET's mandate for prosecuting serious crimes and assisting the judicial sector.<sup>285</sup>

UNMISSET mandate which was for an initial period of one year was extended by the Security Council successively for another two years to permit Timor-Leste, to attain self-sufficiency.<sup>286</sup> On May 20, 2005, UNMISSET completed its mandate in Timor-Leste. The Security Council replaced UNMISSET with a small follow-on political mission – the United Nations Office in Timor-Leste (UNOTIL) which was established to ensure that the foundations of a viable State are firmly in place in Timor-Leste.<sup>287</sup>

#### **4.5.2. Establishment, Jurisdiction and Composition of Timor-Leste Hybrid Special Panel**

In June 2000, the UNTAET passed Regulation 2000/15 which established the Special Panels for Serious Crimes, a hybrid tribunal comprised of two international and one Timor-Leste panels of judges.<sup>288</sup> Regulation 2000/15 conferred exclusive jurisdiction on the Special Panels to try anyone accused of committing serious crimes of genocide, war crimes, crimes against humanity, including torture, murder, and sexual offenses between January 1 and October 25, 1999.<sup>289</sup>

---

<sup>284</sup> S.C. Res. 1410, *supra* note 283.

<sup>285</sup> *Id.*

<sup>286</sup> On May 19, 2003, the Security Council by Resolution 1480 extended UNMISSET mandate for another year until May 20, 2004. On May 14, 2004, the Security Council in its Resolution 1543 again extended UNMISSET mandate to six months with a view to subsequently extending it for a further and final six months. The final extension was made through Security Council Resolution 1573 on November 16, 2004, which extended UNMISSET mandate to May 20, 2005.

<sup>287</sup> See United Nations Mission of Support in East Timor – Mandate, at <http://www.un.org/Depts/dpko/missions/unmisset/mandate.html> (visited September 10, 2005).

<sup>288</sup> Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET, 1.1, 1.3, 2.3, U.N. Doc. UNTAET/REG/2000/15 (2000) [hereinafter Regulation 2000/15].

<sup>289</sup> Regulation No. 2000/15, para 2.3. See also, Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 298 (2003).

There are presently two Special Panels; one panel is English speaking, the other Portuguese, both operating from the Dili District Court. Each of the Special Panel is composed of three judges made up of two international judges and one Timor-Leste judge.<sup>290</sup> Also, there is an Appeals Chamber which is similarly composed of two international judges and one Timor-Leste judge. The Appeals Chamber sits at the Dili Court of Appeals to hear appeals to decisions rendered by the Special Panels. International law norms, customs, and treaties control with respect to these international crimes and jurisdiction of the tribunal.<sup>291</sup> Timor-Leste law, to the extent that it is not inconsistent with customary international law, applies to all other legal matters of the tribunal.<sup>292</sup>

In addition to the Special Panels, UNTAET by Regulation 2000/16 established the Serious Crimes Unit (SCU) to investigate and prosecute crimes within the jurisdiction of the Special Panels.<sup>293</sup> Although Regulation 2000/16 called for the creation of SCU that is staffed by Timor-Leste nationals and international experts “as necessary”,<sup>294</sup> the SCU was in fact staffed mostly by international prosecutors, investigators, case managers, forensic personnel and translators. The other arm of the hybrid tribunal, the legal aid service was not created until September 2001 when the UNTAET passed Regulation

---

<sup>290</sup> Regulation No. 2000/15, *supra* note 288, paras. 1.1, 1.2, 22.1, 22.2.

<sup>291</sup> See Daryl Mundis, *supra* note 230, at 943.

<sup>292</sup> *Id.*

<sup>293</sup> Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor, UNTAET, U.N. Doc. UNTAET/REG/2000/16 (June 6, 2000), available at:

<http://www.jsmp.minihub.org/Resources.htm>.

<sup>294</sup> *Id.* 14.6.

2001/24.<sup>295</sup> The legal aid service provides legal assistance to those accused of committing human rights offenses.<sup>296</sup>

#### **4.5.3. Assessment of the Timor-Leste Special Panel**

The Timor-Leste internationalized domestic tribunal presents a model that could potentially be of benefit in other situations. However, researchers have pointed out that the tribunal's main failings have been its link to a very weak domestic criminal justice system and lack of adequate resources and funding for the Special Panels.<sup>297</sup> Also, the tribunal has been criticized for failing to observe minimal standards of due process.<sup>298</sup> There were also concerns regarding the impartiality of the Special Panels, the competence of the defense counsels, trial delays and interruptions, and questionable interpretation and translation.<sup>299</sup>

The Special Panel began operating in June 2000 at a slow pace. On December 11, the Special Panel rendered its first judgment against ten militiamen accused of crimes against humanity, including torture, murder, and forced expulsion.<sup>300</sup> By October 2003, the Prosecutor has issued seventy-eight indictments against both former East Timorese

---

<sup>295</sup> See Regulation No. 2001/24 on the Establishment of a Legal Aid Service in East Timor, UNTAET, 1-3, 6, U.N.Doc. UNTAET/REG/2001/24 (2001), at <http://www.un.org/peace/etimor/untaetR/2001-24.pdf> (last visited Oct. 6, 2004) [hereinafter Regulation 2001/24].

<sup>296</sup> *Id.*

<sup>297</sup> For a detailed assessment of the achievements and failings of the tribunal, see David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?, 63 ASIA PACIFIC ISSUES, Aug. 2002, at 3-4, available at <http://www.eastwestcenter.org/stored/pdfs/api061.pdf>; Suzannah Linton, Prosecuting Atrocities at the District Court of Dili, 2 MELB. J. INT'L L. 414 (2001); Suzanne Katzenstein, NOTE: Hybrid Tribunals: Searching for Justice in East Timor, 16 HARV. HUM. RTS. J. 245 (2003); Press Release, Judicial System Monitoring Programme, Court of Appeal Decision Raises National and International Concern (July 17, 2003), at [http://www.jsmp.minihub.org/News/17nb-7\\_03nb.htm](http://www.jsmp.minihub.org/News/17nb-7_03nb.htm) (last visited Sept. 24, 2004) and Human Rights Watch World Report 2003, EAST TIMOR, available at: <http://www.hrw.org/wr2k3/asia5.html> (last visited April 27, 2005).

<sup>298</sup> Case No. 9/2000. For the *Los Palos Case* indictment, judgments and JSMP Commentary, available at: <http://www.jsmp.minihub.org/Trialsnew.htm>. [hereinafter "JSMP Commentary"].

<sup>299</sup> David Cohen, *supra* note 297, at 6; Suzanne Katzenstein, *supra* note 297, at 260.

<sup>300</sup> JSMP Commentary, *supra* note 298.



militiamen and Indonesian military officers, accusing 350 individuals of serious crimes committed in 1999 and secured thirty-five convictions.<sup>301</sup> The low rate of conviction is attributed to the fact that out of the 350 individuals indicted by the SCU, 263 remain at large, possibly enjoying safe heaven in Indonesia because the Indonesian government has refused to recognize the court and refuses to extradite the accused.<sup>302</sup> Thus, with Indonesia reluctance to extradite or cooperate with the tribunal, the possibility that those most responsible for the violence in 1999 will ever stand before the Special Panels is very bleak.<sup>303</sup>

The fear that many of the indictees may not face justice is strengthened by the early termination of the activities of the Special Panel and the SCU by the Security Council without any arrangement to ensure the completion of the outstanding trials and appeals.<sup>304</sup> Consequently, over 300 people indicted for serious crimes before the Special Panels have not yet been tried because they could not be brought within the jurisdiction of the Special Panels before the UN prematurely closed the tribunal and the SCU.<sup>305</sup> There are reports that indictees have begun returning to Timor-Leste.<sup>306</sup> Amnesty

---

<sup>301</sup> See East Timor, Asia-Pacific Daily Rep. (Ctr. of Excellence in Disaster Mgmt. and Humanitarian Assistance, Tripler AMC, Hawaii), Sept. 30, 2003, at 2, at <http://www.who.int/disasters/repo/10959.pdf> [hereinafter Asia-Pacific Rep.].

<sup>302</sup> Id., at 2.

<sup>303</sup> Herbert D. Bowman, Letting The Big Fish Get Away: The United Nations Justice Effort In East Timor 18 EMORY INT'L L. REV. 371, 389 (2004).

<sup>304</sup> Pursuant to Resolutions 1543 (2004) and 1573 (2004), the Security Council directed that with the termination of UNMISSET on May 20, 2005, the activities of the Serious Crimes Unit and Special Panels for Serious Crimes in Timor-Leste should cease. The follow-on mission to UNMISSET, UNOTIL, does not have a mandate to continue or to support the serious crimes process.

<sup>305</sup> See Amnesty International, Security Council Inaction on Justice for Timor-Leste Leaves Fight Against Impunity in Limbo, August 19, 2005, available at: <http://www.globalpolicy.org/intljustice/tribunals/timor/2005/0819AItimor.htm> [hereinafter Fight Against Impunity in Limbo].

<sup>306</sup> Id.

International has stated that the result of this development “is legal uncertainty, potential instability and continuing impunity”.<sup>307</sup>

Thus, human rights groups and victims have continued to call on the U.N. Security Council to establish an international tribunal to try the masterminds of war crimes and crimes against humanity committed in Timor-Leste from 1975 to 1999.<sup>308</sup> On the other hand, Timor-Leste and Indonesian political leaders oppose the establishment of such tribunal and instead support the pursuit of “justice” through the Truth and Friendship Commission (TFC).<sup>309</sup> Critics argue that the Truth and Friendship Commission is a means of preventing the establishment of an International Tribunal in Timor-Leste.<sup>310</sup>

## **4.6. THE SPECIAL TRIBUNAL FOR CAMBODIA**

### **4.6.1. Background**

At Cambodia’s independence in 1954, France handed over the governance of Cambodia to King Norodom Sihanouk who ruled until March 18, 1970, when he was

---

<sup>307</sup> Fight Against Impunity in Limbo, *supra* note 305.

<sup>308</sup> East Timor National Alliance for International Tribunal Dili, Timor Leste, Press Release, August 7, 2005, and Victims and Militia Demand Justice but Not Commission of Truth and Friendship at <http://www.etan.org/news/2005/08all.htm>; International Federation for East Timor urges UN Security Council to create International Tribunal for East Timor, Media Release, 05/20/2003, at [http://home.snafu.de/watchin/IFET\\_Release4.htm](http://home.snafu.de/watchin/IFET_Release4.htm); Amnesty International, Indonesia/Timor-Leste: International Responsibility For Justice, Press Release, 14 April 2003, AI Index: ASA 21/013/2003, at <http://web.amnesty.org/library/Index/ENGASA210132003?open&of=ENG-IDN>

<sup>309</sup> The Agreement for the Truth and Friendship Commission was signed on March 9, 2005, by President of Indonesia Susilo Bambang Yudhoyono and Timor-Leste President Xanana Gusmao. The TFC’s mandate is to investigate crimes committed during and after the 1999 referendum. The commission is comprised of five Indonesian and Timorese nationals and is expected to start its work in August 2005 and conclude within two years. The objective of the TFC is only to expose the truth. It has no prosecutorial powers and cannot impose punishment. See, Xanana and SBY Sign Truth Commission Agreement, Timor Post, Thursday March 10, 2005, at <http://www.unmiset.org/>.

<sup>310</sup> Seth Mydans, East Timor Atrocities will go Unpunished, International Herald Tribune WEDNESDAY, MAY 11, 2005, at <http://www.iht.com/articles/2005/05/10/news/timor.php>; Truth and Friendship Commission: More Friendship, Less Truth, Impunity from the Law, JSMP Press Release, January 14, 2005, at [http://www.asia-pacific-action.org/statements/jsmp\\_truthandfriendshipcommission\\_140105.htm](http://www.asia-pacific-action.org/statements/jsmp_truthandfriendshipcommission_140105.htm)

overthrown by General Lon Nol.<sup>311</sup> On April 17, 1975, General Nol's fragile hold to power came to an end when the Khmer Rouge entered the city of Phnom Penh ousting General Nol.<sup>312</sup> The Khmer Rouge and its leader Pol Pot vowing to "turn Cambodia back to the Year Zero"<sup>313</sup> immediately emptied the capital of its residents and brought King Sihanouk back, only to hold him under house arrest. Under the political and ideological leadership of Pol Pot, the Khmer Rouge regime desired to "build a socially and ethnically homogeneous society."<sup>314</sup> Consequently, Pol Pot's democratic Kampuchea abolished all preexisting economic, social, and cultural institutions with a view of transforming Cambodians into a collective workforce. The manner of achieving this transformation resulted in a reign of terror anchored on a systematic and deliberate torture and murder of Cambodian citizens, which, along with the disease and starvation that accompanied the regime's policies, led to the death of about 1.7 million Cambodians during the Khmer Rouge four years in power.<sup>315</sup>

The Tuol Sleng prison which was a site of interrogation, torture, and execution, best exemplifies the brutal nature of the Khmer Rouge regime in the late 1970s.<sup>316</sup> It has

---

<sup>311</sup> Jamie Frederic Metz, WESTERN RESPONSES TO HUMAN RIGHTS ABUSES IN CAMBODIA, 1975-80, at 2-3 (1996); Steven R. Ratner, The Cambodia Settlement Agreements, 87 AM. J. INT'L L. 1, 2 (1993).

<sup>312</sup> See Howard Ball, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 100 (1999) (describing the rise to power of the Khmer Rouge).

<sup>313</sup> Mann Bunyanunda, Note, The Khmer Rouge on Trial: Whither the Defense?, 74 S. CAL. L. REV. 1581, 1582 (2001). For a more detailed discussion of the Khmer Rouge rule and the accompanying atrocities, see generally Elizabeth Becker, WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION (Public Affairs 2d ed. 1998) (1986) (describing the Khmer Rouge); CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH (Karl D. Jackson ed., 1989) (same); Nayan Chanda, BROTHER ENEMY: THE WAR AFTER THE WAR (1986) (same); Ben Kiernan, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79 (2d ed. 2002) (same); Francois Ponchaud, CAMBODIA: YEAR ZERO (Nancy Amphoux trans., 1978) (same); Michael Vickery, CAMBODIA: 1975-1982 (1984).

<sup>314</sup> See Brian D. Tittmore, Khmer Rouge Crimes: The Elusive Search for Justice, 7 HUM. RTS. BRIEF 3 (Fall 1999).

<sup>315</sup> Id. Steven R. Ratner, The United Nations Group of Experts for Cambodia, 93 Am. J. Int'l L. 948 (1999).

<sup>316</sup> Locals in Phnom Penh referred to the prison as the "place of entering, no leaving." David Chandler, A HISTORY OF CAMBODIA 218 (2d ed. 1996).

been suggested that of the 16,000-20,000 people “treated” there, only seven survivors are known to be alive.<sup>317</sup> The Khmer Rouge guards at Tuol Sleng subjected the prisoners to various methods of torture, culminating in the forced written confessions of over 4,000 Cambodians.<sup>318</sup> Tuol Sleng prison was a microcosm for the Khmer Rouge atrocities. Methods of interrogation included, but were not limited to, electric shocks, severe beatings, removal of toenails and fingernails, submersion in water, cigarette burnings, needling, suffocation, suspension, and forced consumption of human waste.<sup>319</sup> The accurate and meticulous records maintained by its guards will undoubtedly serve as significant evidence during any criminal adjudication.

The U.N. Human Rights Commission’s Sub-Commission on Prevention of Discrimination and Protection of Minorities considered Cambodia’s human rights record in March 1979, describing the events between 1975 and 1979 as “the most serious [human rights violations] that had occurred anywhere in the world since nazism,” and concluded that they “constituted nothing less than autogenocide.”<sup>320</sup>

The Khmer Rouge’s efforts to exercise complete control over the territory and population of Cambodia met severe opposition on December 25, 1978, when Vietnamese army invaded Cambodia and stormed Phnom Penh. With the fall of the Democratic Kampuchea regime on January 7, 1979, the Vietnamese-backed People’s Republic of Kampuchea established complete control of the country, forcing the Khmer Rouge into the jungles of Cambodia and nearby Thailand where they continued to fight, supported

---

<sup>317</sup> See Mann Bunyanunda, *supra* note 313, at 1594; see also Alan Sipress, For Torture Camp Survivor, Time is Scarce: Chance to Bear Witness Against Khmer Rouge Hinges on Stalled Tribunal, Wash. Post, Feb. 18, 2003, at A20 (detailing the survival of one of these remaining eyewitnesses).

<sup>318</sup> See Mann Bunyanunda, *supra* note 313, at 1594.

<sup>319</sup> *Id.*, at 1593 n.45.

<sup>320</sup> U.N. ESCOR, Hum. Rts. Comm., 35th Sess., 1510th mtg. at 7, U.N. Doc. E/CN.4/SR.1510 (1979).

mainly by China.<sup>321</sup> A new Cambodian government was then installed by the Vietnamese.

After the overthrow of the Khmer Rouge regime, the Vietnamese backed Cambodian government in 1979 carried out a farcical trial of Pol Pot and Ieng Sary, the Standing Committee Member and Deputy Prime Minister for Foreign Affairs. They were tried in absentia, found guilty of the commission of genocide, and sentenced to death by a domestic tribunal.<sup>322</sup> Whilst the trial of members of the Khmer Rouge regime is necessary, the trial of Pol Pot and Ieng Sary by the People's Revolutionary Tribunal was neither normatively fair nor in conformity with prevailing international law. Thus, the international community refused to recognize these trials as legitimate for several reasons. First, the two leaders were tried in absentia, a violation of the International Covenant on Civil and Political Rights ("ICCPR").<sup>323</sup> Second, the Decree Law which established the "People's Revolutionary Tribunal" contained language denouncing the two defendants, functionally assuming their guilt, a violation of the international norm of the "presumption of innocence."<sup>324</sup> Third, the definition of genocide used at the trial did not comport with the internationally accepted definition, and it was crafted to virtually ensure the guilt of the defendants.<sup>325</sup>

---

<sup>321</sup> Mann Bunyanunda, *supra* note 313, at 1582-83.

<sup>322</sup> See GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 549 (Howard J. De Nike et al. eds., 2000) (containing documents describing Khmer Rouge tactics) [hereinafter 1979 Trial Documents]; William A. Schabas, Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide?, 35 NEW ENG. L. REV. 287, 289 (2001).

<sup>323</sup> Gregory H. Stanton, The Cambodian Genocide and International Law, in Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community 141, 142 (Ben Kiernan ed., 1993).

<sup>324</sup> For a definition of "presumption of innocence," see International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14(2), 999 U.N.T.S. 171, 176 [hereinafter ICCPR].

<sup>325</sup> The Decree defined genocide as "planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; [and] destroying political, cultural and

On the other hand, decades following the overthrow of the Khmer Rouge, the international community was apathetic to holding the Khmer Rouge regime accountable for their various international human rights violations. Rather, the international community limited its attention to the establishment of a non-communist government.<sup>326</sup> As such, the United States supported the Khmer Rouge exiles and assured their continuing seat in the United Nations. United States support for the Khmer Rouge kept Cambodian politics in a turmoil and prevented the pursuit of justice for the mass killings.<sup>327</sup> Thus, the international community was predominantly focused on ensuring Cambodian territorial sovereignty and stability, at the expense of a thorough and adequate investigation and prosecution of those responsible for the atrocities. The U.N. was involved in the settlement agreements terminating the Khmer Rouge leadership and establishing transitional Vietnamese occupation.<sup>328</sup>

In 1989 the Vietnamese withdrew the last of their troops and the government renamed the country State of Cambodia. At this time, the international community began to play a prominent role in the restoration of full self rule to Cambodia. Consequently, on October 23, 1991, a multilateral Paris Peace Accords was signed which restored independence to Cambodia and ended Vietnamese administration of Cambodia.<sup>329</sup> The Paris peace Accords also created the United Nations Transitional Authority (UNTAC).

---

social structures and family and social relations.” See 1979 Trial Documents, *supra* note 322, at 45; see William Schabas, *supra* note 322, at 289.

<sup>326</sup> For a comprehensive review of the international response during and following the Khmer Rouge regime, see generally Jamie Metzl, *supra* note 311.

<sup>327</sup> See Samantha Power, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 146-49 (2003).

<sup>328</sup> For a detailed discussion of the U.N.’s involvement after the Vietnamese were ousted, see Steven Ratner, *supra* note 311, at 5-30.

<sup>329</sup> Steven R. Ratner, an Attorney-Adviser for the Office of the Legal Adviser, United States Department of State, served as a member of the U.S. delegation to the Paris Conference on Cambodia. See Steven Ratner, *supra* note 311, at 1.

Although the 1989 mandate establishing the conference did not reference justice, human rights, or tribunals,<sup>330</sup> the U.N. considered proposals for an international criminal tribunal or a case before the International Court of Justice, but rejected both options.<sup>331</sup> According to Professor Steven R. Ratner, who represented the United States during the negotiations at the Paris Conference, “although all the participants believed that human rights should be mentioned, it was harder to reach consensus on how to . . . punish Khmer Rouge officials responsible for the atrocities and to prevent the repetition of these acts. As a result, the human rights obligations at times appear opaque.”<sup>332</sup> However, the international community attempted to find an indirect route by addressing the human rights concerns in Article 15 of the Paris Peace Accords, emphasizing the Cambodian government’s present-time obligations to human rights treaties and standards.<sup>333</sup> In May 1993, the UNTAC helped supervise Cambodia’s general elections.

#### **4.6.2. Establishment of the Special Tribunal for Cambodia – “Khmer Rouge Tribunal”**

On June 21, 1997, the government of Cambodia submitted a request to the U.N. Secretary-General requesting the United Nations to extend the kind of assistance it offered to the establishment of ICTY and ICTR to Cambodia towards “brining justice to

---

<sup>330</sup> Steven Ratner, *supra* note 311, at 5.

<sup>331</sup> For a discussion of the proposals and their ultimate rejection, see Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUMAN RIGHTS Q. 82, 94-101 (1989); Jim Leach, *Don’t Help Pol Pot. Try Him.*, N.Y. TIMES, Sept. 27, 1989, at A29.

<sup>332</sup> Steven Ratner, *supra* note 308, at 25-26

<sup>333</sup> Final Act of the Paris Peace Conference on Cambodia, art. 15, U.N. SCOR, 46th Sess., Annex, U.N. Doc. A/46/608 & S/23177 (1991), reprinted in 31 I.L.M. 180, 186 (1992). Article 15 included several major human rights provisions. It stated that all Cambodians shall enjoy the rights and freedoms enumerated in the Universal Declaration of Human Rights and other international instruments and imposed on Cambodia an affirmative duty to protect human rights and institute preventive measures to ensure that the policies and practices of the Khmer Rouge era do not return. *Id.*

those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.”<sup>334</sup> The Cambodian government noted that:

crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic right, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.<sup>335</sup>

Before the UN could respond to the Cambodian government request, Hun Sen, one of the author’s of the request, seized power through a bloody coup d’etat on July 5, 1997, and in the process executed about forty of his perceived political opponents.<sup>336</sup> However, on December 12, 1997, the U.N. General Assembly adopted a resolution directing the Secretary-General to examine the Cambodian government’s request and consider establishing an investigative commission.<sup>337</sup> Consequently, U.N. Secretary-General Kofi Annan established a “Group of Experts” with three main goals: “(1) to evaluate the existing evidence and determine the nature of the crimes committed; (2) to assess the feasibility of bringing Khmer Rouge leaders to justice; and (3) to explore options for trials before international or domestic courts.”<sup>338</sup>

Between July 1998 and February 1999, the U.N. Group of Experts (“the Group”) traveled through Cambodia interviewing government officials, survivors of the Khmer Rouge regime, and current Cambodian citizens, hoping not only to obtain information

---

<sup>334</sup> Brian Tittlemore, *supra* note 314, at 3 (quoting Letter from Norodom Ranariddh, Cambodian First Prime Minister, and Hun Sen, Cambodian Second Prime Minister, to Secretary-General Annan (June 21, 1997)).

<sup>335</sup> *Id.*

<sup>336</sup> Seth Mydans, Cambodia Purge Said to Claim 40 Victims, N.Y. Times, July 16, 1997, at A8.

<sup>337</sup> Situation of Human Rights in Cambodia, G.A. Res. 52/135, U.N. GAOR, 52d Sess., 70th plen. mtg., Agenda Item 112(b), P 16, U.N. Doc. A/RES/52/135 (1998).

<sup>338</sup> Steven Ratner, *supra* note 315, at 949.



regarding the atrocities, but also to assess the emotional climate of the country.<sup>339</sup> On February 22, 1999, the Group submitted its report to both the Security Council and General Assembly.<sup>340</sup> The report *inter alia* stated that there were sufficient evidence which support the prosecution of Khmer Rouge leaders for international crimes of genocide, crimes against humanity, war crimes, forced labor, torture, and crimes against internationally protected persons.<sup>341</sup> However, the Group recommended that prosecutions be limited to “those persons most responsible for the most serious violations of human rights [in Cambodia] . . . including senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities.”<sup>342</sup>

Furthermore, because of the precarious state of the Cambodian domestic judicial system, the risk of political influence on the domestic courts, and the contentious international law issues involved, the Group recommended the establishment of an ad hoc U.N. tribunal seated in an Asia-Pacific nation-State other than Cambodia to try the accused.<sup>343</sup> In addition, the Group recommended the appointment of an independent prosecutor for the tribunal.<sup>344</sup> The Group was also of the opinion that such tribunal would promote the goal of achieving retributive justice with the goal of rehabilitation of Cambodia, because the process would not be politically or socially destabilizing to the

---

<sup>339</sup> Steven Ratner, *supra* note 315, at 949.

<sup>340</sup> *Id.*

<sup>341</sup> Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. GAOR, 53d Sess., Annex, Agenda Item 110(b), at 18-27, 41-42, U.N. Doc. A/53/850, S/1999/231 (1999) [hereinafter Group of Experts Report].

<sup>342</sup> *Id.* P 110, at 32. Cambodian Premier Hun Sen has indicated his desire to try up to five former leaders. Mann Bunyanunda, *supra* note 313, at 1586. Seven former officials seem likely candidates. Stephen Heder & Brian D. Tittmore, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge 5-6 (2001), [http://www.cij.org/pdf/seven\\_candidates\\_for\\_prosecution\\_Cambodia.pdf](http://www.cij.org/pdf/seven_candidates_for_prosecution_Cambodia.pdf)

<sup>343</sup> See Group of Experts Report, *supra* note 341, at 16-18; Steven Ratner, *supra* note 315, at 951.

<sup>344</sup> Craig Etcheson, Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership, 6 ILSA J. INT'L & COMP. L. 507, 508 (2000).

country.<sup>345</sup> U.N. Secretary-General Kofi Annan accepted the Groups recommendations and noted that “if the international standards of justice, fairness and the process of law are to be met . . . the tribunal in question must be international in character.”<sup>346</sup>

The Cambodian government disagreed with the Group’s recommendation for an ad hoc international tribunal.<sup>347</sup> A few days after the release of the Group’s report, the Cambodian government ordered the arrest of Khmer Rouge leader Ta Mok, and suggested that with Ta Mok’s arrest, there was no longer a need for any international assistance.<sup>348</sup> In September 1999, the Cambodian government also rejected a second U.N. proposal for a “mixed tribunal” with a majority of international judges and an international prosecutor and limited number of Cambodian judges and prosecutors that would not allow the Cambodian government to control and manipulate the process. The Cambodian government rejected the proposal because it did not conform to Hun Sen’s position that the international community should only provide legal expertise.<sup>349</sup> Hun Sen maintained that U.N. intention “to create a special tribunal, to implement special laws in Cambodia, which in reality is outside the umbrella of the Cambodian constitution and laws, will not be applicable.”<sup>350</sup>

Beginning with the Groups report, the “Khmer Rouge tribunal”, as it is colloquially called, became the object of lengthy and rather complicated negotiations

---

<sup>345</sup> Group of Experts Report, *supra* note 341, at 28-30.

<sup>346</sup> Steven Ratner, *supra* note 315, at 952.

<sup>347</sup> Jaya Ramji, Reclaiming Cambodian History: The Case for a Truth Commission, 24 FLETCHER F. WORLD AFF. 137, 139 (2000).

<sup>348</sup> *Id.*; Chris Seper, Cambodia Captures Last Khmer Rouge Leader: Government Vows to Put Ta Mok on Trial, Wash. Post, Mar. 7, 1999, at A22.

<sup>349</sup> Steven Ratner, *supra* note 315, at 952.

<sup>350</sup> Craig Etcheson, *supra* note 344, at 512-13 (quoting aide memoire from Cambodian Prime Minister Hun Sen, to Secretary General Kofi Annan (Sept. 17, 1999) (unofficial translation)).

between the Cambodian authorities and the United Nations.<sup>351</sup> Finally, on March 17, 2003, the United Nations reached a draft agreement with the Cambodian government for an international criminal tribunal to try former Khmer Rouge leaders.<sup>352</sup> On May 13, 2003, the U.N. General Assembly approved the March Agreement.<sup>353</sup> The approval authorized the UN to help Cambodia set up and run two Extraordinary Chambers in the new tribunal to “prosecute those most responsible for crimes and serious violations of Cambodian and international law between 17 April 1975 and 6 January 1979.”<sup>354</sup> On October 4, 2004, Cambodian National Assembly voted by 107-0 to ratify the legislation setting-up the tribunal.<sup>355</sup> The agreement came after five years of negotiations and 24 years after the Khmer Rouge were driven from power.

#### **4.6.3. Composition and Jurisdiction of the “Khmer Rouge Tribunal”**

The March Agreement created a mixed tribunal with only two extraordinary chambers, the Trial Chamber and the Supreme Court Chamber which serves as the appellate chamber.<sup>356</sup> The Trial Chamber will be comprised of three Cambodian judges

---

351 Stumbling blocks in the negotiations between the Cambodian government and the UN have included the procedure for issuing indictments and reaching verdicts, amnesty provisions, rules on foreign defence counsel, rules of procedure and, most recently, the official language to be used in court. See Colum Lynch, “UN Warns Cambodia on War Crimes Tribunal”, The Washington Post, 3 February 2001, p. A22; see also Human Rights Watch Press Release, “Core Issues in the Khmer Rouge Tribunal Unresolved”, 21 January 2001, available at: <http://www.hrw.org/press/2000/01/cambo0121.htm>, also see “Khmer Rouge Trial Stalled Over Language”, Reuters, Phnom Penh, 26 November 2001 (on file with the author).

352 Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N. GAOR 3d Comm., 57th Sess., Annex, Agenda Item 109(b) U.N. Doc. A/57/806 (2003) [hereinafter Khmer Rouge Tribunal Agreement].

353 Press Release, United Nations, General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials, U.N. GAOR 57th. Sess., 85th plen. mtg., U.N. Doc. GA/10135 (May 13, 2003).

354 *Id.*

355 See, Khmer Rouge Tribunal Approved, BBC News World Edition, Monday 4 October, 2004, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/3712482.stm> (last visited August 11, 2005).

356 Khmer Rouge Tribunal Agreement, *supra* note 352, art. 3(2).

and two international judges,<sup>357</sup> while the Supreme Court Chamber will consist of four Cambodian judges and three international judges.<sup>358</sup> Unlike previous ad hoc tribunals where the U.N. Secretary General appoints the international judges, the Cambodian Supreme Council of the Magistracy (CSCM) will select the international judges from a list generated by the U.N. Secretary-General.<sup>359</sup> According to the March Agreement, decisions in the two Chambers would be taken by a “supermajority” of the judges. Thus a decision in the Trial and Supreme Chambers must be supported by four judges and five judges respectively.<sup>360</sup> This requirement ensures that decisions in both chambers must be supported by at least one international judge and is meant to address international concerns over Cambodian control over the tribunal.<sup>361</sup>

The prosecutor and investigator’s offices include one Cambodian and one international prosecutor and co-prosecutor on the one hand, and one Cambodian and one international investigator and co-investigator on the other hand.<sup>362</sup> Similar to the appointment of the international judges for the Chambers, the CSCM selects the international prosecutor and investigator from nominees of U.N. Secretary-General.<sup>363</sup> In the event of a disagreement between the domestic and international personnel regarding whether to prosecute a case, the case advances.<sup>364</sup> However, the dissenting prosecutor may appeal the decision to a Pre-Trial Chamber of five judges, whose decision is final.<sup>365</sup>

---

<sup>357</sup> Khmer Rouge Tribunal Agreement, *supra* note 352, art. 3(2).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*, art. 3(1).

<sup>360</sup> *Id.* art. 4(1).

<sup>361</sup> Barbara Crosse, U.S. Offers Compromise for Cambodian War Crimes Trials: Washington Proposes a Judicial Tribunal Made up of Three Cambodians and Two Foreign Members, *Portland Oregonian*, Oct. 20, 1999, at A12 (describing the U.S. proposal and chronicling Cambodian objections to the U.N. proposal).

<sup>362</sup> Khmer Rouge Tribunal Agreement, *supra* note 352, arts. 5(1), & 6(1).

<sup>363</sup> *Id.*, arts. 5(5) & 6(5).

<sup>364</sup> *Id.*, art. 6(4).

<sup>365</sup> *Id.*, arts. 6(4), 7, at 6-7.

The CSCM appoints three Cambodians as judges of the Pre-Trial Chamber and the remaining two judges from a list of nominations provided by the U.N. Secretary-General.<sup>366</sup> The Pre-Trial Chamber's decision requires a supermajority vote and in the absence of the required supermajority the investigation or prosecution proceeds.<sup>367</sup>

The tribunal has personal jurisdiction over those most responsible for crimes and serious violations of Cambodian and international law between April 17, 1975 and January 6, 1979. The tribunal's subject matter jurisdiction include the crime of genocide as defined in the 1948 Genocide Convention, crimes against humanity as defined in the 1998 Rome Statute of the ICC, grave breaches of the 1949 Geneva Conventions, and additional crimes defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia.<sup>368</sup>

The tribunal will be seated in Phnom Penh, Cambodia,<sup>369</sup> with Khmer as the official language.<sup>370</sup> The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia governs both the subject matter and personal jurisdiction of the agreed-upon tribunals.<sup>371</sup> The tribunal procedures will be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, the tribunal may seek guidance from international law.<sup>372</sup> Consequently, domestic norms, rather than

---

<sup>366</sup> Khmer Rouge Tribunal Agreement, *supra* note 352, art. 7(2).

<sup>367</sup> *Id.*, art. 7(4), at 7.

<sup>368</sup> *Id.*, art. 9.

<sup>369</sup> *Id.* art. 14.

<sup>370</sup> *Id.* art. 26(1).

<sup>371</sup> *Id.* art. 2.

<sup>372</sup> *Id.* art. 12(1).

international precedents, shall govern the procedural law followed by both Cambodian and international judges.

#### **4.6.3. Assessment of the “Khmer Rouge Tribunal”**

Although the amount so far pledged by U.N. member States is enough for more than one year of the tribunal’s operations, at the time of this writing, the tribunal is yet to start sitting.<sup>373</sup> However, the March Agreement under which the tribunal is to operate has been severally criticized by human rights NGOs who fear that trial under the Agreement may not take place in accordance with international law and standards for fair trial.<sup>374</sup> Although the Cambodian government finally agreed to the inclusion of foreign judges and prosecutors to work with their Cambodian counterparts, critics are skeptical that the holding of the tribunal within Cambodia’s present court system, which is weak, corrupt and susceptible to political influence, will undermine the objective of the tribunal.<sup>375</sup>

Besides the inherent flaws of the March Agreement, the continued delay in the take off of the tribunal dims the possibility of brining the Khmer Rouge to trial. In 1998, Pol Pot, the leader of the Khmer Rouge, died in a camp along the border with Thailand.

---

<sup>373</sup> The budget for the tribunal was set at US\$43 million for the UN and \$13.3 million for Cambodia, over a three-year period the tribunal is expected to sit. In early 2005, U.N. Secretary-General Kofi Annan announced that pledges from member states now covered the UN’s share of the tribunal’s \$56.3 million three-year budget. While Japan pledged more than half of the U.N. contribution, it is instructive to note that the United States declined to contribute to the funding of the tribunal claiming that Legislative restraints made it impossible to pledge moneys towards the Tribunal. On the other hand, the Cambodian government has expressed concerns that it may not be able to contribute its portion of the tribunal’s budget. International donors are reluctant to give again, and the Cambodian government has rejected suggestions of a national fund-raising campaign, even though some local business leaders have expressed interest in donating. See Roger Cohen, For Cambodia’s Dead, Farce Heaped on Insult, International Herald Tribune, April 2, 2005, <http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0402farce.htm>; Nathaniel Myers, Khmer Rouge Tribunal Needs More Than Money, Bangkok Post, July 19, 2005.

<sup>374</sup> For a detailed analysis of the various flaws of the March Agreement, see Amnesty Int’l, Kingdom of Cambodia: Amnesty International’s Position and Concerns Regarding the Proposed “Khmer Rouge” Tribunal, AI Index: ASA 23/005/2003, <http://web.amnesty.org/library/Index/ENGASA230052003>; Human Rights Watch, Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement, Human Rights Watch Briefing Paper April 2003, [http://hrw.org/backgrounder/asia/cambodia040303-bck.htm#P91\\_17633](http://hrw.org/backgrounder/asia/cambodia040303-bck.htm#P91_17633)

<sup>375</sup> Id.

Presently, only five or so of the former leaders of Khmer Rouge are expected to stand trial. Of the five, only two are in jail, Ta Mok 78, known as “the Butcher” who was the commander of the south-western region of Cambodia during the time of the Khmer Rouge and Kang Kek Ieu 62, nicknamed “Duch” commander of the notorious Tuol Sleng prison where thousands of people were killed during the Khmer Rouge regime. The other three are living freely in Cambodia following the grant of pardon to them by Prime Minister Hun Sen after they defected from Khmer Rouge between 1996 and 1998. They include Ieng Sary 74, Pol Pot’s brother-in-law who served as minister of foreign affairs during the Khmer Rouge regime and was referred to as “brother number three”; Khieu Samphan 73, the Khmer Rouge regime’s Head of State and public face, and Nuon Chea, Pol Pot’s second in command, often referred to as “brother number two”.

While the United Nations takes the position that such a pardon cannot protect someone from prosecution, Prime Minister Hun Sen suggested that going after Ieng Sary could reignite civil unrest in Cambodia. Unlike the law establishing other ad hoc tribunals, the March Agreement did not clearly state that such pardon would not be a bar to prosecution. Rather, the March Agreement merely mandates that the Cambodian government will not grant any additional amnesties or pardons to the Khmer Rouge.<sup>376</sup> On the implication of the pardon, the Agreement suggested that the Extraordinary Chambers will have the exclusive authority to determine whether the scope of the pardon precludes potential prosecution.<sup>377</sup> In light of the above, it is anybody’s guess whether at the end of the day, the Cambodian Criminal Tribunal would succeed in bringing justice

---

<sup>376</sup> Khmer Rouge Tribunal Agreement, *supra* note 352, art 11(1).

<sup>377</sup> *Id.* art. 11(2).

to the victims of the Khmer Rouge government and bring an end to the culture of impunity.

#### **4.7. Observations and Commentary**

This part of the study has attempted an examination of the historical efforts at bringing an end to the culture of impunity through the establishment of ad hoc international and mixed criminal tribunals. The enthusiastic development of normative rules of individual accountability which was prompted by the appalling legacy of the World War II died down soon thereafter when it came to establishing permanent international court that would prosecute individuals accused of crimes under international law. After several decades of hardly any progress, the breakthrough came in 1993 and 1994 respectively, with the establishment of the two ad hoc criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

The establishment of the ICTY and ICTR ad hoc tribunals rekindled the negotiations on a permanent criminal court and made it possible to pursue work on the creation of three other ad hoc tribunals dealing with crimes committed in Sierra-Leone, Timor-Leste and Cambodia. The setting-up of the ad hoc tribunals especially, the ad hoc tribunals for the former Yugoslavia (ICTFY) and in Rwanda (ICTR) were no doubt important step in the lengthy process of developing rules on individual criminal responsibility under international law.

However, a scathing analysis of the history of these tribunals reveal that the establishment of each tribunal followed a disturbing trend of a period of passivity by the international community while the atrocities were been carried out. The international community only responds towards the end or at the end of the atrocities and in some



cases many years after the perpetrators of the atrocities have completed their heinous crimes unchallenged. This trend affects the quality of justice in the sense that justice delayed is justice denied. Additionally, a timely intervention on the part of the international community may have gone a long way to reduce the number of casualties of such brutal regimes.

Another disturbing trend that permeates in trials conducted by ad hoc criminal tribunals is the seemingly desire to prosecute only the vanquished. This is prevalent in the refusal of the Nuremberg tribunal to try any national of the allied powers, the continued failure by the Rwandan tribunal to prosecute any member of the Rwandan Patriotic Front. The inability of the Sierra Leonean tribunal to prosecute any member of the government and the Timor-Leste Special court failure to prosecute members of the Indonesian army are yet another example.

Also, the inability of the international community to fully fund the tribunals made it impossible for the wheel of justice to turn full circle against all the perceived perpetrators of atrocious crimes. The effect of this is that the success of the fight against impunity has been severely hamstrung by the unwillingness of the international community to put their money where their mouth is. Be that as it may, the establishment of the ad hoc tribunals showed that international adjudicatory mechanisms were not only necessary but also possible, thus paving the way for the adoption, several years later, of a treaty for the world's first permanent International Criminal Court (ICC).<sup>378</sup> Hopefully, the international community and the ICC will both learn from the mistakes made by the ad hoc tribunals.

---

<sup>378</sup> Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998 [hereinafter ICC Statute].

The next segment of this study discusses the establishment of the ICC. Part II examines the jurisdictional scope of the ICC with a view to evaluating the provisions relating to the entrenchment of the principle of individual criminal responsibility. A critical analysis of ICC jurisdictional provisions will expose some inherent bottlenecks to the exercise of the ICC jurisdiction. This study takes the position that the highlighted obstacles are capable of restricting the reach and effectiveness of the ICC as an institution designed to bring an end to the culture of impunity.

PART III

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL  
COURT

## CHAPTER FIVE

---

### 5.0. THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT

---

#### 5.1. Historical Background to the Creation of the International Criminal Court

Numerous suggestions for the creation of a permanent international criminal court to punish individuals responsible for committing crimes against mankind in violations of norms of international law have been made over the years, but, have generally failed because States lacked the political will to establish such institution.<sup>1</sup>

As Dr. Koffi Annan UN Secretary-General observed:

For nearly half a Century ... almost as long as the United Nations has been in existence... the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought ... that the horrors of the Second World War ... the camps, the cruelty, the exterminations, the Holocaust ... could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time ... this decade even ... has shown us that man's capacity for evil knows no limits. Genocide ... is now a word of our time, too, a heinous reality that calls for a historic response.<sup>2</sup>

Commentators however traced the history of an international criminal court to early nineteenth century, when in January 1872, Gustav Moynier, a Swiss and one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes of the Franco-Prussian War.<sup>3</sup> Mr. Moynier was shocked by the atrocities committed by parties to the Franco-Prussian War in 1870 and dismayed that

---

<sup>1</sup> See Amnesty International, THE INTERNATIONAL CRIMINAL COURT: Making the Right Choices – Part I, 5 (Amnesty International Index: IOR 40/001/1997) at <http://www.amnesty.org/library/Index/engior400011997>, (visited September 28, 2005) [hereinafter “Making the Right Choices”].

<sup>2</sup> See, Establishment of an International Criminal Court – Overview, available at: <http://www.un.org/law/icc/general/overview.htm> (visited on March 6, 2006) [hereinafter ICC Overview].

<sup>3</sup> Beth K. Lamont, The International Criminal Court, available at: [www.corliss-lamont.org/hsmny/icc.htm](http://www.corliss-lamont.org/hsmny/icc.htm) (visited March 13 2002).

there was no mechanism to bring them to justice. Thus, in January 1872, Mr. Moynier proposed the establishment of an international criminal court to deter violations of the Geneva Convention of 1864 and to bring to justice anyone responsible for such violations.<sup>4</sup> Until Mr. Moynier suggested a permanent court, almost all trials for violations of the laws of war were by *ad hoc* tribunals constituted by one of the belligerents, usually the victor State, rather than by ordinary courts or by an international criminal court.<sup>5</sup> Only one European government reportedly declared that it was ready to sign a convention establishing such a court. There was little interest by other governments and many of the leading international experts on humanitarian law criticized the proposal as unrealistic.<sup>6</sup>

In 1899, the first International Peace Conference was convened at the initiation of the Czar of Russia who found himself in a financially unbearable arms race with France.<sup>7</sup> The Conference was attended by delegates from 26 self styled “civilized states” for about 10 weeks at The Hague. At the end of the conference, they drew up three Conventions, three Declarations and six *Voeux* or wishes. But these conventions, declarations and wishes were carefully laced with ambiguities and exceptions. In the end, signatory States merely agreed to “use their best efforts”... “as far as possible” and to disregard the rules if national honor or “essential interests” might be endangered.<sup>8</sup> To that extent, it

---

<sup>4</sup> See Making the Right Choices, *supra* note 1, at 3.

<sup>5</sup> Christopher Keith Hall, The first proposal for a Permanent International Criminal Court, 322 INT’L REV. RED CROSS 57 (1998) available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList320/BFF1AE58DAA8E25AC1256B66005B8BB3> (visited September 28, 2005).

<sup>6</sup> Making the Right Choices, *supra* note 1, at 5 (citing Pierre Bossier, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 283-284 (Geneva: Henry Dunant Institute 1985).

<sup>7</sup> See Benjamin A. Ferencz, The Evolution of International Criminal Law, at <http://www.benferencz.org/hamburg.htm> (last visited September 28, 2005).

<sup>8</sup> *Id.*

was more a wish list than a binding accord. The problem of enforcement was not even mentioned.<sup>9</sup>

In 1907, about 50 participants attended a follow-up Second Hague Conference at The Hague. The 1907 Hague Conference improved some of the earlier texts of the 1899 Conference but was not significantly different. It reflected the fact that leading participants were not ready to accept major changes in the world legal order.<sup>10</sup> Nations were still pretending to conclude an effective peace treaty and rules of war when in 1914 they found themselves in the midst of the unparalleled tragedy that became known as World War I.<sup>11</sup>

After the end of World War I, another Peace Conference of the “Great Powers” was held in Paris in 1919.<sup>12</sup> The Paris Peace Conference established a commission of legal experts to determine the “responsibility of the author’s of the war.” The Commission known as the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War proposed that an *ad hoc* tribunal be established to try nationals of the Central Powers for violations of the laws of war and the laws of humanity.<sup>13</sup> This proposal for an ad hoc tribunal was rejected by the “Great Powers.” Rather, they agreed to include provisions in the Versailles Treaty which will allow for the establishment of a special tribunal composed of five judges from the “Great Powers” to try the Kaiser for “a supreme

---

<sup>9</sup> Benjamin A. Ferencz, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> The great powers included States that were triumphant during the war particularly, the United States of America, Great Britain, France, Italy and Japan.

<sup>13</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1919 Peace Conference Report), Versailles, March 1919, Conference of Paris 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *reprinted* in 14 AM. J. INT’L L. 95, 123-124 (1920 Supp.);

offence against international morality and the sanctity of treaties” and for Allied military tribunals to try other persons for war crimes.<sup>14</sup>

Beyond the inclusion of the said provisions in the Versailles Treaty, the Allies were nonchalant about the prosecution of First World War criminals.<sup>15</sup> Thus, amidst national opposition, the Allies lost interest in the prosecution of those responsible for violations of the laws of war and the laws of humanity in the Ottoman Empire.<sup>16</sup> Another proposal made in 1920 to establish a permanent international criminal court as part of the League of Nations was rejected by the Assembly as premature.<sup>17</sup> In 1934, France proposed that the League of Nations establish a permanent court to try terrorist offences. However, the treaties adopted in 1937 defining the crimes and including the statute of the court never entered into force.<sup>18</sup>

After these failed attempts, there was little effort in this regard until the events of World War II and its aftermath reminded the international community that a permanent criminal court is a requirement of our society. However, proposals made to set up a permanent international criminal court following the World War II were rejected in favor

---

<sup>14</sup>Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Treaty), Versailles, 28 June 1919, Article 227, 11 Martens (3d) 323. Article 229 of the Versailles Treaty also allow for the establishment of military tribunals by each Allied and Associated Powers to try persons accused of committing crimes against their nationals and were the accused person committed crimes against nationals of more than one Allied and Associated Powers, the affected states will constitute a joint military tribunal to try the accused persons. Versailles Treaty, Art. 229. See generally James F. Willis, PROLOGUE TO NUREMBERG (1982).

<sup>15</sup> See discussions on the Leipzig trials in Chapter two, *supra* at pp 5-10. Also see Claude Mullins, THE LEIPZIG TRIALS (1921).

<sup>16</sup> See Vahakn N. Dadrian, Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications, 14 YALE J. INT’L L. 221 (1989); David Matas, Prosecuting Crimes Against Humanity: The Lessons of World War I, 13 FORD. INT’L L. J. 86 (1989).

<sup>17</sup> Memorandum by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction (Historical Survey), UN Doc.A/CN.4/7/Rev. 8-12 (1949). The Assembly only agreed to establish a Permanent Court of International Justice to hear and determine any dispute of an international character which the parties thereto submit to it. See The Covenant of the League of Nations, art. 14 (1929).

<sup>18</sup> Historical Survey, *supra*, note 17, at 16-18.

of *ad hoc* international tribunals at Nuremberg and Tokyo, followed by Allied national military tribunals, to try Axis defendants.<sup>19</sup>

At the end of the Nuremberg Judgment in 1946 there was renewed interest to create a permanent international criminal court with jurisdiction over crimes against humanity, serious violations of humanitarian law and crimes against peace. This time, the proposal for the establishment of a permanent international criminal court was made May 13, 1947 by France representative on the UN Committee on the Progressive Development of International Law and its Codification, Judge Henri Donnedieu de Vabres, formerly a judge on the International Military Tribunal at Nuremberg.<sup>20</sup>

Although the UN General Assembly considered the proposal in 1948 during the negotiations for a treaty prohibiting genocide, it abandoned efforts to establish a permanent international criminal court to try cases of genocide as part of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Instead, the UN General Assembly simply agreed to a provision in the Genocide Convention that cases of genocide to be tried “by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.<sup>21</sup>

However, as a result of the proposal, the UN General Assembly established the International Law Commission (ILC).<sup>22</sup> Through resolution 260 of December 9, 1948,

---

<sup>19</sup> Making the Right Choices, *supra* note 1, at 5.

<sup>20</sup> He submitted the French proposal, which provided that certain matters would be tried by a special international criminal chamber of the International Court of Justice and others in a permanent international criminal court, two days later. See Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the representative of France, UN Doc. A/AC.10/21, 15 May 1947.

<sup>21</sup> Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277, December 9, 1948, art. VI. [hereinafter Genocide Convention].

<sup>22</sup> U.N.G.A. Res. 260 (III), U.N. Doc. A/810, at 174 (1948).



the UN General Assembly invited the ILC “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.”<sup>23</sup> The ILC studied this question at its 1949 and 1950 sessions and came to the conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both “desirable” and “possible”.<sup>24</sup> Thereafter, the UN General Assembly established two successive committees to prepare proposals relating to the establishment of such court and its jurisdiction.

In 1951, the first committee prepared a draft statute for an International Criminal Court which was revised in 1953 by the second committee. In 1954, the ILC adopted a draft Code of Offences against the Peace and Security of Mankind (1954 draft Code of Offences) but no consensus could be reached on either Code or Court. Notwithstanding these efforts, the UN General Assembly in 1954 decided to postpone consideration of the draft statute ostensibly pending the adoption of a definition of aggression and an international code of crimes.<sup>25</sup> There was also the suggestion that the Cold War prevailing at that period stymied efforts at moving ahead with such a project.<sup>26</sup>

In 1974, the General Assembly agreed on a definition of aggression.<sup>27</sup> Also, between 1982 and 1991, the ILC has done considerable work on a draft code of crimes under international law based on the work of its Rapporteur, Doudou Thiam (Senegal).

---

<sup>23</sup> U.N.G.A Res. 260(III), *supra* note 22.

<sup>24</sup> See Report of the International Law Commission Covering its Second Session 5 June-29 July 1950, 5 UN GAOR Supp. (No. 12) at para. 140, UN Doc. A/1316.

<sup>25</sup> Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, 7 UN GAOR Supp. (No. 11) at 21, UN Doc. A/2136 (1952); Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953, 9 UN GAOR Supp. (No. 12), UN Doc. A/2645 (1954); Report of the International Law Commission, 9 UN GAOR Supp. (No. 9) at 11, UN Doc. A/2693 (1954).

<sup>26</sup> Philippe Kirsch, Q.C., *The International Criminal Court: Current Issues and Perspectives*, 64 L & CONT. PROBS. 3 (2001).

<sup>27</sup> See U.N. General Assembly Resolution on the Definition of Aggression, Resolution 3314 (XXIX) of December 14, 1974, G.A. Res. 3314, 29 U.N. GAOR., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975) [hereinafter Res. 3314].

However, the UN General Assembly neglected to resume the work on the creation of a permanent international criminal court. The concept of an international criminal court was placed back on the agenda of the UN General Assembly with the invitation in 1987 by President Mikhail Gorbachev of the USSR who called for an international criminal court to try cases of terrorism and a proposal in 1989 by Prime Minister A.N.R. Robinson of Trinidad and Tobago for the establishment of an international criminal court to try cases of drug trafficking.<sup>28</sup> In response to these requests, the General Assembly in December 1989, mandated the ILC to recommence its work on the proposed court with jurisdiction to include drug trafficking.<sup>29</sup>

Meanwhile, gross acts of ethnic cleansing were taking place in the former Republic of Yugoslavia, while genocidal war continued unabated in Rwanda. The several conflicts that took place within the last decade which are primarily internal, demonstrated tragically that there was a continuing need to take measures to put an end to these abominable crimes.<sup>30</sup> These developments shocked the conscience of the international community and jolted them to action. Thus, in an effort to bring an end to widespread disregard to the laws of war which lead to unprecedented war crimes, crimes

---

<sup>28</sup> See John Quigley, "Perestroika and International Law", 82 AM. J. INT'L L. 788, 794 (1988). These government initiatives followed extensive work by non-governmental organizations, particularly the World Federalist Movement and the International Association for Penal Law (Association Internationale de Droit Pénal), and tireless efforts by independent experts to demonstrate the feasibility of an international criminal court, in particular, by Benjamin B. Ferencz, a member of the United States prosecution team at the Nuremberg trial, in his book, *An International Criminal Court, A Step Toward Peace: A Documentary History* (London: Oceana Publications 1980), and by Professor M. Cherif Bassiouni. See, for example, among his extensive writings, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht: Martinus Nijhoff Publishers 1987).

<sup>29</sup> GA Res. 44/39 of 4 December 1989 (requesting the International Law Commission "to address the question of establishing an international criminal court" with jurisdiction over crimes under the draft Code of Crimes then being prepared, "including persons engaged in illicit narcotics drugs across national frontiers"). The General Assembly renewed the request to study the question of an international criminal court the following year. GA Res. 45/41 of 28 November 1990. See also, Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 297 (1998).

<sup>30</sup> Phillippe Kirsch, *supra* note 26, at 4.

against humanity, and genocide, the UN Security Council established ad hoc International Criminal Tribunal for the former Yugoslavia in 1993 and for Rwanda in 1994, to hold individuals accountable for those atrocities and, deter similar crimes in the future.<sup>31</sup>

On the other hand, the United Nations has to deal with agitations for the creation of criminal tribunals to prosecute those responsible for international crimes committed in Cambodia during the Pol Pot regime of 1975 – 79,<sup>32</sup> during the factional and guerilla warfare for the ouster and the replacement of Samuel Doe in Sierra Leone from 1996,<sup>33</sup> and the killings that followed Timor-Leste referendum for independence in 1999.<sup>34</sup> These agitations resulted in what has been described as “tribunal fatigue” for the United

---

<sup>31</sup> See Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law and Humanitarian Law Committed in the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/RES/827 (1993), *reprinted* in 32 I.L.M. 1192 [hereinafter Resolution 827]. *See also* The Statute of the International Criminal Tribunal for the former Yugoslavia, 3217th mtg., U.N. Doc. S/25704 (1993), appended to SC Resolution 827 (hereinafter ICTY Statute). The ICTY Statute was unanimously adopted by the Security Council at its 3217th meeting, May 25, 1993, for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. Also see, Security Council Resolution Establishing the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), *reprinted* in 33 I.L.M. 1598 (1194) [hereinafter ICTR Statute]. The ICTR was set up to prosecute those responsible for the genocidal war in Rwanda. See discussions on ICTY and ICTR in part I, *supra* at 61, 74.

<sup>32</sup> See G.A. Res. 52/135, U.N. GAOR, 52<sup>nd</sup> Sess., at 2, U.N. Doc. A/52/644/Add.2 (1997), at <http://www.un.org/ga/documents/gares52/res52135.htm>. The resolution requested the UN Secretary General and the Cambodian government work together in order to address past serious violations of Cambodian and international law. See also Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, at 21- 32 (1999) at <http://www1.umn.edu/humanrts/cambodia-1999.html>. The Report recommended that members of the Pol Pot regime could be held criminally responsible through domestic trials, a tribunal under Cambodian law, a United Nations tribunal, and a Cambodian tribunal under United Nations administration.

<sup>33</sup> See S.C. Res. 1315, U.N. SCOR, 55<sup>th</sup> Sess., at 2, U.N. Doc. S/RES/1315 (2000). The Resolution requested the UN Secretary General to issue a report concerning the establishment of a special court in order to prosecute perpetrators of international crimes in Sierra Leone. See also Report of the UN Secretary General on the Establishment of a Special Court for Sierra Leone, at 13, U.N. Doc. S/2000/915 (2000) providing the legal framework and requisite administrative elements for the creation of a Sierra Leonean special court. Also see Res. 1370, U.N. SCOR, 56<sup>th</sup> Sess., at 3, U.N. Doc. S/RES/1370 (2001). The Resolution encourages the UN Secretary General, the government of Sierra Leone and others involved “to expedite the establishment of ... the Special Court envisaged by resolution 1315 (2000) of 14 August 2000.

<sup>34</sup> See Reg. 2000/15, U.N. Transitional Administration in East Timor, at 1, U.N. Doc. UNTAET/REG/2000/15 (2000) establishing a special panel of judges to address serious criminal offences committed in East Timor. See <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>.

Nations.<sup>35</sup> The difficulties that followed the creation of hybrid tribunal and Special Courts to prosecute the said crimes suggested that ad hoc tribunals may not always be available when needed.<sup>36</sup>

These developments engendered a state of urgency on the part of the UN General Assembly which then directed the ILC to accelerate the completion of its work on the draft statute of a permanent international criminal court “as a matter of priority” by July 1994.<sup>37</sup> Thus, in 1994 the ILC presented a draft statute on an international criminal court (ICC) to the UN General Assembly and recommended that it be transmitted to a diplomatic conference.<sup>38</sup> But the recommendation to forward the draft statute to a diplomatic conference was defeated in the Sixth Committee of the General Assembly. As a result, the UN General Assembly set up an Ad Hoc Committee on the Establishment of an International Criminal Court to consider major substantive issues arising from the ILC draft, which met in two sessions in 1995.<sup>39</sup>

During this time, the attempt to create an effective permanent international criminal court benefited from a new wave of widespread and growing support around the world for such a court. In an address to the Commencement Class of 1996 of the Columbia School of International and Public Affairs, the UN High Commissioner for

---

<sup>35</sup> Michael P. Scharf, Comment: The Politics of Establishing an International Criminal Court, 6 DUKE J. COMP. & INT’L L. 167, 169 (1995) (defining “tribunal fatigue” as “the process of reaching a consensus on the tribunal’s statute, electing judges, selecting a prosecutor, and appropriating funds [that] has turned out to be extremely time consuming and politically exhausting for the members of the Security Council.”).

<sup>36</sup> Various reasons were offered for the failure – financial burden to lack of cooperation from successive governments in these countries.

<sup>37</sup> U.N.G.A. Res. 48/31 of December 9, 1993.

<sup>38</sup> Jelena Pejic, *supra* note 29, at 298.

<sup>39</sup> GA Res. 49/53 of 9 December 1994. See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 49 UN GAOR Supp. (No. 22), UN Doc. A/50/22 (1995); see also Christopher Keith Hall, The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 91 AM. J. INT’L L. 117 (1997); Jelena Pejic, *supra* note 29, at 298.

Human Rights has repeatedly endorsed the establishment of such a court.<sup>40</sup> Similarly, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions endorsed it in his November 1996 report to the General Assembly.<sup>41</sup> Also, the UN Special Rapporteur on the independence of judges and lawyers endorsed it in his 1996 report to the UN Commission on Human Rights.<sup>42</sup>

Likewise, regional intergovernmental organizations also strongly supported the establishment of such a court, including the Parliamentary Assembly of the Council of Europe,<sup>43</sup> the European Parliament,<sup>44</sup> the ACP-EU Joint Assembly<sup>45</sup> and the Third Conference of Ministers of Justice of Francophone Countries.<sup>46</sup> Also, the International Committee of the Red Cross (ICRC) stated that it gives “its full support to the work of the Preparatory Committee on the establishment of an international criminal court”.<sup>47</sup> It

---

<sup>40</sup> Address by José Ayala-Lasso, United Nations High Commissioner for Human Rights to the Commencement Class of 1996 of the Columbia School of International and Public Affairs, 14 May 1996; Towards a Permanent International Criminal Court, Turin address, 12 October 1996 (available on the Amnesty International Italian section’s web site: <http://www.amnesty.it/eventi/icc/confer/lasso.htm>); Report of the High Commissioner for Human Rights, UN Doc. A/51/36, 18 October 1996, para. 41.

<sup>41</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457 (1996), para. 160.

<sup>42</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Dato’Param Cumaraswamy, UN Doc. E/CN.4/1996/37 (1996), para. 79.

<sup>43</sup> Council of Europe, Parl. Ass. Rec. 1189 (1992), para. 9 (“The Assembly, therefore, recommends that the Committee of Ministers call upon member states to act through the United Nations to secure the convening of an international diplomatic conference to prepare a convention on the setting up of a criminal court, and support such action.”).

<sup>44</sup> European Parl., Resolution on the establishment of the Permanent International Criminal Court, B4-0992/96, 9 September 1996.

<sup>45</sup> ACP-EU Joint Assembly, Resolution ACP-EU 1866/96/fin. on the establishment of the Permanent International Criminal Court, adopted on 26 September 1996, para. 1 (“Formally invites the ACP-EU Council and its Member States to support the need to establish the Permanent International Criminal Court, and to act in concert at the 51st General Assembly of the UN to ensure that it renews the mandate of the Preparatory Committee and take the decision to convene a Plenipotentiary Diplomatic Conference to establish an International Criminal Court before the end of 1998[.]”).

<sup>46</sup> In the Conference Declaration on November 1, 1995, para. 4, the Ministers stated that “we undertake the following commitments . . . to participate actively in the continuing efforts concerning the establishment of a permanent international criminal court”).

<sup>47</sup> ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p. 2.

was endorsed by the Inter-Parliamentary Union<sup>48</sup> and supported by the Non-Aligned Movement.<sup>49</sup>

Further, the international legal community also endorsed the establishment of an international criminal court, including the International Bar Association,<sup>50</sup> the International Association of Lawyers (*Union Internationale des Avocats*),<sup>51</sup> the Asian-African Legal Consultative Committee,<sup>52</sup> local lawyers groups<sup>53</sup> and former prosecutors of the International Military Tribunal at Nuremberg.<sup>54</sup> These supporters added to the broad international coalition of over 180 nongovernmental organizations around the globe, which have consistently at one time or the other called for the creation of a permanent criminal court.<sup>55</sup> Newspapers throughout the world also called for the prompt establishment of an international criminal court.<sup>56</sup>

---

<sup>48</sup> Inter-Parliamentary Union, 86th sess., October 1991, Santiago, Chile.

<sup>49</sup> NAM, Final Document, Cartagena de Indias, Colombia (14 to 20 October 1995), para. 122 (“Further progress is necessary to achieve full respect for international law and . . . a system of international criminal justice with respect to crimes against humanity as well as other international offences.”).

<sup>50</sup> International Bar Association, Resolution on the Establishment of a Permanent International Criminal Court, June 1995.

<sup>51</sup> International Association of Lawyers, Resolution, Paris, 18 November 1995 (“The International Association of Lawyers . . . Urges State governments to favour the rapid and effective establishment of the Permanent International Criminal Court.”).

<sup>52</sup> Recommendation at meeting in October 1996.

<sup>53</sup> See, for example, The Association of the Bar of the City of New York, Report on the Proposed International Criminal Court, 20 December 1996.

<sup>54</sup> Nuremberg Prosecutors again Appeal for a Permanent International Criminal Court, Press Release, 1 October 1996, and Resolution for a Permanent International Criminal Court, adopted at a reunion held in Washington, D.C., 23 March 1996; Lord Hartley Shawcross, *Life Sentence* (London: Constable 1995), p. 137 (“International law will never gain its full impact until an international court is established. Nor would the establishment of such a court present any great difficulty whether financially or politically.”).

<sup>55</sup> Several non-governmental organizations, including the International Law Association, the Inter-Parliamentary Union, the International Federation of Human Rights Leagues, the International Congress of Penal Law, Amnesty International, and Human Rights Watch urged the establishment of a permanent international criminal court. See Historical Survey, *supra* note 16, at 12-15. Also see, International Federation of Human Rights Leagues, *Justice for Humanity: Towards the Creation of a Permanent International Criminal Court*, *La lettre Hebdomadaire de la FIDH*, No. 613-614/2 (November 1995) (Special Issue), p. 2.

<sup>56</sup> In the past two years, hundreds of articles in countries around the world have been written on the subject. For a comprehensive collection of such articles, contact the NGO Coalition for an International Criminal Court, 777 UN Plaza, New York, New York 10017.

After the ad hoc Committee's report, the General Assembly set up a Preparatory Committee on the Establishment of an International Criminal Court (PreCom) to study the issues further and to draft texts, based on the ILC draft statute, government comments and contributions of relevant organizations and prepare a generally accepted consolidated draft text for submission to a diplomatic conference.<sup>57</sup> The PreCom met in two sessions in 1996.<sup>58</sup> Meanwhile, in July 1996, the International Law Commission completed its second reading of the draft Code of Crimes against the Peace and Security of Mankind (draft Code of Crimes) and sent its report (1996 ILC Report) with the draft Code to the General Assembly.<sup>59</sup>

In view of the completion of the ILC work on the draft Code of Crimes against the Peace and Security of Mankind, the U.N. General Assembly on December 17, 1996, decided that the PreCom should meet in four sessions of up to nine weeks in 1997 and 1998 "in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference" and that "a diplomatic conference of plenipotentiaries will be held in 1998, with a view to finalizing and

---

<sup>57</sup> GA Res. 50/46 of 11 December 1995. The term "other relevant organizations" was intended to include non-governmental organizations. Among the many such contributions, in addition to those published by Amnesty International (see note 2, *supra*), are the following: Association Internationale de Droit Pénal et al., 1994 ILC Draft Statute for an International Criminal Court With Suggested Modifications (Updated Siracusa-Draft) (15 March 1996); Human Rights Watch, Human Rights Watch Commentary for the Preparatory Committee on the Establishment of an International Criminal Court (August 1996); International Commission of Jurists, The International Criminal Court: Third ICJ Position Paper (August 1995); International Federation of Human Rights Leagues, Justice for Humanity, *supra*, n. 10; Lawyers Committee for Human Rights, Establishing an International Criminal Court (August 1996) and Fairness to Defendants at the International Criminal Court (August 1996). Many other useful papers have been published by other non-governmental organizations.

<sup>58</sup> The report is in two volumes. The first summarizes the discussion and the second includes the various proposals for amendment of the ILC draft statute. Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51 UN GAOR Supp. (No. 22), UN Doc. A/51/22 (1996).

<sup>59</sup> Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of Its Forty-Eighth Session May 6 –July 26, 1996, p 9, U.N. GAOR. 51st Sess., Supp. No. 10, U.N. Doc. GA/51/10 (1996), [hereinafter 1996 ILC Draft Code of Crimes].

adopting a convention on the establishment of an international criminal court”.<sup>60</sup> Thus, the PreCom organized several meetings from 1996 to 1998 which was attended by governments, international law experts, and non-governmental organizations (NGOs). In its final session which was held in March and April of 1998, the Committee completed the drafting of the ICC text.

Since Italy had in 1996 offered to host an international criminal court conference, the U.N. General Assembly, at its fifty-second session decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, from June 15 to July 17 1998, “to finalize and adopt a convention on the establishment of an international criminal court”.<sup>61</sup> In his opening speech to the Conference, the UN Secretary General, Dr. Kofi Annan, noted as follows:

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you ... to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.”<sup>62</sup>

Unlike the previous ad hoc tribunals – the Nuremberg, Yugoslavia and Rwanda, the groundwork for the ICC treaty was done by the UN General Assembly and the International Law Commission rather than individual States. Their aim was to develop a

---

<sup>60</sup> U.N.G.A. Res. 51/207, December 17, 1996.

<sup>61</sup> See U.N.G.A. Res. 51/207, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (1997), *reprinted* in 36 I.L.M. 510, 511 (1997) (resolution on the establishment of an international criminal court).

<sup>62</sup> See ICC Overview, *supra* note 2.



code of offences and to elaborate a statute for an independent international criminal jurisdiction.<sup>63</sup>

About 160 countries and a wide representation of nongovernmental organizations converged at the UN Diplomatic Conference of Plenipotentiaries (held in Rome, Italy, from June 15 to July 17, 1998) to finalize and adopt a statute to establish an international criminal court.<sup>64</sup> At the end of the conference, on July 17, 1998, members of the diplomatic conference voted 120 to 7 in favor of adopting the Rome Statute of the International Criminal Court (ICC Statute).<sup>65</sup> The U.S. was not in favor of signing the statute and therefore voted against it, along with six other states, including China, India, Iran, Iraq, Israel, and Libya.<sup>66</sup> There has been tremendous success in the signing and ratification of the ICC Statute. To date, 139 countries have signed and 100 countries, encompassing countries from all regions of the globe, have ratified the statute,<sup>67</sup> which came into effect on July 1, 2002, after being ratified by more than 66 countries.<sup>68</sup>

---

<sup>63</sup> Jonathan Stanley, *International Criminal Court: A Court that knows no Boundaries?: The International Criminal Court Treaty is a Big Achievement but can it deliver what it Promises?* *The Lawyer*, Tuesday, August 11, 1998 (available at WL 9167987).

<sup>64</sup> For a complete list of states and organizations represented at the Conference, see Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/10, Annex II, III (1998) [hereinafter *Diplomatic Conference*].

<sup>65</sup> See *The Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF. 183/9 (July 17, 1998), *reprinted* in 37 I.L.M. 999 (1998) [hereinafter *ICC Statute*].

<sup>66</sup> By the December 31, 2000, deadline for signing the ICC Statute, the U.S. and Israel signed the Statute. However, the U.S. on May 6, 2002, and Israel on August 28, 2002, respectively, informed the U.N. Secretary-General that they have no legal obligations arising from their signatures of the Rome Statute on December 31, 2000. See *Multilateral Treaties Deposited with the Secretary-General*, available at <http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (visited March 13, 2006) [hereinafter *Multilateral Treaties*]. For analysis of the U.S. opposition to the Court, see Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, 9 ANN. SURV. INT'L & COMP. L. 19 (2003).

<sup>67</sup> As at October 31, 2005, the countries that have ratified the Statute are: Afghanistan, Albania, Andorra, Antigua & Barbuda, Argentina, Australia, Austria, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia-Herzegovina, Botswana, Brazil, Burkina-Faso, Bulgaria, Burundi, Cambodia, Canada, Central African Republic, Colombia, Congo, Costa Rica, Croatia, Cyprus, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Jordan,

The tenuous but fruitful conference marks the end of more than 50 years of attenuated efforts by the United Nations to create a permanent international criminal court.<sup>69</sup> On the other hand, the coming into effect of the ICC Statute signifies the beginning of a new era of individual criminal responsibility for those who commit egregious international crimes. It is the hopeful expectation of supporters of the Court that it serve as “a deterrent to future international crimes, a contributor to stable international order, and a reaffirmation of international law.”<sup>70</sup> This remarkable support for the ICC demonstrates the direction of a new world order and the recognition that international justice and the fight against impunity require the cooperation and consensus of nations. The Court will seat permanently at The Hague, Netherlands, and may sit in other countries when necessary.<sup>71</sup>

## **5.2. The Objectives of the International Criminal Court**

According to the Statute of the ICC, the Court was established to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished”.<sup>72</sup> Also, the ICC was created to realize the determination of the

---

Kenya, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Mali, Malta, Marshall Islands, Mauritius, Mexico, Mongolia, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, The Federal Republic of Yugoslavia, and Zambia. See Multilateral Treaties, *supra* note 64.

<sup>68</sup> ICC Statute, *supra* note 65, Article 126, provides that the Statute shall come into force when ratified by 60 countries.

<sup>69</sup> See Cherif Bassiouni, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 3 (1998) [hereinafter Bassiouni, Documentary History], where he notes that “since the end of World War 1 (1919), the world community has sought to establish a permanent international criminal court.”

<sup>70</sup> Alison McIntire, Be Careful What You Wish for Because You Just Might Get It: The United States and the International Criminal Court, 25 SUFFOLK TRANSNAT’L L. REV. 249, 259 (2001).

<sup>71</sup> ICC Statute, *supra* note 65, art. 3.

<sup>72</sup> *Id.*, preamble, para. 4.

international community “to put an end to impunity for the perpetrators of these crimes [of concern to the international community], and thus to contribute to the prevention of such crimes”.<sup>73</sup> Similarly, the United Nations had suggested that the international criminal court is needed *inter alia*, “to achieve justice for all”,<sup>74</sup> “to end impunity”,<sup>75</sup> “to help end conflicts”,<sup>76</sup> “to remedy the deficiencies of ad hoc tribunals”,<sup>77</sup> “to take over when national criminal justice institutions are unwilling or unable to act”,<sup>78</sup> and “to deter future war criminals”.<sup>79</sup>

In order to achieve the objectives of the ICC, effective prosecution of the perpetrators “must be ensured by taking measures at the national level and by enhancing international cooperation”.<sup>80</sup> While the ICC is there to assist, it remains the primary “duty of every State to exercise its criminal jurisdiction over those responsible for the prevention of such crimes”.<sup>81</sup>

---

<sup>73</sup> ICC Statute, *supra* note 65, preamble, para. 5.

<sup>74</sup> See, ICC Overview, *supra* note 2 (noting that the International Court of Justice at The Hague handles only cases between States, not individuals and that the ICC will provide an avenue for dealing with individual responsibility).

<sup>75</sup> *Id.*, (quoting the Nuremberg judgment that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”).

<sup>76</sup> *Id.* (citing Benjamin B. Ferencz, a former Nuremberg prosecutor who observed that “there can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance”).

<sup>77</sup> *Id.* (pointing out the deficiencies of the ad hoc tribunal to include allegations of “selective justice”, “tribunal fatigue”, and that the ad hoc tribunals are subject to limits of time or place, making it impossible to cover all crimes and prosecute all criminals).

<sup>78</sup> *Id.* (referring to situations where the State lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia or where national institutions may have collapsed, as in the case of Rwanda).

<sup>79</sup> *Id.* (expressing the view that once it is clear that the international community will no longer tolerate violations of international crimes without assigning responsibility and meting out appropriate punishment to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits, it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers).

<sup>80</sup> ICC Statute, *supra* note 65, preamble, para. 4

<sup>81</sup> *Id.*, para. 6.

While it may be too soon to judge the ICC's ability to achieve its objective, it should be noted that in spite of the coming into force of the ICC Statute in June 2002, the possibility of a prosecution by the Court has not had the desired effect of deterring perpetrators of international crimes. Thus, notwithstanding the United Nations' Security Council referral of the situation in Darfur, Sudan to the ICC, the violence in Sudan remains unabated.<sup>82</sup> Also, the war crimes and crimes against humanity in the territory of DR Congo, parts of Uganda, and the Central African Republic has not waned in spite of the fact that the Court is currently investigating the violations in these States. Thus, the mere creation of the Court is not sufficient to stem the tide of the culture of impunity. There is the need for sustained effective prosecution of individuals directly or indirectly responsible for these atrocities especially those in positions of governmental authority or military command.

### **5.3. Overview of the Organizational Structure of the International Criminal Court**

The ICC is composed of four organs: the Presidency, the Judiciary (comprised of an Appeals Division, a Trial Division and a Pre-Trial Division), the Office of the Prosecutor, and the Office of the Registrar.<sup>83</sup> These organs will not be subject to the instruction of States Parties but will operate independently in their respective fields of action. In addition to the above organs, the ICC Statute made provision for the establishment of an institution to be known as the Assembly of States Parties.<sup>84</sup> Before

---

<sup>82</sup> See, Reuters, Sudan Unable to Try Darfur Suspects - UN Official, March 6, 2006, available at: <http://www.alertnet.org/thenews/newsdesk/MCD652175.htm> (quoting Sima Samar, the U.N. Special Rapporteur on Sudan, who noted after a 10-day visit to Sudan that intelligence services continue to carry out arbitrary arrests, detention and torture with impunity, and that "freedom of expression and association unfortunately continue to be abused by the national intelligence services or military intelligence").

<sup>83</sup> ICC Statute, *supra* note 65, art. 34.

<sup>84</sup> *Id.*, art. 112.

examining the organizational structure of the ICC, it is necessary to understand the legal nature of the ICC because legal personality is a *conditio sine qua non* for the participation of an entity in a legal system.<sup>85</sup> Also, given the pivotal role assigned to the Assembly of States Parties in the composition of the Court's personnel and its managerial oversight, examination of the Assembly of States Parties will precede the overview of the Court's organizational structure.<sup>86</sup>

### **5.3.1. The Legal Personality of the International Criminal Court**

Unlike ad hoc tribunals which were established by the UN Security Council or the UN General Assembly independently and/or in collaboration with concerned State(s), the ICC is a creation of a multilateral treaty. Also, unlike the International Court of Justice (ICJ), which is an organ of the United Nations, the ICC is not an organ of the UN.<sup>87</sup> Rather, the ICC Statute provides that the Court "shall be brought into relationship with the United Nations."<sup>88</sup>

International legal personality is the ability to possess rights and obligations with the capacity to exercise those rights and duties at the international sphere. Thus, the conferment of international legal personality must be based on international law. While States are the primary possessors of international legal personality, international organizations and other entities have been accorded international legal personality. Generally, there are two prevailing views on international legal personality to non-state entities. Under the State-oriented view of legal personality, the rights and duties that the

---

<sup>85</sup> A.S. Muller, *INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES* 75 (1995).

<sup>86</sup> See ICC Statute, *supra* note 65, arts. 9, 36, 42, 46, 51, 112 respectively.

<sup>87</sup> The ICJ is the principal judicial organ of the United Nations. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993, 3 Bevens 1179, article 1.

<sup>88</sup> ICC Statute, *supra* note 65, art. 2.

founding States of an organization give to it in its constitution are the determining factor in deciding whether legal personality on the international level exists. The more acceptable view is the functional theory and the objective approach, otherwise known as the doctrine of implied powers which was advanced by the ICJ in its Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations.<sup>89</sup> The ICJ noting that the United Nations possessed “a large measure of international personality,”<sup>90</sup> observed as follows:

The organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.<sup>91</sup>

Thus, the ICJ concluded that “under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”<sup>92</sup>

The Advisory Opinion of the ICJ in the *Reparation* case is applicable to other international organizations.<sup>93</sup> It follows that the reasoning in the *Reparation* case can be applied to the ICC in the sense that the Court satisfies the criteria of an international

---

<sup>89</sup> *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 174 (1949) [hereinafter *Reparation for Injuries*].

<sup>90</sup> *Id.*, at 179. See also Quincy Wright, *The Jural Personality of the United Nations*, 43 AM. J. INT'L L. 509 (1949).

<sup>91</sup> *Reparations for Injuries*, *supra* note 89, at 179.

<sup>92</sup> *Id.*, at 182.

<sup>93</sup> Henry G. Schermers & Niels M. Blokker, *INTERNATIONAL INSTITUTIONAL LAW* 979 (1995) (where he rhetorically questioned “if organizations are empowered to conclude treaties to exchange diplomats, and to mobilize international forces, ... how can such powers be exercised without having the status of international legal person?”).

organization under general international law.<sup>94</sup> Thus, applying the opinion of the ICJ in the *Reparation* case, the ICC will undoubtedly qualify as an international legal personality.<sup>95</sup> However, the ICC Statute in a bid to clarify its legal personality expressly stated that:

the Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.<sup>96</sup>

Also, the United Nations has recognized that the Court possess international legal personality and has such capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.<sup>97</sup> Similarly, the Agreement on the Privileges and Immunities of the Court (APIC) also acknowledges the Court's international legal personality.<sup>98</sup> Furthermore, the APIC specifically recognizes that the Court has the

---

<sup>94</sup> Under general international law, the criteria for an international organization include: (a) a lasting association of states, (b) an organic structure, (c) a sufficiently clear distinction between the organization and its member states, (d) the existence of legal powers exercisable on the international level, and (e) lawful purposes. See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 5<sup>th</sup> ED., 678-981 (Oxford University Press 1998). See ICC Statute, *supra* note 65, arts. 1 & 34.

<sup>95</sup> Several provisions in the ICC Statute confer treaty making powers on the Court. For instance, article 2 of the ICC Statute requires the Court to conclude a relationship agreement with the UN. Similarly, under article 3(2) of the ICC Statute, the Court is to enter into a headquarters agreement with the host state, the Netherlands. And article 87(5)(a) empowers the Court to enter into agreement with non party States on international cooperation and legal assistance.

<sup>96</sup> ICC Statute, *supra* note 65, art. 4.

<sup>97</sup> See Relationship Agreement Between the United Nations and the International Criminal Court, Article 2, U.N. Doc. PCNICC/2001/1/Add.1. The Agreement was signed on October 4, 2004, by Judge Philippe Kirsch, President of the International Criminal Court (ICC) and Kofi Annan, Secretary-General of the United Nations (UN). The Agreement which provides a framework for the relationship between the UN and the Court entered into force upon signature. See Press Release, Agreement Between the International Criminal Court and the United Nations, October 4, 2004, at <http://www.icc-cpi.int/press/pressreleases/47.html> [hereinafter Relationship Agreement].

<sup>98</sup> Agreement on the Privileges and Immunities of the Court (APIC), Article 2, U.N. Doc. PCNICC/2001/1/Add.3 (January 2002) [hereinafter "Agreement on Privileges and Immunities"]. The Agreement was adopted by the Assembly of States Parties at its First Session, September 3-10, 2002. See ICC-ASP/1/3. As at January 31, 2005, 21 States are now party to the Agreement on the Privileges and Immunities of the ICC while 62 States have signed the Agreement. States who are party to the Agreement are, Austria, Canada, Croatia, Estonia, Germany, Iceland, Latvia, Lithuania, Mali, Namibia, New Zealand, Norway, Panama, Serbia and Montenegro, Slovakia, Slovenia, Sweden and Trinidad and Tobago have ratified the Agreement. Finland is party to the Agreement through acceptance, France through approval and Liechtenstein through accession. See <http://www.icc-cpi.int/press/pressreleases/90.html> (visited October 4, 2005).

“capacity to contract, to acquire and dispose of immovable and movable property and to participate in legal proceedings.”<sup>99</sup> Also, the APIC which extends and elaborates upon article 48 of the ICC Statute, confers on the Court the privileges and immunities usually accorded to an international legal personality necessary for the effective discharge of the Court’s purposes.<sup>100</sup>

In addition, the Court which will be based permanently in The Hague, Netherlands is expected to conclude a headquarters agreement with the host State.<sup>101</sup> Under the basic principles governing such headquarters agreement, the host State is obliged to ensure that the Court “enjoy privileges, immunities and treatment that are no less favorable than those accorded to any international organization or tribunal located in the host country.”<sup>102</sup> Also, the headquarters agreement should recognize the Court’s international legal personality and the legal capacity to exercise its functions and fulfill its purposes as stated in Article 4 of the ICC Statute.<sup>103</sup>

---

<sup>99</sup> Agreement on Privileges and Immunities, *supra* note 98, art. 2. See also Phillippe Sands & Pierre Klein, BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 471 (2001) (concluding that the explicit attribution of international legal personality to the Court reflects the change in international society, which is increasingly open to the co-existence of various categories of subjects of international law).

<sup>100</sup> Article 48 of the ICC Statute provides that “the Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes.” ICC Statute, *supra* note 65, art. 48. For a discussion on the privileges and immunities of the Court see, Phakiso Mochochoko, Completing the Work of the Preparatory Commission: The Agreement on Privileges and Immunities of the International Criminal Court, 25 FORDHAM INT’L L.J. 638 (2002); Stuart Beresford, The Privileges and Immunities of the International Criminal Court: Are They Sufficient for the Proper Functioning of the Court or Is There Still Room for Improvement? 3 SAN DIEGO INT’L L.J. 83 (2002)

<sup>101</sup> ICC Statute, *supra* note 65, art. 3. Pending the entry into force of the permanent Headquarters Agreement, it has been agreed that the provisions of the Headquarters Agreement with the Yugoslavia Tribunal applies, *mutatis mutandis* to the Court. The interim Headquarters Agreement was agreed to by an exchange of notes between the Dutch Ministry of Foreign Affairs and the Court on 19 November 2002. See Press Release, Exchange of Notes between the Netherlands and the ICC, The Hague, November 19, 2002, at <http://www.icc-cpi.int/press/pressreleases/4.html> (visited October 4, 2005).

<sup>102</sup> See Draft Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, Principle 1(j), U.N. Doc. PCNICC/2002/1/Add.1 (hereinafter “Basic Principles Governing a Headquarters Agreement”). The said Agreement was drafted by the ICC Preparatory Commission and adopted by the Assembly in September 2002.

<sup>103</sup> *Id.*, Principle 6.



It follows from the above summation that the Court is endowed with the capacity to conclude agreements with States and make claims in respect of the rights contained therein. Consequentially, the Court can institute legal proceedings, and acquire and dispose of property under the national law of the States concerned. Therefore, the above instruments will ensure that the Court has sufficient legal standing for the independent exercise of its functions.

### **5.3.2. Assembly of States Parties**

The Rome Statute provides for the establishment of an Assembly of States Parties which will be open to States that have ratified the ICC Statute as members and to States that have signed but have not ratified the ICC Statute as observers.<sup>104</sup> During its first session, the Assembly of States Parties adopted the work of the Preparatory Commission and elected the members of the Bureau, consisting of its President, H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini, of Jordan, two Vice Presidents and 18 members elected by the Assembly for a three-year term.<sup>105</sup> In electing the members of the Bureau, the Assembly must take into consideration principles of equitable geographic distribution and adequate representation of the principal legal systems of the world.<sup>106</sup> On its second session in September 2003, the Assembly of States Parties adopted Resolution ICC-ASP/2/Res.3

---

<sup>104</sup> ICC Statute, *supra* note 65, art. 112. See generally, S. Rama Rao, Article 112: Assembly of State Parties, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1201-13 (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

<sup>105</sup> For a summary of the work of the Assembly of States Parties, see Progress Report, on the Ratification and National Implementing Legislation of the Statute for the Establishment of an International Criminal Court, The International Human Rights Law Institute, DePaul University College of Law 13 (10th ed. 2003) [hereinafter Progress Report].

<sup>106</sup> ICC Statute, *supra* note 65, art. 112(2).

establishing the Permanent Secretariat of the Assembly.<sup>107</sup> Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of State of government or the Minister of Foreign Affairs<sup>108</sup>

The Assembly of States Parties is the management oversight and legislative body of the Court. The Assembly's duties include adopting recommendations of the Preparatory Commission; providing oversight to the Presidency, the Prosecutor, and the Registrar; taking action pursuant to reports; making decisions regarding the Court's budget; and considering questions related to non-cooperation.<sup>109</sup> This list is by no means exhaustive.<sup>110</sup> Thus, the Assembly is also responsible for approving the budget of the Court and providing the necessary funds to operate the Court.<sup>111</sup> The United Nations may also contribute funds,<sup>112</sup> and voluntary contributions will be allowed.<sup>113</sup> The Assembly is also responsible for the election and removal of the Judges, the Prosecutor and the Deputy Prosecutor(s).<sup>114</sup>

According to Article 112 (7), each State Party has one vote, however, every effort has to be made to reach decisions by consensus both in the Assembly and the Bureau and where consensus cannot be reached, decisions are made on the basis of either a two-thirds

---

<sup>107</sup> The Permanent Secretariat of the Assembly commenced its work in 2004 in The Hague and is headed by Dr. Medard Rwelamira (South Africa). See Secretariat of the Assembly of States Parties, at <http://www.icc-cpi.int/asp.html> (visited October 5, 2005).

<sup>108</sup> See Rules of Procedure of the Assembly of States Parties, chapter iv, ICC-Asp/1/3 (2002), adopted by the Assembly of States Parties at its First Session at The Hague, September 3-20, 2002, available at [http://www.un.org/law/icc/asp/1stsession/report/first\\_report\\_contents.htm](http://www.un.org/law/icc/asp/1stsession/report/first_report_contents.htm) (visited October 11, 2005).

<sup>109</sup> ICC Statute, *supra* note 65, art. 112(2)(a-f).

<sup>110</sup> *Id.*, art. 112(2)(g) (stating that in addition to the list included in Article 112 (a)-(f), the Assembly shall, “[p]erform any other function consistent with this Statute or the Rules of Procedure and Evidence”).

<sup>111</sup> *Id.*, art. 115(a).

<sup>112</sup> *Id.*, art 115(b) provides that the Court shall receive “[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”

<sup>113</sup> *Id.*, art 116.

<sup>114</sup> *Id.*, arts. 36, 42(4), & 46(2).

or simple majority depending on the issues in question.<sup>115</sup> To ensure that the Assembly of States carry out their duties independently without interference by either the host country or third parties, the APIC provides that the representatives of States participating in the proceedings of the Assembly and its subsidiary organs as well as representatives of observer States and intergovernmental organizations invited to attend such meetings enjoy privileges and immunities for their official acts.<sup>116</sup>

Disputes between two or more States parties concerning the interpretation of the Statute that do not involve the “judicial functions of the Court” that cannot be resolved by negotiation or by the Assembly may be referred to the ICJ for resolution.<sup>117</sup> Perhaps, resort to the ICJ instead of the Court is in recognition of the fact that the Court’s jurisdiction is limited to criminal acts committed by individuals. Also, it is remarkable that ICJ jurisdiction to interpret the ICC Statute does not include the interpretations that border on the Court’s judicial functions as this may subject the Court to judicial review by the ICJ. Be that as it may, it is suggested that ICJ Article 119 jurisdiction should be narrowly construed and every efforts should be made by States parties to discourage resort to the ICJ.

### **5.3.3. The Presidency**

The Presidency is one of the four Organs of the Court and is composed of the President and First and Second Vice-Presidents, all of whom were first elected as Judges of the ICC on a full-time basis.<sup>118</sup> The judges composing of the Presidency are then

---

<sup>115</sup> ICC Statute, *supra* note 65, art. 112(7).

<sup>116</sup> See Agreement on Privileges and Immunities, *supra* note 98, art. 14.

<sup>117</sup> ICC Statute, *supra* note 65, art. 119.

<sup>118</sup> *Id.*, art. 38.

elected by an absolute majority of the eighteen judges of the Court for a three year renewable term.<sup>119</sup> On March 11, 2003, the ICC judges elected Judge Philippe Kirsch (Canada) as its first President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the Court.<sup>120</sup>

With the exception of the Office of the Prosecutor, the Presidency is responsible for the general administration of the Court, particularly, the judicial administration of the Court.<sup>121</sup> However, the Presidency will coordinate and seek the concurrence of the Prosecutor on all matters of mutual concern.<sup>122</sup>

#### **5.3.4. The ICC Judiciary**

The judiciary of the Court is composed of three divisions: Appeals Division, Trial Division, and Pre-Trial Division. Each division is responsible for carrying out the judicial functions of the Court. The Court's bench will comprise of 18 judges, sitting on the Pre-trial, Trial and Appeal benches.<sup>123</sup> All the judges must be persons of "high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices"<sup>124</sup> and must be nationals of States parties to the ICC Statute.<sup>125</sup> In addition, each candidate for the judgeship must possess cognate experience in criminal law and procedures as a judge, a prosecutor, an

---

<sup>119</sup> ICC Statute, *supra* note 65, art. 38.

<sup>120</sup> See International Criminal Court: The Presidency, at <http://www.icc-cpi.int/organs/presidency.html> (visited on October 7, 2005); Jeff Sallot, Canadian First to Lead War-Crimes Court, *Globe and Mail*, March 12, 2003, at <http://www.globalpolicy.org/intljustice/icc/2003/0312canuck.htm>

<sup>121</sup> ICC Statute, *supra* note 65, art. 38(3).

<sup>122</sup> *Id.*, art. 38(4).

<sup>123</sup> *Id.*, art 36(1). The Presidency, acting on behalf of the Court, can propose to increase the number of the judges, if it is considered necessary and appropriate. On receipt of such proposal, the Registry then will circulate the proposal to all States Parties for final discussion by the Assembly of States Parties. *Id.*, art. 36(2).

<sup>124</sup> ICC Statute, *supra* note 65, art. 36(3).

<sup>125</sup> *Id.*, art. 36(4).

advocate, or in other similar capacity.<sup>126</sup> On the other hand, the candidate may establish “competence in relevant areas of international law, such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.”<sup>127</sup>

The judges are elected by the countries that have ratified the Statute of the ICC using secret ballots.<sup>128</sup> Nominations for judges may be made by any State party.<sup>129</sup> Judges are elected by a two-thirds majority of States’ parties.<sup>130</sup> In electing judges, the Assembly of States Parties are enjoined to take into consideration “[t]he representation of the principal legal systems of the world; [e]quitable geographical representation; and [a] fair representation of female and male judges.”<sup>131</sup> The Assembly is also encouraged to consider the need to include “judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”<sup>132</sup> Furthermore, the Assembly of States Parties must elect at least nine judges from “List A” and at least five judges from “List B.”<sup>133</sup>

During first session of the Assembly of States Parties held in New York from 3 to 7 February 2003, the Assembly elected the eighteen judges of the Court for a term of office of three, six, and nine years.<sup>134</sup> The judges constitute a forum of international

---

<sup>126</sup> ICC Statute, *supra* note 65, art. 36(3)(b)(i). Candidates who meet this qualification are grouped under “List A.”

<sup>127</sup> *Id.*, art. 36(3)(b)(ii). “List B” contains the names of candidates who meet this requirement.

<sup>128</sup> *Id.*, art. 36(6).

<sup>129</sup> *Id.*, art. 36(4).

<sup>130</sup> *Id.*, arts. 35-36.

<sup>131</sup> *Id.*, art. 36(8)(a).

<sup>132</sup> *Id.*, art. 36(8)(b).

<sup>133</sup> *Id.*, art. 36(5).

<sup>134</sup> These are, alphabetically by State of nationality: Rene Blattmann (Bolivia); Sylvia Steiner (Brazil); Philippe Kirsch (Canada); Elizabeth Odio Benito (Costa Rica); Georghios M. Piki (Cyprus); Erkki Kourula (Finland); Claude Jorda (France); Hans-Peter Kaul (Germany); Akua Kuenyehia (Ghana); Maureen Harding Clark (Ireland); Mauro Politi (Italy); Anita Usacka (Latvia); Fatoumata Dembele Diarra (Mali); Hyun Song (Republic of Korea); Tuiloma Neroni Slade (Samoa); Navanethem Pillay (South

experts that represents the world's principal legal systems.<sup>135</sup> Judges will hold their offices for a term of nine years and will not be eligible for re-election.<sup>136</sup> However, judges selected for a term of three years are eligible for re-election for a full term of nine years.<sup>137</sup> Also, a judge involved in an on-going trial or appeal may conclude the trial or appeal before his or her retirement.<sup>138</sup> Article 36(10) will ensure that a trial or an appeal is not interrupted mid-way with the withdrawal of a judge before the completion of the trial or appeal.

After the election of the judges, the Court organized itself into Appeals, Pre-Trial and Trial Divisions and Chambers in accordance with Article 39 of the ICC Statute.<sup>139</sup> The Appeals Division consists of one appeals chamber of five judges. The Appeals Chamber is composed of judges primarily elected from List B including the President and four other judges.<sup>140</sup> The judges assigned to the Appeals Division shall serve in this Division for the entire term of their office.<sup>141</sup> The Trial Division is composed of six judges with predominantly criminal trial experience and consists of the Second Vice President and five other judges.<sup>142</sup>

---

Africa); Karl T. Hudson-Phillips (Trinidad and Tobago); and Sang- Adrian Fulford (United Kingdom). For a list of the judges and their biographies, See International Criminal Court: Judges – Biographical Notes at <http://www.icc-cpi.int/organs/chambers.html> (visited October 7, 2005).

<sup>135</sup> Seven were elected from the Western European and others Group of States (WEOG), four from the Latin American and the Caribbean Group of States (GRULAC), three from the Asian Group of States, three from the African Group of States, one from the Group of Eastern Europe. Seven are female and eleven are male judges.

<sup>136</sup> ICC Statute, *supra* note 65, art. 36(9)(a).

<sup>137</sup> *Id.*, art. 36(9)(c).

<sup>138</sup> *Id.*, art. 36(10).

<sup>139</sup> *Id.*, art. 39(1).

<sup>140</sup> *Id.* The judges assigned to the Appeals Division are the President, Judge Philippe Kirsch, Judge Erkki Kourula, Judge Navanethem Pillay, Judge Georghios M. Pikis, and Judge Sang-hyun Song. See International Criminal Court: Appeals Division at <http://www.icc-cpi.int/chambers/appeals.html> (visited October 7, 2005).

<sup>141</sup> ICC Statute, *supra* note 65, art. 39(3)(b).

<sup>142</sup> *Id.*, art. 39(1). The judges assigned to the Trial Division are the Second Vice-President, Judge Elizabeth Odio Benito, Judge René Blattmann, Judge Maureen Harding Clark, Judge Anita Ušacka, Judge Sir Adrian

The Trial Division is divided into two Trial Chambers of three judges each. Three judges of the Division form a quorum and can carry out the judicial functions of the Trial Chamber.<sup>143</sup> The Trial Chamber judges shall serve in this Division for a period of three years, and thereafter until the completion of any case if the hearing has already started.<sup>144</sup> The major role of the Trial Chamber, expressed in article 64 of the ICC Statute, is adopting all the necessary procedures to ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses.<sup>145</sup>

The Pre-Trial Division which is composed of judges with predominantly criminal trial experience consists of the First Vice President and six other judges.<sup>146</sup> They shall serve in this Division for a period of three years, and thereafter until the completion of any case if the hearing has already started.<sup>147</sup> The functions of the Pre-Trial Division may be carried out by Pre-Trial Chambers composed of either a single judge or of a bench of three judges.<sup>148</sup> The Pre-Trial Chamber *inter alia*, confirms or rejects the authorization to commence an investigation by the Prosecutor and makes a preliminary determination on admissibility and jurisdiction of the Court, without prejudice to subsequent determinations by the Court with regard to challenge on the jurisdiction and

---

Fulford, and Judge Karl Hudson-Phillips. See International Criminal Court: Trial Division at <http://www.icc-cpi.int/chambers/trial.html> (visited October 7, 2005).

<sup>143</sup> ICC Statute, *supra* note 65, art. 39(2)(b)(ii).

<sup>144</sup> *Id.*, art. 39(3)(a).

<sup>145</sup> *Id.*, art. 64(2).

<sup>146</sup> *Id.*, art. 39(1). The judges assigned to the Pre-Trial Division are the First Vice-President, Judge Akua Kuenyehia, Judge Fatoumata Diarra, Judge Claude Jorda, Judge Hans-Peter Kaul, Judge Mauro Politi, Judge Tuiloma Neroni Slade, and Judge Sylvia Steiner. See International Criminal Court: Pre-Trial Division at <http://www.icc-cpi.int/chambers/pretrial.html> (visited October 7, 2005).

<sup>147</sup> ICC Statute, *supra* note 65, art. 36(3)(a).

<sup>148</sup> *Id.*, art. 39(2)(b)(iii).

admissibility of a case.<sup>149</sup> Also, the Pre-Trial Chamber confirms the charge(s) against the accused person before commencement of trial.<sup>150</sup>

Although all judges are to be elected on the basis of their nationality to one of the States Parties to the ICC Statute, once elected, a judge cannot be automatically disqualified from sitting on a case solely on the basis that he or she is of the same nationality with the accused. Rather, a judge may recuse his or herself<sup>151</sup> or may be disqualified from a particular case on the subjective ground that his or her “impartiality might reasonably be doubted” or on the objective ground that he or she was previously involved in that case before the Court or in a related criminal case at the national level.<sup>152</sup> Contrast with the 1994 International Law Commission’s draft Statute which disqualifies a judge from sitting in a case if he or she is a national of a complainant State or of the accused person.<sup>153</sup> Article 41 of the ICC Statute presents a better approach to disqualification of a judge as opposed to the 1994 ILC draft because it allows for disqualification only in circumstances that suggests judge impartiality.<sup>154</sup>

---

<sup>149</sup> ICC Statute, *supra* note 65, arts. 53 & 57.

<sup>150</sup> *Id.*, art. 61.

<sup>151</sup> *Id.*, art. 41(1).

<sup>152</sup> *Id.*, art. 41(2)(a).

<sup>153</sup> See Report of the International Law Commission on the Work of Its Forty-Sixth Session, Draft Article 9(7), U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Draft Statute].

<sup>154</sup> Note however that Article 41(2)(a) also provides that a judge may also be disqualified on other grounds as may be included in the Rules of Procedure and Evidence. For instance see Rule 34 RPE which added additional bases for disqualification on grounds of conflict of interest or bias. See Rules of Procedure and Evidence, adopted by the Assembly of States Parties at its first session in New York 3-10 September 2002, ICC-ASP/1/3 at [www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf) (visited October 7, 2005) [hereinafter ICC Rules of Procedure and Evidence].



### 5.3.5. The Office of the Prosecutor

The Office of the Prosecutor is headed by a Chief Prosecutor and assisted by two Deputy Prosecutors who must be of different nationalities.<sup>155</sup> The Chief Prosecutor has full authority over the management and the administration of the Office, including the staff, facilities and other resources of the Office.<sup>156</sup> The principal mandate of the Office of the Prosecutor is to receive referrals and substantiated information and conduct investigations and prosecutions of crimes that fall within the jurisdiction of the Court.<sup>157</sup> For efficient discharge of its mandate, the ICC Statute provides that the Office of the Prosecutor shall act independently.<sup>158</sup> Consequently, a member of the Office of the Prosecutor must not seek or act on instructions from any external source, such as States, international organizations, NGOs or individuals.<sup>159</sup>

The Chief Prosecutor and the two Deputy Prosecutors are elected by the Assembly of States Parties for a non renewable term of nine years unless a shorter term is decided at the time of their election.<sup>160</sup> Like the judges, the Chief Prosecutor and the Deputy Prosecutors shall not participate in any matter in which their “impartiality may reasonably be doubted on any ground.”<sup>161</sup> Also, they shall be disqualified from a case if they had previously been involved in any capacity in that case before the Court or in a related criminal case at the national level concerning the accused person.<sup>162</sup>

Article 42(7) of the ICC Statute represents a departure from the 1994 ILC draft which recommended automatic disqualification of the Chief Prosecutor and Deputy

---

<sup>155</sup> ICC Statute, *supra* note 65, art. 42(2).

<sup>156</sup> *Id.*.

<sup>157</sup> *Id.*, arts. 42(1) & 54.

<sup>158</sup> *Id.*, art. 41(1).

<sup>159</sup> *Id.*.

<sup>160</sup> *Id.*, art. 42(4).

<sup>161</sup> *Id.*, art. 42(7).

<sup>162</sup> *Id.*, art 42(7).

Prosecutors from participating in any case involving an accused person of their own nationality.<sup>163</sup>

On April 21, 2003, the Assembly of States unanimously elected Luis Moreno Ocampo (Argentina)<sup>164</sup> as the first Chief Prosecutor of the Court for a term of nine years.<sup>165</sup> On June 16 2003, Mr. Moreno-Ocampo took office and pledged to solemnly undertake the duties of his Office as provided in the ICC Statute.<sup>166</sup> Also, on September 10, 2003, the Assembly of States Parties elected Serge Brammertz (Belgium) as Deputy Prosecutor (Investigations), for a term of six years and was sworn in on November 3, 2003.<sup>167</sup> On September 8, 2004, Fatou Bensouda (Gambia) was elected Deputy Prosecutor (Prosecutions), for a full term of nine years.<sup>168</sup> Ms. Bensouda was sworn in on November 1, 2004, at The Hague.<sup>169</sup>

---

<sup>163</sup> 1994 ILC Draft Statute, *supra* note 153, art. 12(5).

<sup>164</sup> Moreno Ocampo had established his reputation as a prosecutor during several high profile trials involving leading figures from Argentina's military junta. He is also a renowned academic in the field of human rights, and is the Robert F. Kennedy Visiting Professor at Harvard Law School. See Curriculum vitae Luis Moreno Ocampo, available at [http://www.icc-cpi.int/otp/moreno\\_ocampo\\_cve\\_revised.pdf](http://www.icc-cpi.int/otp/moreno_ocampo_cve_revised.pdf) (last visited Oct. 10, 2005).

<sup>165</sup> See Election of the Prosecutor of the International Criminal Court (last modified Apr. 21, 2003), at <http://www.un.org/law/icc/elections/results/prosecutor<uscore>results.htm>. Also see, Media Alert, International Criminal Court, Election of the Prosecutor (Apr. 24, 2003), available at: <http://www.icc-cpi.int/php/news/details.php?id=3> (last visited Oct. 6, 2005). In a move to usher confidence on the Chief Prosecutor, The ASP decided that the prosecutor should be elected "by consensus," and encouraged States Parties to consult with each other before nominating a candidate for prosecutor. On March 24, 2003, the President of the Assembly of States Parties announced that the States Parties to the Rome Statute had "informally, and on the basis of consensus" selected the Argentine Luis Moreno Ocampo to serve as the court's first prosecutor. See Press Release, Election of the Prosecutor - Statement by the President of the Assembly of States Parties Prince Zeid Raad Al Hussein (Mar. 25, 2003), available at <http://www.icc-cpi.int/news/details.php?id=2>.

<sup>166</sup> International Criminal Court: Ceremony for the Solemn Undertaking of the Chief Prosecutor (June 16, 2003), available at [http://www.icc-cpi.int/otp/otp\\_ceremony.html](http://www.icc-cpi.int/otp/otp_ceremony.html) (visited October 7, 2005).

<sup>167</sup> ICC Press Release, Election of the Deputy Prosecutor of the International Criminal Court (Sept. 10, 2003), at <http://www.un.org/law/icc/asp/aspfra.htm>

<sup>168</sup> ICC Press Release, States Parties to International Criminal Court elect Ms. Fatou Bensouda of the Gambia Deputy Prosecutor (Prosecutions) [Sept. 10, 2003], at [http://www.icc-cpi.int/statesparties/third\\_session.html](http://www.icc-cpi.int/statesparties/third_session.html) (visited October 7, 2005).

<sup>169</sup> ICC Press Release, Solemn Undertaking of Deputy Prosecutor (Prosecutions) (Nov. 1, 2004), at [http://www.icc-cpi.int/pressrelease\\_details&id=83.html](http://www.icc-cpi.int/pressrelease_details&id=83.html).

In order to efficiently discharge the functions of the Office of the Prosecutor, the Office is subdivided into three operational divisions.<sup>170</sup> The Investigation Division headed by Deputy Prosecutor Brammertz, is responsible for carrying out the actual investigations, such as collecting and examining evidence, questioning persons being investigated as well as victims and witnesses. The Investigation Division is composed of several interdisciplinary investigative teams, including forensic, military, political, financial, and other analysts.<sup>171</sup> The Investigation Division may carry out its work at the seat of the ICC and, if necessary on the territory of the State concerned.<sup>172</sup> The ICC Statute requires the Office to extend the investigation to cover both incriminating and exonerating facts in order to establish the truth.<sup>173</sup>

The Prosecution Division headed by Deputy Prosecutor Fatou Bensouda has a role in the investigative process, but its principal responsibility is the litigation of cases before the various Chambers of the Court. The Prosecution Division comprises the trial and appeals counsel who will present cases before the Court.<sup>174</sup>

The Jurisdiction, Complementarity and Cooperation Division (JCCD) headed by Mrs. Silvia Fernandez de Gurmendi, analyses referrals and communications, with support from the Investigation Division and makes recommendations on issues of jurisdiction, complementarity, and cooperation related to the situations under analysis or

---

<sup>170</sup> See International Criminal Court – Office of the Prosecutor: General Organization, at <http://www.icc-cpi.int/organs/otp.html> (visited October 10, 2005).

<sup>171</sup> Hans-Peter Kau Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years, 99 AM. J.INT'L L. 370, 373 (2005).

<sup>172</sup> ICC Statute, *supra* note 65, art. 54(2).

<sup>173</sup> *Id.*, art. 54(1)(a).

<sup>174</sup> It is noteworthy that while the U.S. continues its opposition to the ICC, one of the senior trial attorneys for the ICC is former New York federal prosecutor Christine Chung, a U.S. national. See Jess Bravin, International Criminal Court Picks US Lawyer to Lead First Case, WALL ST. J., Jan. 30, 2004.

investigation.<sup>175</sup> The JCCD also helps to negotiate and secure cooperation agreements with relevant States, entities, and intergovernmental and nongovernmental organizations needed for the activities of the Office of the Prosecutor.<sup>176</sup>

While the ICC Statute provides that the Office of the Prosecutor should act independently,<sup>177</sup> the Statute nevertheless provided some checks on the investigation power of the Prosecutor in order to assuage the fears of some States on the implication of an independent Prosecutor with absolute power. Thus, the ICC Statute contains a graduated procedure by which the Pre-Trial Chamber would have to approve the investigation of cases in situations where the Office of the Prosecutor wishes to exercise its prosecution powers *proprio motu*.<sup>178</sup>

#### **5.3.6. The Office of the Registrar**

The Office of the Registrar is one of the four organs of the Court and is responsible for the administration of non-judicial aspects of the Court.<sup>179</sup> The Registry is headed by the Registrar who as the principal administrative officer of the Court shall exercise his or her functions under the authority of the President.<sup>180</sup> The Registrar and Deputy Registrar are elected by secret ballot by an absolute majority of judges meeting in plenary session.<sup>181</sup> Following the recommendation from the Bureau of the Assembly of States Parties, on June 24, 2003, Mr. Bruno Cathala (France) was appointed first Registrar of the Court for a renewable term of five years.<sup>182</sup>

---

<sup>175</sup> ICC Statute, *supra* note 65, arts. 15 & 53.

<sup>176</sup> *Id.*, art. 54(3)(c) & (d).

<sup>177</sup> *Id.*, art. 41(1).

<sup>178</sup> *Id.*, art., 15.

<sup>179</sup> *Id.*, art. 43(1).

<sup>180</sup> *Id.*, art. 43(2).

<sup>181</sup> *Id.*, art. 43(3).

<sup>182</sup> *Id.*, art. 42(5).

Apart from general administration of the Court, the Registry provides administrative support to the judges and the Secretariat of the Assembly of States Parties. Also, the Registry, through the Victims and Witnesses Unit of the Registry is responsible for providing protective measures to victims and witnesses who appear before the Court.<sup>183</sup> The Registrar is also to serve as the channel of communication between the Court and States, Inter-governmental Organizations and Non-Governmental Organizations.<sup>184</sup>

#### **5.4. Observations and Commentary**

The twentieth century witnessed atrocities of a truly unprecedented nature. It is estimated that 170 million died in 250 conflicts that have occurred since World War II evidencing a testament of the failure of the international community to create a viable mechanism to prevent aggression and enforce international humanitarian law.<sup>185</sup> Fortunately, the apathy that the international community showed to various proposals for a permanent international court gave way to a purposeful deliberation at the Rome Conference which established the ICC. The ICC Statute is an expression of the compromises that have to be made at the Rome Conference to ensure that the Court is created.

The main objective of ICC is to end the impunity of perpetrators who commit crimes that are of concern to the international community as a whole.<sup>186</sup> By holding individuals criminally responsible for the crime under the ICC Statute, the ICC will

---

<sup>183</sup> ICC Statute, *supra* note 65, art. 42(6).

<sup>184</sup> See ICC Rules of Procedure and Evidence, *supra* note 154, Rule 13(1).

<sup>185</sup> Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 GEO. L.J. 381, 384 (2000).

<sup>186</sup> ICC Statute, *supra* note 65, preamble.

deter other perpetrators from committing atrocities against their own people by sending a strong message that these crimes will not go unpunished.<sup>187</sup> Further, the ICC serves as effective replacement of ad hoc tribunals and unlike ad hoc tribunals, the ICC will have a broader jurisdiction to prosecute persons accused of genocide, crimes against humanity and war crimes. Additionally, with the establishment of the ICC, the United Nations is relieved from the financial burden and international politics that the United Nations faces when requested to set up ad hoc tribunals for every conflict.

The ICC Statute has already entered into force in 2002 having been ratified by more than the required sixty States Parties within a record time. Also, with the election and appointment of the judicial and administrative officers of the ICC, the Court is ready to commence work. The qualification and the professional competence of the judges and the Prosecutor signals desire of the Assembly of States Parties to properly equip the ICC to take off on a proper footing. These first set of appointments have received the approval of majority of the international community.

---

<sup>187</sup> U.N. Dep't of Public Information, The Draft Statute of the International Criminal Court: Background Information (May 1998), at <http://www.un.org/icc/statute.htm>.

## CHAPTER SIX

---

### 6.0. THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

---

#### 6.1. Introduction

The Court will exercise complementary jurisdiction<sup>1</sup> with national courts over individuals accused of committing egregious “crimes of concern to the international community as a whole.”<sup>2</sup> Such crimes include the crime of genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>3</sup> The Court’s exercise of jurisdiction over the crime of aggression is however deferred to a later day when “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.”<sup>4</sup> Under this process, the earliest time aggression could be included in the Court’s jurisdiction as a crime is seven years after the statute entered into force.<sup>5</sup> Terrorism and drug related crimes were adopted into the text in an annexed resolution and will become part of the

---

<sup>1</sup> The Rome Statute of the International Criminal Court, Preamble para.10, arts. 1, 17(1), & 19(2)(b). U.N. Doc. A/CONF. 183/9 (July 17, 1998), *reprinted* in 37 I.L.M. 999 (1998) [hereinafter ICC Statute]. The ICC Statute does not define the term complementarity, but a combined reading of the provisions of the ICC Statute indicated herein suggests that it means the Court should only exercise jurisdiction if state(s) that has jurisdiction over the individual(s) is “unable” or “unwilling” to initiate criminal prosecution. See further discussion on the Principle of Complementarity, *infra* Chapter 8.

<sup>2</sup> ICC Statute, *supra* note 1, at Preamble para. 9 & arts. 1,5.

<sup>3</sup> *Id.*, art. 5(1). arts. 6-8 (defining the terms genocide, crimes against humanity, and war crimes).

<sup>4</sup> *Id.*, art. 5(2).

<sup>5</sup> Articles 121 and 123 of the ICC Statute detail the process of amending the Statute. In particular, under articles 121(1) & 123(1), proposal to amend the Rome Statute may be made seven years after its entry into force. *Id.*

crimes under the Court's jurisdiction once it is defined at a review conference in the future.<sup>6</sup>

The above categories of crimes over which the Court will exercise jurisdiction were considered to be *jus cogens* norms<sup>7</sup> by majority of States involved in the Rome Conference.<sup>8</sup> Article 6 of the Rome Statute confirms, in the same words, the provisions of the 1948 Genocide Convention and represents a further step towards the codification of principles and rules of the crimes of genocide which appear to be generally accepted. On the other hand, articles 7 and 8 represent an evolution of the crimes against humanity and war crimes. Here, detailed provisions have replaced those of article 6 of the Nuremberg Charter and of their successive formulations.

During the drafting of the ICC Statute, there was the question whether the Court's subject matter should be limited to those crimes which are beyond any doubt part of customary law or whether it should also include all crimes or offences codified in international instruments.<sup>9</sup> As the discussion progressed, it became clear that the more

---

<sup>6</sup> See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. E, U.N. Doc. A/CONF.183/10 (1998) [hereinafter Final Act].

<sup>7</sup> Article 53 of the Vienna Convention on the Law of Treaties (1969) defines *jus cogens* as "norms accepted and recognized by the international community of States from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334 [hereinafter Vienna Convention]. The ICJ made this clear when it considered the effect of reservations to the Genocide Convention and stated that "the prohibition of genocide is binding on states, even without any contractual obligation." See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Adv. Op.), 1951 I.C.J. Rep. 15, 23 (1951) (discussing genocide as a *jus cogens* norm); Barcelona Traction (Belgium v. Spain), 1970 I.C.J. Rep. 3, 32 (5 Feb.) (Second Phase) (discussing genocide as an obligation *erga omnes*). The term *jus cogens* norms refer to customary international laws which give rise to obligations *erga omnes*, that is, obligations owing to the international community as a whole. See Michael P. Scharf, The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, LAW & CONTEMP. PROBS. 67, 80, n. 60 (2001).

<sup>8</sup> M. Cherif Bassiouni, The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 201-202 (1998); Michael P. Scharf, *supra* note 7, at 80.

<sup>9</sup> See Report of the International Law Commission on the Work of Its Forty-Sixth Session, Article 20, U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Draft Statute]. While the



punishable conducts included in the jurisdiction, the fewer the States that are willing to accept the Court's jurisdiction. The Committee then suggested referring all crimes that are recognized by treaty to an *ad hoc* jurisdiction with the consequence that the parties to the statute can still decide whether they are willing to accept an ICC's jurisdiction on a case by case basis, while the more important exclusive jurisdiction implying an automatic acceptance of the ICC's jurisdiction upon becoming party to the statute should be limited to the most serious crimes of concern to the international community.<sup>10</sup>

At the end, a practical compromise was reached to establish a court with a modest jurisdictional scope which jurisdiction will be generally acceptable by the majority of the States Parties. Thus, as noted by Judge Philippe Kirsch, President of the Court who was then, the Rome Diplomatic Conferences Chairman, "[i]t was understood that the [Rome] statute was not to create new substantive law, but only to include crimes already prohibited under international law."<sup>11</sup>

It has been argued that while the above approach limited the Court's jurisdiction, it was desirable to achieve the more expedient goal of making the Court's jurisdiction automatic and compulsory to States Parties instead of an optional or case by case

---

conferment of jurisdiction to the Court over all treaty crimes may expand the jurisdiction of the Court, it could also minimize the Court's efficiency as it may be over burden with cases. Besides, unlike the ILC Draft which merely lists the crimes, a decision had earlier been reached by the Committee to include the definition of the crimes in the Statute, the Committee therefore recognized that it may encounter problem of definition because there are no uniformity of definition to some of the treaty crimes.

<sup>10</sup> This was the position of the ILC and many of the States involved in the Conference. See 1994 ILC Draft, *supra* note 9, at Preamble para. 2.: "Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole." *Also see*, Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 5 (1999).

<sup>11</sup> Philippe Kirsch & John T. Holmes, *supra* note 10, at 7 n.19 (citing 1 Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, at 16, U.N. Doc. A/51/22 (1996)).

jurisdiction envisioned by the ILC.<sup>12</sup> Therefore, a State upon becoming a State Party to the ICC Statute automatically accepts the Court's jurisdiction with respect to crimes referred to in Article 5<sup>13</sup> but subject to the deferred jurisdiction over the crimes of aggression.<sup>14</sup> Articles 6-8 of the ICC Statute contains detailed definition of the crime of genocide, crimes against humanity and war crimes respectively. These crimes have been specifically addressed and carefully described in the Statute and will be examined below shortly.

## **6.2. Guidelines for Interpreting and Applying the Definitions.**

Before examining the definition of the crimes of genocide, crimes against humanity and war crimes, it is apposite to precede the examination with the guidelines underlying the interpretation and application of the definitions. In interpreting the definition, it is important to bear in mind the caveat that the definition is supplied only for "the purpose of this Statute".<sup>15</sup> It appears that the basis for the express limitation of the application of the definition to the purpose of the Statute is to avoid the impression that the Statute purports to serve as an international codification of the said crimes and thereby preclude the further development of these crimes for other purposes, especially as crimes under customary international law.

Article 10 of the ICC Statute offers another guideline to the effect that the definition of the crimes proffered in this Part of the Statute shall not be "interpreted as limiting or prejudicing in any way existing or developing rules of international law for

---

<sup>12</sup> See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 669 (1995).

<sup>13</sup> ICC Statute, *supra* note 1, art. 12(1).

<sup>14</sup> *Id.* art. 5(2).

<sup>15</sup> *Id.*, arts. 6(1), 7(1), & 8(1).

purposes other than this Statute.”<sup>16</sup> Obviously, the purposes of the ICC Statute will be better served with the progressive advancement of rules of international law as the Court may apply these rules in the interpretation of the Statute.<sup>17</sup>

Further, other than the definition of the crimes, the Court may look to the Elements of Crimes<sup>18</sup> and the Court’s Rules of Procedure and Evidence<sup>19</sup> for assistance in “the interpretation and application of articles 6, 7, & 8.”<sup>20</sup> Also, the Court should endeavor to interpret the definitions in consonance with the other parts of the Statute<sup>21</sup> especially Part III of the Statute on General Principles of Criminal Law. Specifically, the Court should adhere strictly to the principle of *nullum crimen sine lege* as formulated by article 22 which obligates the Court to strictly construe the definitions and not to extend it by analogy.<sup>22</sup>

### **6.3. ICC Jurisdiction *Ratione Materiae***

#### **6.3.1. The Crime of Genocide**

The term genocide and its eventual criminalization are attributed to Raphael Lemkin.<sup>23</sup> The Polish-Jewish scholar and jurist coined the word “genocide” from a combination of the ancient Greek word *genos*, meaning, according to Lemkin, “race” or

---

<sup>16</sup> ICC Statute, *supra* note 1, art. 10.

<sup>17</sup> *Id.*, art. 20(1)(b).

<sup>18</sup> Article 9(1) of the ICC Statute provides that the Elements of Crimes “shall be adopted by two-thirds majority of the members of the Assembly of States Parties.” *Id.* See Elements of Crimes, adopted by the Assembly of States Parties at its first session in New York 3-10 September 2002, ICC-ASP/1/3 at [www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_b\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf) (visited October 7, 2005) [hereinafter ICC Elements of Crimes].

<sup>19</sup> See Rules of Procedure and Evidence, adopted by the Assembly of States Parties at its first session in New York 3-10 September 2002, ICC-ASP/1/3 at [www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf) (visited October 7, 2005) [hereinafter ICC Rules of Procedure and Evidence].

<sup>20</sup> ICC Statute, *supra* note 1, arts 9 & 20(1)(a).

<sup>21</sup> *Id.*, art. 20(1)(a).

<sup>22</sup> *Id.*, art. 22(2).

<sup>23</sup> See Samantha Power, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 42-60 (2002).

“tribe” and the derivative *cide* from the Latin word *caedere*, which means “killing”.<sup>24</sup> According to Lemkin, genocide is “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”<sup>25</sup> In 1948, the U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide which criminalized the acts of genocide as defined in article II of the Convention.<sup>26</sup>

By 1951, the crime and definition of Genocide were already generally acknowledged as reflecting customary international law.<sup>27</sup> Attempts to expand or otherwise restrict the definition of genocide at the Preparatory Committee meetings to reflect changing circumstances of the twenty-first century proved unsuccessful.<sup>28</sup> Thus, the provisions of Article II of the Geneva Convention were adopted *mutatis mutandis* in the Statute of the ICC<sup>29</sup> as was the case with the Statutes of the International Criminal Tribunal for the former Yugoslavia, (ICTY)<sup>30</sup> and the International Criminal Tribunal for

---

<sup>24</sup> Raphael Lemkin, *AXIS RULE IN OCCUPIED EUROPE, LAWS OF OCCUPATION: ANALYSIS OF GOVERNMENT: PROPOSALS FOR REDRESS* 79 (Washington: Carnegie Endowment for International Peace, 1944); Samantha Power, *supra* note 23, at 42.

<sup>25</sup> *Id.*, at 79.

<sup>26</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280, approved and opened for signature and ratification or accession on December 9, 1948, (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. As at October 7, 2005, 137 States have ratified the Genocide Convention. Information on ratification, reservations and declarations of the Genocide Convention are available at <http://www.ohchr.org/english/countries/ratification/1.htm> (visited October 10, 2005).

<sup>27</sup> See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep., 15, 23 (May 28, 1951) (ICJ noted that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without conventional obligation”); *Barcelona Traction (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 32 (Feb 5, 1970) (Second Phase) (discussing genocide as an obligation *erga omnes*).

<sup>28</sup> Preparatory Committee for Establishment of International Criminal Court Discusses Definitions of “Genocide”, “Crime Against Humanity”, March 26, 1996, U.N. Press Release L/2762 (1996); Herman von Hebel and Darryl Robinson, *Crimes Within the Jurisdiction of the Court in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* 79-126, 89 (R.S. Lee Ed. The Hague/Boston/London: Kluwer Law International, 1999).

<sup>29</sup> ICC Statute, *supra* note 1, art. 6.

<sup>30</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, art. 4, 3217th mtg., U.N. Doc. S/25704 (1993), appended to SC Resolution 827, *reprinted* in 32 I.L.M. 1192 (1993) (hereinafter ICTY

Rwanda (ICTR).<sup>31</sup> Therefore, article 6 of the ICC Statute which replicates the definition of genocide in the Geneva Convention provides that:

For the purposes of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (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.<sup>32</sup>

Article 6(a-e) lists the various ways in which a protected group may be targeted for destruction, but it has been suggested that killing represents one manifestation of genocidal intent.<sup>33</sup> Therefore, the *sine qua non* of genocide is the intent to destroy the group and not the act of killing itself which is just one way of achieving the objective.<sup>34</sup> In addition to the crime of genocide, article 25 of the ICC Statute enlarges punishable acts, adding soliciting or inducing the commission of a crime of genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide, and complicity in genocide as punishable crimes.<sup>35</sup> For an act to be considered as genocide, it is necessary that one of the acts listed above has been committed, with the special

---

Statute]. The ICTY Statute was unanimously adopted by the Security Council at its 3217th meeting, May 25, 1993, for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.

<sup>31</sup> Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Art. 2, U.N. Doc. S/RES 955, (1994) *reprinted* in 33 I.L.M. 1598 (1994).

<sup>32</sup> ICC Statute, *supra* note 1, art. 6.

<sup>33</sup> By stating that perpetrators’ objectives include “the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups,” Lemkin clearly suggests that “killing” is but one among other unspecified acts that may constitute genocide. See Raphael Lemkin, *supra* note 24, at 42.

<sup>34</sup> Thomas W. Simon, *Defining Genocide*, 15 WIS. INT’L L.J. 243, 244-47 (1996) (proposing killing as critical element in definition of genocide).

<sup>35</sup> ICC Statute, *supra* note 1, art. 25, Genocide Convention, *supra* note 26, art. III.

intent to destroy in whole or in part one of the protected groups covered under article 6. These three elements are briefly considered below.

**6.3.1.a. The Mental Element of the Crime of Genocide**

Article 6 of the ICC Statute provides that an accused shall be guilty of the crime of genocide as defined in the Statute if committed with “intent to destroy ...a group.” The requirement of the “intent to destroy” in article 6 is consistent with the general requirement in article 30 of the ICC Statute to the effect that:

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*.<sup>36</sup>

Thus, in order for the Court to convict an individual for a crime of genocide, the Prosecutor must establish that the accused committed one or more of the acts listed in article 6(a-e) with a culpable *mens rea*.<sup>37</sup> It is probably easier to establish the occurrence of any of the prohibited acts than it is to establish the intent requirement. As noted by the International Law Commission, the *actus reus* of genocide:

are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.<sup>38</sup>

---

<sup>36</sup> ICC Statute, *supra* note 1, art. 30(1) [emphasis added].

<sup>37</sup> *Id.*, art. 6.

<sup>38</sup> See Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of Its Forty-Eighth Session May 6 –July 26, 1996, p 88, U.N. GAOR. 51st Sess., Supp. No. 10, U.N. Doc. GA/51/10 (1996), [hereinafter 1996 ILC Draft Code of Crimes].

The ICC Statute did not offer general guidelines for deciphering intent, however, article 30 suggests that intent will be found “in relation to conduct [where] that person means to engage in the conduct”<sup>39</sup> and “in relation to a consequence, [where] that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>40</sup> On the other hand, “‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>41</sup> For the *actus reus* to amount to genocide, the *mens rea* to destroy a group must be established, the outcome of the act is of no consequence in itself.<sup>42</sup> Thus, the intent of the perpetrator is paramount in a finding of genocide because it is that intent to destroy a particular protected group in whole or in part, that makes crimes of mass murder and crimes against humanity qualify as genocide.<sup>43</sup>

Taken together therefore, the question of intent must be interpreted against the background that “genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself.”<sup>44</sup> Thus, attacks on moderate Hutus during the Rwandan hostilities cannot constitute genocide under the Convention,<sup>45</sup> even though many of those crimes were an essential part of the overall scheme to destroy

---

<sup>39</sup> ICC Statute, *supra* note 1, art. 30(2)(a).

<sup>40</sup> *Id.*, art. 30(2)(b).

<sup>41</sup> *Id.*, art. 30(3).

<sup>42</sup> Nehemiah Robinson, *THE GENOCIDE CONVENTION: A COMMENTARY* 59 (New York, 1960).

<sup>43</sup> See Final Report of the Commission of Experts, U.N. Doc. S/1994/674, par. 97 (May 5, 1994). Also see 1996 Draft Code of Crimes, U.N. Doc. A/51/10, p. 88 (1996) [noting that the intent of the perpetrator must be to destroy a group and not merely individuals who are coincidentally members of a particular group].

<sup>44</sup> Alexander K.A. Greenawalt, *Rethinking Genocide Intent: The Case for a Knowledge-Based Interpretation*, 99 *COLUM. L. REV.* 2259, 2264 (1999).

<sup>45</sup> See *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T 710 (Int'l Crim. Trib. Rwanda, Trial Chamber I, September 2, 1998), available at: <http://www.icttr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm> [hereinafter *Akayesu Judgment*].

Tutsis as a group because there was no intent to destroy the Hutu ethnic group in whole or in part.<sup>46</sup>

While the Court is yet to be confronted with the interpretation of the intent requirement, the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda have addressed the issue. In each case, the tribunals attempted to formulate general guidelines for inferring genocidal intent absent an admission of intent to commit genocide by the accused. In *Prosecutor v. Akayesu*,<sup>47</sup> the first case to convict an accused for genocide, the Trial Chamber of the ICTR noted that the specific intent of the accused is a mental factor which is difficult, if not impossible to determine.<sup>48</sup> Notwithstanding, the Trial Chamber suggested that “in the absence of a confession from the accused, intent can be inferred from a certain number of presumptions of fact.”<sup>49</sup> The ICTR then proceeded to establish that genocidal intent may be inferred from the following factors:

The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged 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.<sup>50</sup>

---

<sup>46</sup> Atrocities against moderate Hutu probably constitute crimes against humanity. See ICTR Statute, *supra* note 31, art. 3.

<sup>47</sup> *Prosecutor v. Akayesu* Judgment, *supra* note 45, p.523.

<sup>48</sup> *Id.*, at 523.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



Prior to Akayesu judgment, the Trial Chamber 1 of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Karadzic and Mladic*<sup>51</sup> had suggested that genocidal “intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.”<sup>52</sup> Also, the “general political doctrine that gave rise to the acts” is relevant just as the “repetition of destructive and discriminatory acts.”<sup>53</sup> In addition, acts which “violate, or which the perpetrators themselves consider to violate, the very foundation of the group” may also give rise to the inference.<sup>54</sup>

In another ICTR case of *Prosecutor v. Kayishema and Ruzindana*,<sup>55</sup> Trial Chamber II opined that “intent can be inferred either from words or deed and may be demonstrated by a pattern of purposeful action.”<sup>56</sup> Apart from “words” or “deed”, the Trial Chamber in *Kayishema and Ruzindana* suggested that the Chamber may also consider “evidence such as the physical targeting of the group or their property to the exclusion of other groups;<sup>57</sup> the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury;<sup>58</sup> the methodical

---

<sup>51</sup> *Prosecutor v. Karadzic and Mladic*, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61 94 (Int’l Crim. Trib. Yugoslavia, Trial Chamber 1, July 11, 1996) in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998, at 679 (Andre Klip & Goran Sluiter eds., 1999) [hereinafter *Karadzic and Mladic*].

<sup>52</sup> *Prosecutor v. Karadzic and Mladic*, *supra* note 51, p 94-95, at 711.

<sup>53</sup> *Id.*, p 94, at 711.

<sup>54</sup> *Id.* The Trial Chamber cited Serbian destruction of Muslim libraries and religious institutions as evidence of genocidal intent toward Muslims. *Id.*, at 95.

<sup>55</sup> *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T (Int’l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999) available at: <http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm> [hereinafter *Kayishema and Ruzindana*].

<sup>56</sup> *Id.*, p 93.

<sup>57</sup> *Id.*, p.94.

<sup>58</sup> *Id.*

way of planning, the systematic manner of killing.<sup>59</sup> Further, the scale and general nature of the atrocities committed is also important.<sup>60</sup>

While the *Kayishema and Ruzindana* case suggested that “words” or “deed” may suffice to infer genocidal intent, in the ICTY case of *Prosecutor v. Jelusic*,<sup>61</sup> the Trial Chamber seems to suggest that words alone without the existence of a plan to destroy a protected group as such may make it impossible for the prosecution to prove genocidal intent. In this case, Jelusic had openly remarked his hatred for and desire to kill all Muslims, a protected religious group.<sup>62</sup> The Trial Chamber decided that the Prosecutor has not discharged its burden of proof regarding Jelusic’s genocidal intent because the “Prosecutor has not provided sufficient evidence allowing it to be established beyond all reasonable doubt that there existed a plan to destroy the Muslim group ... within which the murders committed by the accused would allegedly fit.”<sup>63</sup> On appeal, the Appeals Chamber rejected the requirement of a plan as an ingredient of the crime.<sup>64</sup>

Additional factors have also been proffered by the prosecution in *Prosecutor v. Sikirica*.<sup>65</sup> The prosecution in *Sikirica* offered seven factors which it considered relevant to prove the defendant’s mental culpability for genocide.<sup>66</sup>

---

<sup>59</sup> *Kayishema and Ruzindana*, *supra* note 55, p.94.

<sup>60</sup> *Id.*

<sup>61</sup> *Prosecutor v. Jelusic*, Judgment, Case No. IT-95-10-T P 102 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf> [hereinafter *Prosecutor v. Jelusic*, Judgment].

<sup>62</sup> *Id.*, at p 93.

<sup>63</sup> *Id.*, at p 98.

<sup>64</sup> See *Prosecutor v. Jelusic*, Appeal, Case No. IT-95-10-A Pp 47, 48 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001) where the Appeals Chamber common to both the ICTR and ICTY upheld the inferability of intent and stated that “The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime.” P 48, available at: <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf> [hereinafter *Prosecutor v. Jelusic*, Appeals Chamber].

<sup>65</sup> *Prosecutor v. Sikirica*, Judgment, Case No. IT-95-8-T PP 86, 90 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf> [hereinafter *Prosecutor v. Sikirica*, Judgment].

The above factors that have been put forward by the Tribunals and the prosecution are obviously offered as guidelines and were based on the consideration of the facts of each case. While the guidelines may differ from one case to the other, the Tribunals' appear to agree that a court could infer genocidal intent from a methodological examination of the factual record before the court on a case by case basis.<sup>67</sup> In any event, the underlying motivations for the crime of genocide are irrelevant.<sup>68</sup>

Note however the decision of the ICTY Prosecutor in *Prosecutor v. Erdemovic*<sup>69</sup> not to charge Erdemovic with genocide ostensibly on the basis that Erdemovic does not have genocidal intent when he and his detachment were ordered to a farm where they shot and killed unarmed Bosnian Muslim men because he acted pursuant to superior orders and under threat of death.<sup>70</sup> This case should not stand for the proposition that subordinates who acted pursuant to superior orders cannot form genocidal intent. As explained in the comment to article 17 of the 1996 ILC Draft Code of Crimes, the

---

<sup>66</sup> The seven factors, which apparently derived from the prosecutor's brief before the Appeals Chamber in Jelisić, were:

- (a) The general and widespread nature of the atrocities committed;
- (b) The general political doctrine giving rise to the acts;
- (c) The scale of the actual or attempted destruction;
- (d) Methodical way of planning the killings;
- (e) The systematic manner of killing and disposal of bodies;
- (f) The discriminatory nature of the acts;
- (g) The discriminatory intent of the accused.

*Prosecutor v. Sikirica*, Judgment, *supra* note 65, p 46 & n.123.

<sup>67</sup> See *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-T P 167 (Int'l Crim. Trib. Rwanda, Trial Chamber, Jan. 27, 2000) at <http://www.ictor.org/wwwroot/ENGLISH/cases/Musema/judgement/index.htm>; *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3 P 63 (Int'l Crim. Trib. Rwanda, Trial Chamber, Dec. 6, 1999), <http://www.ictor.org/wwwroot/ENGLISH/cases/Rutaganda/judgement/index.htm>; The Appeals Chamber common to both the ICTR and ICTY upheld the inferability of intent in *Prosecutor v. Jelisić*. See *Prosecutor v. Jelisić*, Appeals Chamber, *supra* note 64, p 47. See also William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 222-25 (2000).

<sup>68</sup> Note, however, that it is not always clear whether specific evidence relates to motive or intent at trial. See, e.g., Frederick M. Lawrence, The Case for a Federal Bias Crime Law, 16 Nat'l Black L.J. 144, 156-57 (1999) (noting that motive and intent are not always analytically distinct).

<sup>69</sup> *Prosecutor v. Erdemovic*, Sentencing Judgment, Trial Chamber, Case No. IT-96-22-Tbis (Int'l Crim. Trib. Yugoslavia, Trial Chamber, March 5, 1998) [hereinafter *Prosecutor v. Erdemovic*].

<sup>70</sup> *Id.*, p 14.

definition of genocide applies to subordinates who carry out the order as well as those who plan or order the genocide, even though the subordinate may not have the same level of knowledge as the planner or superior. The ILC noted that:

The definition of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals belonging to a particular group. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the relevance of the destructive effect of this criminal conduct on the group itself. Thus the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to particular group and are therefore singled out as the immediate victims of the massive criminal conduct. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from the obvious.<sup>71</sup>

It is also necessary to distinguish between intent to destroy a community as such because they belong to a protected group from intent to persecute individuals because they belong to a specific community without the intent to destroy the community. While the former is genocide, the latter is a crime against humanity, the underlying difference being that a discriminatory murder is not proof of genocidal intent.<sup>72</sup> Thus, in *Prosecutor v. Jelusic*,<sup>73</sup> the ICTY noted that the crime of “genocide ... differs from the crime of

---

<sup>71</sup> 1996 ILC Report, *supra* note 9, at p 60.

<sup>72</sup> See William A. Schabas, *supra* note 67, at 230-38 (discussing quantitative elements in determining requisite intent); see also M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 523 (1999) (reiterating necessity of intent).

<sup>73</sup> *Prosecutor v. Jelusic*, Judgment, *supra* note 61, p 21.

persecution in which the perpetrator chooses his [or her] victims because they belong to a specific community but does not necessarily seek to destroy the community as such.”<sup>74</sup> The ICTY opined that the intent to discriminatorily persecute individuals of a particular group without the objective to destroy the entire group qualifies as a crime against humanity while intent to destroy the entire group is genocide.<sup>75</sup> On the other hand, it is the intent to destroy a group, in whole or in part, that differentiates genocide from homicide.<sup>76</sup>

Another related issue to genocidal intent is the question of motive. Although the draft of the Ad Hoc Committee of the Genocide Convention included motives,<sup>77</sup> the final text of the Convention is silent on the question of genocidal motive.<sup>78</sup> However, it remains a source of contention whether the words “as such” require the prosecutor to establish the perpetrator’s motive as well as the perpetrator’s intent.<sup>79</sup> It appears that the

---

<sup>74</sup> Persecutor v. Jelasic, Judgment, *supra* note 61, p 79.

<sup>75</sup> *Id.*, pp 67, 68.

<sup>76</sup> Mathew Lippman, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 ARIZ. J. INT’L & COMP. LAW 415, 455 (1998).

<sup>77</sup> Report of the Ad Hoc Committee on Genocide, UN ESCOR, 7<sup>th</sup> Sess., Supp. No. 6, U.N. Doc. E/794/Corr.1 (1948), art. 2 (defined genocide as a crime committed “on grounds of the national or racial origin, religious belief or political opinion of [the] members [of the group].”

<sup>78</sup> Final Report of the Commission of Experts for the former Yugoslavia, para. 97, U.N. Doc. S/1994/674 (1994); P.N. Drost, *supra* note 69, at 33 (noting that the Genocide Convention final text “does not mention motive beside the definition of the protected group which as such must be the object of persecution.”); Prosecutor v. Jelasic, Appeal Chamber, *supra* note 64, at p 49 (“The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”).

<sup>79</sup> See Nehemiah Robinson, *supra* note 42, at 59-61; M. Lippman, The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 B.U. INT’L L.J. 1, 41 (1985) (arguing that it is clear that under article II [of the Convention] the requisite intent to commit genocide must be accompanied by proof of motive ...”). See however, Lawrence Leblanc, THE UNITED STATES AND THE GENOCIDE CONVENTION 80 (Durham, N.C.: Duke University Press 1991) (noting that “[n]either article 2 or any other article of the Convention refers to the motives that must lie behind the commission of such acts”). The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?, 13 YALE J. INT’L L. 268, 288-90 (1988).

general consensus is that since the ultimate objective of genocide is to destroy a protected group, the motive for such objective is irrelevant.<sup>80</sup>

Adopting the Genocide Convention definition of the crime of genocide, the ICC Statute does not require the existence of motive for the crime of genocide. No doubt, requiring the existence of motive would provide perpetrators with a defense to argue that their actions had been actuated by motives other than those enumerated.<sup>81</sup> Once the requisite intent exists, it should make no difference whether that intent was fueled by personal animus toward the protected group, by hopes of financial gain, by political reasons, by a personal grudge against individual group members, by ideological resistance, to win a war, or indeed by any reason whatsoever.<sup>82</sup> Thus, the underlying motives for the crime of genocide are irrelevant. Motive can, however, serve as evidence toward proving the existence of genocidal intent,<sup>83</sup> as well as nature and duration of punishment.<sup>84</sup>

### **6.3.1.b. Extent of Intended Destruction**

Article 6 of the ICC Statute provides that an accused shall be guilty of the crime of genocide as defined by the Statute if committed with intent to destroy “in whole or in

---

<sup>80</sup> P.N. Drost, *supra* note 69, at 84; John Webb, *Genocide Treaty: Ethnic Cleansing, Substantive and Procedural Hurdles in the Application of the genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT’L. & COMP. L. 377, 391 (1993), cited with approval in Final Report of the Commission of Experts for Rwanda established pursuant to Security Council Resolution 955 (1994), Dec. 9, 1994, U.N. Doc. S/1994/1405 (1994) at paras. 158-59, (where the Commission opined that if the intent to destroy a group is established, the absence or presence of a political motive would not negate the intent to commit genocide); Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 108-12 (1989); Lawrence LeBlanc, *supra* note 79, at 289-90; Paul Starkman, *Genocide and International Law: Is There a Cause of Action?*, 8 ASILS INT’L L.J. 1, 7 n.14 (1984).

<sup>81</sup> Mathew Lippman, *supra* note 78, at 454. In any event, the line between motive and intent is often time blurred. See Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT’L BLACK L.J. 144, 156-57 (1999) (noting that motive and intent are not always analytically distinct).

<sup>82</sup> See, *Prosecutor v. Jelusic*, Appeals Chamber, *supra* note 64, p 49; P.N. Drost, *supra* note 69, at 83-84.

<sup>83</sup> See Kayishema and Ruzindana, *supra* note 55, p 93; Karadzic and Mladic, *supra* note 51, pp 94-95.

<sup>84</sup> P.N. Drost, *supra* note 69, at 83; ICC Statute, *supra* note 1, art. 78.

part ...”, The meaning of the words “in part” has been a source of controversy. On the one hand are those who express the view that proportionate scale and total number of victims should be read into the definition of genocide in order to prevent trivializing the gravity of the concept behind the crime of genocide.<sup>85</sup> Other proponents of the “substantial part” test argue that the test is satisfied if it is the intent of the perpetrator to destroy a multitude of persons of the same group because of their belonging to this group, even though those persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial.<sup>86</sup> The Convention, they argue, is intended to deal with action against large numbers, not individuals even if they happen to possess the same group characteristics.<sup>87</sup> The underlying argument being that the perpetrator need not target the entire group wherever

---

<sup>85</sup> See Benjamin Whitaker (U.N. Special Rapporteur for Human Rights Commission), Whitaker Report, Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide 16, 29-30, Jul. 2, 1985, 38 UN ESCOR, Human Rights Sub-Comm’n on the Prevent. of Discrim. and Protect. of Minorities, 38th Sess. U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [hereinafter Whitaker Report]; Malcolm Shaw, Genocide and International Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 797, 806 (Yoram Dinstein ed., 1989) (expressing the view that “the offence can only retain its awesome nature if the strictness of its definitional elements is retained and not in any way trivialized”). Also, this appears to be the understanding of the U.S. as expressed by the United States Senate Foreign Relations Committee pursuant to U.S. ratification of the Genocide Convention and in the U.S. implementing legislation which defines “substantial part” as “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.” See Proxmire Act, 18 U.S.C. 1093(8) (2001). Similarly, the ILC had suggested that “the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.” See ILC Draft Code of Crimes, *supra* note 38, at 89.

<sup>86</sup> Nehemiah Robinson, *supra* note 42, at 62-63, (arguing that the word “in part” suggests that genocide could occur even if the victims constitute only a part of a group “*provided that the number is substantial*” (emphasis added)). In the same vein, Raphael Lemkin seems to suggest that the Convention was designed to apply to large numbers of people and that the “destruction in part must be of such a substantial nature ... so as to affect the entirety” (cited by Lawrence J. Leblanc, *supra* note 80, at 44, referring to a Hearing on the Genocide Convention before a Sub-Commission of the Senate Commission on Foreign Relations, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess. 106-7 (1971)); and William A. Schabas, *supra* note 67, at 238, n. 171 (citing Letter from Raphael Lemkin to Dr. Kalijarvi, Senate Foreign Relations Committee, in 2 Executive Sessions of the Foreign Relations Committee 370 (1976)).

<sup>87</sup> Nehemiah Robinson, *supra* note 42, at 63.

they may exist, provided the perpetrator targets a substantial part of the group within a geographic location.<sup>88</sup>

In furtherance of the above position, two ICTY cases have required that the alleged acts for which a defendant stands trial affect a “reasonably substantial number of the group relative to its total population” prior to making any inference of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.”<sup>89</sup> In *Sikirica*, the ICTY referred to this as a “quantitative criterion.”<sup>90</sup> Similarly, the ICTR in *Kayishema’s* case interpreted the “in part” language as mandating “the intention to destroy a considerable number of individuals who are part of that group.”<sup>91</sup> In *Kayishema and Ruzindana*, the court held that destroying a group “in part” required intent to “destroy a considerable number of individuals.”<sup>92</sup> However, while the *Kayishema and Ruzindana* court considered the number of victims significant, it did not consider it to be a threshold issue.<sup>93</sup>

Under this approach, the court must determine whether the number of victims constitute a significant number of victims or a significant percentage of the targeted group. The court may do this by comparing the number of victims to the size of the overall group or by inquiring whether the number of victims alone, is sufficiently large to determine whether the victimization was “substantial.”<sup>94</sup> This exercise must be conducted within the context of a particular geographical area, be it a city, a state, a

---

<sup>88</sup> Nehemiah Robinson, *supra* note 42, at 63.

<sup>89</sup> Prosecutor v. Sikirica, Judgment, *supra* note 65, pp 57, 67-75 (analyzing genocidal intent of defendant under ICTY Statute, *supra* note 30, art. 4,) and Prosecutor v. Jelusic, Judgment, *supra* note 61, pp 66-77.

<sup>90</sup> Prosecutor v. Sikirica, Judgment, *supra* note 65, p 76.

<sup>91</sup> See *Kayishema and Ruzindana*, *supra* note 55, p 97.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* p 93.

<sup>94</sup> Prosecutor v. Jelusic, Judgment, *supra* note 61, n.111.



region or a country taken into consideration the composition and size of that group within the particular geographical area.<sup>95</sup>

Invariably, what constitutes a “substantial part” becomes relative and to that extent is fluid. In situations where the group is broadly defined, the number or percentage of victims that would constitute a “significant part” will obviously be higher than where the group is narrowly defined. For example, the Trial Chamber in Kayishema found the accused guilty of genocide, *inter alia* for the killing of at least 8,000 Tutsi at the Gatwaro Stadium in Kibuye Town and another 4,000-5,500 at a Church in Mubuga.<sup>96</sup> Both killings took place within the Kibuye prefecture, (one of eleven regional areas in Rwanda), which was in turn divided into nine communities.<sup>97</sup> Because the Trial Chamber considered these killings within the limited geographical area of Kibuye prefecture, it found that the killings constitute “substantial part” of the Tusti ethnic group.

Evidently, the result would be different if the Trial Chamber adopted a wider conception of the geographic area which looks at genocide as an act intended to destroy a substantial part of the protected group within a nation.<sup>98</sup> If Kayishema intended only to rid the Kibuye prefect of Tutsi, he probably could not be convicted of genocide because the killings of over 13,500 individuals would probably not constitute acts against a “substantial part” of the overall Tutsi population in Rwanda, where minimum estimates of the number killed exceed 800,000. The implication of this approach is that a perpetrator who deliberately targeted and killed more than 13,500 persons because of

---

<sup>95</sup> See Nehemiah Robinson, *supra* note 42, at 63.

<sup>96</sup> Kayishema and Ruzindana, *supra* note 55, pp 531, 535, 556-563.

<sup>97</sup> *Id.*, pp 2, 20.

<sup>98</sup> Proxmire Act, 18 U.S.C. 1093(8).

their membership to a protected group would be found not guilty of genocide. This outcome is nothing but judicial absurdity.

Opposing the “substantial part” approach, are those who argue that the perpetrator’s genocidal intent may manifest from a deliberate desire to target only a limited number of individuals within a protected group because of the impact the destruction of those persons may have on the survival of the group as such.<sup>99</sup> It is noted that the targeting of some group members is more harmful because their loss contributes more significantly to the destruction of the group.<sup>100</sup> Thus, as suggested by the U.N. Commission of Experts, a focused attack on a specific segment of a protected group (i.e., political, business, or intellectual leaders or military or law enforcement personnel) “may be a strong indication of genocide regardless of the numbers killed.”<sup>101</sup> This view recognizes the impact the elimination of the selected persons would have not just on the physical and biological survival of the group but also in the area of the group’s economic, social and cultural preservation.<sup>102</sup>

The approach has been criticized for its underlying presumption that some human beings are inherently more valuable than others and therefore somewhat elitist.<sup>103</sup> However, suffice it to suggest that the evaluation if any, is not what their lives worth

---

<sup>99</sup> M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279, 323-24 (1994) (arguing that the concept of genocide “is sufficiently pliable to encompass not only the targeting of an entire group, as stated in the Convention, but also the targeting of certain segments of a given group, such as the Muslim elite or the Muslim women”).

<sup>100</sup> *Prosecutor v. Jelisić*, Judgment, *supra* note 61, p 81 (noting that the extermination of the group’s leadership may make the remainder of the group more vulnerable to further victimization)

<sup>101</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. A/1994/674 at P 94 (1994). See also *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-T, p 587 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf> [hereinafter *Prosecutor v. Krstić*, Judgment]; *Prosecutor v. Sikirica*, Judgment, *supra* note 65, p 65.

<sup>102</sup> See *Prosecutor v. Jelisić*, Judgment, *supra* note 61, p 81.

<sup>103</sup> See Steven R. Ratner, *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, 92 AM. SOC. INT’L L. PROC. 1, 11 (1998).

personally, but its worth to the continued existence of the group. Therefore, where the dislodgment of some selected individuals within the group will affect the foundational structure of the group such that the remainder of the group becomes endangered species, the court should find that the perpetrator possess the necessary genocidal intent. Adopting this reasoning, the Trial Chamber of the ICTY in *Prosecutor v. Krstic*<sup>104</sup> after analyzing the effect on the group of an attack on all Bosnian Muslims men of military aged in Srebrenica concluded that the intent to kill them constituted an intent to destroy in part the Bosnian Muslim group.<sup>105</sup>

On the other hand, it has been argued that the number of victims should not be a threshold issue in defining the crime of genocide because it is the genocidal intent which makes the act genocide that is paramount, not the result of the act.<sup>106</sup> It is sufficient to impose criminal responsibility for genocide if the accused aimed to destroy a large number of the group in a particular community even if the accused was unable to accomplish that objective.<sup>107</sup> It follows therefore that a perpetrator can be guilty of genocide even in cases where the genocidal conduct resulted in the death of one victim provided the intent of the perpetrator is directed at the destruction of the entire group or part of it.<sup>108</sup>

Thus, regardless of the approach adopted, the application should not apply to actual destruction but to the intent of the perpetrator. In other words, if the intent of the

---

<sup>104</sup> *Prosecutor v. Krstic*, Judgment, *supra* note 101.

<sup>105</sup> *Id.*, p 595.

<sup>106</sup> William A. Schabas, *supra* note 67, at 233-34 (noting that “the actual quantity killed or injured remains a material fact, but what is really germane to the debate is whether the author of the crime intended to destroy the group ‘in whole or in part.’”)

<sup>107</sup> Amnesty International, THE INTERNATIONAL CRIMINAL COURT: Fundamental Principles Concerning the Elements of Genocide, AI Index: IOR 40/001/1999, February 17, 1999 available at: <http://web.amnesty.org/library/Index/ENGIOR400011999?open&of=ENG-385>

<sup>108</sup> P.N. Drost, *supra* note 69, at 84-86.

perpetrator is to destroy a “substantial” or “large” or “considerable” or “selected” part of the group, the perpetrator is guilty of genocide. The extent to which the perpetrator was successful in his or her design is inconsequential to determine whether genocide has occurred. To ascribe a threshold number will result in situations where genocidal victims would be left without justice.

In *Sikirica*, the ICTY in acquitting the accused on the charges of genocide for allegedly killing 1,000-1,400 Muslims held that “this would represent between 2% and 2.8% of the Muslims in the Prijedor municipality and would hardly qualify as a ‘reasonably substantial’ part of the Bosnian Muslim group in Prijedor.”<sup>109</sup> Such decision is disturbing in light of the Trial Chamber’s observation that “the fact that the evidence does not establish that a substantial number of Bosnian Muslims or Bosnian Croats were victims ... does not necessarily negate the inference that there was an intent to destroy in part the Bosnian Muslim or Bosnian Croat group.” The Trial Chamber consigned itself with the number of victims and therefore concluded that when the quantitative figures are “considered long with other aspects of the evidence, it becomes clear that this is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred.”<sup>110</sup>

If the ICTR Trial Chamber in *Kayishema* adopted the ICTY Trial Chamber’s approach in *Sikirica*’s case, *Kayishema* probably would not be convicted of genocide because the killings of over 13,500 individuals would probably not constitute a

---

<sup>109</sup> Prosecutor v. *Sikirica*, Judgment, *supra* note 65, p 72.

<sup>110</sup> *Id.*, p 75.

“substantial part” of the overall Tutsi population in Rwanda, where minimum estimates of the number killed exceeds 800,000.<sup>111</sup>

The ICC Preparatory Committee considered whether the words “intent to destroy, in whole or in part ... [a] group” includes a specific intent to destroy more than a small number of individuals who are members of the group and rejected the idea of ascribing quantitative criteria to genocide because it would prohibit the application of genocide to attacks against small number of individuals carried out within a broader context.<sup>112</sup> Thus, article 6 expressly requires only that the acts be committed with the “intent to destroy, in whole or in part,” a protected group.<sup>113</sup> Therefore, adopting a literal interpretation of the plain meaning of article 6, there is no requirement that the accused have intended to destroy the whole of a group in a particular geographic region or that the aim must be the destruction of a substantial part of that group. Adopting “quantitative criterion” as a threshold requirement undermines the object and purpose of the Genocide Convention on which article 6 of the ICC Statute is based.<sup>114</sup>

Suffice it to note that the use of the plural in article 6(a-e) to enumerate the acts which constitute genocide may support the contention that more than one victim is

---

<sup>111</sup> Kayishema and Ruzindana, *supra* note 55, pp 531, 535, 556-563.

<sup>112</sup> See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 425 (2000) (citing Jordan J. Paust, *Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft: Article 5[20], Crimes Within the Jurisdiction of the Court, and Articles 19[C] and 26[M], Leader and Responsibility and Superior Orders*, in *OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE* (Leila Sadat Wexler ed., 1998).

<sup>113</sup> *Id.*

<sup>114</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S 340 (1969), which states the “General Rule of Interpretation” that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

required.<sup>115</sup> However, the use of the singular in the ICC Elements of Crimes appears to support the proposition that one victim suffices as genocide.<sup>116</sup> Thus, it may be argued that the use of the plural in article 6(a-e) was not a deliberate attempt by ICC to require more than one victim for genocide conviction but a result of the decision to wholly adopt the definition of genocide from the Genocide Convention. Perhaps, it may be good prosecution strategy to include conspiracy to commit genocide and attempted genocide as part of the counts in a charge of genocide such that where the Court is of the opinion that the degree of the perpetrator's conduct is not sufficient for genocide, the Court may find the perpetrator guilty of attempted genocide or conspiracy to commit genocide or other associated genocidal crime.<sup>117</sup>

While it is conceded that as a practical matter, “the evidentiary hurdles posed by the intent requirement would seem to preclude prosecution for acts directed at a small number of people”,<sup>118</sup> the utility of the quantitative element should be consigned to its evidentiary value as a determinant to deciphering genocidal intent and making a *prima facie* case of genocide.<sup>119</sup> It has correctly been observed that “[n]umbers do not count in cases of genocide”, ... because “we cannot defend the establishment of a threshold above which a certain number of killings would become genocide per se”, ... rather, “we must

---

<sup>115</sup> See Whitaker Report, *supra* note 85, at 16 (discussing Article 2(a-e) of the Genocide Convention which is impair material with Article 6(a-e) of the ICC Statute). ICC Statute, *supra* note 1, art. 6(a-e) using the words such as “members”, “measures”, “births” and “children.”

<sup>116</sup> ICC Elements of Crimes uses the term “one or more persons”, See Elements of Crimes, adopted by the Assembly of States Parties at its first session in New York 3-10 September 2002, ICC-ASP/1/3 at [www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_b\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf) (visited October 7, 2005) [hereinafter ICC Elements of Crimes].

<sup>117</sup> See ICC Statute, *supra* note 1, art. 25(3).

<sup>118</sup> Steven R. Ratner and Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, BEYOND THE NUREMBERG LEGACY, 2<sup>nd</sup> Ed., 39 (Oxford: Clarendon 2000).

<sup>119</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 523; Kayishema and Ruzindana, Judgment, *supra* note 55, p 93; Final Report of the Commission of Experts for Rwanda, U.N. Doc. S/1994/1405, para. 166 (noting that “unless the intent were express ... the intent to destroy the group would be difficult to prove, except in those instances where the number of people of the group affected was significant”

acknowledge that the higher the number of killings, the easier a *prima facie* case for genocide may be made.”<sup>120</sup> Beyond this, application of quantitative criteria as a threshold issue to determine whether genocide has occurred will result in situations where genocidal destructions or killings which were mercifully ended by the perpetrators or stopped by rescue force before it gets out of proportion or meets the “prevailing” quantitative criterion may go unpunished.

The submission to either the numeric test or percentage test to determine whether sufficient number of victims have been met in order to establish genocide is outside the purview of the power of the ICC judges given the admonition to avoid judicial activism.<sup>121</sup> Any attempt to undertake an evaluation of quantitative analysis is an exercise in judicial activism. Once intent to destroy a group wholly or in part has been established, it suffices that a crime of genocide has been made. After all, genocide is an inchoate offence because it criminalizes certain acts committed with a particular mental state, whether or not those acts actually lead to the injury contemplated (i.e., attempts).<sup>122</sup> This is in contrast to result-oriented offenses, which require the act in question actually achieve a specified result (i.e., murder).<sup>123</sup>

### **6.3.1.c. Protected Groups of the Crime of Genocide**

Under article II of the Genocide Convention which is repeated in article 6 of the ICC Statute, the only victims of genocide recognized under the Convention and Statute

---

<sup>120</sup> Thomas W. Simon, *supra* note 34, at 254.

<sup>121</sup> See ICC Statute, *supra* note 1, art. 22.

<sup>122</sup> See, e.g., Andrew J. Ashworth, Defining Criminal Offences Without Harm, in *CRIMINAL LAW: ESSAYS IN HONOUR OF J.C. SMITH* 7, 8 (Peter Smith ed., 1987).

<sup>123</sup> *Id.*

are persons who are members of national, ethnical, racial or religious groups.<sup>124</sup> Any of the prohibited acts under article II of the Convention or article 6 of the ICC committed against an individual only becomes a crime of genocide if the individual is a member of one of the four protected groups and the act was done with the intent to destroy the group in whole or in part.<sup>125</sup> Thus, it is only the protected groups that are considered victims of the crime of genocide and not individual members of the group.<sup>126</sup> Therefore, the prohibited acts are not genocide if carried against members of the group without the intent to destroy the group in whole or in part.<sup>127</sup>

During the drafting of the Genocide Convention, there were debates on whether the protected groups should include a political, social, economic, cultural, and any other group in the definition of genocide. Under Raphael Lemkin's conception of genocide, an attack directed on the various aspects of human existence such as physical, political,

---

<sup>124</sup> Genocide Convention, *supra* note 26, art. II; ICC Statute, *supra* note 1, art. 6.

<sup>125</sup> Raphael Lemkin, *supra* note 24, at 79 (arguing that “[g]enocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group”).

<sup>126</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 521; see also 1996 ILC Draft Code of Crimes, *supra* note 38 (“The group itself is the ultimate target or intended victim of this type of massive criminal conduct... The intention must be to destroy the group ‘as such’, meaning as a separate and distinct entity.”); United Nations, Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, U.N. Doc. E/AC.25/3/Rev.1 (1948) (“The victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason but a group as such.”), quoted in Prosecutor v. Krstic, Judgment, *supra* note 101, p 552 n.1222; William A. Schabas, *supra* note 67, at 231; Nehemiah Robinson, *supra* note 42, at 58 (noting that the main characteristic of Genocide is its object: the act must be directed toward the destruction of a group. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not *per se* but only as members of the group to which they belong.).

<sup>127</sup> M. Cherif Bassiouni, International Law and the Holocaust, 9 CAL.W. INT’L L.J. 201, at 251 (1979); see also Bunyan Bryant, Substantive Scope of the Convention, 16 HARVARD INT’L L.J. 686, 691 (1975) explaining the scope of article II:

From the ordinary meaning of article II of the Genocide Convention, it would seem that the killing of a single person could be considered genocide if the killing were done with the intent to destroy, in whole or in part, the national, ethnic, racial, or religious group of which the victim was a member. On the other hand, without this intent to destroy the group, in whole or in part, mass killings of members of the group would presumably not constitute genocide under the Convention.

*Id.* at 691.



social, biological, cultural will qualify as genocide.<sup>128</sup> Lemkin campaigned for the criminalization of genocide to provide protection for racial, national, and religious groups whose cultural, political, social, or physical existence was imperiled, regardless of whether the acts were committed in time of peace or war.<sup>129</sup> Consistent with Lemkin's definition of genocide, U.N. General Assembly Resolution 96(1) adopted a non-exhaustive enumeration of various groups that may be protected against the crime of genocide.<sup>130</sup> Resolution 96(1) stated that racial, religious, political, and other groups had been historically targeted for genocide, and the punishment of this crime was of international concern.<sup>131</sup> The resolution affirmed that genocide was an offense whether the perpetrator committed it on religious, racial, political, or any other grounds.<sup>132</sup>

Although these principles enunciated in Resolution 96(1) were part of the reference submitted to the Sixth Committee of the General Assembly which considered the drafting of the Genocide Convention, the committee produced a narrow definition of genocide that was wildly divergent from the original resolution as well as the definition originally derived by Raphael Lemkin.<sup>133</sup> During the Committee's hearing, the matter of the groups to be included in the definition of genocide, especially the inclusion of

---

<sup>128</sup> Raphael Lemkin, *supra* note 24, at 79. Lemkin defined genocide as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups. . . . The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups." *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> G.A. Res. 96 (I), U.N. GAOR 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1947) [hereinafter G.A. Res. 96(1)].

<sup>131</sup> *Id.*, at 189.

<sup>132</sup> *Id.*

<sup>133</sup> Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 *YALE L.J.* 2259, 2264 (1997).

political group, was one of the most debated provisions.<sup>134</sup> There was tension between the desire to condemn the atrocities committed by Nazi Germany and the aspiration to craft a Convention that was sufficiently expansive to anticipate and prevent future acts of genocide.<sup>135</sup>

The delegates opposed to broad definition of genocide wanted the definition to include only groups that were based on perceived “homogeneity and stability.”<sup>136</sup> On this basis, the USSR argued that political groups unlike a national, racial or religious group, lacked stability or permanence and has no common characteristic features.<sup>137</sup> Additionally, it has been suggested that the USSR opposed the inclusion of political or social groups because Stalin’s government had already targeted both.<sup>138</sup> It was suggested that the inclusion of political and other groups may deter some States from ratifying the Convention because States would reject “such limitations to their right to suppress internal disturbances.”<sup>139</sup>

Delegates in support of defining genocide to include political and other groups questioned the “permanence and stable” criterion for inclusion of national or religious groups under the definition of genocide arguing that the members of these groups are usually free to leave at any time.<sup>140</sup> They noted that “strife between nations has now been superseded by strife between ideologies. Men no longer destroyed for reasons of national, racial, or religious hatred, but in the name of ideas and the faith to which they

---

<sup>134</sup> Frank M. Afflitto & Margaret Vandiver, *The Political Determinants of Ethnic Genocide*, in *ANATOMY OF GENOCIDE: STATE SPONSORED MASS KILLINGS IN THE TWENTIETH CENTURY 7* (Alexandre Kimenyi & Otis L. Scott eds., 2001); Beth V. Schaack, *supra* note 133, at 2264.

<sup>135</sup> Louis Henkin et al., *International Law* 448 (3d ed. 1993).

<sup>136</sup> *Id.* (quoting U.N. GAOR 6th Comm., 3d Sess., 63d mtg. at 6 (1948)).

<sup>137</sup> U.N. GAOR 6th Comm., 3d Sess., 64d mtg. at 19 (1948)).

<sup>138</sup> M. Cherif Bassiouni, *supra* note 8, at 212.

<sup>139</sup> U.N. GAOR 6<sup>th</sup> Comm., 3d Sess., 65<sup>th</sup> mtg. at 21 (1948).

<sup>140</sup> Beth V. Schaack, *supra* note 133, at 2265.

gave birth.”<sup>141</sup> The delegates noted that while the Nazis had destroyed millions of human beings in the Netherlands and elsewhere on account of their race or their nationality, they had also destroyed a great many others for their political opinions. Similarly, the Nazis had also attacked the members of the Socialist and Communist parties as well as their parliamentary representatives in Germany.<sup>142</sup>

The opposition view was not enough to sway the Committee which agreed to adopt a definition of genocide that recognizes fewer groups than was contained in Lemkin’s definition of genocide and Resolution 96(1).<sup>143</sup> The Committee justified the inclusion of only a national, ethnic, racial, and religious groups on the basis that each of the said groups have historically been target of animosity and each group is characterized by cohesiveness, homogeneity, inevitability of membership, stability, and tradition.<sup>144</sup> It noted that membership of a political group is a matter of personal choice and as such not stable enough to be afforded protection under the statute.<sup>145</sup>

In 1993 and 1994, attempts to expand the definition of genocide to include political and other groups were unsuccessful as the Statutes of the ICTY and ICTR respectively, ultimately adopted the definition of genocide as contained in article II of the Convention.<sup>146</sup> Similarly, during the Rome Conference, some delegates suggested

---

<sup>141</sup> Beth V. Schaack, *supra* note 133, at 2265 (quoting U.N. GAOR 6th Comm., 3d Sess., 74th mtg. at 103 (1948)).

<sup>142</sup> *Id.* (quoting U.N. GAOR 6th Comm., 3d Sess., 74th mtg. at 100 (1948)).

<sup>143</sup> The Sixth Committee accepted the argument that the inclusion of groups that are not readily unidentifiable such as political groups would cause international interferences in the domestic political affairs of states. See U.N. Doc. A/C.6/SR.69/128 (1948).

<sup>144</sup> Frank M. Afflitto & Margaret Vandiver, *The Political Determinants of Ethnic Genocide*, in *Anatomy of Genocide: State Sponsored Mass Killings in the Twentieth Century* 7 (Alexandre Kimenyi & Otis L. Scott eds., 2001).

<sup>145</sup> *Id.*

<sup>146</sup> ICTY Statute, *supra* note 30, art. 4 and ICTR Statute, *supra* note 31, art. 2.

expanding the Convention definition of genocide to include political and social groups<sup>147</sup> but in the end, the Preparatory Committee for the ICC Statute failed to support any changes to article II of the Genocide Convention.<sup>148</sup> Roman Kolodkin, a representative of the Russian Federation, thought that the “idea of amending the definition to include social and political groups would be counter-productive” and John Hope of the United States asserted that to “try to add to that definition would just create controversy.”<sup>149</sup> Mr. Hope therefore suggested that “[t]he Preparatory Committee should resist the temptation to add new categories to the definition included in the Genocide Convention.”<sup>150</sup> The French representative thought that “the crime of genocide should be defined by adopting the definition in the 1948 Convention. The desire to improve the wording contained in that Convention was not appropriate at present.”<sup>151</sup>

As a result of the above opposition, the Committee concluded that expanding the definition of genocide would jeopardize the consensus or at least affect widespread support for the Rome Statute.<sup>152</sup> With apprehensions like these in mind, the delegates at

---

<sup>147</sup> H. von Hebel and D. Robinson, *supra* note 28, at 89. The Japanese representative opined that “caution needed to be exercised since that Convention . . . had only been acted upon three times . . . . It was worth considering whether the Genocide Convention definition was fully operational . . . .” See Press Release, 1st Preparatory Committee on Establishment of International Criminal Court, Preparatory Committee For Establishment of International Criminal Court Discusses Definitions of “Genocide,” “Crimes Against Humanity” (Mar. 25, 1996), at <http://www.iccnw.org/romearchive/documentsreportsprepcmt1.html> Similar attempts by some NGOs to address what they perceived as the limitations in the Convention definition of genocide by including political, social, and other identifiable groups in the list of the protected persons, was rejected by overwhelming support to refrain from opening the definitional debate. See Timothy L.H. McCormick & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELBOURNE U. L. REV. 635, 647 (1999).

<sup>148</sup> See M. Cherif Bassiouni, *supra* note 8, at 213-14; see generally Press Release, 1st Preparatory Committee on Establishment of International Criminal Court, Preparatory Committee on Establishment of International Criminal Court Begins First Session (Mar. 25, 1996) U.N. Press Release L/27614 (1996), at <http://www.iccnw.org/romearchive/documentsreportsprepcmt1.html> [hereinafter Preparatory Committee First Session].

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See Preparatory Committee on Establishment of International Criminal Court Begins First Session, Mar. 25, 1996, U.N. Press Release L/27614 (1996).

the preparatory committee decided not to expand the group but to treat persecution on social and political grounds as crimes against humanity.<sup>153</sup> The Preparatory Committee argued that its decision not to expand the definition of genocide is consistent with the political pragmatism and international recognition of the peremptory status of the prohibition of genocide.<sup>154</sup>

Contrast with the view that the exclusion of political groups from the Genocide Convention “contravenes the customary *jus cogens* prohibition of genocide, which protects political groups in addition to national, ethnic, racial, and religious groups.”<sup>155</sup> Beth Van Schaack pointed *inter alia* to Resolution 96(1) and referred to some States’ national laws as instances where genocide prohibition extended beyond the four groups mentioned in the Convention.<sup>156</sup>

However, in view of the reluctance of the international community to expand the definition of genocide in the Convention and the Statutes of the ICTY, ICTR, and the ICC, it is plausible to suggest that “evidence of state practice to date appears insufficient to support the proposition that the definition of genocide under customary international

---

<sup>153</sup> See Leila Nadya Sadat & S. Richard Carden, *supra* note 112, at 425; ICC Statute, *supra* note 1, art. 7(1)(h).

<sup>154</sup> *Id.*

<sup>155</sup> Beth Van Schaack, *supra* note 133, at 2280 (arguing that “support for this argument comes from positive law sources, the application of analogous international legal norms, the dictates of public sentiment, and the lack of a legally justifiable principle to justify the exclusion of political groups’). Also see, Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT’L L.J.* 286, 306 (1999) (suggesting that “[t]here is much to be said for the view that a customary-law concept of genocide is much broader than the definition of that crime contained in the Genocide Convention. Acts of the kind mentioned in the convention targeting a group not falling within the narrow categories expressly mentioned or impliedly included in the convention’s definition of genocide would nevertheless be genocide under customary international law, provided that genocidal intent can be demonstrated. ... However, jurisdiction of international criminal tribunals, including the ICC, is limited to the Genocide Convention’s definition of genocide. Therefore, prosecutions for genocide under customary international law in cases falling outside that definition can only occur in municipal criminal courts”).

<sup>156</sup> Beth Van Schaack, *supra* note 133, at 2281.

law is broader than that in the Convention ...”<sup>157</sup> These international treaties more than any other source of international law serves as clear indicators of international law because they unequivocally bind the States that have ratified them.<sup>158</sup> Thus, the prohibition of genocide that has attained the status of *jus cogens* is the prohibition of the crime of genocide as defined in Article II of the Convention which is reproduced in article 6 of the ICC Statute.<sup>159</sup>

#### **6.3.1.1. Defining the Composition and Application of the Protected Groups**

Within the four categories of protected national, religious, ethnic and racial groups covered by the Statute, there has been much difficulty defining the precise contours of each of the protected groups under the Convention. Nonetheless, attempts have been made to define these groups based on certain characteristics that are thought to be common to each of the group. In *Nottebohm Case*, the International Court of Justice defined nationality as:

a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law

---

<sup>157</sup> Steven R. Ratner and Jason S. Abrams, *supra* note 118, at 42. *See also*, Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060, T.S. No. 993 (listing the sources of international law as; international conventions, international custom, as evidenced by state practice; general principles of law recognized by civilized nations; and the teachings of the most highly qualified publicists); *The Paquete Habana*, 175 U.S. 677 (1900) (where the Supreme Court of the United States demonstrated the classical method for ascertaining international legal principles by analyzing several centuries of interactions between individual nations); G. Schwarzenberger & E. Brown, A MANUAL OF INTERNATIONAL LAW 26-27 (6th ed. 1976)(describing how customary principles are ascertained).

<sup>158</sup> Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 Duke L.J. 876, 878 (1983). *See also*, RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Introductory Note at 16 (Tent. Draft No. 1, 1980) (listing customary law and treaties as the two principal sources of international law).

<sup>159</sup> Machteld Boot, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLEM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 428 (Intersentia: New York, 2002).

or as the result of an act of the authorities, is in fact more closely connected to the population of the State conferring nationality than with that of any other State.<sup>160</sup>

The Trial Chamber of the ICTR in Akayesu, adopting the definition of the ICJ defined a “national group” as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”<sup>161</sup> On the other hand, the Proxmire Act defines a national group as one “whose identity as such is distinctive in terms of nationality or national origins.”<sup>162</sup>

An ethnic group has been generally defined as “a group whose members share a common language or culture.”<sup>163</sup> The idea that ethnic groups share cultural and linguistic identity appears to find support from the *travaux préparatoires* of the Genocide Convention.<sup>164</sup> On the other hand, a racial group has been conventionally defined on basis of “the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”<sup>165</sup> An ethnic group differs from a racial group because ethnic groups are bonded by cultural values<sup>166</sup> while a racial group is identified primarily by “external, physical features and appearance ...”<sup>167</sup>

---

<sup>160</sup> Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. REP. 4, 23 (6 April 1955) (Second Phase). Id. at 23 (emphasis added).

<sup>161</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 512.

<sup>162</sup> Proxmire Act, 18 U.S.C. 1093(6).

<sup>163</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 513; Mathew Lippman, *supra* note 78, at 456.

<sup>164</sup> See U.N. GAOR 6th Comm., 3d Sess., 73rd mtg. at 97-98 (1948) (Mr. Petren, Swed.); U.N. GAOR 6th Comm., 3d Sess., 75th mtg. at 115-16, U.N. Doc. A/C.6/SR.75 (1948) (Mr. Petren, Swed.).

<sup>165</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 514. *Also see*, Proxmire Act, 18 U.S.C. 1093(6) (which defines racial groups as “a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent”).

<sup>166</sup> See Doudou Thiam, Special Rapporteur, Fourth Report on the Draft Code of Offenses Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/398 and Corr. 1-3, P 58 (1986), *reprinted* in 2 Y.B. INT’L L. COMM’N 53, 60, U.N. Doc. A/CN.4/Ser.A/1986/Add.1 (1986).

<sup>167</sup> Pieter N. Drost, THE CRIME OF STATE: GENOCIDE 62 (1959).

The ICTR defines a religious group as one “whose members share the same religion, denomination or mode of worship.”<sup>168</sup> Elsewhere, a religious group was defined as one whose members have a “common religious creed, beliefs, doctrines, practices or rituals.”<sup>169</sup> It is an open question whether the definition of religious group includes theistic, agnostic, and atheistic communities.<sup>170</sup> For purposes of genocide, avoiding the perplexities attending the concept of “religion” in this instance is innocuous.<sup>171</sup>

Application of the these conventional definition nonetheless remains problematic especially in situations where there is a congruence of characteristics between the perpetrators and the victims which may qualify both into one or two protected groups.

As the Trial Chamber of the ICTR noted in the case of *Prosecutor v. Rutaganda*:

The concepts of national, ethnical, racial and religious groups have been researched extensively and ... at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context.<sup>172</sup>

An example of such difficulty presented itself in the trial of Akayesu before the Trial Chamber of the ICTR. The Trial Chamber had to decide whether the Rwandan

---

<sup>168</sup> *Prosecutor v. Akayesu*, Judgment, *supra* note 45, p 515.

<sup>169</sup> Proxmire Act, 18 U.S.C. 1093(7) (1988) (emphasis added).

<sup>170</sup> Mathew Lippman, *supra* note 78, at 455. *Also see*, *Prosecutor v. Akayesu*, Judgment, *supra* note 45, p 515; Mathew Lippman, *Genocide: The Crime of the Century - The Jurisprudence of Death at the Dawn of the new Millennium*, 23 HOUS. J. INT’L L. 467, 475 (2001); See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR, 73d plen. mtg., Supp. No. 51, at 171, art. 1(1), U.N. Doc. A/36/684 (1981) (“Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice ...”).

<sup>171</sup> Those perplexities appear, for example, in a South African case, *Wittmann v. Deutscher Schulverein, Pretoria and Others*, identifying “religion” with a “system of faith and worship” as “the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship.” The judgment then mentions “Jewish, Christian, Moslem, Buddhist and other faiths practicing their religion ....” as instances of religious communities. Buddhism is, however, a non-theistic religion and would therefore not qualify as a “religion” under above circumscription. *Wittmann v. Deutscher Schulverein, Pretoria and Others*, 1998 (4) SA 423 (T), at 449 (South Africa 1998).

<sup>172</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, P 56 (ICTR Trial Chamber Dec. 6, 1999), available at [www.ictor.org](http://www.ictor.org); See also *Prosecutor v. Krstic*, Case No. IT-98-33 (ICTY Trial Chamber Aug. 2, 2001) P 557, available at [www.un.org/icty](http://www.un.org/icty) (“A group’s cultural, religious, ethnical, or national characteristics must be identified within the socio-historic context which it inhabits.”) [hereinafter *Prosecutor v. Rutaganda*].



Tutsis constituted a protected group under the Genocide Convention. Since it is given that the Tutsis and the Hutus share the same nationality, race, and religion, the Trial Chamber has to find that the Rwandan Tutsis are of a different ethnic group from the Rwandan Hutus. To do this, the Trial Chamber would have to find that Tutsis and the Hutus do not share a common cultural and linguistic identity. This is hardly the case since the Tutsis could not be significantly distinguished from the Hutus in terms of language and culture.<sup>173</sup> Realizing this, the Trial Chamber looked beyond the plain text of the Genocide Convention (and its own articulation of the characteristics of an ethnic group) and analyzed the Convention's drafting history. The Trial Chamber argued that it was "particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux preparatoires*, was patently to ensure the protection of any stable and permanent group."<sup>174</sup>

Analyzing the *travaux preparatoires* of the Genocide Convention, the Rwandan Tribunal proffered that the common denominator among protected groups is involuntary membership, which must be 'determined by birth,' "in a continuous and often irremediable manner."<sup>175</sup> The Trial Chamber further recognized that the intent to protect extends beyond the four enumerated groups, reaching any group similar in terms of its stability and permanence.<sup>176</sup> Applying this analysis, the tribunal found that Tutsi

---

<sup>173</sup> William A. Schabas, Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, 6 ILSA J. INT'L. & COMP. L 375, 379 (2000); Guglielmo Verdirame, The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals, 49 INT'L & COMP. L.Q. 578, 592 (2000) (stating that Kinyarwanda, a tonal language of the Bantu family, is spoken by both Hutus and Tutsis, and that there is no difference in the customary practices of the two groups).

<sup>174</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 516 (emphasis added). Diane Marie Amann, International Decisions: Prosecutor v. Akayesu - Case ICTR-96-4-T - International Criminal Tribunal for Rwanda, September 2, 1998, 93 AM. J. INT'L L. 195, 196 (1999).

<sup>175</sup> William A. Schabas, *supra* note 173, at 379; Prosecutor v. Akayesu, Judgment, *supra* note 45, p 511.

<sup>176</sup> Diane Marie Amann, *supra* note 174, at 196.

constituted a distinct and stable ethnic group even though they shared language, society, and culture with the Hutu that massacred them.<sup>177</sup>

The Trial Chamber approach has been criticized as a contradiction of the Genocide Convention and the conventional definition of ethnicity.<sup>178</sup> It is seen as an attempt to define genocide by analogy which will include all permanent and stable groups.<sup>179</sup> It has been argued that the supposed ethnic differences between the Tutsis and the Hutus did not actually exist,<sup>180</sup> and that the only obvious divide between the Tutsis and the Hutus was based on social, economic, and political factors.<sup>181</sup> However, a financial or class distinction was not mentioned in the Genocide Convention as a means of classifying groups into one of the four enumerated categories. Nevertheless, the ICTR was determined not to let what it considers an obvious genocide to go unpunished, therefore the ICTR used constructive ethnicity to force the two groups into different ethnic classifications.<sup>182</sup>

Be that as it may, it should be noted that the Trial Chamber did not create additional group beyond the four groups stated in the Convention. Rather, the Trial

---

<sup>177</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, pp 122, 124, at 702, and n.56. For the contrary view, see Tara Sapru, Into the Heart of Darkness: The Case Against the Foray of the Security Council Into the Rwandan Crisis, 32 TEX. INT'L L.J. 329, 343-44 (1997) (arguing that Tutsi do not qualify as a distinct ethnic, national, religious or racial group).

<sup>178</sup> Machteld Boot, *supra* note 159, at 432; Johan D. van der Vyver, *supra* note 155, at 302 (quoting Prosecutor v. Akayesu, Judgment, *supra* note 45, p 512).

<sup>179</sup> Johan D. van der Vyver, *supra* note 155, at 304; Machteld Boot, *supra* note 159, at 431.

<sup>180</sup> William A. Schabas, *supra* note 173, at 379 (noting that “distinguishing between them was so difficult that the Belgian colonizers established a system of identity cards, and determined ‘ethnic origin’ based on the number of cattle owned by a family”); Diane Marie Amann, *supra* note 174, at 196 (observing that decades of discrimination by custom of “patrilineal descent” and by laws that required each person to be identified by their membership in either the Hutu or Tutsi group led the Tutsis to be regarded as a distinct, stable and permanent group).

<sup>181</sup> William A. Schabas, *supra* note 173, at 379; See, e.g., Mariann Meier Wang, The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact, 27 COLUM. HUM. RTS. L. REV. 177, 179 (1995).

<sup>182</sup> Johan D. van der Vyver Manuscript, *supra* note 155, at 16 (noting that the ICTR considered that the victims were selected not as individuals, but rather as members of an involuntary group).

Chamber found that Tutsi witnesses testified credibly as to their separate ethnic identity.<sup>183</sup> The Trial Chamber also determined that the former Belgian colonizers in Rwanda distinguished between Hutu and Tutsi.<sup>184</sup> Based on “the facts brought to its attention during the trial,”<sup>185</sup> the ICTR ruled that “Tutsi did indeed constitute a stable and permanent [ethnic] group and were identified as such by all.”<sup>186</sup> Thus, the Trial Chamber did not suggest that all “permanent and stable” groups should automatically be included in the definition of genocide. The “permanent and stable” group still has to satisfy the requirement of involuntary membership, which must be ‘determined by birth,’ “in a continuous and often irremediable manner.”<sup>187</sup> However, to be consistent with the Convention, the “permanent and stable” group must fit into one of the four groups since the Convention’s list of protected groups is exhaustive.

Further, while the Trial Chamber’s approach appears to contradict its definition of ethnicity, it seems that this contradiction is not so much about the limitation of the Convention but an exposure of the inadequacy of the conventional definition of the protected groups in general. Recognizing this limitation, the ICTR in *Kayishema and Ruzindana* suggested that an ethnic group should comprise “one whose members share a common language or culture” as well as “a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”<sup>188</sup> In view of this obvious problem, the Trial Chamber of the ICTY in *Jelusic* rejected the objective approach to determining group status.<sup>189</sup> It

---

<sup>183</sup> Prosecutor v. Akayesu, Judgment, *supra* note 45, p 56.

<sup>184</sup> Id. at p 122.

<sup>185</sup> Id. at p 702.

<sup>186</sup> Id. (emphasis added).

<sup>187</sup> William A. Schabas, *supra* note 173, at 379; Prosecutor v. Akayesu, Judgment, *supra* note 45, p 511.

<sup>188</sup> *Kayishema and Ruzindana* Judgment, *supra* note 55, p 98.

<sup>189</sup> See Prosecutor v. Jelusic, *supra* note 61, p 61.

may be appropriate to adopt a subjective approach to the definition of protected groups as suggested by the Trial Chamber of the ICTY in *Jelusic* where the Tribunal stated as follows:

[a]lthough the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irresponsible criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. *The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion.*<sup>190</sup>

The Trial Chamber was convinced that “it is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.”<sup>191</sup> The subjective approach was adopted by the ICTR in the *Rutagandan*<sup>192</sup> and *Musema*<sup>193</sup> cases. The subjective theory recognizes that perpetrators of genocide can stigmatize, and thus define, the victim group positively or negatively. Positive stigmatization distinguishes the target group based on the perpetrator’s assessment of the group’s peculiar characteristics (i.e., dark skin, attending Synagogue, social and cultural traits, etc.).<sup>194</sup> On the other hand, by negative stigmatization, the perpetrator defines the characteristics of his or her national, ethnical,

---

<sup>190</sup> Prosecutor v. Jelusic, *supra* note 61, p 70. (The Trial Chamber did not explain why it claimed that objective determination of religious groups is still possible. As noted above, religious characteristics seem no less and no more immutable than those of nationality, ethnicity or race).

<sup>191</sup> *Id.*, p 70.

<sup>192</sup> Prosecutor v. Rutaganda, *supra* note 172, p 55.

<sup>193</sup> Prosecutor v. Musema, *supra* note 67, p 161.

<sup>194</sup> *Id.*, p 71.

racial, or religious group and disassociates others that lack those characteristics.<sup>195</sup> The rejected individuals form a distinct (and protected) group by virtue of their exclusion.<sup>196</sup>

Although the Convention does not require perpetrators to belong to a different group than the victims,<sup>197</sup> a case of genocide where the victim and perpetrator belonged to the same group may be difficult to establish because the perpetrator is likely to have chosen the victims on grounds besides nationality, ethnicity, religion or race.<sup>198</sup> For example, the killing of moderate Hutus in Rwanda by Hutus does not qualify as genocide because the moderate Hutus were persecuted because of their perceived political alignment or social association with the Tutsis. Negatively stigmatized or not, groups so-targeted based upon such other criteria do not qualify for protection under the Convention.<sup>199</sup>

Since “[g]enocide is a crime that we punish, not based upon the underlying acts themselves (murder, assault, etc.), but based upon the special intent with which those acts were accomplished, ... [w]ithout a subjective definition, the aims of the Convention are thwarted because the conduct and intentions of the perpetrator, which we seek to punish, may bear no relation to an “objective” measure of the group attacked.”<sup>200</sup> Therefore, neither the objective nor the subjective approach should be dispositive. As the *Jelisić* court noted, the “perilous exercise” of defining groups “using objective and scientifically irreproachable criteria” does not necessarily lead to sensible results corresponding “to the

---

<sup>195</sup> Prosecutor v. Musema, *supra* note 67, p 71.

<sup>196</sup> Id. See, Helen Fein, GENOCIDE: A SOCIOLOGICAL PERSPECTIVE 20 (1993) (arguing that negative stigmatization could be used to “[make] the case that genocide could be committed by perpetrators of the same ethnicity who justified their murders by an ideology which reclassified and labeled the victims, discriminating their collaborators and those to be saved as a new kind of people..”).

<sup>197</sup> Whitaker Report, *supra* note 85, at 37.

<sup>198</sup> David L. Nersessian, The Razor’s Edge: Defining and Protecting Human Groups Under the Genocide Convention, 36 CORNELL INT’L L.J. 293, 310 (2003).

<sup>199</sup> Id.

<sup>200</sup> Id., at 313-14.

perceptions of the persons concerned by such categorization.”<sup>201</sup> On the other hand, the group may exist solely because the perpetrators conceived of it as a group and not because of a predefined description.<sup>202</sup> Perpetrators often irrationally and inconsistently define the victim group.<sup>203</sup> Therefore, as noted by the Trial Chamber in *Bagilishema*:

The Chamber notes that the concepts of national, ethnical, racial, and religious groups enjoy no generally or internationally accepted definition. Each of these concepts must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension. 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 could be considered by the Chamber as a member of the protected group, for the purposes of genocide.<sup>204</sup>

Thus, as has been suggested by both the Trial Chambers of the ICTY and ICTR, the determination of whether a particular group may be considered protected from the crime of genocide should be made on a case-by-case basis, taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.<sup>205</sup> It is better to redefine the law than weaken it by denying

---

<sup>201</sup> See *Prosecutor v. Jelusic*, *supra* note 61, p 70; *Prosecutor v. Jelusic*, Case No. IT-95-10, pp 53-77 (ICTY Appeal Chamber Jul. 5, 2001), available at [www.un.org/icty](http://www.un.org/icty) [hereinafter *Jelusic* (AC)].

<sup>202</sup> Thomas W. Simon, *supra* note 34, at 245.

<sup>203</sup> *Id.*

<sup>204</sup> See *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T (ICTR Appeal Chamber Jul. 3, 2002), available at [www.ictt.org](http://www.ictt.org) [hereinafter *Bagilishema*], P 65. See also *Prosecutor v. Rutaganda*, *supra* note 178, p 56; *Prosecutor v. Krstic*, *supra* note 101, p 557 (“The Chamber identifies the relevant group by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics”).

<sup>205</sup> *Prosecutor v. Musema*, *supra* note 67, p 162; *Prosecutor v. Akayesu*, Judgment, *supra* note 45, p 122, at 702, and n.56; *Prosecutor v. Rutaganda*, *supra* note 178, p 58.

its insufficiency. In any event, whatever approach is adopted, the inquiry should be limited to whether the group is within any of the four protected groups under the Convention.<sup>206</sup> For it is without doubt that under a strict application of the Convention and the ICC as presently worded, the crime of genocide is only applicable to a national, ethnical, racial and religious group.<sup>207</sup>

### **6.3.2. CRIMES AGAINST HUMANITY**

#### **6.3.2.a. The Development of the Legal Prohibition of Crimes Against Humanity**

##### **I. Before World War II**

Unlike the crime of genocide which was defined in the Genocide Convention of 1948 and remained unchanged for nearly half a century by the time the ICC Statute was drafted, crimes against humanity have never been consistently defined in a single treaty. On the contrary, the definition and development of crimes against humanity has continue to evolve and clarified in several legal international instruments since these crimes first received international legal recognition in the St. Petersburg Declaration of 1868.<sup>208</sup> Noting that the Declaration was aimed at limiting the use of explosives or incendiary projectiles as “contrary to the laws of humanity”, the parties agreed to draw up additional instruments “in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and

---

<sup>206</sup> See Prosecutor v. Jelusic, *supra* note 61, pp 69-72.

<sup>207</sup> See, Amy E. Ray, The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries, 46 AM. U. L. REV. 793, 821-22 (1997) (observing that there is no protection for gender-based groups under the Genocide Convention).

<sup>208</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, Adam Roberts & Richard Guelff eds, 30-31 (Oxford: Clarendon Press 2d ed., 1989) [hereinafter St. Petersburg Declaration of 1868].

to conciliate the necessities of war with the laws of humanity.”<sup>209</sup> However, no additional instrument was drawn until the First Hague Peace Conference in 1899 unanimously adopted the Martens clause.<sup>210</sup> The Martens clause which forms part of the preamble to the Hague Convention respecting the laws and customs of war on land provides as follows:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>211</sup>

The Martens clause was reaffirmed by the Contracting Parties to the 1907 Hague Convention IV concerning the Law and Customs of War on Land.<sup>212</sup> Similarly, the Martens clause was incorporated virtually unchanged in subsequent humanitarian law instruments such as the four Geneva Conventions and their Additional Protocols I and II.<sup>213</sup> Although the Martens Clause did not contain the particular acts which are prohibited as crimes against humanity, it is regarded as the first articulation of “the notion

---

<sup>209</sup> St. Petersburg Declaration of 1868, *supra* note 208.

<sup>210</sup> The Martens Clause is named after Fyodor Martens, the Russian diplomat and jurist who drafted it at the first Hague Conference to address the laws of war.

<sup>211</sup> Hague Convention Respecting the Laws and Customs of War on Land of 1899, Preamble, para. 9.

<sup>212</sup> Fourth Hague Convention Respecting the Laws and Customs of War on Land, Preamble, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, [hereinafter 1907 Hague Convention IV], *reprinted* in M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 638 (1992). (A rephrased version of the Martens clause states that “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience”). *Id.*

<sup>213</sup> First Geneva Convention, art. 63; Second Geneva Convention, art. 62; Third Geneva Convention, art. 142; Fourth Geneva Convention, art. 158; Additional Protocol I, Art. 1 (2); and Additional Protocol II, Preamble.



that international law encompassed transcendental humanitarian principles that existed beyond conventional law.”<sup>214</sup>

However, the origin of individual criminal responsibility for crimes against humanity is traced back to the failed attempts to hold members of the Turkish government responsible for the massacres of the Armenians during World War I.<sup>215</sup> After World War I, the governments of France, Great Britain, and Russia on May 24, 1915, issued a joint declaration denouncing the Ottoman Empire’s massacre of the Armenians in Turkey as “crimes against humanity and civilization,” for which the Allied government would hold personally responsible “all members of the Ottoman government and those of their agents who are implicated in such massacres.”<sup>216</sup> On January 25, 1919, the Allied governments set up a fifteen member Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War which concluded *inter alia*, that the Central Empires together with their allies, Turkey and Bulgaria acted in barbarous or illegitimate methods “in violation of the established laws and customs of war and the elementary laws of humanity”.<sup>217</sup>

---

<sup>214</sup> Beth Van Schaak, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 *COLUM. J. TRANSNATIONAL L.*, 787, 795-97 (1999).

<sup>215</sup> Steven R. Ratner and Jason S. Abrams, *supra* note 118, at 46.

<sup>216</sup> Declaration of France, Great Britain and Russia, May 24, 1915, (cited in Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 *YALE J. INT’L L.* 221, 262 (1989); M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 62 (2d rev. ed., 1999). The May 28, 1915, date quoted by Egon Schwelb, *Crimes Against Humanity*, 23 *BRIT. Y.B. INT’L L.* 178, 181 (1946) is a misprint. See Vahakn N. Dadrian, *ibid.*, at 262 n. 129.

<sup>217</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference [hereinafter 1919 Peace Conference Report], Versailles, March 1919, Conference of Paris 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *reprinted in* 14 *Am. J. Int’l L.* (1920) (Supp.), p. 95, 123-124; Treaty of Peace Between the Allied and Associated Powers and Germany Versailles, June 28, 1919, arts 227-230, 11 *Martens* (3d) 323, *reprinted in* M. Cherif Bassiouni, *supra* note 216, at 551-52 [hereinafter Versailles Treaty]. The military tribunals were to be national tribunals established by the states of the victim’s nationality or, if the victims were of more than one nationality, international and composed of members of military tribunals of the states of the victims. Versailles Treaty, Art. 229. *See generally* James F. Willis, *PROLOGUE TO NUREMBERG* (1982).

The 1919 Peace Conference Commission for the first time indicated that violations of the laws of humanity include crimes such as murders and massacres, systematic terrorism, putting hostages to death, torture of civilians, deliberate starvation of civilians, rape, abduction of girls and women for the purpose of enforced prostitution, deportation of civilians, internment of civilians under inhuman conditions, forced labor of civilians in connection with the military operations of the enemy, imposition of collective penalties and deliberate bombardment of undefended places and hospitals.<sup>218</sup>

Consequently, the 1919 Peace Conference Commission recommended that “all persons belonging to enemy countries . . . who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”<sup>219</sup> However, the U.S. members of the Commission argued against criminal prosecution because in their view, the standard of laws and principles of humanity was too vague to provide individuals adequate notice of the crime and as such, the concept of laws of humanity was ‘not the object of punishment by a court of justice’.<sup>220</sup> Thus, Versailles Treaty concluded shortly by the Allied Powers did not include any provision for the prosecution of violators of crimes against humanity.<sup>221</sup> Eventually, no person was prosecuted for violations of the laws of war and the laws of humanity in the Ottoman Empire because of national opposition and Allied loss of interest.<sup>222</sup>

---

<sup>218</sup> 1919 Peace Conference Commission Report, *supra* note 217, at pp. 95, 114-115 (the factual allegations are contained in a 29-page annex which is not reprinted in the American Journal of International Law).

<sup>219</sup> *Id.*

<sup>220</sup> Benjamin Ferencz, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE, Vol. 1, 30 (London: Oceana, 1980); Lord Wright, War Crimes Under International Law, 62 LAW Q. REV. 40, 49-49 (1946); Egon Schwelb, *supra* note 216, at 181-82; Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 47.

<sup>221</sup> Article 228 of the Versailles Treaty only called for the trial of German military personnel for war crimes. See Versailles Treaty, *supra* note 217, art. 228.

<sup>222</sup> Vahakn N. Dadrian, *supra* note 216, at 221; David Matas, Prosecuting Crimes Against Humanity: The Lessons of World War I, 13 FORDHAM INT’L L. J. 86 (1989).

## II. “Crimes Against Humanity” in the Nuremberg Charter, Control Council Law No. 10, and the Tokyo Charter

Although the 1919 Conference recommended that violations of the laws of humanity covers offenses committed on the territory of Germany and its Allies against their own nationals, during World War II, there was no clearly identified law of war which protected victims who share the same nationality with the accused. However, the degree of Germany’s atrocities against its nationals during World War II, particularly, its desire to exterminate all persons of Jewish descent, acted as a catalyst for the first attempt to prosecute perpetrators of crimes against humanity. After the end of World War II, the Allied Powers in 1943 established the United Nations War Crimes Commission (UNWCC).<sup>223</sup> The UNWCC, bothered by the unparalleled record of atrocities by the Nazi regime recommend to the Allied Governments that “the retributive action of the United Nations should not be restricted to what was traditionally considered as war crimes in the technical sense, namely, a violation of the laws and customs of war.”<sup>224</sup>

As a result, the Charter of the International Military Tribunal<sup>225</sup> adopted by the Allied Powers for the trial of the Major War Criminals marked the beginning of the modern notion of “crimes against humanity.”<sup>226</sup> The Nuremberg Charter became the first international instrument to define crimes against humanity. Article 6(c) of the Nuremberg Charter defined crimes against humanity as follows:

---

<sup>223</sup> History of the U.N. War Crimes Comm’n and the Development of the Laws of War complied by the U.N. War Crimes Comm’n (1948) [hereinafter UNWCC], *reprinted* in M. Cherif Bassiouni, *supra* note 216, at 570.

<sup>224</sup> UNWCC, *supra* note 223, at 193-95; Egon Schwelb, *supra* note 216, at 184-85. (Egon Schwelb was a legal officer for the United Nations War Crimes Commission).

<sup>225</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S 279, 286-88 [hereinafter Nuremberg Charter].

<sup>226</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 47.

murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>227</sup>

Article 6(c) created two types of crimes against humanity, namely crimes of the “murder-type” such as murder, extermination, enslavement, deportation, and “other inhuman acts” on the one hand, and “persecutions” on political, racial, or religious grounds.”<sup>228</sup> Reference to the phrase “on political, racial or religious grounds” serves as clarifying the basis of persecution, rather than imposing a requirement of discriminatory motive for inhuman acts.<sup>229</sup> Also, as observed by Egon Schwelb, article 6 of the Nuremberg Charter maintained the distinction made in 1919 between violations of the laws and customs of war on the one hand, which is referred to as “war crimes in Article 6(b), and offences against the laws of humanity on the other, which is referred to as “crimes against humanity” in article 6(c) of the Nuremberg Charter.<sup>230</sup> The Nuremberg Tribunal convicted sixteen of the eighteen Nazi leaders indicted for crimes against humanity.<sup>231</sup>

Also, Control Council Law No. 10, which formed the legal basis for a series of subsequent trials at Nuremberg within each of the Allied occupation zones provided for the prosecution of crimes against humanity.<sup>232</sup> Article II(c) of the CCL offers a

---

<sup>227</sup> Nuremberg Charter, *supra* note 225, art. 6(c).

<sup>228</sup> Report of the International Law Commission, U.N.GAOR, 5th Sess., Supp. No. 12, at p 120, U.N. Doc. A/1316 (1950); Egon Schwelb, *supra* note 216, at 190; and UNWCC, *supra* note 223, at p. 179.

<sup>229</sup> Phyllis Hwang, Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court, 22 FORDHAM INT’L L.J. 457, 462-63 (1998).

<sup>230</sup> Egon Schwelb, *supra* note 225, at 181-83.

<sup>231</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 47.

<sup>232</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3,

definition of crimes against humanity which differs slightly from the Nuremberg Charter.<sup>233</sup> The definition omitted the words “in execution of or in connection with any crime within the jurisdiction of the Tribunal” thereby removing the requirements that crimes against humanity occur in connection with either “crimes against peace” or “war crimes.”<sup>234</sup> Similarly, the Tokyo Charter provided for the prosecution of crimes against humanity.<sup>235</sup> Article 5(c) of the Tokyo Charter definition of crimes against humanity differs from the Nuremberg Charter and CCL No. 10. While it maintained the connection between “crimes against humanity” and “crimes against peace” or “war crimes” it omitted persecution on religious grounds.<sup>236</sup>

The tribunal established pursuant to the Tokyo Charter tried twenty-five Japanese leaders for war crimes and crimes against humanity, but the judgment of the Tribunal addressed only war crimes.<sup>237</sup> Trial of major war criminals by allied tribunals or by German courts under supervision by Allies in their occupied zones in accordance with

---

Berlin, Jan. 31, 1946, *reprinted* in M. Cherif Bassiouni, *supra* note 212 at 590 [hereinafter Control Council Law No. 10 or CCL].

<sup>233</sup> *Id.* Article II (c) of CCL No. 10 defines “crimes against humanity” as:

Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

*Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See Charter for the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20 (as amended Apr. 26, 1946, 4 Bevens 27), *reprinted* in 1 Benjamin B. Ferencz, *DEFINING INTERNATIONAL AGGRESSION* 522, 523 (1975) [hereinafter Tokyo Charter].

<sup>236</sup> Article 5(c) of the Tokyo Charter states:

Crimes Against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or in violation of the domestic law of the country where perpetrated. Leaders organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

*Id.*

<sup>237</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 47-48.

CCL No. 10 resulted in the convictions of hundreds of Nazi soldiers for crimes against humanity.<sup>238</sup>

### **III. The International Law Commission and the Codification of “Crimes Against Humanity”**

In 1947, the United Nations through Resolution 177(II) mandated the newly created International Law Commission (ILC) to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.<sup>239</sup> In 1950, the ILC issued its report on the formulation of the Nuremberg Principles.<sup>240</sup> Article VI of the Nuremberg Principles contained a definition of crimes against humanity as “murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime”.<sup>241</sup>

The 1950 ILC definition of crimes against humanity maintained the nexus between crimes against humanity and crimes against peace or war crimes as contained in article 6(c) of the Nuremberg Charter. However, it had to omit the phrase “before or during the war” since the phrase in the Nuremberg Charter referred to a particular war, the World War II.<sup>242</sup>

---

<sup>238</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 48.

<sup>239</sup> G.A. Res. 177 (II), U.N. GAOR, 2d Sess., 123rd plen. mtg., at 111, U.N. Doc A/519 (1947). See Lyal S. Sunga, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 8-9 (1997).

<sup>240</sup> International Law Commission Report on the Principles of the Nuremberg Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12 at 11, U.N. Doc. A/1316 (1950), *reprinted* in M. Cherif Bassiouni, *supra* note 225, at 624-26.

<sup>241</sup> *Id.*, art. VI(c). D.H.N. Johnson, The Draft Code of Offences Against the Peace and Security of Mankind, 4 INT’L & COMP. L.Q. 445, 449-50 (1955).

<sup>242</sup> Report of the International Law Commission, U.N. GAOR, 5th Sess., Supp. No. 12, at para. 123, U.N. Doc. A/1316 (1950).

The next phase of the works of the ILC was directed towards the drafting of a Code of Offenses against the Peace and Security of Mankind. The ILC Draft Code of Offenses codifies acts which would constitute violations of international law and entail international responsibility if committed or tolerated by a State. The first ILC Draft Code adopted in 1951 contained a definition of crimes against humanity.<sup>243</sup> The ILC 1951 Draft Code for the first time prohibited inhuman acts on cultural grounds and severed the nexus between crimes against humanity with war crimes or crime against peace. Also, by beginning the definition of crimes against humanity with the words “inhuman acts such as”, the 1951 Draft Code blurred the previous distinction between “murder-type” and “persecution” categories of crimes against humanity.

In 1954, the ILC adopted another Draft Code of Offenses which also contained a revised definition of crimes against humanity.<sup>244</sup> Article 2 of the ILC 1954 Draft Code defines crimes against humanity as:

Inhuman acts such as murder, extermination, enslavement, deportation, or persecutions, committed against any civilian population on social, political, racial, religious, or cultural grounds by the authorities of a state or by private individuals acting at the instigation or with the toleration of such authorities.<sup>245</sup>

---

<sup>243</sup> Report of the International Law Commission to the General Assembly, Draft Code of Offences Against the Peace and Security of Mankind, U.N. GAOR, 6th Sess., Supp. No. 9, U.N. Doc. A/1858 (1951); [hereinafter ILC 1951 Draft Code]. Article 2 of the 1951 Draft Code defines crimes against humanity as:

Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious, or cultural grounds, when such acts are committed in execution of or in connection with other offences defined in this article.

Id.

<sup>244</sup> Report of the International Law Commission to the General Assembly, Draft Code of Offences Against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., Supp. No. 9, ch. 3, U.N. Doc. A/2691 (1954). [hereinafter ILC 1954 Draft Code].

<sup>245</sup> ILC 1954 Draft Code, Id., art. 2(11).

The 1954 Draft Code omitted the phrase “when such acts are committed in execution of or in connection with other offences defined in this article” which was contained in the 1951 Draft Code, to make it clear that these acts are punishable whether or not they were committed in connection with another crime prohibited by the Draft Code. Further, the 1954 Draft Code in addition to retaining persecution on cultural grounds from the 1951 Draft Code, added persecution on social grounds.

Also, the 1954 Draft Code maintained the prohibition introduced by the 1951 Draft Code regarding the previous distinction between the “murder-type” and “persecution-type” categories of crimes against humanity. The abolition of this distinction has been criticized because of the implication that “inhumane acts,” including murder, extermination, enslavement and deportation, as well as persecutions are now required to be committed on social, cultural, political, racial, and religious grounds.<sup>246</sup> Contrast with the previous situation in the Nuremberg principles where it was only persecution which was required to be on “political, racial or religious grounds.”<sup>247</sup>

In addition, under the ILC 1954 Draft Code, the Commission decided that inhuman acts committed by individuals without State’s direction or assistance should not be regarded as international crimes. Therefore, article 2(11) was drafted to indicate that an individual is responsible for “inhumane acts” only if it can be shown that the individual committed these acts “at the instigation or with the toleration” of the authorities of a State.<sup>248</sup> The requirement of State involvement has been question in light

---

<sup>246</sup> D.H.N. Johnson, *supra* note 241, at 465. For the redrafting of the 1954 Draft Code, see Doudou Thiam, Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, Agenda Item 5, U.N. Doc. A/CN.4/398 (1986), *reprinted* in 2 Year Book of Int’l L. Comm’n 53, 38th Sess., U.N. Doc. A/CN.4/SER.A/1986/Add.1 (1986). Mr. Thiam’s 1991 version was more specific and far more elaborate than the 1954 Draft Code.

<sup>247</sup> See Nuremberg Charter, *supra* note 225, art. 6(c).

<sup>248</sup> ILC 1954 Draft Code, *supra* note 244, art. 2(11).



of the Genocide Convention which holds individuals responsible if they commit genocide under any circumstances.<sup>249</sup>

After the 1954 ILC Draft Code, ILC deactivated further works on the draft code for several decades. However, within this interlude, particular crimes against humanity, such as genocide, apartheid and enforced disappearance, were identified in subsequent international instruments.<sup>250</sup> The next ILC Draft Code was adopted in 1991.<sup>251</sup> The 1991 Draft Code contained a definition of crimes against humanity under a provision entitled “Systematic or Mass Violation of Human Rights”.<sup>252</sup> In 1996, the ILC adopted yet another Draft Code of Crimes Against the Peace and Security of Mankind.<sup>253</sup> Article 18 of the ILC 1996 Draft Code proclaimed an expanded definition of crimes against humanity.<sup>254</sup>

---

<sup>249</sup> D.H.N. Johnson, *supra* note 241, at 465.

<sup>250</sup> See Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, UN GAOR, 47th Sess., Supp. No. 49, at 207, UN Doc. A/47/49 (1992); Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, OEA Doc. AG/RES. 1256 (XXIV-0/94), *reprinted in* 33 I.L.M. 1529 (1994).

<sup>251</sup> Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the Int’l Law Commission on the Work of Its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 265, U.N. Doc. A/46/10 (July 19, 1991) [hereinafter 1991 Draft Code].

<sup>252</sup> *Id.* Article 21 defines crimes against humanity as:

An individual who commits or orders the commission of any of the following violations of human rights: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds, in a systematic manner or on a mass scale; or deportation or forcible transfer of population shall, on conviction thereof, be sentenced . . .

1991 Draft Code, *supra* note 251, art. 21.

<sup>253</sup> Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR, 48th Sess., at 6-7, U.N. Doc. A/CN.4/L.532 (July 8, 1996) [hereinafter 1996 Draft Code].

<sup>254</sup> Article 18 of the 1996 Draft Code states that:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group:

- a) murder;
- b) extermination;
- c) torture;
- d) enslavement;
- e) persecution on political, racial, religious or ethnic grounds;

The 1991 and 1996 Draft Codes re-established the dichotomy between “murder-type” and “persecution-type” crimes against humanity. In the 1991 Draft Code, an individual is liable for crimes against humanity with or without State policy, but the 1996 Draft Code required the acts to have been carried out at the instigation or direction of a “[g]overnment or by any organization or group”.<sup>255</sup>

Further, both the 1991 and 1996 Draft Codes do not include a requirement that crimes against humanity be committed against a civilian population. There is no explanation in the Commentary to the Draft Code for the elimination of the requirement as an element of the offense of “crimes against humanity” that the acts be directed to a civilian population. This omission leaves room for speculation whether the ILC intended that crimes against humanity be committed against civilian and non-civilian population or against civilian population including ex-combatants. The latter approach seems to be consistent with the development of crimes against humanity and the ICTY opinion in the Rule 61 Decision in the *Vukovar* case.<sup>256</sup>

- 
- f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
  - g) arbitrary deportation or forcible transfer of population;
  - h) forced disappearance of persons;
  - i) rape, enforced prostitution and other forms of sexual abuse;
  - j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Id.

<sup>255</sup> See 1991 Draft Code, *supra* note 251, art. 21; 1996 Draft Code, *supra* note 262, art. 18. For comments on the 1991 and 1992 Draft Codes, see M. Cherif Bassiouni, *supra* note 225, at 186-92; Christian Tomuschat, Crimes Against the Peace and the Security of Mankind and the Recalcitrant Third State, in *WAR CRIMES IN INTERNATIONAL LAW* 41, 49-50 (Yoram Dinstein & Mala Tabory eds., 1996);

<sup>256</sup> Prosecutor v. Mile Msksic, Miroslav Radic, and Veselin Sljivancanin, (Case No. IT-95-13-R 61) Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, April 3, 1996, at para. 29, [hereinafter *Vukovar Hospital Decision*], quoted in Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 643 (Trial Chamber II, May 7, 1997), *reprinted* in 36 I.L.M. 908 (1997) [hereinafter *Prosecutor v. Tadic, Opinion and Judgment*].

Also both Draft Codes mandated that acts constituting crimes against humanity has to be committed in a “systematic manner or on a large scale”.<sup>257</sup> The words “systematic manner” refers to acts committed as a result of methodological plan or policy while “large scale” refers to the degree or multiplicity of victims.<sup>258</sup> These requirements were imposed to distinguish isolated or random act which falls under domestic prosecution from systematic and large scale violations which constitute crimes against humanity.<sup>259</sup> The above works by the ILC may have influenced the development of international law but none of the Draft Codes was directly developed into international instruments.

#### **IV. “Crimes Against Humanity” in the Statutes of the ICTY and ICTR**

The next major development of “crimes against humanity” was its inclusion in the Statutes of the ICTY<sup>260</sup> and ICTR<sup>261</sup> respectively. Both Statutes contain identical list of

---

<sup>257</sup> See 1991 Draft Code, *supra* note 251, art. 21; 1996 Draft Code, *supra* note 253, art. 18. The ILC 1991 Draft Code used the words “systematic” or “mass violations of human rights”.

<sup>258</sup> Report of the International Law Commission on the work of its forty-eighth session U.N. GAOR, 51st Sess., Supp. No. 10, ch. 2, art. 18, at paras. 3 & 4, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/reports/1996/96repfra.htm>.

<sup>259</sup> *Id.*

<sup>260</sup> ICTY Statute, *supra* note 30. Article 5 of the ICTY provides that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

*Id.*

<sup>261</sup> ICTR Statute, *supra* note 31. Article 3 of the ICTR provides that:

prohibited inhuman acts but the differences between the Statutes lie in the chapeau that describes the circumstances under which the commission of those acts amount to a crime against humanity. First, the ICTY Statute which is modeled after the Nuremberg Charter suggests that a nexus to armed conflict, whether international or internal, is required, whereas the ICTR Statute does not require proof of the existence of an armed conflict.

However, the Appeal Chamber of the ICTY in the *Tadic's* case has noted that:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. . . .<sup>262</sup>

On the other hand, while the ICTR requires the crimes to have been committed as part of a widespread or systematic attack, the ICTY does not expressly include such requirement.<sup>263</sup> Also, the ICTR suggests that all acts constituting crimes against

---

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as a part of a wide spread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Id.

<sup>262</sup> Prosecutor v. Tadic, Appeal on Jurisdiction, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 141 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996), available at: <[www.un.org/icty](http://www.un.org/icty)> (citing the Control Council Law No. 10, the 1948 Genocide Convention, and the 1973 Apartheid Convention) [hereinafter Prosecutor v. Tadic, Appeal on Jurisdiction].

<sup>263</sup> While the ICTY definition does not include the requirement that the acts be “systematic and widespread”, the ICTY Tribunal has observed that the term “widespread or systematic” constitutes an

humanity must have been committed on national, political, ethnic, racial, or religious grounds, the ICTY Statute restricted this requirement to persecutions. These differences which have been elaborated on by both Tribunals are discussed in more detail below.<sup>264</sup>

## **V. ICC Statute and Codification of the “Crimes Against Humanity”**

The divergent approaches to the definitions of the crime against humanity indicated above and the body of international jurisprudence on crimes against humanity coming from the decisions of the ad hoc tribunals for Yugoslavia and Rwanda helped shape the debate at the Preparatory Committee and at the Rome Conference. Therefore, the ICC Statute which results from multilateral negotiations contains a more detailed definition of crimes against humanity than any of the previous instrument discussed above. Hence, the most important and authoritative codification of crimes against humanity to date is contained in article 7 of the ICC Statute. Article 7(1) defined crimes against humanity as follows:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

---

essential element of the notion of “crimes against humanity” under the ICTY Statute. See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, *supra* note 264, p 644.

<sup>264</sup> For a legislative history of Article 5 of the ICTY, see M. Cherif Bassiouni & Peter Manikas, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, 538-54 (1996).

- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>265</sup>

Unlike previous instruments, article 7 elaborated on the meaning of “imprisonment”, “persecution”, and “other inhuman acts”. While the list of criminal acts which constitute crimes against humanity under the ICC Statute encompasses the traditional acts which constitute crimes against humanity in the Nuremberg Charter and subsequent instruments, it also includes additional criminal acts. The new acts added by the ICC Statute include “forcible transfer of population”;<sup>266</sup> “severe deprivation of physical liberty in violation of fundamental rules of international law”;<sup>267</sup> “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”;<sup>268</sup> “enforced disappearance of persons”;<sup>269</sup> and “the crime of apartheid”.<sup>270</sup> Article 7 ends the list with a broad category: “other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health”. This leaves the door open to the future inclusion of other acts within the category of crimes against humanity.

---

<sup>265</sup> ICC Statute, *supra* note 1, art. 7(1).

<sup>266</sup> *Id.*, art. 7(1)(d). This is added as an alternative to “deportation”.

<sup>267</sup> *Id.*, art. 7(1)(e). This was added to “imprisonment”, which is contained in the Statutes of the ICTY and ICTR.

<sup>268</sup> *Id.* art. 7(1)(g). This is an improvement to the Statutes of the ICTY and ICTR which recognize only the crime of rape and sexual violence.

<sup>269</sup> *Id.*, art. 7(1)(i).

<sup>270</sup> *Id.*, art. 7(1)(j).

Apart from enumerating the list of criminal acts which constitutes crimes against humanity, article 7(2) of the ICC Statute defines some of the acts such as extermination, enslavement, deportation, torture, forced pregnancy, persecution, the crime of apartheid, and the enforced disappearance of persons as follows:

For the purpose of paragraph 1:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “Extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a 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 the law for a prolonged period of time.<sup>271</sup>

From the above definition, the ICC Statute defines the crimes of torture and enforced disappearance<sup>272</sup> more expansively than the relevant human rights instruments<sup>273</sup> by dissociating them from the requirement of the perpetrator’s official capacity. Generally, ICC definition of crimes against humanity offers a reflection of the development of international law since Nuremberg. Thus, the ICC Statute definition codifies the contemporary notion of crimes against humanity as it has developed from the Nuremberg Charter through the Statutes of the *ad hoc* tribunals, and the case law of those tribunals.

### **6.3.2.b. Changes in the Crimes Against Humanity Under the ICC Statute**

In furtherance of customary international law development in this area, article 7 of the ICC Statute dropped the requirement of a nexus between crime against humanity and armed conflict as well as the requirement of a discriminatory motive. The chapeau reveals that a nexus to an armed conflict or a discriminatory motive is no longer required. These positive developments are discussed below while discussions on the elements of crimes against humanity contained in the chapeau to article 7 follow thereafter.

---

<sup>271</sup> ICC Statute, *supra* note 1, art. 7(2).

<sup>272</sup> *Id.*, art. 7(2)(f)(i).

<sup>273</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Article 1 [hereinafter Convention Against Torture], and Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, preambular para. 3.



## I. Elimination of Nexus to Armed Conflict

The Nuremberg Charter definition of crimes against humanity incorporated a compromise which tied crimes against humanity only “in connection with crimes against peace and war crimes.”<sup>274</sup> Although the UNWCC envisaged crimes against humanity occurring independent of the existence of an armed conflict, the IMT regarded itself as bound by its Charter to confine itself to those crimes against humanity committed after the beginning of World War II because of a requirement to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace or war crimes.<sup>275</sup>

Control Council Law No. 10, which provided the legal basis for a series of subsequent trials at Nuremberg, excluded the requirement that crimes against humanity be committed in execution of or in connection with war crimes or crimes against peace.<sup>276</sup> Thus, tribunals hearing cases pursuant to Control Council Law No. 10 adopted differing approaches concerning whether crimes against humanity could be committed in peace time as well as in war. In the *Einsatzgruppen Case*<sup>277</sup> and in the *Justice Case*,<sup>278</sup> the Tribunals held that crimes against humanity could be committed during peace. In the *Flick Case*<sup>279</sup> and in the *Ministries Case*,<sup>280</sup> the Tribunals held to the contrary.

---

<sup>274</sup> Nuremberg Charter, *supra* note 225, art. 6(c).

<sup>275</sup> See International Military Tribunal (Nuremberg), 1 Trial of Major War Criminals 254-5 (1948).

<sup>276</sup> See H. Levie, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 559 (1993).

<sup>277</sup> U.S. v. Ohlendorf, Case No. 9, *reprinted* in 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Council Law No. 10 (1946-48) 3, 499 (1949) [hereinafter *Einsatzgruppen Case*].

<sup>278</sup> U.S. v. Altstoetter, Case No. 3, *reprinted* in 3 NMT 974 (1949) [hereinafter *The Justice Case*].

<sup>279</sup> U.S. v. Flick, Case No. 5, *reprinted* in 6 NMT 3, 1212-13 (1949) (the court acquitted the defendant of “crimes against humanity” for his acquisition of Jewish property before the war, finding itself without jurisdiction) [hereinafter *The Flick Case*].

<sup>280</sup> U.S. v. von Weizsaecker, Case No. 11, *reprinted* in 14 NMT 1, 316 (1949) (The tribunal dismissed the counts of “crimes against humanity” against officials in the Nazi foreign ministry and other bureaucracies, noting that CCL No. 10 was meant to go no further than the Nuremberg Tribunal itself, which codified international law). [hereinafter *The Ministries Case*].

The requirement of a nexus to an international armed conflict or any conflict was dropped in the Statute of the ICTR. On the other hand, the requirement of a connection of crimes against humanity to armed conflict was contained in article 5 of the ICTY Statute which is similar to that of article 6(c) of the Nuremberg Charter which limited the Nuremberg Tribunal's jurisdiction to "crimes against humanity" committed "before or during the war." Although constrained by the language of the ICTY Statute, the ICTY Appeals Chamber in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadic's* case rightly opined that the requirement of a nexus to armed conflict was peculiar to the Nuremberg Charter and does not appear in subsequent instruments.<sup>281</sup> The Appeals Chamber while holding that "crimes against humanity" may be committed notwithstanding the absence of any connection with an armed conflict, observed as follows:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.<sup>282</sup>

At the Rome Conference, a minority of delegations expressed the view that crimes against humanity could be committed only in the context of an armed conflict. However, the majority of delegations believed that such a limitation would have rendered crimes against humanity largely redundant, as they would have been subsumed in most

---

<sup>281</sup> Prosecutor v. Tadic, Appeal on Jurisdiction, *supra* note 262, pp 140-41.

<sup>282</sup> *Id.*, para. 141.

cases within the definition of “war crimes.”<sup>283</sup> In the view of the majority, such a restriction would have been contrary to post-Nuremberg developments, as observed in statements of the International Law Commission (ILC), judicial decisions and reflected in instruments addressing specific crimes against humanity, such as the Genocide Convention and the Apartheid Convention.<sup>284</sup>

In the end, the ICC Statute’s definition of crimes against humanity made no reference to a nexus to armed conflict thereby affirming that crimes against humanity may be committed not only in war time but also in peacetime or during civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large-scale atrocities committed against civilian population by their government during peace time.<sup>285</sup> Also, it avoids the difficulty of differentiating crimes against humanity from war crimes.

## **II. Elimination of Discriminatory Intent**

Consistent with the Nuremberg Charter, the Tokyo Charter, CCL No. 10 and the Statute of the ICTY, the ICC Statute does not contain an express requirement that crimes against humanity be committed “on national, political, ethnic, racial, religious, or other grounds.”<sup>286</sup> However, the ICC Statute adopted the distinction between “murder-type” crimes against humanity and “persecution-type” crime against humanity which originated

---

<sup>283</sup> Darryl Robinson, Developments in International Criminal Law: Defining “Crimes Against Humanity” at the Rome Conference, 93 AM. J. INT’L. L. 43, 45-6 (1999); Darryl Robison, Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 144-49 (Flavia Lattanzi & William A. Schabas eds., 1999) [hereinafter Essays on the Rome Statute].

<sup>284</sup> Id., Leila Sadat & Richard Carden, *supra* note 112, at 428.

<sup>285</sup> Darryl Robinson, *supra* note 283, at 46.

<sup>286</sup> Although the ICTY Statute contains no such requirement, the ICTY Trial Chamber applied it in the *Tadic’s* case. See Prosecutor v. Tadic, Opinion and Judgment, *supra* note 256, pp 650-52. However, the Appeals Chamber reversed this holding in its judgment of July 15, 1999. See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para 305 (Appeals Chamber, July 15, 1999) [hereinafter Prosecutor v. Tadic, Appeals Chamber, Judgment].

from Article 6(c) of the Nuremberg Charter.<sup>287</sup> Thus, the ICC Statute provides that discriminatory intent is required only for persecution on “political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.<sup>288</sup>

With this approach, the ICC Statute adopted the dominant view that discriminatory motive is relevant only to the crime of persecution.<sup>289</sup> Therefore, the elimination of discriminatory intent accords with the concept of humanity as victim of crimes against humanity which essentially characterizes this crime. As noted by the ICTY in the *Erdemovic* case:

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated.<sup>290</sup>

The approach by the ICC Statute avoids the imposition of an onerous and unnecessary burden on the prosecution to establish discriminatory intent for crimes against humanity. Moreover, the requirement of a discriminatory motive, particularly

---

<sup>287</sup> Note that the ICTR Statute does not follow this distinction as it required a discriminatory motive for all crimes against humanity. See ICTR Statute, *supra* note 31, art. 3.

<sup>288</sup> ICC Statute, *supra* note 1, art. 7(1)(h).

<sup>289</sup> Darryl Robinson, *supra* note 283, at 46 (noting that when the 1954 ILC draft Code of Crimes suggested that discriminatory motive was required for all crimes against humanity, it was strongly criticized for misconstruing the Nuremberg Charter in D. H. N. Johnson, Draft Code of Offenses against the Peace and Security of Mankind, *supra* note 241. Robinson notes that Johnson’s article was widely received as expressing the correct interpretation, and the subsequent ILC draft codes have reflected Johnson’s approach).

<sup>290</sup> Prosecutor v. Erdemovic, Judgment, Case No. IT-96-22-T (Trial Chamber, November 29, 1996).

when coupled with exhaustive list of prohibited grounds, could have resulted in the inadvertent exclusion of some very serious crimes against humanity. Thus, the expansion of the group in the ICC Statute to include “political”, “cultural”, “gender” and “other grounds that are universally recognized as impermissible under international law” is a remarkable development that allows extension of protection to other groups subjected to “persecution-type” crime against humanity.

### **6.3.2.c. Elements of the Crime Against Humanity**

The discussions contained in the various codifications of the crimes against humanity and the case-law jurisprudence of the ICTY and ICTR developed the characteristics of the crimes against humanity which is now expressed in the chapeau of article 7 of the ICC Statute. Under the chapeau of article 7 of the ICC Statute, “crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>291</sup> According to paragraph two of article 7, for “attack directed against any civilian population” to constitute crime against humanity, it must be a course of conduct involving the multiple commission of acts prohibited in paragraph 1 carried out “pursuant to or in furtherance of a State or organizational policy to commit such attack”.<sup>292</sup>

From the foregoing, to establish that crimes against humanity have taken place, the Prosecutor in addition to establishing the occurrence of any of the prohibited acts enumerated in article 7(1)(a-k) must also establish that the perpetrator committed the acts as part of (1) a widespread or systematic attack, (2) directed against a civilian population, (3) with knowledge that the attack was part of, or intended to be part of a widespread or

---

<sup>291</sup> ICC Statute, *supra* note 1, art. 7(1).

<sup>292</sup> *Id.*, art. 7(2).

systematic attack against a civilian population, and (4) was carried out pursuant to State or organizational policy.<sup>293</sup>

### **I. Widespread or Systematic Attack**

Both the Statute of the ICTR and article 7 chapeau of the ICC Statute require that crimes against humanity be committed either as part of a “widespread” or “systematic” attack against a civilian population.<sup>294</sup> The term “widespread” has been defined as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>295</sup> On the other hand, “systematic” means “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”<sup>296</sup> In other words, “widespread” focuses on the number or multiplicity of victims,” whereas “systematic” refers to the existence of a pattern of conduct or methodical plan.<sup>297</sup>

Although the ICTY Statute does not contain this requirement as a threshold issue,<sup>298</sup> the ICTY has noted that the requirement that the attack be “widespread or systematic” is an essential element of the notion of crime against humanity as it elevates

---

<sup>293</sup> See the Finalized draft text of the Elements of Crimes adopted by Preparatory Commission for the International Criminal Court, at its 23rd meeting on 30 June 2000 UN Doc. PCNICC/2000/1/Add.2, p. 9-17. *See also*, Prosecutor v. Akayesu, *supra* note 45, p 578.

<sup>294</sup> ICTR Statute, *supra* note 31, art. 3; ICC Statute, *supra* note 1, art. 7.

<sup>295</sup> Prosecutor v. Akayesu, *supra* note 45, p 580.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> See Interpretive Report of the Secretary-General, para. 48, which states that crimes against humanity are those “committed as part of a widespread or systematic attack against any civilian population”. The report was approved by Security Council Resolution 827 (May 25, 1993), 32 ILM 1203 (1993). In the Security Council discussion of Resolution 827, Ambassador Albright stated:

Secondly, it is understood that Article 5 applies to all acts listed in that article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread *or* systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds.

UN Doc. S/PV.3217, at 16 (1993).

ordinary common crimes from the realm of national crimes to the level of crimes under international law.<sup>299</sup> Therefore, the rationale for the requirement that the attack be widespread or systematic and directed against any civilian population is designed to target crimes involving a course of conduct thereby excluding isolated or random acts from the notion of crimes against humanity.<sup>300</sup>

In view of the above, it is not the single killing that is targeted, but mass killings, unless the single killing can be linked to a “systematic” policy or to “widespread” attacks.<sup>301</sup> Once “there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity”.<sup>302</sup> In other words, a “single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.”<sup>303</sup>

The requirement that the attack be “widespread” or “systematic” should be read disjunctively thereby eliminating the need to prove a cumulation of these two elements.<sup>304</sup> As noted by the Trial Chamber of the ICTY, “it is now well established that the requirement that the acts be directed against a civilian ‘population’ can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts.”<sup>305</sup> Once it is convinced that either requirement is met, the Trial Chamber is not obliged to consider whether the alternative qualifier is also satisfied.

---

<sup>299</sup> Prosecutor v. Tadic, *supra* note 45, pp. 646-48.

<sup>300</sup> *Id.*, Decision on Form of the Indictment, para. 11 (Nov. 14, 1995).

<sup>301</sup> M. Cherif Bassiouni, *supra* note 216, at 193-99.

<sup>302</sup> Vukovar Hospital Decision, *supra* note 256, p 30.

<sup>303</sup> Prosecutor v. Tadic, *supra* note 45, p 649.

<sup>304</sup> Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, at para. 93 (June 12, 2002)

<sup>305</sup> *Id.*, p 644.

## II. Attack Directed against Any Civilian Population

The requirement that the attack be directed against “any civilian population” originated from the Nuremberg Charter and was adopted in the Statutes of the ICTY, ICTR, and the ICC.<sup>306</sup> An attack is “directed against” any civilian population in the context of crimes against humanity where the civilian population is the primary object of the attack rather than an incidental target of the attack.<sup>307</sup> On the other hand, the word “any” serves to clarify that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.<sup>308</sup> The term is broad enough to support the notion that for purposes of crimes against humanity, all civilians are protected be they nationals of the perpetrator, foreign nationals or stateless.<sup>309</sup>

With respect to the term “civilian” the UNWCC took the position that the term should be construed to exclude attacks against armed forces.<sup>310</sup> Latter jurisprudence however supports a more expansive definition of the term “civilian.” Thus, the Commission of Experts established pursuant to Security Council Resolution 780 noted

---

<sup>306</sup> See Nuremberg Charter, *supra* note 225, art. 6(c), ICTY Statute, *supra* note 30, art. 5; ICTR Statute, *supra* note 31, art. 3; and ICC Statute, *supra* note 1, art. 7.

<sup>307</sup> Prosecutor v. Kunarac, *supra* note 304, para. 92.

<sup>308</sup> Prosecutor v. Tadic, *supra* note 256, p 634; Prosecutor v. Jelusic, *supra* note 61, p 54. Schwelb in his analysis of the text of Article 6(c) of the Charter wrote that “From the word ‘against any civilian population’ it follows that a crime against humanity can be committed both against the civilian population of territory which is under belligerent occupation and against the civilian population of other territories, irrespective of whether they are under some other type of occupation or whether they are under no occupation at all. The civilian population protected by the provision may therefore also include the civilian population of a country which was occupied without resort to war. . . .” Egon Schwelb, *supra* note 216, at 188.

<sup>309</sup> Darryl Robinson, *supra* note 283, at 51 (citing UNWCC, *supra* note 223, at 193).

<sup>310</sup> UNWCC, *supra* note 223, at 193.



that while the term “any civilian population” principally applies to noncombatants, it does not necessarily exclude those “who at one particular point in time did bear arms.”<sup>311</sup>

Similarly, the ICTR has construed the term “civilian population” broadly such that “the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”<sup>312</sup> In the *Vukovar Hospital Decision*, civilians or resistance fighters who had laid down their arms were considered victims of crimes against humanity.<sup>313</sup> And “in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian . . .”<sup>314</sup>

The term “population” ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.<sup>315</sup> It places emphasis on the collective rather than on the individual victim,<sup>316</sup> and calls for some element of scale of the attack which will exclude single or isolated acts.<sup>317</sup> The ICC Statute appears to reflect this view in article 7(2)(a) which refers to “a course of conduct involving the multiple commission of acts referred to in paragraph 1.”<sup>318</sup>

---

<sup>311</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. SCOR, Annex, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter Commission of Experts’ Report]; Annexes to the Final Report, U.N. Doc S/1994/674/Add.2, P 75 (1994) [hereinafter Annexes to Commission of Experts’ Report].

<sup>312</sup> Prosecutor v. Tadic, *supra* note 256, p 643.

<sup>313</sup> Vukovar Hospital Decision, *supra* note 256, p 29.

<sup>314</sup> Prosecutor v. Kunarac, *supra* note 304, p 435.

<sup>315</sup> Prosecutor v. Tadic, Form of the Indictment, No. IT-94-1-T, para. 11 (Nov. 14, 1995).

<sup>316</sup> Prosecutor v. Jelusic, *supra* note 61, p 54.

<sup>317</sup> See Prosecutor v. Tadic, *supra* note 256, p 644. UNWCC, *supra* note 223, at 193 (noting that the term “population” “appears to indicate that a larger body of victims is visualized and that single or isolated acts against individuals may be considered to fall outside the scope of the concept.”)

<sup>318</sup> ICC Statute, *supra* note 1, art. 7(2)(a).

### III. *Mens Rea/Knowledge of the Act*

Apart from satisfying the general mental element under article 30 of the ICC Statute,<sup>319</sup> the Prosecutor must also establish under article 7(1) that the perpetrator knew the widespread or systematic nature of the attack and that his or her criminal activity constitutes part of the attack.<sup>320</sup> Therefore, “the acts of the accused must comprise part of a pattern of widespread or systematic attack directed against a civilian population and that the accused must have known that his [or her] acts fit into such pattern.”<sup>321</sup> In other words, “to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his [or her] act is part of the attack.”<sup>322</sup>

The connection to a widespread or systematic attack is the essential and central element that raises an “ordinary” crime to one of the most serious crimes known to humanity. Therefore, “to convict a person of this most serious international crime, if the person was truly unaware of this essential and central element would violate the principle *actus non facit reum nisi mens sit rea*”.<sup>323</sup> However, it shall not be a defense for the accused to argue that he or she was not aware that the acts constitute crimes against humanity. In the Canadian case of *Finta*, the Canadian Supreme Court noted as follows:

However, it would not be necessary to establish that the accused knew that his or her actions were inhumane. For example, if the jury was satisfied that Finta was aware of the conditions within the boxcars [in which the Jews were deported] that would be

---

<sup>319</sup> Under Article 30 of the ICC Statute, “knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”

<sup>320</sup> ICC Statute, *supra* note 1, art. 7(1).

<sup>321</sup> Prosecutor v. Tadic, *supra* note 256, p 248.

<sup>322</sup> Prosecutor v. Kayishema, *supra* note 55, p 134 (noting that “part of what transforms an individual’s act into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite mens rea element of the accused.”)

<sup>323</sup> Darryl Robinson, *supra* note 283, at 52.

sufficient to convict him for crimes against humanity even though he did not know that his action in loading the people into those boxcars were inhumane.<sup>324</sup>

It is not expected that the obligation to prove the accused *mens rea* should impose an inappropriate burden on the prosecution. Given the inescapable notoriety of any widespread or systematic attack against a civilian population, it is difficult to imagine a situation where a person could commit a murder (for example) as part of such an attack while credibly claiming to have been completely unaware of that attack.<sup>325</sup>

#### **IV. State or Organizational Policy**

To ensure that a spontaneous wave of widespread, but completely unrelated crimes do not qualify as crime against humanity, an “attack directed against any civilian population”, is further defined as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.<sup>326</sup> On the other hand, according to the Introduction to the Elements of Crimes against humanity, “it is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.”<sup>327</sup> This understanding was further clarified in the footnote to this part of the text as follows:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy

---

<sup>324</sup> Regina v. Finta, 1 S.C.R. at 820 (Can. 1994). See also Prosecutor v. Tadic, *supra* note 256, p 657.

<sup>325</sup> Darryl Robinson, *supra* note 283, at 52.

<sup>326</sup> ICC Statute, *supra* note 1, art. 7(2)(a).

<sup>327</sup> ICC Elements of Crimes, *supra* note 116, Introduction.

cannot be inferred solely from the absence of governmental or organizational action.<sup>328</sup>

By virtue of the Elements of Crimes, it follows that the policy element includes a policy of commission or a policy of omission to stop the commission of the attacks. According to Professor Bassiouni, because crimes against humanity consists of a number of crimes which may be found in many national criminal laws, the “state action or policy”, provides the international or jurisdictional element which transforms the hitherto domestic crimes to international crimes.<sup>329</sup>

The policy element was not explicitly required in the Nuremberg Charter but the *travaux preparatoires* of the Nuremberg Charter and the decisions of the Nuremberg Tribunal referred to the “policy of terror” and a “policy of persecution, repression, and murder of civilians.”<sup>330</sup> Also, the jurisprudence of the military tribunals suggests that the policy element was a requisite for crimes against humanity.<sup>331</sup>

This policy element has been adopted by decisions of national courts. In the French cases of *Barbie* and *Touvier* respectively, the French Cour de Cassation required that “the criminal act be affiliated with the name of a state practicing a policy of ideological hegemony.”<sup>332</sup> The Netherlands Hoge Raad in the *Menten* case held that “the concept of crimes against humanity also requires . . . that the crimes in question form part

---

<sup>328</sup> ICC Elements of Crimes, *supra* note 116, p 116, n 6.

<sup>329</sup> M. Cherif Bassiouni, *supra* note 216, at 243-245.

<sup>330</sup> See, excerpts of the Nuremberg Judgment compiled by the UNWCC, *supra* note 232, 194-95, *reprinted* in M. Cherif Bassiouni, *supra* note 212, at 572-73.

<sup>331</sup> See, Darryl Robinson, *supra* note 283, at 49 (citing the decision of the U.S. Military Tribunal in Nuremberg in the *Altstotter* case, regarding “proof of systematic governmental organisation of the acts as a necessary element of crimes against humanity.” 6 LAW REPORTS OF TRIALS OF MAJOR WAR CRIMINALS 1, 79-80 (UN War Crimes Commission, 1948)).

<sup>332</sup> *Barbie*, French Court of Cassation (Criminal Chamber), June 3, 1988, *reprinted* in 100 I.L.R 331, 336 (1995); *Touvier* French Court of Appeal of Paris (First Chamber of Accusation), April 13, 1992, *reprinted* in 100 I.L.R. 338, 350-51 (1995); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351). *Barbie*, Cass. Crim., Dec. 20, 1985, 1985 Bull. Crim., No. 407, at 1053; *Touvier*, Cass. Crim., Nov. 27, 1992, 1992 Bull. Crim., No. 394, at 1085.

of a system based on terror or constitute a link in consciously pursued policy directed against particular groups of peoples.”<sup>333</sup> Similarly, the Supreme Court of Canada in the *Finta* case held that “what distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.”<sup>334</sup>

These cases appear to recognize the policy element of crimes against humanity, but some commentators have criticized the traditional conception that the policy must be that of a State<sup>335</sup> or the requirement of an “official policy of discrimination.”<sup>336</sup> While it may be the case that crimes against humanity could be committed only by States or individuals exercising State power during World War II, events after World War II particularly in the former Yugoslavia and Rwanda have shown that multiplicity of crimes can be committed by persons not associated with a recognized State. Consequently, the Security Council Resolutions establishing the Statutes of the ICTY and ICTR made no reference to State policy requirement.<sup>337</sup> Recognizant of this development, the ICTY observed that customary international law has evolved “to take into account forces which,

---

<sup>333</sup> *Public Prosecutor v. Menten*, The Netherlands, District Court of Amsterdam, Extraordinary Penal Chamber, 75 I.L.R. 361-63 (1981).

<sup>334</sup> *Regina v. Finta*, *supra* note 324, at 814.

<sup>335</sup> See Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 360 (1994) (questioning both the requirement of State action and the requirement that the State be one “practicing a hegemonic political ideology.” Wexler argued that it is illogical to require State action for crimes against humanity but not for genocide and notes that it would significantly hinder prosecutions for atrocities committed in civil wars or other situations, in which identification of the offending “State” is difficult to make).

<sup>336</sup> See Mark R. von Sternberg, *A Comparison of the Yugoslav and Rwandan War Crimes Tribunals: Universal Jurisdiction and the “Elementary Dictates of Humanity,”* 22 BROOKLYN J. INT'L L. 111 (1996), argues that the suggestion of the UN Commissions of Inquiry (for former Yugoslavia and for Rwanda) that an “official policy of discrimination” is required would add a difficult evidentiary hurdle.

<sup>337</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 67.

although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory.”<sup>338</sup>

In light of the above, the ICTY expressed the view that crimes against humanity may be committed by “entities exercising *de facto* control over a particular territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization”.<sup>339</sup> Accordingly, the Tribunal held that the phrase “directed at any civilian population entailed that “there must be some form of a governmental, organizational or group policy to commit these acts”.<sup>340</sup> Also, in the 1996 Draft Code of Crimes against the Peace and Security, ILC stated that “[a] crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.”<sup>341</sup>

The retention of State policy in the ICC Statute is recognition that there is still some sort of ‘official’ action associated with the concept of crime against humanity.<sup>342</sup> On the other hand, inclusion of organizations is recognition that non-state actors such as terrorist groups, *de facto* government or armed insurrections or other non-state entities seeking political or ideological relevance or territorial control “can and do commit egregious assaults on human dignity that should incur individual responsibility under international law”.<sup>343</sup> However, the term “organizational policy” should be interpreted broadly to include public and private organizational policy whether aimed at public or

---

<sup>338</sup> Prosecutor v. Tadic, *supra* note 256, p 654.

<sup>339</sup> Id., pp 654-655; Prosecutor v. Kupreskic Judgment, pp 551-52; Darryl Robinson, *supra* note 283, at 50.

<sup>340</sup> Prosecutor v. Tadic, *supra* note 256, p 644.

<sup>341</sup> ILC 1996 Draft Code, *supra* note 253, art. 18.

<sup>342</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 68-69 (noting that the Prosecutor of the ICTY and ICTR has not indicted private persons in the sense of those not associated with one of the sides in the conflict).

<sup>343</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 67.

private gain only. Significantly, the ICTY has noted that a policy to commit crimes against humanity need not be formal, and can be inferred from the manner of the crime. Thus, evidence that “the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not” should suffice.<sup>344</sup>

### **6.3.3. WAR CRIMES**

#### **6.3.3.a. Introduction**

The first comprehensive codification of war crimes was in the Leiber Code issued by President Lincoln in 1863 during the American Civil War. However, as noted in part I of this study, the origin of war crimes in international law is traced to the Hague Conference of 1899<sup>345</sup> and the Hague Conference of 1907<sup>346</sup> as well as the 1925 Geneva Protocol I to the 1907 Hague Convention.<sup>347</sup> The Hague Law as both Conventions are known is concerned with regulating the materials and means of combat itself, such as permissible weaponry and targets on land, sea, and air, as well as neutrality and prohibited attacks on undefended towns, use of arms designed to cause unnecessary suffering, use of poisonous weapons, collective penalties, and pillage; and includes various protections for hospitals, religious and cultural sites, and family honor.<sup>348</sup>

Following the aftermath of World War I which witnessed violations of the Hague Law, including killings of civilian populations, bombings of nonmilitary targets,

---

<sup>344</sup> Prosecutor v. Tadic, *supra* note 256, p 653.

<sup>345</sup> Convention Concerning the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, 1 Bevans 247 (entered into force, September 4, 1900).

<sup>346</sup> Convention Concerning the Laws and Customs of War on Land (Hague IV), October 18, 1907, 36 Stat. 2277; 1 Bevans 631(entered into force, January 26, 1910).

<sup>347</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 3 *Martens Nouveau Recueil* (3d) 461 (entered into force, February 8, 1928).

<sup>348</sup> See Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 81.

unnecessary destruction of private industry, sinking of merchant ships, and looting,<sup>349</sup> the International Committee of the Red Cross in 1929 facilitated what would be later known as the Geneva Law to supplement the Hague Law.<sup>350</sup> The Geneva Law focuses on the protection of classes of victims of armed conflict such as wounded soldiers, prisoners of war, and civilians.

After the end of World War II, the Nuremberg Charter, the Tokyo Charter, and Control Council Law No. 10 contain provision on “war crimes” enabling the Tribunals to prosecute persons accused of war crimes during the war.<sup>351</sup> Four years later, another codification of war crimes was carried out under the 1949 four Geneva Conventions to update the 1929 Geneva Conventions.<sup>352</sup> In 1977, the four Geneva Conventions were supplemented by Protocols I & II.<sup>353</sup> Protocol I applicable to international armed conflict elaborates, clarifies, and expands on much of the Geneva Conventions.<sup>354</sup> Protocol II refers to non-international armed conflict offering new rules and protections for civil

---

<sup>349</sup> Remigiusz Bierzanek, *The Prosecution of War Crimes*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 562 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

<sup>350</sup> See, Geneva Convention for the Amelioration of Conditions of the Wounded and Sick in Armies in the Field, July 27, 1929, 118 L.N.T.S. 303; Geneva Convention Relative to the Treatment of Prisoners of War, July 29, 1929, 118 L.N.T.S. 343 [hereinafter Geneva Law].

<sup>351</sup> Nuremberg Charter, *supra* note 225, art. 6(b).

<sup>352</sup> Each Geneva Convention protects a different class of persons and property. The First Convention protects wounded and sick members of the armed forces in the field. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950). The Second protects wounded, sick, and shipwrecked members of the armed forces at sea. See Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950). The Third protects prisoners of war. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950). The Fourth protects civilian persons in times of war. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950). Each Convention contains a more specific definition of precisely who is protected by its terms. [hereinafter Geneva Conventions].

<sup>353</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (entry into force 7 December 1979); [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 (entry into force 7 December 1978) [hereinafter Additional Protocol II].

<sup>354</sup> Additional Protocol I, *supra* note 353, art. 1.



conflicts meeting a certain threshold.<sup>355</sup> The Geneva Conventions have been universally ratified by States and undoubtedly represent customary international law.<sup>356</sup> The Statutes of ad hoc Tribunal for the former Yugoslavia and Rwanda also contain provisions for war crimes.<sup>357</sup>

Unlike previous instruments which provided very brief provisions concerning war crimes, article 8 of the ICC Statute which defines war crimes, is one of the Statute's longest and most comprehensive codification of war crimes to date. Article 8 of the ICC Statute defines war crimes in four categories: grave breaches of the Geneva Conventions; other serious violations of laws and customs applicable in international armed conflict; serious violations of article 3 common to the Geneva Conventions of 1949 committed during a non-international armed conflict "against persons taking no active part in the hostilities"; and other serious violations of the laws and customs applicable in non-international armed conflicts.<sup>358</sup> Therefore, the application of war crimes under the ICC will depend on whether the acts occurred in international or non-international armed conflict.

#### **6.3.3.b. International Armed Conflict**

War crimes occurring in international armed conflict are divided into two categories. Article 8(2)(a) which incorporates most of the graves breaches provisions of the four Geneva Conventions provides that for the purpose of this Statute, "war crimes" means:

---

<sup>355</sup> Additional Protocol II, *supra* note 360, art. 1.

<sup>356</sup> Steven R. Ratner & Jason S. Abrams, *supra* note 118, at 82; Theodor Meron, The Geneva Conventions as Customary International Law, 81 AM. J. INT'L L 348 (1987).

<sup>357</sup> ICTY Statute, *supra* note 30, arts. 2 & 3; ICTR Statute, *supra* note 31, art. 4.

<sup>358</sup> ICC Statute, *supra* note 1, art. 8(2)(a)-(c), (e).

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.<sup>359</sup>

Victims of “grave breaches” must be “protected persons” under the relevant Geneva Conventions.<sup>360</sup> In accordance with article 2 common to the Geneva Conventions, an international armed conflict exists and thus triggers the application of the Conventions in situations of declared war or of any other armed conflict between two or more State Parties to the Conventions, even if one of the States does not recognize the war or armed conflict.<sup>361</sup> Also, the Conventions apply to all cases of partial or total occupation of the territory of a State party to the Conventions, even if the said occupation meets with no armed resistance.<sup>362</sup>

---

<sup>359</sup> ICC Statute, *supra* note 1, art. 8(2)(a).

<sup>360</sup> *Id.* See, Geneva Convention IV, *supra* note 352, art. 4.

<sup>361</sup> See article 2 common to the 1949 Geneva Conventions, *supra* note 352.

<sup>362</sup> *Id.*

Further, the fact that one of the parties to the armed conflict is not a State Party to the Conventions does not suspend the application of the Conventions between the parties who are States Parties to the Conventions. In the event that the non-State party accepts and applies the Conventions, the States Parties to the Convention will then be obligated to apply the Conventions in relation to the said State.<sup>363</sup>

It follows that the Court can only exercise jurisdiction over graves breaches of the Geneva Convention when the victims are nationals of a State party to the Conventions involved in the international armed conflict or nationals of a non-State party which accepts and applies the Conventions, and the victims have become *hors de combat* due to injury, shipwreck, illness, or prisoners of war or civilians who are “in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>364</sup> However, the ICTY has observed that “nationals” in the traditional international law sense are protected if they cannot rely upon the protection of the State of which they are citizens especially in situations where they belong to a national minority.<sup>365</sup> For purposes of nationality, the perpetrator need not know the nationality of the victim provided the perpetrator is aware that the victim belonged to an adverse party to the conflict.<sup>366</sup>

---

<sup>363</sup> See Article 2 common to the 1949 Geneva Conventions, *supra* note 352.

<sup>364</sup> See William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 46 (2003) (noting that the first three Geneva Conventions which protect only members of the armed forces of a party to the international armed conflict and the fourth Geneva Convention which provides that “protected persons” must be “in the hands of a Party to the conflict or Occupying Powers of which they are not nationals”); Frits Kalshoven, CONSTRAINTS ON THE WAGING OF WAR 40-41 (ICRC, 2nd ed, 1991) (drawing up a list of protected persons based on Article 4 of Third Geneva Convention).

<sup>365</sup> Prosecutor v. Tadic, Appeals Chamber, Judgment, *supra* note 286, pp 164-6. The Appeals Chamber noted that the primary purpose of the Convention “is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting this protection, Article 4 [of the Fourth Geneva Convention] intends to look into the substance of relations, not to their legal characterization as such”. *Id.*, p 168.

<sup>366</sup> ICC Elements of Crimes, *supra* note 116, art. 8(2)(a)(i), para. 3, n.33.

The second category of war crimes occurring during international armed conflict is contained in Article 8(2)(b) and includes:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) 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 clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) 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;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) 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;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an

annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.<sup>367</sup>

This definition focuses on Hague Law because it consists of crimes found in the regulations annexed to the 1907 Hague Convention IV and Protocol I to the 1949 Geneva Convention as well as new developments in the laws of war.<sup>368</sup> In all, twenty-six actions are prohibited under this section, including some new crimes to the laws of war such as attacks directed against humanitarian or peacekeeping missions,<sup>369</sup> acts that severely

---

<sup>367</sup> ICC Statute, *supra* note 1, art. 8(2)(b).

<sup>368</sup> William A. Schabas, *supra* note 364, at 47-50.

<sup>369</sup> ICC Statute, *supra* note 1, art. 8(2)(b)(iii). This provision mirrors the Convention on the Safety of United Nations and Associated Personnel, Annex to U.N. Doc. A/RES/49/59 (1994), *reprinted* in 34 I.L.M. 482, (1995) (entered into force January 15, 1999); For further reading see Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621(1995); M.-Christiane Bourloyannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT'L & COMP. L.Q. 560 (1995); Major Corn, *United Nations Convention*

damage the environment,<sup>370</sup> population transfers,<sup>371</sup> sexual offenses,<sup>372</sup> and the conscription or enlistment of child soldiers.<sup>373</sup>

With respect to the words, “within the established framework of international law” which is contained in subparagraphs 2(b) and (e), it has been suggested that “these words were intended to include implicitly considerations of the *jus in bello* such as military necessity and proportionality”.<sup>374</sup> Some delegates at the Rome Conference however, expressed the view that these words also included requirements such as those in article 85(3) and (4) of Protocol I, dealing with causing death or serious injury to body or health or when committed willfully and in violation of the Geneva Conventions or the Protocols.<sup>375</sup> Also, the words appears to dispel doubts as to the customary law status of subparagraphs 2(b) and (e) thereby avoiding any requirement on the Prosecutor to establish the *nullum crimen sine lege* of each of the numerated acts independent of the Statute.<sup>376</sup>

---

on the Safety of United Nations (UN) and Associated Personnel Enters Into Force, Army Law., Feb. 1999, at 21.

<sup>370</sup> See ICC Statute, *supra* note 1, art. 8(2)(b)(iv). For a full discussion on the law of war and environmental damage, see Mark J.T. Caggiano, The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form, 20 B.C. ENVTL. AFF. L. REV. 479 (1993); Michael D. Diederich, Jr., “Law of War” and Ecology - A Proposal for a Workable Approach to Protecting the Environment Through the Law or [sic] War, 136 MIL. L. REV. 137 (1992); Stephanie N. Simonds, Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform, 29 STAN. J. INT’L L. 165 (1992).

<sup>371</sup> ICC Statute, *supra* note 1, art. 8(2)(b)(viii); See William A. Schabas, *supra* note 371, at 48, n. 91 (noting that this provision led Israel to vote against the ICC Statute). On the topic of the legality of population transfer in international law, see Christopher M. Goebel, Population Transfer, Humanitarian Law, and the Use of Ground Force in U.N. Peacemaking: Bosnia and Herzegovina in the Wake of Iraq, 25 N.Y.U. J. INT’L L. & POL. 627 (1993).

<sup>372</sup> ICC Statute, *supra* note 1, art. 8(2)(b)(xxii).

<sup>373</sup> *Id.*, art. 8(2)(b)(xxiv). Under this provision, a child soldier is anyone less than fifteen years of age. Article 8(2)(b)(xxiv) codifies the 1989 Convention on the Rights of the Child, GA Res. 44/25, Annex, art.38; and Additional Protocol I to the Geneva Convention, *supra* note 363, art. 77(2).

<sup>374</sup> Mahnoush H. Arsanjani, Developments In International Criminal Law: The Rome Statute of the International Criminal Court, 93 AM. J. INT’L L. 22, 33 (1999).

<sup>375</sup> *Id.*

<sup>376</sup> Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, 10 EUR. J. INT’L L. 144, 151-152 (1999).

Unlike grave breaches violations, there is no requirement that the victims of “other serious violations of the laws and customs” should be “protected persons” because the focus of the Hague Law was aimed at punishing the architects of the war.<sup>377</sup> Thus, several of the provisions in this category list weapons that have been prohibited in warfare.<sup>378</sup> Also, by adopting Protocol I, the ICC Statute provides for individual criminal responsibility for violations of the Hague Law which was first introduced under Protocol I.<sup>379</sup>

### **6.3.3.c. Non-International Armed Conflict**

Until the adoption of the 1949 Geneva Convention, war crimes have been traditionally regarded as serious violations of the law applicable to international armed conflict.<sup>380</sup> States were very reluctant to accept international regulation of internal conflict or civil war. This reluctance was manifested in the 1949 Geneva Convention which only made provision for non-international armed conflict in common article 3 of the four Geneva Conventions. States’ objection to the application of international law to non-international armed conflict continued during the 1977 update of the Geneva Conventions. Efforts to expand the scope of common article 3 were met with opposition such that Protocol II only contained a slight improvement on common article 3 and avoided any suggestion that grave breaches of war crime could be committed during a non-international armed conflict.<sup>381</sup>

---

<sup>377</sup> William A. Schabas, *supra* note 364, at 47.

<sup>378</sup> Roger S. Clark, *Methods of Warfare That Cause Unnecessary Suffering or Are Inherently Indiscriminate: A Memorial Tribute to Howard Berman*, 28 CAL. W. INT’L L.J. 379 (1998).

<sup>379</sup> See Protocol Additional I, *supra* 353, art. 85.

<sup>380</sup> Yves Sandoz, Christophe Swinarski, & Bruno Zimmerman, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, 1320 (Yves, Swinarski, & Zimmerman eds., 1987).

<sup>381</sup> William A. Schabas, *supra* note 364, at 51.



Similarly, the Statute of the ad hoc tribunal for the former Yugoslavia contain provisions proscribing grave breaches of the four Geneva Conventions of 1949, and the laws or customs of war which limits the Tribunal's jurisdiction to international armed conflict.<sup>382</sup> On the other hand, the Statute of the ad hoc Tribunal for Rwanda provides that ICTR shall have jurisdiction in respect of war crimes when committed only in non-international armed conflict.<sup>383</sup> However, notwithstanding the clear provisions of the Statute of the ICTY, the Tribunal held that the ICTY has jurisdiction to try serious violations of laws or customs of war irrespective of whether "the serious violations has occurred within the context of an international or internal armed conflict".<sup>384</sup> While this decision has been criticized as an attempt at "judicial law making", it has also been praised as reflection of customary international law development in this area of law.<sup>385</sup>

Article 8 of the ICC Statute reflects this development by expressly providing for the application of war crimes in non-international armed conflicts. However, the expansion of war crimes to include acts committed in non-international armed conflict was by no means a foregone conclusion when the treaty negotiations began.<sup>386</sup> Even though article 3 common to the 1949 Geneva Conventions and Protocol Additional II of 1977 prohibit certain acts in internal armed conflict, not all governments were happy to

---

<sup>382</sup> ICTY Statute, *supra* note 30, arts. 2 & 3.

<sup>383</sup> ICTR Statute, *supra* note 31, art. 4.

<sup>384</sup> Prosecutor v. Tadic, Jurisdiction Decision, *supra* note 262, pp 86-94. *See also* Theodor Meron, International Criminalization of Internal Atrocities, 89 AM. J. INT'L L. 554 (1995).

<sup>385</sup> William A. Schabas, *supra* note 364, at 42.

<sup>386</sup> See Darryl Robinson and Herman von Hebel, War Crimes in Internal Conflicts: Article 8 of the ICC Statute, 2 Y.B. INT'L HUM. L., 193, 199 (1999) (noting that "it remained controversial throughout the negotiations whether war crimes in internal armed conflict should be included in the Statute at all. Some delegations strongly believed that the ICC Statute should not include such norms, as it was feared that ICC competence over such crimes would be an unacceptable intrusion on sovereignty and would undermine the general acceptability of the Statute"); Thomas Graditzky, War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court, 5 U.C. DAVIS J. INT'L L. & POL'Y, 199, 210 (1999) (recalling that "the issues of whether to include a non-international armed conflicts clause and what threshold should be adopted dominated discussions").

see some of them defined as war crimes entailing individual criminal responsibility. Partly as a result of the jurisprudence of the ad hoc tribunals and partly due to the obvious prevalence of internal conflicts globally, those objections were overcome.<sup>387</sup>

The ICC Statute is thus the first international treaty to explicitly provide for individual criminal responsibility for “serious” violations of common article 3 and for twelve other “serious violations of the laws and customs” applicable in non-international armed conflict, including intentional attacks against civilians, crimes of sexual and gender violence, and forced displacement.<sup>388</sup>

War crimes during non-international armed conflict are divided into two categories. The first set of war crimes during non-international armed conflict which covers serious violations of article 3 common to the four Geneva Conventions is contained in Article 8(2)(c) which provides:

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted

---

<sup>387</sup> See Daryl Robinson and Hermann von Hebel, *supra* note 386, at 199.

<sup>388</sup> ICC Statute, *supra* note 1, art. 8(2)(c)(e)(i), (vi) and (viii).

court, affording all judicial guarantees which are generally recognized as indispensable.<sup>389</sup>

Article 8(2)(c) is *impari material* with common article 3 of the four Geneva Conventions. However, under the ICC Statute, “serious violations of common article 3” does not apply “...to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”<sup>390</sup> This limitation which is also contained in Protocol II is intended to ensure that only non-international armed conflict of certain degree and intensity should trigger the application of the Convention.<sup>391</sup> According to the ICTY Trial Chamber:

the test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; *the intensity of the conflict and the organization of the parties to the conflict*. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.<sup>392</sup>

This formula has been adopted and applied in other cases by the ICTY and ICTR tribunals to determine the existence of non-international armed conflict.<sup>393</sup>

---

<sup>389</sup> ICC Statute, *supra* note 1, art. 8(2)(c).

<sup>390</sup> *Id.*, art. 8(2)(d).

<sup>391</sup> Additional Protocol II, *supra* note 353, art. 1.

<sup>392</sup> Prosecutor v. Tadic, *supra* note 256, p 562 [emphasis added]. *Also see*, Prosecutor v. Delalic, et al., Trial Chamber Judgment, Case No. IT-96-21, paras. 183-84 (16 November 1998) (noting that “in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved”).

<sup>393</sup> See, Prosecutor v. Akayesu, *supra* note 45, p 620 (holding that in order to determine the existence of armed conflict it is “necessary to evaluate both the intensity and organization of the parties to the conflict”); Prosecutor v. Furundzija, Trial Chamber Judgment, Case No. IT-95-17/1, para 59 (December 10, 1998) (applied the formula to determine the existence of armed conflict between the Croatian Defence Council (HVO) and the Army of Bosnia and Herzegovina (ABiH) during May 1993); Prosecutor v. Kunarac, Kovac and Vukovic, Appeals Chamber Judgment, Case No. IT-96-23, para. 56 (June 12, 2002) (The Appeals Chamber applied the formula in upholding the Tribunal’s position on the existence of armed conflict between Bosnian Serbs and Bosnian Muslims in the municipalities of Foca, Gacko and Kalinovik). *Also see*, Prosecutor v. Milorad Krnojelac, Trial Chamber II Judgment, Case No. IT-97-25, P 51 (March 15,

The second category of war crimes during non-international armed conflict is drawn mainly from Protocol II but also from the Geneva Conventions, Protocol I and the United Nations Convention on the Safety of United Nations and Associated Personnel.<sup>394</sup>

Article 8(2)(e) of the ICC Statute defines this category of war crimes as:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) 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;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

---

2002); and Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcać, Trial Chamber Judgment, Case No. IT-98-30/1, P 123 (November 2, 2001).

<sup>394</sup> However, not all serious violations of Protocol II are included in Article 8. See Christopher Keith Hall, The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AM. J. INT'L L 331, 336 (1998); Christopher Keith Hall, The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AM. J. INT'L L 124 (1998).

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;<sup>395</sup>

Acts which constitute war crimes under this subparagraph are mainly drawn from Protocol Additional II.<sup>396</sup> Article 8(2)(e) is intended to protect intentional attacks directed against civilians, buildings belonging to non-governmental and humanitarian organizations, and prohibits sexual and gender violence as well as child soldiers as is the case under international armed conflict. However, this subparagraph has a lower threshold application than Protocol II because it applies to “armed conflicts that take place in the territory of a State when there is *protracted* armed conflict between governmental authorities and organized armed groups or between such groups”.<sup>397</sup>

Contrast with Protocol II which requires dissident or other organized armed groups to *control* territory, maintain responsible command over troops sufficient to carry

---

<sup>395</sup> ICC Statute, *supra* note 1, Article 8(2)(e).

<sup>396</sup> See Christopher Keith Hall, *supra* note 394, at 336.

<sup>397</sup> ICC Statute, *supra* note 1, Article 8(2)(f) (emphasis added).

out sustained and concerted military operations, and possess the ability to implement international agreement.<sup>398</sup> The lowering of the threshold:

is important because it reduces the chances that a situation arises in a state that can be qualified neither as an internal conflict nor as an emergency as provided for in the human rights conventions. A better protection of human rights may be achieved because of this reduction.<sup>399</sup>

Also, the use of the term “protracted” implies that hostilities need not be continuous because interruptions in fighting do not suspend the obligations of States Parties to the Convention.<sup>400</sup> On the other hand, the use of the term “governmental authorities” broadens the scope of the parties to non-international armed conflict. According to Zimmerman, the term “has to be understood as including not only regular armed forces of a State but all different kinds of armed personnel provided they participate in protracted armed violence, including, where applicable, units of national guards, the police forces, border police or other armed authorities of a similar nature.”<sup>401</sup>

Furthermore, Article 8(2)(f) extends the application of Protocol II to armed conflict between warring factions without the involvement of a *de jure* governmental authority. Hitherto, such situations, irrespective of their scale, were generally not recognized in international humanitarian law as constituting armed conflicts.<sup>402</sup> This development makes it possible to apply laws of war to non-international armed conflict between belligerent groups who are the principal parties to armed conflict especially in

---

<sup>398</sup> Protocol II, *supra* note 353, art. 1(1), (emphasis added).

<sup>399</sup> Adriaan Bos, The Universal Declaration of Human Rights and the Statute of the International Criminal Court, 22 *FORDHAM INT’L L.J.* 229, 233 (1998).

<sup>400</sup> See Andreas Zimmermann, War Crimes Committed in an Armed Conflict Not of an International Character, in Otto TRIFFTERER, *COMMENTARY ON STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 285 (1999).

<sup>401</sup> Andreas Zimmermann, *supra* note 407, at 286 (noting that this was due to the “experiences of the last twenty years after the adoption of the Second Additional Protocol”).

<sup>402</sup> See however the *Tadic* Jurisdiction Decision by the ICTY, *supra* note 286.

situations where State structures have disintegrated such as was the case in Somalia and Liberia.<sup>403</sup> The recognition that *de facto* armed conflict may exist between organized armed groups is significant in ensuring a greater degree of protection to the victims of such situations.

In conformity with Protocol II to the 1949 Geneva Convention, the ICC Statute excludes application of “other serious violations of the laws and customs applicable in armed conflicts not of an international character”, from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>404</sup> Further, in extending the application of certain war crimes to non-international armed conflict, the ICC Statute in conformity with the Geneva Conventions and Protocol Additional II, reiterated that this will not affect the general right of States “to maintain or establish law and order or to defend their unity and territorial integrity by all *legitimate means*”.<sup>405</sup>

This limitation implies that the Court has no jurisdiction over atrocities committed during internal disturbances and tensions. This provision is intended to assure States that the Court’s jurisdiction over war crimes committed during non-international armed conflict will not intrude on State sovereignty.<sup>406</sup> However, the provision generally, and

---

<sup>403</sup> See, ICRC, *Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law*, Geneva (Jan. 19-23, 1998), available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/02CED570ABFDD384C1256B66005C91C6>.

<sup>404</sup> ICC Statute, *supra* note 1, Article 8(2)(f); Protocol II, *supra* note 353, art. 1(2).

<sup>405</sup> ICC Statute, *supra* note 1, art. 8(2)(g) (emphasis added); Protocol II, art. 3(1). This provision generally, and in particular, the words “by all legitimate means” should be strictly interpreted to avoid resort by States as a defense to war crimes.

<sup>406</sup> Additional Protocol II, *supra* note 360, art. 3(1); Darryl Robinson & H von Hebel, *supra* note 386, at 205 (noting that some States such as China and Russia expressed the concern at the Rome Conference that the provisions of the ICC Statute on non-international armed conflict may be used for unjustified interference in their internal affairs).

in particular, the words “by all legitimate means” should be strictly interpreted to avoid resort by States as a defense to war crimes.

#### **6.3.3.d. Requirements for the Application of War Crimes**

##### **I. Part of a Policy or Large Scale**

In a broad sense, the Court’s jurisdiction over war crimes in international armed conflict emanates “in particular” when those crimes are “committed as a part of a plan or policy or as part of a large scale commission of such crimes”.<sup>407</sup> The words “in particular” serves as a compromise between those in favor of a jurisdictional threshold and those opposed to such limitation.<sup>408</sup> This requirement has been described as a “non-threshold threshold”<sup>409</sup> in the sense that while it does not limit the Court’s jurisdiction only to cases involving large-scale commission of war crimes or cases involving plans or policies to commit war crimes, it requires the Court to take into consideration the gravity of the crime in determining admissibility under article 17(1)(d) of the Statute.<sup>410</sup>

Therefore, unlike crimes against humanity, there is no requirement for the act to be widespread or systematic or as in the case of genocide, war crimes do not require a very high level of specific intent.<sup>411</sup> Thus, a war crime can be a single, isolated,

---

<sup>407</sup> ICC Statute, *supra* note 1, Article 8(1).

<sup>408</sup> Herman von Hebel & Darryl Robinson, *supra* note 28, at 107-08.

<sup>409</sup> *Id.*, at 124.

<sup>410</sup> Leila Nadya Sadat & S. Richard Carden, *supra* note 112, at 434-35; ICC Statute, *supra* note 1, art. 17(1)(d) which provides that:

Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where ... (d) the case is not of sufficient gravity to justify further action by the Court.

<sup>411</sup> William A. Schabas, *supra* note 364, at 42.



dispersed or random act. This means that the Court may assume jurisdiction over isolated acts of war crimes committed by individuals.<sup>412</sup>

However, discussing United States argument that U.S. nationals involved in peacekeeping operations may be unwittingly charged with war crimes by a “politically” minded Prosecutor, Professor Cherif Bassiouni, noted that a situation in which war crimes charges were brought against U.S. military personnel on peacekeeping missions would not hold up because the ICC Statute defines war crimes as primarily acts committed “as part of a plan or policy or as part of a large scale commission of such crimes.”<sup>413</sup> Therefore, he argued that isolated incident carried out by a “trigger-happy Marine wouldn’t fall under that.”<sup>414</sup> Suffice it to note that to reach this desired result, the Court would have to be guided by the purpose of the Statute which requires the Court to prosecute only the “most serious crimes of concern to the international community as a whole”.<sup>415</sup>

## **II. The Existence of Armed Conflict**

In order for an act to qualify as a war crime, the act must occur during an armed conflict.<sup>416</sup> This requirement which is jurisdictional provides the essential difference between a war crime and a crime against humanity is that “[a] war crime can only be prosecuted if committed during a war, whereas a crime against humanity can be

---

<sup>412</sup> Marie-Claude Roberge, *The New International Criminal Court: A Preliminary Assessment*, 325 INT’L REV. RED CROSS 671, 674 (Dec. 1998); William A. Schabas, *supra* note 371, at 44; Von Hebel & Robinson, *supra* note 28, at 124.

<sup>413</sup> See James Podgers, *War Crimes Court Under Fire*, 1998 ABA Journal 68 (Sept.1998).

<sup>414</sup> *Id.*, at 68.

<sup>415</sup> ICC Statute, *supra* note 1, art. 5(1).

<sup>416</sup> *Id.*, art. 8 2(d).

prosecuted during times of war or peace”.<sup>417</sup> Thus, the existence of an armed conflict, international or non-international is a pre-condition for holding individuals accountable for war crimes.

As to what constitutes an armed conflict, the Appeals Chamber of the International Tribunal for the former Yugoslavia proffered that:

[A]n 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.<sup>418</sup>

The above definition encompasses international and non-international armed conflict.<sup>419</sup> While international armed conflict is between two or more States, non-international armed conflict results from a protracted armed violence between governmental authorities and organized armed group(s) on the one hand or between organized armed groups within a State. In other words, internal armed conflict may exist between two armed groups without the involvement of a State or governmental authorities. The recognition that protracted armed conflict may exist between “organized

---

<sup>417</sup> Rana Lehr-Lehnardt, One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court, 16 BYU J. PUB. L. 317, 340 (2002).

<sup>418</sup> Prosecutor v. Tadic, Appeal on Jurisdiction, *supra* note 262, p 70.

<sup>419</sup> This definition was imported into the ICC Statute with a minor change in that while the ICTY referred to “protracted armed *violence*”, the ICC Statute used the words “protracted armed *conflict*”, see ICC Statute, *supra* note 1, art. 8(2)(f). The substitution of the word “violence” for “conflict” has been criticized as inaccurate and capable of introducing a new crime. See Claus Kress, War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice, 30 ISR. Y.B. Human Rights 103, 117-118 (2001) (arguing that “it was not the intention of the drafters to substitute “protracted armed conflict” for “protracted armed violence.” Noting that the French version of the Rome Statute includes the original wording of the *Tadic* decision, he suggested that the English version should not give rise to misunderstanding). This is significant as Article 128(1) of the ICC Statute states that “Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.” Thus, the ICRC has suggested that “the addition of the word “protracted” to armed conflict seems to be redundant since protracted violence is a constituent element of an armed conflict not of an international character. See, International Committee of the Red Cross (ICRC) Working Paper, June 29, 1999, available at [http://www.igc.org/icc/html/icrc8\\_2e\\_19990629.html](http://www.igc.org/icc/html/icrc8_2e_19990629.html). Therefore, in view of this, it has been suggested that the provision “should not be considered as creating yet another threshold of applicability.” See, Theodor Meron, The Humanization of Humanitarian Law, 94 AM. J. INT’L L. 239, 260 (2000).

armed groups” is “both welcome and realistic”,<sup>420</sup> as often times, this kind of conflict constitutes the vast majority of contemporary internal conflicts.

It is pertinent to note that armed conflict could also “be international in character alongside an internal armed conflict”.<sup>421</sup> In other words, an internal armed conflict may become international or assume an international character. This may result in situations where another State directly intervenes in an internal conflict through its armed force or indirectly where a party to the internal conflict acts at the direction of the other State. In some situations, it is difficult to ascertain when an armed group is acting at the direction of another State.<sup>422</sup>

Concerning the commencement of armed conflict, it has been suggested that the “firing of weapons by soldiers of opposing sides across a contested border or the uninvited intervention of the armed forces of one state, even in small numbers, in the territory of another state may trigger the application of the Geneva Conventions in

---

<sup>420</sup> Theodor Meron, Classification of the Conflict in the Former Yugoslavia: Nicaragua’s Fallout, 92 AM. J. INT’L L. 236, 237 (1998).

<sup>421</sup> Prosecutor v. Tadic, Judgment, Appeals Chamber, *supra* note 286, p 84.

<sup>422</sup> In the Military and Paramilitary Activities in and against Nicaragua (Nicar v. U.S.), Merits, 1986 I.C.J. REP. 14, para 115 (June 27, 1986), the ICJ expressed the view that the other State must be in “effective control of the military or paramilitary operations in the course of which the alleged violations were committed”. However, the Appeals Chamber in Prosecutor v. Tadic, Judgment, Appeals Chamber, *supra* note 286, pp 145, 156 rejected Trial Chamber II application of the test in the Nicaragua’s case, Prosecutor v. Tadic, *supra* note 265, pp 584-588, Judge McDonald, dissenting. The Appeals Chamber rejected the “effective control” test offered by the ICJ in the Nicaragua case on the basis that it would not seem to be consonant with the logic of the law of state responsibility and because the test was at variance with judicial and state practice. *Id.*, at pp 115-145. *See also*, Prosecutor v. Delalic, Mucic, Delic and Landzo, Trial Chamber Judgment, Case No. IT-96-21-T, pp 230-34 (16 November 1998) [hereinafter Prosecutor v. Delalic]; Theodor Meron, *supra* note 427, at 237 (arguing that the Trial Chamber misapplied the *Nicaragua* test because the “*Nicaragua*’s test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal. In practice, applying the *Nicaragua* test to the question in *Tadic* produces artificial and incongruous conclusions”). But see Judge McDonald dissenting opinion where he opined that “overall control” by a foreign State over a military organization is sufficient for considering the armed conflict to be international.” *See*, Prosecutor v. Tadic, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, Case IT-94-1-T (May 7, 1997), 36 I.L.M. at 970, 979, para. 34.]

totality”.<sup>423</sup> For purposes of determining the duration and territorial application of war crimes provisions, the Appeals Chamber discussing the situation in Prijedor region of Bosnia and Herzegovina, opined that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”<sup>424</sup>

With respect to the duration of armed conflict for purposes of the application of international law, the ICTY Appeals Chamber suggests that “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.”<sup>425</sup> The Appeals Chamber noted that “until 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 the control of a party, whether or not actual combat takes place there.”<sup>426</sup>

Thus, international humanitarian law does not pertain only to those areas where actual fighting takes place; it applies to the entire territory of the State involved in armed conflict. This is also supported by the position of the ICTY Trial Chamber in the *Delalic* case, holding that “whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable.”<sup>427</sup> This approach is consistent with

---

<sup>423</sup> W.J. Fenrick, Article 8, margin No. 6 in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE (Otto Triffler ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

<sup>424</sup> Prosecutor v. Tadic, Jurisdiction Decision, *supra* note 271, p 67.

<sup>425</sup> *Id.*, p 70.

<sup>426</sup> *Id.*

<sup>427</sup> Prosecutor v. Delalic, *supra* note 422, p 185.

application of international humanitarian law to situations of protracted armed violence where hostilities are not necessarily to be characterized as continuous.<sup>428</sup>

Regarding the awareness of the perpetrator to the existence of armed conflict, the Prosecutor only has to establish that the perpetrator has knowledge of the factual circumstances that established the existence of an armed conflict to satisfy the requirement that the act(s) “took place in the context of and associated with” [an international armed conflict]. The Prosecutor is not required to prove that the perpetrator was aware of the existence of the armed conflict or that the perpetrator had knowledge of whether the armed conflict is international or non-international.<sup>429</sup> The perpetrator’s knowledge of the factual circumstances that led to the existence of armed conflict, establishes the nexus between the perpetrator’s war crime violation(s) and the armed conflict.<sup>430</sup>

#### **6.4. Observations and Commentary**

The reluctance to tinker with the definition of genocide prevented the possibility of expanding the protected group to include attack on political and social groups. As a consequence of this omission, the atrocities of the Khmer Rouge regime in Cambodia between 1975 and 1985, which resulted in the killing of an estimated one million persons, can be argued to have not constituted genocide because the perpetrators are of the same

---

<sup>428</sup> See Andreas Zimmermann, *supra* note 399, at 285.

<sup>429</sup> See ICC Elements of Crimes, *supra* note 116, art. 8, Introduction.

<sup>430</sup> For what amounts to sufficient nexus between the crime and the armed conflict, see Prosecutor v. Tadic, Opinion and Judgment, *supra* note 262, pp 572-73 (expressing the view that it is not necessary that “the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict”). See also, Prosecutor v. Delalic, *supra* note 422, pp 193-98.

ethnic group as the victims.<sup>431</sup> Also, the Khmer Rouge may argue that the victims were targeted as a political, social or economic group which is not covered by the Convention.<sup>432</sup> Thus, when in 1980 the United Nations General Assembly convened an international conference, it mandated the conference to focus on Vietnam's invasion in Cambodia, not the atrocities of the Khmer Rouge.<sup>433</sup> Consequently, the Khmer Rouge would arguably avoid prosecution for genocide because of the restrictive definition of genocide which clearly excluded political groups and other groups from protection.<sup>434</sup>

Similarly, the crimes of former Chilean dictator Augusto Pinochet would not meet the definition of Genocide because he allegedly targeted individuals due to their politics rather than their race or religion.<sup>435</sup> Arguably, the Soviet Union's extermination of 15 to 20 million Soviet citizens before, during, and after the adoption of the Genocide Convention, may not be considered as genocide as the victims were targeted because they are "class enemies" and "enemies of the people."<sup>436</sup>

While it is unfortunate that an unscrupulous entity could attempt to avoid application of the Convention and the ICC Statute in cases of discriminate killings by labeling the victims as a political group,<sup>437</sup> the class of protected groups cannot be justifiably extended without corresponding amendment of the Convention or the ICC Statute. There is no doubt that since the Convention was concluded, there has been an

---

<sup>431</sup> M. Cherif Bassiouni, *supra* note 8, at 212.

<sup>432</sup> See Jason Abrams, Universal Jurisdiction: Myths, Realities and Prospects: The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide, 35 NEW. ENG. L. REV. 303, 304-06 (2001).

<sup>433</sup> See Steven R. Ratner, The Cambodia Settlement Agreements, 87 AM. J. INT'L L. 1, 4 (1993).

<sup>434</sup> Mathew Lippman, *supra* note 78, at 464.

<sup>435</sup> Diane F. Orentlicher, Putting Limits on Lawlessness: From Nuremberg to Pinochet, Wash. Post, Oct. 25, 1998, at C1.

<sup>436</sup> Frank Chalk, Redefining Genocide, in Genocide: Conceptual and Historical Dimensions 47, 50 (George J. Andreopoulos ed., 1994).

<sup>437</sup> Through the assertion of what amounts to an affirmative defense, the accused state may characterize victims as "political" or "economic" opponents, or even deny that the group exists at all, and in doing so avoid responsibility under the Convention. See Paul Starkman, Genocide and International Law; Is there a Cause of Action?, 8 ASILS INT'L L.J. 1, at 13, 37 (1984).

increasing number of violent crimes directed against groups that are not categorized as national, ethnic, racial, or religious. These developments should have necessitated the redefinition of genocide to overcome the ambiguities or limitations that plague the current definition.<sup>438</sup> For “it would be reprehensible if the world could not condemn massive slaughter of members of a group ... simply because of a preordained idea of what types of groups qualified for coverage under the [Genocide] Convention.”<sup>439</sup>

Crimes against humanity have developed from doubtful precedent and now forms part of the core international crimes. The ICC Statute has overcome the uncertainty behind the categorization of crimes against humanity by attempting to detail the contours of the crime in the Statute. Also, the elimination of the requirement of governmental action broadens the scope of crimes against humanity. Further, the dissociation of crimes against humanity from armed conflict clears any doubt as to the distinct nature of the crime. As noted by the ICTY in the *Erdemovic* case, crimes against humanity can best be understood as “serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, or dignity”.<sup>440</sup>

While some of the crimes prohibited under article 7 of the ICC Statute may fall under the purview of domestic criminal law, such atrocious acts graduate to crimes against humanity once accompanied by special elements associated with an overall attack on a civilian population.<sup>441</sup> In addition, the distinction between “murder-type” and “persecution-type” crimes against humanity expands the groups that are protected against persecution beyond the scope of the Genocide Convention. In deed, article 7 leaves the

---

<sup>438</sup> Thomas W. Simon, *supra* note 34, at 247.

<sup>439</sup> *Id.*

<sup>440</sup> *Prosecutor v. Erdemovic*, *supra* note 290, para. 28

<sup>441</sup> Steven R. Ratner and Jason S. Abrams, *supra* note 118, at 78.

group wide open to include all persecutions on “other grounds that are universally recognized as impermissible under international law ...”<sup>442</sup> Thus, “intentional and severe deprivation of fundamental rights contrary to *international law* by reason of the identity of the group or collectivity” amounts to persecution-type crimes against humanity.<sup>443</sup> This will no doubt expand the application of crimes against humanity to include violations of acts prohibited in international conventions such as the international bill of rights and other human rights treaties.<sup>444</sup>

As can be seen above, article 8 of the ICC Statute includes a far more comprehensive codification of war crimes under customary international law than existed in the statutes of previous tribunals.<sup>445</sup> Article 8 of the ICC Statute confers jurisdiction to the Court over a wide range of war crimes committed during international armed conflict. Also, article 8 of the ICC Statute reaffirms recent developments in international law by conferring the Court with power to try war crimes committed in non-international armed conflicts, such as civil wars, which are the most common conflicts today. The ICC Statute finds its justification for the international supervision of internal conflicts in common article 3 of the Geneva Conventions and Protocol II.

---

<sup>442</sup> ICC Statute, *supra* note 1, art. 7(1)(h).

<sup>443</sup> *Id.*, art. 7(2)(g) [emphasis added].

<sup>444</sup> See discussion and accompanying notes in Part I, chapter 3, pp 65-74.

<sup>445</sup> For example, article 3 of the ICTY Statute provides a non-exhaustive list of five sub-clauses which constitute violations of the laws and customs of war. By contrast, Article 8(2)(b) of the ICC Statute, covering violations of the laws and customs applicable in international armed conflict alone, contains twenty-six sub-clauses. Article 6(b) of the Nuremberg Charter simply defines “violations of the laws or customs of war” as:

Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other 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.  
Nuremberg Charter, *supra* note 234, art. 6(b).



The use of the word “namely” in each of the four categories of war crimes appears to suggest that the enumerated list of acts constituting war crimes in the ICC Statute is exhaustive rather than inclusive in nature.<sup>446</sup> However, while the ICC Statute contain a list of more prohibited acts as war crimes than previous instruments, it would have been better to list them in an inclusive form to leave open the inclusion of additional “grave breaches” or “other serious violations” that may develop in the future without necessarily amending the Statute.

---

<sup>446</sup> Jordan J. Paust, *supra* note 112, at 29, Leila Nadya Sadat & S. Richard Carden, *supra* note 112, at 435.

## CHAPTER 7

---

---

### 7.0. PERSONAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

---

#### 7.1. ICC Jurisdiction *Ratione Personae*

##### 7.1.1. Jurisdiction *Ratione Personae* (Personal Jurisdiction)

The Court has jurisdiction over natural persons only and “a person who commits a crime within the jurisdiction of the Court shall be held individually responsible and liable for punishment ...”.<sup>1</sup> Thus, the Court’s jurisdiction does not extend to States or organizations.<sup>2</sup> During the preparatory phase, France proposed extending the court's jurisdiction to organizations. The proposal was addressed at Rome but could not gather sufficient support and was dropped. The accused person must have attained the age of eighteen<sup>3</sup> and be in the custody of the Court as the ICC Statute does not allow trials in absentia.<sup>4</sup> In conformity with customary international law, crimes within the jurisdiction of the Court are not subject to any statute of limitations.<sup>5</sup>

##### 7.1.2. Jurisdiction *Ratione Temporis* (Temporal Jurisdiction)

The Court’s jurisdiction will not apply retroactively because the Statute limits the Court’s jurisdiction to crimes committed after July 1, 2002, being the date the ICC Statute entered into force.<sup>6</sup> With respect to States that become parties to the ICC Statute after its entry into force, the Court will exercise its jurisdiction only for crimes committed

---

<sup>1</sup> Rome Statute of the International Criminal Court, arts. 1, 25, U.N. Doc. A/CONF. 183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

<sup>2</sup> Id., art. 25(4) (stating that “no provisions of this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law”).

<sup>3</sup> Id., art. 26.

<sup>4</sup> Id., art. 63(1).

<sup>5</sup> Id., art. 29.

<sup>6</sup> Id., art. 11(1).

after the State becomes a party to the ICC Statute, unless the State has made a declaration accepting the Court's jurisdiction at an earlier time.<sup>7</sup> It has been suggested that the Court may exercise jurisdiction over continuing crimes that began before the enactment of the ICC Statute.<sup>8</sup> However, for such conduct to be included within the jurisdiction of the Court, it must first meet the conditions for a continuing crime, and international principles of legality, that is to say, the act must have been criminal at the time the accused committed it.<sup>9</sup>

### **7.1.3. Jurisdiction *Ratione Loci* (Territorial Jurisdiction)**

An overwhelming majority of States at the Diplomatic Conference in Rome supported giving the Court automatic jurisdiction regarding genocide, crimes against humanity, war crimes and the crime of aggression. Also, a great majority of the States at the Diplomatic Conference supported a proposal by South Korea that the Court should exercise jurisdiction if the ICC Statute has been ratified by a State on whose territory the crimes were committed or the State of nationality of the accused or the State of nationality of the victim, or the State with custody of the accused.<sup>10</sup> However, a few States, including the United States, wanted automatic jurisdiction only for genocide and for other crimes, they preferred some form of a consent regime on individual cases. At the end of the conference, a compromise arrangement was reached which ensures that

---

<sup>7</sup> ICC Statute, *supra* note 1, arts. 11, 12(3).

<sup>8</sup> Michael P. Scharf, The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 LAW & CONTEMP. PROBS. 67, 79-80 (2001). Such crimes include forced removal of children from a specific ethnic group or disappearances. *Id.*; see also ICC Statute, *supra* note 1, arts. 6-8 (defining the terms genocide, crimes against humanity, and war crimes to include continuing crimes).

<sup>9</sup> Alan Nissel, Continuing Crimes in the Rome Statute, 25 MICH. J. INT'L L. 653, 663-64 (2004).

<sup>10</sup> See Human Rights Watch, The ICC Jurisdictional Regime; Addressing U.S. Arguments 1, available at: <http://www.hrw.org/campaigns/icc/docs/icc-regime.htm>.

States Parties to the ICC Statute accept automatic jurisdiction of the Court over all crimes contained in the Statute.<sup>11</sup>

With respect to the territorial scope of the Court, this varies depending on how a situation is referred to the Court. Where a situation is referred to the Court by a State Party or by *proprio motu* investigation by the ICC Prosecutor, the Court has jurisdiction if the crimes have been committed in the territory of a State which has ratified the ICC Statute or on its vessel and aircraft; or when the crimes have been committed by a citizen of a State which has ratified the ICC Statute.<sup>12</sup> Further, the Court may exercise jurisdiction over crimes committed in the territory of a non-party State or crimes committed by a citizen of a non-party State if the State which has not ratified the ICC Statute makes a declaration accepting the Court's jurisdiction over the crime.<sup>13</sup>

On the other hand, where a situation is referred to the Court by the Security Council pursuant to Article VII of the UN Charter, the Court's territorial jurisdiction literally extends to the whole world.<sup>14</sup> In other words, the Court has jurisdiction over such situation whether or not the crime occurred in the territory of a State party and/or whether or not the accused is a national of a State party. It is also immaterial that the non-Party State in whose territory the crime occurred or whose national is accused of the crime did not consent to the Court's jurisdiction.

---

<sup>11</sup> ICC Statute, *supra* note 1, arts. 12(1). Note however that a State party may opt out of the Court's jurisdiction over war crimes for a period of seven (7) years after the entry into force of the Statute for the State concerned. See *Id.*, art. 124.

<sup>12</sup> *Id.*, arts. 12; 13(a)(c).

<sup>13</sup> *Id.*, art. 12(3).

<sup>14</sup> *Id.*, art. 13(b).

## 7.2. ICC and Individual Criminal Responsibility

In accordance with the principle of individual criminal responsibility firmly established in Part III of the ICC Statute, an individual is criminally responsible for his or her conduct.<sup>15</sup> The individual's criminally responsibility extends to the commission of the crime, whether as an individual or jointly, and includes the ordering, soliciting or inducing the commission of a crime that in fact occurs or is attempted; or facilitating the commission of a crime, or aiding, abetting or otherwise assisting in its commission or attempted commission.<sup>16</sup> Also, individual criminal responsibility attaches in any other way, where for instance, the individual intentionally contributes to the commission or the attempted commission of a crime by a group of persons acting with a common purpose, when that contribution is 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 is "made in the knowledge of the intention of the group to commit the crime."<sup>17</sup>

In cases of genocide, an individual would also have criminal responsibility for direct and public incitement.<sup>18</sup> Further, an individual is criminally liable for attempt to commit a crime so long as the individual has taken substantial steps toward commission of the crime, even if the crime does not occur because of circumstances independent of the individual's intention.<sup>19</sup> However, a timely withdrawal resulting in complete and

---

<sup>15</sup> ICC Statute, *supra* note 1, art. 25(3).

<sup>16</sup> *Id.*, art. 25(3)(a-c).

<sup>17</sup> *Id.*, art. 25(3)(d).

<sup>18</sup> *Id.*, 25(3)(e).

<sup>19</sup> *Id.*, 25(3)(f).

voluntary abandonment of the criminal purpose shall excuse punishment under the Statute.<sup>20</sup>

The Court's jurisdiction extends to all people regardless of their official capacity.<sup>21</sup> This means that any member of government or Head of State shall be subject to the jurisdiction of the ICC.<sup>22</sup> Therefore, the official position of the individual or any immunity or special procedural rules that may attach to the individual because of his or her official capacity will not bar the jurisdiction of the Court.<sup>23</sup> In essence, national amnesties, pardons or similar measures of impunity for crimes under the Court's jurisdiction, which prevent the discovery of the truth and prevent accountability in a criminal trial, cannot bind the Court.<sup>24</sup>

However, it is not unlikely that the Court may consider the outcome of credible alternative measures of accountability such as Truth and Reconciliation Commission. The Court may do this before or after the completion of investigation, if the Prosecutor taking into account all circumstances including the gravity of the crimes, the interests of victims, and other strategic factors,<sup>25</sup> determines that it is not "in the interests of justice"

---

<sup>20</sup> ICC Statute, *supra* note 1, art. 25(3)(f).

<sup>21</sup> See, art. 27(1) which provides that the Statute:

shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as whether as a Head of State or ..... [any other capacity] shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at art. 27(2). Article 27 (2) provides that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

<sup>24</sup> Amnesty International, THE INTERNATIONAL CRIMINAL COURT: CHECKLIST FOR EFFECTIVE IMPLEMENTATION 6, AI Index: IOR 40/011/2000, 1 August 2000, available at: <http://web.amnesty.org/library/index/engior400112000?open&of=eng-385> [hereinafter Checklist for Effective Implementation].

<sup>25</sup> Hans-Peter Kaul, Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years, 99 AM. J. INT'L L. 370, 375 (2005) (observing that examples of factors that might be considered are the protection of victims, the potential impact of

to investigate or prosecute.<sup>26</sup> According to Judge Kaul, this question is not simply theoretical because the “Prosecutor operates in the context of ongoing conflicts, often at the same time as peace negotiations are taking place, purely legal considerations may not always be the sole basis for deciding whether or not to prosecute”.<sup>27</sup> The Trial Chamber may, on its own initiative review the Prosecutor’s decision not to proceed with an investigation or prosecution on the grounds that it will not serve the interest of justice.<sup>28</sup>

Regarding command responsibility, the ICC Statute provides that command responsibility is a form of criminal responsibility in addition to other forms of responsibility and that military commanders are not immune from responsibility for the acts of their subordinates.<sup>29</sup> Also, command responsibility extends to any superior in a nonmilitary setting.<sup>30</sup> Thus, article 28 deals with the responsibility of military commanders and other superiors with respect to the criminal acts of subordinates under their “effective authority and control”.<sup>31</sup> The military commander or other superior is liable if he or she knew or should have known that his or her subordinates were committing or about to commit crimes prohibited by the Statute and failed to take

---

investigations on the conflict in question, and the question of the existence of national criminal prosecution initiatives).

<sup>26</sup> ICC Statute, *supra* note 1, arts. 53(1)(c), 53(2)(c). *See also*, Annex to the “Paper on Some Policy Issues Before the Office of the Prosecutor”: Referrals and Communications 1 (Apr. 23, 2004) [hereinafter Paper on Some Policy Issues].

<sup>27</sup> Hans-Peter Kaul, *supra* note 19, at 375. Judge Kaul is a Judge of the International Criminal Court, and President of the Pre-Trial Division.

<sup>28</sup> ICC Statute, *supra* note 1, art. 53, para. 3(b); Regulations of the Court, Reg. 48, Doc. ICC-BD/01-01-04 (May 26, 2004) [hereinafter ICC Regulations].

<sup>29</sup> *Id.*, art. 28(a).

<sup>30</sup> *Id.*, art. 28(b).

<sup>31</sup> *Id.* (emphasis added). The words “effective authority and control” are intended to superimpose in a civilian setting the requirements of the same types of relationships between superior and subordinate in the military.

reasonable steps to “prevent or repress . . . or to submit the matter to the competent authorities.”<sup>32</sup>

The ICC Statute prohibits superior orders and prescription of law as grounds for excluding criminal responsibility unless (1) the person was under a legal obligation to obey such orders, (2) the person did not know that the order was unlawful, *and* (3) the order was not manifestly unlawful.<sup>33</sup> The application of this exception is limited because the ICC Statute makes it clear that orders to commit genocide or crimes against humanity are manifestly unlawful.<sup>34</sup>

Also, mental incapacity as a result of mental disease or defect, involuntary intoxication, self defense, defense of others and defense of property essential for survival during war times as well as duress are grounds for excluding criminal responsibility.<sup>35</sup> Also, mistake of fact or law may be grounds to exclude criminal responsibility if it negates the mental element required by the crime.<sup>36</sup> However, superior orders and prescription of law are not grounds for excluding criminal responsibility unless the person was under a legal obligation to obey such orders, the person did not know that the order was unlawful, *and* the order was not manifestly unlawful.<sup>37</sup> The exception offers little or no defense as orders to commit genocide, or crimes against humanity, or war crimes are generally manifestly unlawful.<sup>38</sup>

---

<sup>32</sup> ICC Statute, *supra* note 1, art 28(b).

<sup>33</sup> *Id.*, art. 33(1)(a-c) (emphasis in the original).

<sup>34</sup> *Id.*, art. 33(2)

<sup>35</sup> *Id.*, art. 31.

<sup>36</sup> *Id.*, art. 32.

<sup>37</sup> *Id.*, art. 33 (emphasis added).

<sup>38</sup> *Id.*, art. 33(2).



### 7.3. ICC Jurisdiction over Non-Parties

The Court may exercise jurisdiction over a national of a non-party State if he or she commits a crime in the territory of a State party and the State party elects to surrender the accused to the jurisdiction of the Court rather than prosecute him or her in its national court.<sup>39</sup> For this to occur, the accused must remain in the territory of a State party or be otherwise lawfully apprehended by the State party. Also, the Court may exercise jurisdiction over nationals of non-party States if a non-party State by declaration consents to the Court's jurisdiction over its national.<sup>40</sup>

Furthermore, the jurisdiction of the Court extends to nationals of non-party States if the Security Council refers a situation to the Court.<sup>41</sup> Article 13 paragraph (b) allows the Security Council to refer situations to the ICC with "mandatory effect."<sup>42</sup> Thus, regardless of whether an accused is a national of a State party to the ICC Statute or not, if a situation involving him or her is referred to the Court by the Security Council, the Court can obtain jurisdiction over the person.<sup>43</sup> This provision makes it difficult for a national of a rogue State to escape the Court's jurisdiction but only if the Security Council gets involved.<sup>44</sup>

---

<sup>39</sup> ICC Statute, *supra* note 1, art. 12(2)(a).

<sup>40</sup> Id., art. 12(3). *See also* art. 4(2) which provides that "the Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State"). Id.

<sup>41</sup> See Id., art. 13(b).

<sup>42</sup> John Seguin, Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute, 18 B.U. INT'L L.J. 85, 95 (2000).

<sup>43</sup> Id.

<sup>44</sup> Id., at 95 (citing David J. Scheffer, Developments at Rome Treaty Conference, p. 3 (July 23, 1998) [http://www.state.gov/www/policy\\_remarks/1998/981021/scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/981021/scheffer_icc.html)> where he stated that the "United States believed that this was a particularly important objective in order to ensure that a rogue state could not escape the Court's jurisdiction". [hereinafter "Scheffer Report"].

The Court's potential jurisdiction over nationals of non-State parties has been raised by the United States as a basis to object to its participation in the ICC.<sup>45</sup> The United States expresses the view that the ICC should require the authority of the Security Council in order for the Court to exercise jurisdiction over non-party nationals.<sup>46</sup> However, as noted above, the Court's jurisdiction over nationals of non-party States in situations referred to the ICC by a State will only materialize with the consent of a State party in whose territory the crime was committed or with the consent of a non-State party whose national is accused of committing the crime.<sup>47</sup> Absent such consent, the Court will only exercise jurisdiction over nationals of non-State parties if the situation was referred to the Court by the Security Council.<sup>48</sup>

#### **7.4. Triggering the Court's Jurisdiction**

Article 13 provides three mechanisms to trigger the Court's exercise of jurisdiction for the crimes listed in Articles 6 to 8 of the Statute.

##### **7.4.1. Referral by a State**

Under article 14(1), a State party to the Court may refer a situation to the Prosecutor in which one or more of the crimes covered by the Statute appears to have been committed.<sup>49</sup> The Prosecutor is obliged to investigate such referrals for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.<sup>50</sup>

---

<sup>45</sup> See, Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, 2002-Sep Army Law. 1, 11 (2002).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> John Seguin, *supra* note 42, at 95-96.

<sup>49</sup> ICC Statute, *supra* note 1, art. 13(a).

<sup>50</sup> *Id.*

Under article 12(3) a non-party State in whose territory a crime subject to the jurisdiction of the court occurred, or of which the accused person is a national may, by declaration lodged with the registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.<sup>51</sup> Thus, it follows that such a non-party State may refer on ad hoc basis, a case to the Prosecutor who shall in turn treat the referral in accordance with article 14.

#### **7.4.1(1). First Sets of States' Referrals to the Court**

In accordance with article 14(1), three States Parties; Uganda, the Democratic Republic of the Congo, and the Central African Republic, have referred situations in their respective countries to the Office of the Prosecutor.<sup>52</sup> Also, pursuant to article 12(3), Cote d'Ivoire, a non-State party accepted the jurisdiction of the ICC with respect to crimes committed on its territory since the events of September 19, 2002.<sup>53</sup> Already the Chief Prosecutor has opened investigations into the situations in the Democratic Republic of the Congo<sup>54</sup> and Uganda<sup>55</sup> respectively.

---

<sup>51</sup>ICC Statute, *supra* note 1, art. 12(3).

<sup>52</sup> See ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, The Hague, January 29, 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) (visited February 26, 2006); Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, April 19, 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=19&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html) (visited February 26, 2006); ICC Press Release, Prosecutor Receives Referral Concerning Central African Republic, January 7, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html) (visited February 26, 2006).

<sup>53</sup> ICC Press Release, Registrar Confirms that the Republic of Cote d'Ivoire Has Accepted the Jurisdiction of the Court, February 15, 2005, available at <http://www.icc-cpi.int/pressreleases/93.html> (visited February 26, 2006). (The text of the declaration remains confidential at the moment).

<sup>54</sup> ICC Press Release, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation, June 23, 2004, at [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) (visited February 26, 2006).

<sup>55</sup> See ICC Press Release, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda, July 29, 2004, at [http://www.icc-cpi.int/pressrelease\\_details&id=33&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html) (visited February 26, 2006).

On June 23, 2004, the ICC Presidency decided to set up three Pre-Trial Chambers to prepare for the referrals.<sup>56</sup> On July 5, 2004, the Presidency assigned the situation in the Congo to Pre-Trial Chamber I<sup>57</sup> and the situation in northern Uganda to Pre-Trial Chamber II.<sup>58</sup> The respective Chambers are now duly seized of the two situations and are functioning accordingly. On January 19, 2005, the situation in the Central African Republic was assigned to Pre-Trial Chamber III<sup>59</sup> in anticipation of the Prosecutor's decision on whether or not to open an investigation. On July 8, 2005, Pre-trial Chamber II issued its first warrant of arrests against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Onguen.<sup>60</sup>

As noted above, the Prosecutor received the three referrals from States Parties and has initiated investigations on the first two referrals. Such referrals evince confidence in the works of the Court and the Chief Prosecutor. Also, they facilitate the practical work of the ICC, since cooperation with national authorities become easier when the government in question supports the Court's activities regarding its investigation and

---

<sup>56</sup> See ICC Press Release, Decision Constituting Pre-Trial Chambers, June 23, 2004, ICC-Pres-01/04, available at <http://www.icc-cpi.int/organs/presidency/decisions.html> (the Presidency issued its decision to constitute three Pre-Trial Chambers, composed of the following judges: Pre-Trial Chamber 1, Judges Akua Kuenyehia, Claude Jorda, and Sylvia Steiner; Pre-Trial Chamber II, Judges Tuiloma Neronis Slade, Mauro Politi, and Fatoumata Dembele Diarra; and Pre-Trial Chamber III, Judges Tuiloma Neronis Slade, Hans-Peter Kaul, and Sylvia Steiner).

<sup>57</sup> See Situation in the Democratic Republic of Congo, Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, No. ICC-01/04-1 (July 5, 2004).

<sup>58</sup> Situation in Uganda, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, No. ICC-02/04-1 (July 5, 2004).

<sup>59</sup> See Situation in the Central African Republic, Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, No. ICC-01/05-1 (Jan. 19, 2005).

<sup>60</sup> Situation in Uganda, Pre-Trial Chamber II, Warrant of Arrests, No. ICC-02/04-01/05-53-57, available at [http://www.icc-cpi.int/cases/current\\_situations/Uganda.html](http://www.icc-cpi.int/cases/current_situations/Uganda.html)

prosecution. In the two cases currently under investigation, no requests for deferral have been submitted, which could be interpreted as a sign of confidence in the ICC.<sup>61</sup>

With respect to the referral by Cote d'Ivoire, the State accepted ICC jurisdiction to investigate in the country and requested the ICC's help in bringing to justice rebels who started the civil war in that country. However, since only "situations" can be referred to the ICC, the Prosecutor will consider the actions of all individuals in groups involved in the conflict. Consequently, on January 28, 2005, the Chief Prosecutor of the ICC announced that an ICC team will visit the Ivory Coast. The team's mission will be to determine whether there is sufficient evidence to open a formal investigation into alleged war crimes that occurred during the civil war there. So far, no formal procedural steps have followed its acceptance, and it is unclear whether the Ivorian government is intending to refer the situation to the ICC, or whether it will be for the prosecutor to initiate an investigation under article 15(3).

#### **7.4.2. *Proprio Motu* Investigation by the ICC Prosecutor**

Article 15 allows the Court's independent Prosecutor to initiate investigations *proprio motu* based on information from victims, non-governmental organizations, or any other source.<sup>62</sup> This power of the Prosecutor was strenuously objected to by some States on the grounds that the office might be overwhelmed by frivolous complaints and would have to waste the limited resources at his or her disposal to attend to them. In addition, concerns were expressed that the Prosecutor might be placed under political pressure to bring a complaint even if the complaint might not be justifiable or helpful in a particular

---

<sup>61</sup> Such a request must be made within one month after the Prosecutor has notified "all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned." ICC Statute, *supra* note 1, art. 18(1).

<sup>62</sup> ICC Statute, *supra* note 1, art. 15(1)(2).

political context. But majority of States were of the view that, despite the potential for waste and abuse, it was better to empower the Prosecutor with such independence. Despite the controversy surrounding this provision occasioned by the United States' objection, its advantage cannot be overemphasized because one cannot always rely on national governments and the Security Council to bring matters to the Court.

In any event, there exist various safeguards within the ICC treaty to avoid frivolous and politically motivated cases. For instance, the ICC Statute confers adequate supervisory powers on the Pre-trial Chamber with regard to the power of the Prosecutor to initiate a *proprio motu* investigation. Thus, investigations and indictments initiated by the Prosecutor will have to be confirmed and approved by a Pre-Trial Chamber of three judges, after examining the evidence.<sup>63</sup> The accused and/or the State will have the opportunity to challenge the indictment during confirmation hearings before the Pre-Trial Chamber.

In other words, the Prosecutor's exercise of discretion is subject to the approval of the Pre-trial judges who determine whether there is a reasonable basis for the investigation.<sup>64</sup> Should the Pre-trial judges conclude that there is a reasonable basis to proceed with the investigation, and that the case appears within the jurisdiction of the Court, it shall authorize the Prosecutor to proceed with investigation.<sup>65</sup> On the other hand, if the Pre-trial judges are of the opinion that there is no sufficient basis to proceed with investigation, they would decline authorization. The Prosecutor may subsequently represent the case based on new facts or evidence regarding the same situation.<sup>66</sup>

---

<sup>63</sup> ICC Statute, *supra* note 1, art. 15(3).

<sup>64</sup> *Id.*, art. 15(3).

<sup>65</sup> *Id.*, art. 15(4).

<sup>66</sup> *Id.*, art. 15(5).

In addition, where a situation has been referred by a State or the Prosecutor has initiated a case *proprio motu*, the Prosecutor must inform all States parties to the Statute, as well as non-States parties that would normally exercise jurisdiction over the crimes concerned.<sup>67</sup> This provision was proposed by the United States. Many States accepted the provision with great reluctance and as a compromise necessary for securing the Prosecutor's power to bring a case on his or her own initiative. The Prosecutor would have to defer to the State's investigation unless the Pre-trial Chamber decided otherwise.<sup>68</sup> The Prosecutor may review a State's investigation six months after the date of deferral or at any time when there has been a significant change of circumstances indicating the State's unwillingness or inability genuinely to carry out the investigation.<sup>69</sup> The State or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-trial Chamber regarding admissibility of the situation.<sup>70</sup> Where the Prosecutor has deferred an investigation to a State, the Prosecutor may request that the State periodically inform him or her of the progress of its investigation.<sup>71</sup>

#### **7.4.3. Referral by the Security Council**

In a situation in which one or more of the crimes covered under the ICC Statute appears to have been committed, the Security Council, acting under Chapter VII of the UN Charter, may refer such matter to the prosecutor.<sup>72</sup> Since the Security Council is exercising its power under Article VII of the UN Charter, it has been suggested that the

---

<sup>67</sup> ICC Statute, *supra* note 1, art 18(1). The one-month period is designed to permit a State that is already investigating the alleged crimes to inform the ICC and ask the prosecutor to defer to its jurisdiction under the complementarity principle.

<sup>68</sup> *Id.*, art. 18(2).

<sup>69</sup> *Id.*, art 18(3).

<sup>70</sup> *Id.*, art. 18(4).

<sup>71</sup> *Id.*, art. 18(5).

<sup>72</sup> *Id.*, art. 13(b).

ICC, acting under Security Council's direction, shall have jurisdiction over nationals of States Parties and non-State parties without their consent.<sup>73</sup> In other words, the UN Security Council may confer jurisdiction on the Court even when the alleged crimes occurred in the territory of a State which has not ratified the ICC Statute or the crime was committed by the national of a non State Party to the ICC Statute. Also, when the Security Council refers a situation to the ICC, it is expected that it will avail the Court with its enforcement mechanism should a State fail to cooperate with the Court.<sup>74</sup>

#### **7.4.3.1. Security Council First Referral to the Court**

On January 25, 2005, the International Commission of Inquiry on Darfur, Sudan, issued its report to the Secretary-General of the United Nations.<sup>75</sup> Relying on article 13(b) of the ICC Statute, the Commission recommended that the situation in Darfur be referred to the ICC by the Security Council because “the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur.”<sup>76</sup> Although the U.S. was instrumental to the inclusion of article 13(b) in the ICC Statute<sup>77</sup>, the U.S. initially hesitated to support the recommendation to refer the situation in Darfur to the ICC because of the U.S. opposition to the Court.

However, after lengthy discussions, the Security Council, acting under Chapter VII of the UN Charter, by Resolution 1593 decided “to refer the situation in Darfur since

---

<sup>73</sup> Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 324 (1998).

<sup>74</sup> *Id.*, at 325.

<sup>75</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Jan. 25, 2005), available at <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)>.

<sup>76</sup> *Id.*, para. 569.

<sup>77</sup> The former ambassador-at-large for war crimes issues and head of the U.S. delegation in Rome, David Scheffer, even describes Article 13(b) as one of the “major [U.S.] objectives . . . achieved” in the Statute. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 73 (Nov. 2001-Feb. 2002).



1 July 2002 to the Prosecutor of the International Criminal Court.”<sup>78</sup> The Resolution was adopted by a vote of 11 in favor, none against, and 4 abstentions, namely Algeria, Brazil, China, and the United States. The Security Council enjoined the Sudanese government and all other parties to the conflict in Darfur to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to Resolution 1593.<sup>79</sup> Also, while recognizing that non-State parties to the ICC Statute have no obligation under the Statute, the Resolution implores all States and concerned regional and other international organizations to cooperate fully with the Court.<sup>80</sup>

On April 1, 2005, the ICC’s Chief Prosecutor, Mr. Luis Moreno-Ocampo announced his intention to make contact with the relevant national and international authorities, including the United Nations and the African Union, in order to establish the necessary arrangements for his work.<sup>81</sup> Mr. Moreno-Ocampo noted that continuous support will be required from the Security Council. On April 21, 2005, the Presidency assigned the situation in the Congo to Pre-Trial Chamber I.<sup>82</sup> On June 6, 2005, the ICC Chief Prosecutor opened an investigation into the situation in Darfur, Sudan.<sup>83</sup>

The referral by Resolution 1593 is the first case in which the Security Council has used the trigger mechanism provided by article 13(b) of the ICC Statute. Resolution 1593 reflects the complex negotiation and discussions in the Security Council and the

---

<sup>78</sup> U.N. Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, March 31, 2005, SC/8351, S.C. Res. 1593, U.N. SCOR, 60<sup>th</sup> Sess., 5158<sup>th</sup> mtg., U.N. SC Res. 1593, 1 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (hereinafter “SC Resolution 1593”).

<sup>79</sup> *Id.*, para. 2.

<sup>80</sup> *Id.*

<sup>81</sup> ICC Press Release, Security Council Refers Situation in Darfur to ICC Prosecutor (Apr. 1, 2005).

<sup>82</sup> Situation in the Darfur, Decision Assigning the Situation in Darfur to Pre-Trial Chamber I, No. ICC-02/05-1 (April 21, 2005).

<sup>83</sup> See ICC Press Release, The Prosecutor of the ICC opens investigation in Darfur, June 6, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=107&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=107&l=en.html).

difficult compromise that allowed the situation in Darfur to be referred to the Court.<sup>84</sup> It remains to be seen how the ICC will be able to cope with the situation in Darfur. Hopefully, the dissenting States, particularly, the United States may find it necessary to put aside its opposition to the Court and support the decision of the Security Council to refer the situation in Darfur to the Court to enhance the effectiveness of the Court in that matter.<sup>85</sup>

#### **7.5. Authorization of Investigation and Confirmation of Charges**

Under the ICC Statute, the Court must satisfy itself that it has jurisdiction in any case brought before it.<sup>86</sup> Therefore, regardless of how a situation is brought under the jurisdiction of the Court, the Pre-Trial Chamber has an important role to play with regard to the investigation and preparation of the cases that may result. With respect to situations where the Prosecutor triggers the Court's jurisdiction *suo moto*, the Prosecutor must seek and obtain the authorization of the Pre-trial Chamber before commencing an investigation into the situation.<sup>87</sup>

Generally, once the Prosecutor concludes investigation in any situation whether based on State referral, *proprio motu* investigation, or Security Council referral, the Prosecutor will, before charges are brought, consider other strategic factors to determine

---

<sup>84</sup> In this context, it is noteworthy that Brazil, a State party and one of the strong supporters of the Court, reaffirmed its support for the ICC but felt unable to cast a positive vote because of doubts about the compatibility of Resolution 1593 with the Rome Statute. On the other side, Sudan, the country most directly concerned, expressed its opposition to the decision of the Council. See the summary of the explanation of vote made by Ambassadors Ronaldo Mota Sardenberg of Brazil and Elfatih Mohamed Ahmed Erwa of Sudan respectively. UN Press Release SC/8351, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, at 6-7 (Mar. 31, 2005), available at <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>.

<sup>85</sup> This possibility was proposed in the so-called Compact Between the United States and Europe, a document signed on February 17, 2005, by fifty foreign policy experts proposing to bridge the differences between the United States and Europe on some fundamental policy questions. The compact is available online at <<http://www.brookings.edu/fp/cuse/analysis/USEUCompact.pdf>>.

<sup>86</sup> ICC Statute, *supra* note 1, art. 19.

<sup>87</sup> *Id.*, art. 15(3).

whether and when, having regard to the gravity of the crimes and the interests of victims, it is “in the interests of justice” to prosecute.<sup>88</sup> Should the Prosecutor decide not to prosecute, the decision may be subject to review by the Pre-trial Chamber on application by the referring State or the Security Council.<sup>89</sup> Also, the Pre-Trial Chamber on its own may review a decision of the Prosecutor not to proceed if it is based solely on considerations of the “interests of justice.”<sup>90</sup> In other words, the Prosecutor’s decision not to proceed shall be effective only if confirmed by the Pre-Trial Chamber.<sup>91</sup>

On the other hand, if after the commencement of an investigation, the Prosecutor conclude that there are sufficient evidence against a person to show that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the Court, the Prosecutor will apply to the Pre-trial Chamber for a warrant of arrest or a summons to appear.<sup>92</sup> After the person’s surrender or voluntarily appearance before the Court, the Prosecutor must apply to the Pre-trial Chamber for confirmation of the charges for which the Prosecutor intends to seek trial.<sup>93</sup> A confirmation hearing is held by the Pre-trial Chamber to determine whether to approve the charges. Also, the confirmation hearing serves to define the scope of the trial in terms of the exact nature of the alleged crimes and the precise form of participation attributed to the accused.<sup>94</sup>

---

<sup>88</sup> ICC Statute, *supra* note 1, art. 53(1)(c). Examples of factors that might be considered are the protection of victims, the potential impact of investigations on the conflict in question, and the question of the existence of national criminal prosecution initiatives.

<sup>89</sup> *Id.*, art. 53(3)(a).

<sup>90</sup> *Id.*, art. 53(3)(b); Regulation 48.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, art. 58.

<sup>93</sup> *Id.*, art. 61.

<sup>94</sup> Regulation 52 requires the Prosecutor to provide a precise characterization of the facts, specifying the type of crimes alleged, as well as the precise form of participation. See ICC Regulations, *supra* note 28, Regulation 52. If later it becomes apparent that a different crime or a different form of participation may be at stake, the chamber is permitted to modify the legal characterization of the facts in the document containing the charges. *Id.*

## 7.6. Grounds for Challenging Admissibility of a Case or the Court's Jurisdiction

The ICC Statute states that the Court's jurisdiction may be challenged on grounds of inadmissibility of a case under article 17 or on any other ground by certain entities.<sup>95</sup> Article 19 provides that the following entities may challenge the admissibility of a case or the jurisdiction of the Court: (1) the accused or an individual against whom a warrant of arrest or a summons to appear has been issued, (2) a State with jurisdiction over the case, (3) a State party in whose territory the crime was committed or the State of nationality of the accused or a non State party which has accepted the jurisdiction of the Court with respect to a particular crime.<sup>96</sup> In addition, the Prosecutor may request the Court to issue a ruling regarding a question of jurisdiction or admissibility.<sup>97</sup> Further, since the ICC Statute vests the Court with jurisdiction to determine its jurisdiction,<sup>98</sup> the Court may also determine the admissibility of a case *sua sponte*.<sup>99</sup>

Suffice it to note that the ICC Statute makes a distinction between jurisdiction and admissibility. While a challenge on jurisdiction is an attack on the Court's authority over the matter and/or the accused, challenge based on admissibility recognizes the Court's authority over the matter and the accused but argues that the Court is precluded from exercising that authority in that particular matter based on any of the grounds listed in article 19.<sup>100</sup> Thus, a challenge of the Court's jurisdiction should be made first before a challenge on admissibility since the former is more fundamental because if a Court lacks

---

<sup>95</sup> ICC Statute, *supra* note 1, art. 19(2).

<sup>96</sup> *Id.*, art. 19(2)(a-c). Note however that where the Prosecutor has determined pursuant to Article 53(1) & (2) that a case is inadmissible, the referring authority – the State or the Security Council, may request the Court to rule on the admissibility of the case. *Id.*, art. 53(3)(a).

<sup>97</sup> *Id.*, art. 19(3).

<sup>98</sup> See *id.* arts. 17, 19.

<sup>99</sup> *Id.*, arts. 19(1), 53(3)(b).

<sup>100</sup> See William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 68 (2<sup>nd</sup> ed. 2004) (noting that the “question of admissibility ... seeks to establish whether matters over which the Court properly has jurisdiction should be litigated before it”).

jurisdiction, the issue of admissibility does not arise.<sup>101</sup> Hence, while the ICC Statute mandates that the Court must satisfy itself that it has jurisdiction, it only requires the Court to discretionarily determine the admissibility of a case.<sup>102</sup>

Where the challenge is brought before the confirmation of charges, the challenge shall be entertained by the Pre-trial Chamber.<sup>103</sup> On the other hand, the challenge shall be made before the Trial Chamber if brought after the confirmation of the charges.<sup>104</sup> Decisions of the Pre-trial Chamber or the Trial Chamber on challenge of jurisdiction or admissibility of a case may be appealed to the Appeals Chamber whose decision is final.<sup>105</sup>

#### **7.6.1. Inadmissibility of the Case**

There are two ways the admissibility of a case may be challenged. First, for situations referred to the Court by a State or investigations initiated *proprio motu* by the Prosecutor, a State may challenge the admissibility of the case under the procedure laid down in article 18.<sup>106</sup> Second, admissibility of case irrespective of how it was referred to the Court may be challenged by any party listed under article 19.<sup>107</sup> However, the

---

<sup>101</sup> See ICC, Rules of Procedure and Evidence (adopted by the Assembly of States Parties, First Session, New York, 3-10 Sept. 2002), U.N. Doc. PCNICC/2000/1/Add. 1, R. 58(4), available at: [http://www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf) (visited March 3, 2006) [hereinafter ICC Rules] (providing that a challenge or question regarding jurisdiction be considered prior to any challenge or question of admissibility).

<sup>102</sup> ICC Statute, *supra* note 1, arts. 19(1), 53(3)(b). *See also*, Christopher K. Hall, Article 19, Challenges to the Jurisdiction of the Court or the Admissibility of a Case, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 405, 408 (Otto Triffterer, ed. 1999) [hereinafter COMMENTARY ON THE ROME STATUTE] (noting that the Court has a duty to determine jurisdiction, but determinations as to admissibility are discretionary).

<sup>103</sup> ICC Statute, *supra* note 1, art. 19(6).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*, art. 18(1)(2).

<sup>107</sup> *Id.*, art. 19(2)(a-c). Article 19 expands the entities that can challenge the admissibility of a case unlike article 18, which limits it to only a State. Also, article 19 refers to admissibility of a case while article 18

grounds for challenging the admissibility of a case whether under article 18 or 19 are the same.<sup>108</sup>

A case is inadmissible by the Court where: (1) the case is being investigated or prosecuted by a State with jurisdiction, (2) the case has been investigated by a State with jurisdiction and the State decided not to prosecute the person concerned, (3) the person concerned has already been tried for the conduct which is the subject of the complaint, or (4) the case lacks sufficient gravity to warrant further action by the Court.<sup>109</sup>

However, the Pre-trial Chamber may determine that the case is admissible if the Pre-trial Chamber is of the opinion that the State is unwilling or unable to genuinely carry out the investigation or prosecution.<sup>110</sup> The ICC Statute provides guidelines on how to determine the “unwillingness”<sup>111</sup> or “inability”<sup>112</sup> of a State to conduct an investigation or prosecution. Note however, the position of the International Commission of Inquiry

---

talks about challenging the power of the Prosecutor to initiate investigation on a situation referred to the Court by a State or initiated *proprio motu*. See also, ICC Rules, *supra* note 101, R. 133.

<sup>108</sup> ICC Statute, *supra* note 1, art. 17(1), art. 19(2).

<sup>109</sup> *Id.*, art. 17(1)(a-d).

<sup>110</sup> *Id.*, art. 17(1)(a)(b).

<sup>111</sup> *Id.*, art 17(2) provides that a State is unwilling if one or more of the following situation is applicable:

- (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.

*Id.*, art. 17(2).

<sup>112</sup> See, *Id.*, art. 17(3) provides that:

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.

*Id.*, art. 17(3).

on Darfur, Sudan to the effect that a referral presumptively by the Security Council “is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so”.<sup>113</sup>

The word “genuinely” is not defined by the ICC Statute but appears to evoke a requirement of good faith on behalf of the State.<sup>114</sup> In other words, a State should not proceed to conduct investigation for the sole purpose of depriving the Court of jurisdiction without a good faith believe in its willingness or a good faith assessment of its ability to conduct the investigation or prosecution.

With respect to inadmissibility based on prior prosecution by a State, obviously a re-trial of the person concerned by the Court will violate the principle of double jeopardy. However, the Court may disregard the prior prosecution if it was conducted for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.<sup>115</sup> Similarly, the case will be admissible if the national prosecution was not conducted independently or impartially in accordance with the norms of due process recognized by international law and lacked a meaningful intent to

---

<sup>113</sup> See Report of the International Commission on Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of September 18, 2004, 608 (Jan. 25, 2005). The Commission however notes that the final decision in this regards rests with the ICC Prosecutor. *Id.*, at 608, n. 220. See also, John T. Holmes, Complementarity: National Courts versus the ICC in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 683 (Cassese, Gaeta & Jones, eds., 2002) [hereinafter THE ROME STATUTE: A COMMENTARY] (expressing the view that even if a Council decision includes a determination that the state(s) concerned is unwilling or unable to investigate or prosecute, the Court as an independent body will not be bound by such a determination, though it will likely be given great weight in the context of admissibility challenges). This view accords with the position of the ICC Prosecutor to the effect that “before starting an investigation, I am required under the Statute to assess factors including crimes and admissibility”. See Press Release, Luis Moreno-Ocampo, ICC Chief Prosecutor, Security Council refers Situation in Darfur to ICC Prosecutor (April 1, 2005), available at: [http://www.icc-cpi-int/pressrelease\\_details&id=98.html](http://www.icc-cpi-int/pressrelease_details&id=98.html) (visited February 28, 2006).

<sup>114</sup> Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 GEO. L.J. 381, 418 (2000).

<sup>115</sup> ICC Statute, *supra* note 1, art. 20(3)(a).

bring the person concerned to justice.<sup>116</sup> In the event that the Pre-trial or Trial Chamber determines that a State is unable or unwilling to investigate or prosecute the case, article 18(4) allows the requesting State to appeal an adverse ruling to the Appeals Chamber.<sup>117</sup> In addition, under article 18(7) a State which has challenged a ruling of the Pre-trial Chamber may challenge the admissibility of the case under article 19 on grounds of additional significant facts or significant change of circumstances.<sup>118</sup>

The provisions of article 17 paragraphs 2 & 3 and article 20 paragraphs 3(a-b) call for judicial review of the decision of the State concern and/or its national judicial system. Under article 20(3), the appropriateness of the prior prosecution by a national court is to be determined by the ICC.<sup>119</sup> Ordinarily, States see judicial review of its national court decision by an outside judicial organ as unwelcome challenge to its sovereignty. As such, it remains to be seen how States would respond to a decision by the Court that the State's decision not to investigate or prosecute was based on its inability or unwillingness. Probably, a decision based on "inability" to investigate or prosecute may be easier to justify as it generally stems from a breakdown of or unavailability of institutions of legal enforcement.<sup>120</sup> On the other hand, "unwillingness" to prosecute involves a deliberate decision of the State not to hold the accused person accountable.<sup>121</sup>

---

<sup>116</sup> ICC Statute, *supra* note 1, art. 20(3)(b).

<sup>117</sup> *Id.*, art 18(4). The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance to Article 82. Such appeal may be heard on an expedited basis.

<sup>118</sup> *Id.*, art. 19(2) (b), provides that Challenges to the admissibility of a case under Article 17 or challenges to the jurisdiction of the Court may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case.

<sup>119</sup> Leila Sadat & S. Richard Carden, *supra* note 114, at 418.

<sup>120</sup> ICC Statute, *supra* note 1, art. 17(3).

<sup>121</sup> *Id.*, art. 17(2).



Lastly, a case is inadmissible if the case is not of sufficient gravity to justify action by the Court.<sup>122</sup> Although not stated, it appears that the basis for this ground stems from the fact that jurisdiction of the Court shall be reserved for “the most serious crime of concern to the international community”.<sup>123</sup> Be that as it may, it is up to the Court to determine which case meets the “sufficient gravity” test as the ICC Statute does not define the term “gravity”. In this regard, it has been suggested that the Court may draw a clue from the chapeau of articles 6, 7 and 8 which provide the jurisdictional threshold for the crimes under the ICC Statute.<sup>124</sup>

Thus, the ICC may consider whether the genocidal act was committed with intent to destroy in part or in whole any of the protected “group”,<sup>125</sup> whether a crime against humanity was “widespread or systematic”,<sup>126</sup> and whether the war crime was “part of a plan or policy” or committed on a large scale basis<sup>127</sup> respectively. Therefore, elements of gravity will include scale - that is, the magnitude or widespread nature of the crimes; the heinous nature of the offense, and level of participation of the accused – with a view to distinguish “major” war criminals from “minor” offenders who should be tried locally.<sup>128</sup>

On the other hand, the first three grounds for inadmissibility find support on the Court’s complementary jurisdiction which confers primacy of jurisdiction to national courts.<sup>129</sup> It follows that where the national court has assumed jurisdiction, the Court will find the case inadmissible unless the Court determines that the domestic authorities are

---

<sup>122</sup> ICC Statute, *supra* note 1, art. 17(1)(d).

<sup>123</sup> *Id.*, art. 5(1).

<sup>124</sup> Leila Sadat & S. Richard Carden, *supra* note 114, at 419.

<sup>125</sup> ICC Statute, *supra* note 1, art. 6.

<sup>126</sup> *Id.*, art. 7(1).

<sup>127</sup> *Id.*, art. 8(1).

<sup>128</sup> Leila Sadat & S. Richard Carden, *supra* note 114, at 419.

<sup>129</sup> See ICC Statute, *supra* note 1, Preamble, para. 10; arts. 1, 17.

unwilling or unable to genuinely carry out the investigation or prosecution. Article 17 firmly establishes the authority and prerogative of States to preserve their sovereign right to prosecute these cases in their national courts, as opposed to relying on the Court.<sup>130</sup>

It is noteworthy that under the ICC Statute, the Security Council may pursuant to its powers under article VII of the UN Charter refer a situation in non-Party State to the Court without the consent of the non State party.<sup>131</sup> This raises the question whether the ICC Statute permits a non-Party State to challenge the admissibility of the case under article 19 if the case was referred to the Court by the Security Council. While the consent of a non State party is not required for referrals from the Security Council,<sup>132</sup> a non State party may still challenge the admissibility of a case or the Court's jurisdiction regarding referrals made to the Court by the Security Council pursuant to article 19, paragraph 2(b).<sup>133</sup>

Since article 19 is of general application, that is, it covers all cases regardless of how it was brought before the Court, it follows that a non-State party may challenge the admissibility of a case referred to the Court by the Security Council if the non-State party has jurisdiction over the case.<sup>134</sup> This may be so in situations where the accused is a national of the non-State party and the State wishes to exercise jurisdiction based on

---

<sup>130</sup> Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 47-48 (2001).

<sup>131</sup> ICC Statute, *supra* note 1, art. 14.

<sup>132</sup> See *Id.*, art. 12(2) which requires the consent of a State only if the Court's jurisdiction was triggered under Article 13, paragraph (a) or (c).

<sup>133</sup> See *Id.*, art. 19(2)(b) which provides that challenges to the admissibility of a case may be made by "[a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted" the case.

<sup>134</sup> John T. Holmes, *supra* note 113, at 683.

nationality principle.<sup>135</sup> Similarly, a non-State party may challenge the admissibility of case against its national even where the case was referred to the Court by the territorial State that is a State-party to the ICC Statute because the non-State party qualifies as a “State which has jurisdiction over [the] case.”<sup>136</sup>

In view of the above, Sudan may elect to challenge the situation in Darfur, Sudan referred to the Court by the Security Council via Resolution 1593.<sup>137</sup> However, it is debatable whether the non-State party may procedurally make such challenge without first recognizing the ICC Statute or the Court’s jurisdiction even for the limited purpose of challenging the admissibility of case or the Court’s jurisdiction for the said case.

It should be noted that neither the ICC Statute nor the ICC RPE provide for who bears the burden to proof inadmissibility of a case. Generally, under the principle of *actori incumbit probatio*, the burden of proof rests initially on the party asserting the existence of any of the grounds for inadmissibility or admissibility and in situations.<sup>138</sup> With respect to admissibility based on on-going and or completed investigation or prosecution, it appears the ICC Statute only require the State to communicate this to the Prosecutor together with supporting information.<sup>139</sup> Once a State has asserted that it is investigating or prosecuting or has investigated or prosecuted the accused, the onus is on

---

<sup>135</sup> Under the nationality principle, which, like the territorial principle, is widely recognized, every State has jurisdiction to prosecute its own nationals for crimes even when committed outside of its own territory. See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (3d ed. 1979).

<sup>136</sup> ICC Statute, *supra* note 1, art. 19(2)(b).

<sup>137</sup> The Sudanese government has handed to the United Nations a list of individuals of the regular services who have been allegedly tried for perpetrating crimes connected with the Darfur conflict thereby preparing the ground to assert inadmissibility of the case. See Agence France Presse, Sudan Hands UN Darfur Suspects List, February 26, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14276](http://www.sudantribune.com/article.php3?id_article=14276) (visited February 28, 2006).

<sup>138</sup> See Mojtaba Kazazi, *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 54-66 (1996) (tracing the genesis of the rule and its applicability in Islamic law, and common and civil law jurisdictions). See notes 96-99 and accompanying text (for parties that may challenge the admissibility of a case).

<sup>139</sup> ICC Statute, *supra* note 1, art. 118(2)

the ICC Prosecutor to prove that a State is unable or unwilling to prosecute, or that investigations and trials carried out by a State are fraudulent.<sup>140</sup> On the other hand, where the Prosecutor has determined that the case is inadmissible, on challenge by a party, the Prosecutor has to substantiate the grounds for determining that the case is inadmissible. Thereafter, the challenging party has to establish the admissibility of the case.

Apart from grounds for challenging the inadmissibility of a case, the ICC Statute does not list grounds for challenging the Court's jurisdiction. However, some of the grounds by which the Court's jurisdiction may be challenged are discussed below.

#### **7.6.2. Age Requirement**

The Court's jurisdiction may be challenged on the ground that the accused was under the age of eighteen at the time the crime was committed.<sup>141</sup> While this may appear a non-issue, it could sometime be a knotty legal issue to determine the age of an individual in situations where there is no proper record of birth or where the record is otherwise unavailable. Given the increasing participation of under-aged "soldiers" in recent armed conflicts, this may prove to be a ground for challenging the Court's jurisdiction. Successful challenge based on age of criminal liability means that no body will be criminally liable for atrocities committed by individuals between the age of fifteen and eighteen years because the ICC Statute only provides for the punishment of persons responsible for conscripting or enlisting children under the age of fifteen years to participate in armed conflict.<sup>142</sup>

---

<sup>140</sup> ICC Statute, *supra* note 1, art. 17(2) & (3). 823.

<sup>141</sup> *Id.*, art. 26.

<sup>142</sup> *Id.*, art. 8(2)(b)(xxvi), 8(2)(e)(vii).

Perhaps, the ICC should have adopted the position of the Sierra Leone Special Court to the effect that where any person who was at the time of the alleged commission of the crime between 15 and 18 years of age, the Court's objective should be to rehabilitate and reintegrate the juvenile offender back to the society.<sup>143</sup> It is however doubtful if the Court would be confronted with a lot of offenders in this age group given that the Court will focus on those who bear the greatest responsibility for serious violations of the crimes within the Court's jurisdiction.

### **7.6.3. Security Council Deferral/Opt Out Period**

The jurisdiction of the Court may be temporarily suspended by the Security Council for a renewable period of 12 months.<sup>144</sup> Similarly, a State party may at the time of becoming a party to the Statute, suspend the jurisdiction of the Court for a one time period of seven (7) years with respect to war crimes.<sup>145</sup> Thus, a challenge to the Court's jurisdiction or admissibility of a case may be based on the ground that the investigation and/or prosecution of the case have been suspended by the Security Council or that the territorial State or State of nationality of the accused has opted out of the Court's jurisdiction with respect to war crimes.<sup>146</sup> During the period of the deferral or opt out, the Court lacks jurisdiction to authorize investigation or prosecution of the case.

### **7.6.4. Nationality**

Where a crime is committed in the territory of a State that is not a party to the ICC Statute, the accused person may challenge the Court's jurisdiction if the State of which

---

<sup>143</sup> ICC Statute, *supra* note 1, art. 8(2)(b)(xxvi), 8(2)(e)(vii). See also, article 15(5) requiring the Prosecutor to "ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."

<sup>144</sup> *Id.*, art. 16.

<sup>145</sup> *Id.*, art. 124.

<sup>146</sup> *Id.*, arts. 16, 124.

the accused is a national is not a State party to the ICC Statute and has not given its consent, unless the case was referred to the Court by the Security Council<sup>147</sup> The State must be a State party to the ICC Statute before the date of the commission of the crime unless the State makes a declaration to accept the Court's jurisdiction in accordance with article 12 paragraph 3.<sup>148</sup> Such declaration must however not be for crimes committed earlier than the date of the entry into force of the ICC Statute as "no person shall be criminally responsible for conduct prior to entry into force of the Statute".<sup>149</sup>

The ICC Statute does not address the issue of dual nationality and therefore leaves a loophole which may be exploited by an accused with dual nationality if one of the State to which the accused is a national is not a State party to the Statute. For example, an accused person may be a national of State A which is a State party to the Statute and State B which is not a State party to the Statute. The act did not occur in State A but in the territory of State B which has declined to give its consent. The situation has not been referred to the Court by the Security Council.

In the above hypothetical situation, the Court can only exercise jurisdiction through State A because the accused person is a national of State A and State A is a State party to the ICC Statute. However, the accused may try to avoid the jurisdiction of the Court by denouncing his or her citizenship of State A. In which case, the accused may challenge the Court's jurisdiction on the grounds that he or she is not a national of a State party to the ICC Statute. It remains to be seen what the Court would do if faced with this circumstance. It is suggested that the Court may find that it has jurisdiction since the

---

<sup>147</sup> ICC Statute, *supra* note 1, art. 12.

<sup>148</sup> *Id.*, 11(2).

<sup>149</sup> *Id.*, art. 11(1), 24(1).

accused was a national of a State party at the time the crime was committed. Also, the Court may invoke jurisdiction if the accused normal place of residence is in State A.

#### **7.6.5. *Nullum Crimen Sine Lege***

The ICC Statute does not have *ex post facto* subject matter or personal jurisdiction.<sup>150</sup> Therefore, a challenge on the Court's jurisdiction may be made on the basis that the conduct was committed before the entry into force of the ICC Statute<sup>151</sup> or that the conduct was not a crime within the jurisdiction of the Court at the time it was committed.<sup>152</sup>

#### **7.7. Time of Challenge**

In principle, article 19 provides that there can only be one challenge on the admissibility of a case or jurisdiction of the Court and that it must take place prior to or at the commencement of the trial unless the Court grants leave for the challenge to be made more than once or to be brought after the beginning of a trial.<sup>153</sup> However, challenges to the admissibility of a case at the commencement of the trial or with leave of the Court is limited to challenges on grounds of *ne bis in idem*.<sup>154</sup> This is so because the ICC Statute enjoins States to make a challenge at the earliest opportunity.<sup>155</sup> Under the ICC Statute, the earliest opportunity for a State to challenge the admissibility of a situation referred to the Court by another State or by the Prosecutor *proprio motu*, is within one month of its notification by the Prosecutor.<sup>156</sup>

---

<sup>150</sup> ICC Statute, *supra* note 1, arts. 11(1), 24(1).

<sup>151</sup> *Id.*, arts. 11.

<sup>152</sup> *Id.*, art. 22(1).

<sup>153</sup> *Id.*, art. 19(4).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*, art. 19(5).

<sup>156</sup> *Id.*, art. 18(2).

However, a State which has unsuccessfully challenged the admissibility of a situation under article 18 may challenge the admissibility of a case under article 19 on grounds of additional significant facts or significant change of circumstances.<sup>157</sup> Where the State failed to challenge the admissibility of a situation within the stipulated time, the Court cannot grant the State leave to initiate the challenge at the commencement of the trial or thereafter as the Court's authority in this regard is limited to challenges on grounds of *ne bis in idem*.<sup>158</sup>

It follows that a State that failed to make the challenge within one month of its notification by the Prosecutor has permanently waived its right to challenge the admissibility of the case even if there are additional sufficient facts or change of circumstance. The State can no longer challenge the admissibility of the case on the basis that it is investigating or has investigated or prosecuted the case unless the case was referred to the Court by the Security Council in which case there is no obligation on the Prosecutor to notify the States before commencement of investigation.<sup>159</sup>

### **7.8. Observations and Commentary**

It is commendable that three States have taken the step to refer situations in their respective States to the ICC. However, such steps raises issues of procedural compliance with the ICC Statute and Rules since the instruments did not anticipate a situation where the referral State is both the territorial State and the State of nationality of the accused.<sup>160</sup>

---

<sup>157</sup> ICC Statute, *supra* note 1, art. 18(7).

<sup>158</sup> *Id.*, art. 19(4).

<sup>159</sup> *Id.*, art. 18(1). The Prosecutor is only required to notify all State Parties and States that may have a right to exercise jurisdiction if the situation was referred to the Court by a State or where the Prosecutor intends to initiate an investigation *proprio motu* based on information available to the Prosecutor. *Id.*

<sup>160</sup> The ICC Statute and the ICC Rules do not have any provision that deals with such scenario.



First, does a State referral equal a waiver of its primacy jurisdiction and ability to challenge the jurisdiction of the Court or the admissibility of the case? In other words, can the State open its domestic investigation and/or prosecution of the case after it had referred the case to the Court thereby positioning itself to assert jurisdiction. Second, should State referral imply an expression by the State that it is unwilling or unable to investigate or prosecute? Lastly, should the Prosecutor comply with the procedural requirements to notify the referral State before commencing investigation?

With respect to the issue of waiver, the question first came up for discussions at the 1995 Ad hoc Committee session without a resolution.<sup>161</sup> Some delegates favored an inclusion of a provision in the ICC Statute that expressly allows a State to voluntarily decide to relinquish its jurisdiction in favor of the ICC while others expressed the view that such provision would be inconsistent with the principle of complementarity as the ICC should in no way undermine the effectiveness of national justice systems and should only be resorted to in exceptional cases.<sup>162</sup> Although the issue came up again in subsequent Preparatory Committee sessions, no consensus was reached on this other than to insert the proposal as a footnote.<sup>163</sup> When the issue came up at the Rome Conference, the Conference suggested that the issue would be better addressed in the Rules of

---

<sup>161</sup> See, Report of the Ad hoc Committee on the Establishment of an International Criminal Court, G.A., 50<sup>th</sup> Sess., Supp. No. 22, A/50/22, para. 47 (1995).

<sup>162</sup> Id.

<sup>163</sup> See Decisions Taken by the Preparatory Committee at its Session Held on 4 to 15 August 1997, A/AC.249/1997/L.8?Rev.1, art. 35, p. 11. n. 17 (1997); Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, art. 11, p. 42 n. 53 (1998); Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, A/Conf.183/2/Add.1, art. 15, p. 48 n. 38, p. 40 n. 38 (1998).

Procedure and Evidence.<sup>164</sup> The ICC Rules however does not address the issue and it is now up to the Court to determine this issue if it does come up before the Court.

Should the Court determine that the referral amounts to a waiver of jurisdiction by the referral State, such waiver may be limited only to the right to investigate because a State referral may be for purposes of investigation to determine “whether one or more specific persons should be charged with the commission of crimes” under the ICC Statute.<sup>165</sup> Thus, the referral State may take the position that after investigation, the Prosecutor should advise it of persons to be prosecuted and the State may decide to commence domestic investigation and/or prosecution or give its consent for prosecution by the Court under article 12.<sup>166</sup>

Be that as it may, if the Court determines that a State referral amounts to a waiver of jurisdiction, the State should regain jurisdiction where the Prosecutor determines and the Pre-Trial Chamber concurs, that the ICC cannot investigate or prosecute the case in accordance with article 53 because a decision not to investigate or prosecute pursuant to article 53 does not equal a determination that a crime under the Statute has not been committed.<sup>167</sup>

In the event that the referral State is the territorial State where the crimes occurred and State of nationality of the accused, as is the case with the first three States’ referrals, this may raise the question whether the Prosecutor still has to comply with article 18 paragraph 1 and Rule 54 requiring the Prosecutor to inform all States that would

---

<sup>164</sup> John T. Holmes, The Principle of Complementarity, in Roy S. Lee (ed) THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 78 (The Hague/London/Boston: Kluwer Law International, 1999).

<sup>165</sup> ICC Statute, *supra* note 1, art. 14(1).

<sup>166</sup> *Id.*, art. 12(2).

<sup>167</sup> *Id.*, art. 53 (the Prosecutor may decide not to investigate or prosecute if there is not insufficient evidence, or the case is inadmissible under article 17, or a prosecution would not be in the interest of justice). *Id.*

generally exercise jurisdiction over the crimes of the Prosecutor's intent to commence investigation.<sup>168</sup> In this situation, the State that would exercise jurisdiction is the State that has referred the situation to the Prosecutor with a request that the Prosecutor investigate the situation. Thus, there would be no need for the Prosecutor to notify the State of his or her decision to commence investigation because the State requested the investigation. Even if the Prosecutor notifies the State of his or her intent to commence investigation, such notice should serve as an update and should not be intended to invoke article 18 paragraph 2.

On the other hand, it may be that between the time the State made the referral and before the Prosecutor commence investigation, there has been a change in circumstance which positions the State to carry out the investigation domestically. In such event, the State may argue that its referral does not amount to a waiver of their rights under article 18, paragraphs 1 and 2. On the face of article 18, paragraph 1, this argument may be sustained since the subparagraph provides that "the Prosecutor *shall* notify *all* States Parties and those States which ... would normally exercise jurisdiction over the crimes concerned."<sup>169</sup> In the first place, the requirement is mandatory and secondly, the notice is to be given to *all* States entitled to exercise jurisdiction over the crime concerned. Thus, to avoid a situation where the Prosecutor may be forced to terminate its investigation prematurely as a result of a challenge by the referral State, it is suggested that the prudent thing to do is to comply with article 18, paragraph 1, *a fortiori* such compliance would be innocuous.

---

<sup>168</sup> ICC Statute, *supra* note 1, art 18(1); ICC Rules, *supra* note 101, R. 54.

<sup>169</sup> ICC Statute, *supra* note 1, art. 18(1) [emphasis added].

Should the Prosecutor notify the referral State of his or her intent to commence investigation and the referral State fails within one month of receipt of the notification to inform the Prosecutor that it is investigating or has investigated its nationals, or the State fails to challenge the admissibility of the case under article 18, the State would lose its right to challenge the admissibility of the case under article 19 unless there are “additional significant facts” or “significant change of circumstances” enabling the Court to allow a dilatory challenge.<sup>170</sup> On the other hand, if the Prosecutor failed to notify the referral State of his or her intent to commence investigation, the referral State may challenge the admissibility of the case under article 19 for the first time.<sup>171</sup>

Also, a related issue to States referrals is whether such referrals amount to abdication of States Parties’ duties under the ICC Statute which affirms that to realize the Statute’s objective that crimes within the subject matter jurisdiction of the Statute “must not go unpunished ... effective prosecution must be ensured by taking measures at the national level”.<sup>172</sup> Thus, the Statute obligates States to “exercise its criminal jurisdiction over those responsible for international crimes.”<sup>173</sup> This raises the question whether States can discharge this obligation to “exercise its criminal jurisdiction” by simply referring the case to the ICC. Put differently, must a State carry out domestic prosecution of those responsible for international crimes to satisfy its obligation under the ICC Statute?

It may be argued that a joint reading of preamble four requiring that measures be taken at the national level and preamble six imposing a duty on States to exercise its

---

<sup>170</sup> ICC Statute, *supra* note 1, art. 18(7).

<sup>171</sup> *Id.*, art. 19(4) (stating that the admissibility of a case or the jurisdiction of the Court may be challenged only once by any State).

<sup>172</sup> *Id.*, preamble, para. 4.

<sup>173</sup> *Id.*, preamble, para. 6.

criminal jurisdiction implies that States have an affirmative duty to first attempt domestic prosecution. While national prosecution is desirable and appears preferable by the ICC Statute, the Statute does not expressly require that the duty to exercise criminal jurisdiction can only be discharged by pursuing domestic criminal prosecution. The duty is akin to the principle of *aut dedere aut judicare* which requires a State to either prosecute or extradite the accused to a third State willing to prosecute without *preferring* one to the other.<sup>174</sup> Similarly, under the ICC Statute, the duty of a State should be to prosecute or surrender the accused to the Court or extradite to a third party State (territorial State or State of nationality of the accused) that is willing to prosecute the accused.

It is submitted that where a State elects to surrender those responsible for international crimes to the Court, the State has discharged its obligation under the Statute because such decision to refer the matter to the ICC involves taking measures at the national level and exercising its criminal jurisdiction to the effect that the matter should be handled by the Court. Also, the ICC Statute expressly allows the States to refer a situation in which one or more of the crimes within the Court's jurisdiction may have been committed to the Prosecutor for investigation without any requirement that the States Parties must first attempt domestic prosecution.<sup>175</sup>

With respect to referral by the Security Council referral, there is the question whether the admissibility of the case may be challenged by the concerned State(s). The

---

<sup>174</sup> See Colleen Enache-Brown and Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L. J. 613, 626 (1998); M. Cherif Bassiouni and Edward M. Wise, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3-5, 56-57 (Dordrecht/Boston/London: Martinus Nijhoff, 1995) (emphasis added).

<sup>175</sup> ICC Statute, *supra* note 1, art. 14(1).

Security Council referral of the situation in Darfur, Sudan promises to test the effect of such referral. Already, the Sudanese government has left no one in doubt that they have no intention of cooperating with the Court and will not surrender any of their nationals to the Court regarding this referral.<sup>176</sup> As a prelude to asserting jurisdiction, after the Security Council via Resolution 1593 referred the situation in Darfur, Sudan to the Court, the Sudanese government established its own special court in June 2005 to allegedly try Darfur criminals and has vehemently maintained its right to handle the case domestically.<sup>177</sup> Contrast with the position of the U.N. Special Rapporteur on Sudan who has argued that the special court is not able to try Sudanese officials responsible for violating international crimes in Darfur, Sudan.<sup>178</sup>

The plain language of article 19 does not take away the right of a State to challenge the admissibility of a case, even when that case was referred to the Court by the Security Council. Thus, the admissibility of the situation in Darfur is likely going to be challenged by the government of Sudan on the ground that it has investigated and

---

<sup>176</sup> See, Sudan Tribune, ICC Delegation to Visit Sudan's Darfur", February 27, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14271](http://www.sudantribune.com/article.php3?id_article=14271) (reporting that the Sudan's Justice Minister Mohamed al-Mardi told Reuters in an interview on 13 December 2005 that Moreno Ocampo's investigators would not have any access to Darfur, where ethnic cleansing has resulted in killings, rape and the uprooting of 2 million refugees. The paper quoted the Justice Minister as saying that "the ICC officials have no jurisdiction inside the Sudan or with regards to Sudanese citizens," and that "they cannot investigate anything on Darfur").

<sup>177</sup> The Sudanese government has handed to the United Nations a list of individuals of the regular services who have been allegedly tried for perpetrating crimes connected with the Darfur conflict thereby preparing the ground to assert inadmissibility of the case. See Agence France Presse, Sudan Hands UN Darfur Suspects List, February 26, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14276](http://www.sudantribune.com/article.php3?id_article=14276) (visited February 28, 2006).

<sup>178</sup> Reuters, Sudan Unable to Try Darfur Suspects - UN Official, March 6, 2006, available at: <http://www.alertnet.org/thenews/newsdesk/MCD652175.htm> (quoting Sima Samar, the U.N. Special Rapporteur on Sudan to the effect that "Sudan's special court for Darfur is not able to try Sudanese officials responsible for war crimes and authorities continue to abuse freedom of expression." Ms. Samar said the courts had not yet tried anyone with command responsibility for crimes in Darfur and that she had only been given a list of 15 officers from the police and army who had been tried for crimes between 1991 and 2003, before the Darfur conflict even began. "We did ask for information and they didn't provide much information so that means that maybe they are not able to bring anybody to justice," she said).

prosecuted those that it considered responsible for the situation in Darfur.<sup>179</sup> It remains to be seen how the Court will deal with this challenge. It is not unlikely that the Court may consider such prosecution as an attempt to shield the individuals from the jurisdiction of the Court or to completely deny the Court of jurisdiction in the case.<sup>180</sup> Such determination will lead the Court to conclude that the Sudanese government is unwilling and/or unable to investigate or prosecute thereby opening the door for exercise of jurisdiction by the Court.

Hopefully, with the enforcement powers of the Security Council, the Prosecutor will be able to carryout his investigations in the matter and that indicted individuals will be apprehended and surrendered to the Court. However, it is suggested that if the Security Council referral should have the anticipated boast, the ICC Statute should be amended to clearly indicate that a referral by the Security Council should suffice as evidence of the unwillingness or inability of the State concerned to investigate or prosecute the case thereby removing the procedural hurdle of article 19 admissibility challenge.

---

<sup>179</sup> ICC Statute, *supra* note 1, art. 19(2)(b).

<sup>180</sup> *Id.*, art. 17(2).

## PART IV

# OBSTACLES TO INDIVIDUAL CRIMINAL LIABILITY IN THE ROME STATUTE



## CHAPTER EIGHT

---

### 8.0. BOTTLENECKS AND LIMITATIONS TO THE COURT'S JURISDICTION

---

#### 8.1. Introduction

The understandable euphoria surrounding the establishment of the ICC obscured the fact that many compromises that were necessary to reach the successful conclusion significantly diluted the original aspirations. The reality is that the ICC Statute cut down on the ability of the Court to exercise universal jurisdiction through the principle of complementarity. The ICC could act only in those cases where national States were unwilling or unable to investigate or prosecute the accused. The Prosecutor could not act without prior approval of the Pre-trial Chamber. Also, absent U.N. Security Council action, the Court can only exercise jurisdiction after it has passed through the layer of procedural rules requiring the Prosecutor to obtain the consent of either the State on whose territory a crime is committed or the State of nationality of the accused.<sup>1</sup> Further, the UN Security Council has authority to halt prosecutions if in its opinion such prosecution will not be compatible with its responsibilities under Article VII of the UN Charter.<sup>2</sup> Some of these compromises which severely limited the Court's jurisdiction are discussed below.

---

<sup>1</sup> ICC Statute, *supra* note 1 art. 12.

<sup>2</sup> *Id.*, art. 16.

## 8.2. The Complementarity Principle

The principle of complementarity which permeates the ICC Statute confers jurisdictional primacy on national courts over the ICC.<sup>3</sup> In other words, the Court has no jurisdiction over a case when the matter “is being appropriately dealt with by a national justice system”.<sup>4</sup> National sovereignty concerns informed the introduction of the principle of complementarity in the operation of the ICC.<sup>5</sup> Article 17 provides that the ICC will defer its jurisdiction to a national court except in situations where national courts have been genuinely unable or unwilling to investigate and/or prosecute the accused.<sup>6</sup> Article 17 is applicable even when the State’s leaders are themselves implicated.<sup>7</sup>

The Prosecutor is duty-bound to notify all States that might normally exercise jurisdiction of his or her intention to commence an investigation.<sup>8</sup> Thereupon, any State with jurisdiction over the case, whether a State party or not, may within one month of receipt of such notice inform the Court that it is investigating or has investigated the situation domestically.<sup>9</sup> Such notice may be accompanied with a request that the Prosecutor stop his or her own investigation in the case.<sup>10</sup> On receipt of the request, the

---

<sup>3</sup> Id., Preamble, Para. 10, arts. 1, 17. (Article 1 of the Statute provides that the Court shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction).

<sup>4</sup> William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85 (2<sup>nd</sup> ed. 2004).

<sup>5</sup> See David J. Scheffer, Staying the Course with the International Criminal Court, 35 CORNELL INT’L L.J. 47, 59-60 (Nov. 2001-Feb. 2002) (noting that Article 17 was ostensibly drafted to accommodate and protect the United States’ interest).

<sup>6</sup> ICC Statute, *supra* note 1, art. 17(a).

<sup>7</sup> Id., art. 28.

<sup>8</sup> Id., art. 18(1).

<sup>9</sup> Id., art 18(2).

<sup>10</sup> The request must be made in writing and must contain information regarding the State’s investigation. See, ee ICC, Rules of Procedure and Evidence (adopted by the Assembly of States Parties, First Session, New York, 3-10 Sept. 2002), U.N. Doc. PCNICC/2000/1/Add. 1, ICC-ASP/1/3, Rules 53 & 54, available at: [http://www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf) (visited March 3, 2006) [hereinafter ICC Rules].

Prosecutor must defer to the State's investigation but may make an application to the Pre-Trial Chamber which may decide to authorize the investigation.<sup>11</sup> To the extent that the Prosecutor has no choice in the matter but to comply, "the 'request is really not a request. It is a demand or an assertion by the State of its right to primacy".<sup>12</sup>

Therefore, the complementarity notion in the ICC Statute replaces the primacy jurisdiction of international tribunals as was the case with the ad hoc tribunals such as the Nuremberg<sup>13</sup> and Tokyo<sup>14</sup> war tribunals, the International Criminal Tribunal for the Former Yugoslavia<sup>15</sup> (ICTY), the International Criminal Tribunal for Rwanda<sup>16</sup> (ICTR) as well as the mixed tribunals in Sierra Leone, Timore-Leste, and Cambodia with priority for national courts.<sup>17</sup> This deference to national courts suggestively makes the ICC a court of last resort.<sup>18</sup>

---

<sup>11</sup> ICC Statute, *supra* note 1, art. 18(2).

<sup>12</sup> See Daniel D. Ntanda Nsereko, Article 18 Preliminary Rulings Regarding Admissibility in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 395, 401 (Otto Triffterer, ed. 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

<sup>13</sup> The International Military Tribunal at Nuremberg was established by an agreement between four victorious Allied Powers at the end of World War II. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted* in 39 AM. J. INT'L L. 257 (1945) [hereinafter Nuremberg Charter].

<sup>14</sup> The International Military Tribunal for the Far East was established in Tokyo pursuant to the Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, [4 Bevens 20](#).

<sup>15</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993), *reprinted* in 32 ILM 1192 (1993) [hereinafter ICTY Statute].

<sup>16</sup> Statute of the International Criminal Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted* in 33 ILM 1602 (1994) [hereinafter ICTR Statute].

<sup>17</sup> See Bartram S. Brown, Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals 23 YALE J. INT'L L. 383, 385 (1998) (noting that ICTY and ICTR raised for the first time the appropriate relationship between the jurisdiction of national courts and that of an international criminal court which was clearly to resolve the jurisdictional conflict in favor of the International Tribunal). *Id.*

<sup>18</sup> John Seguin, Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute, 18 B.U. INT'L L.J. 85, 94 (2000); James L. Taulbee, A Call to Arms Declined: The United States and the International Criminal Court, 14 EMORY INT'L L. REV. 105, 129 (2000).

Thus, under the complementarity provision, any State with jurisdiction can effectively prevent the ICC from exercising jurisdiction over its nationals by informing the Court of its willingness to investigate the allegation under article 18(2).<sup>19</sup> In the event that the Pre-trial Chamber rejects such request, article 18(4) allows the requesting State to appeal an adverse ruling of the Pre-trial Chamber to the Appeals Chamber.<sup>20</sup> In addition, under article 18(7) a State which has challenged a ruling of the Pre-trial Chamber may challenge the admissibility of the case under article 19 on grounds of additional significant facts or significant change of circumstances.<sup>21</sup> With these arrangements, the possibility that the ICC would exercise its jurisdiction without hindrance from one State or the other is exceedingly remote because no State will wish the Court to remove a case from its jurisdiction where it intended to conduct the investigation and prosecution itself.<sup>22</sup>

In view of this development, the complementarity provisions have watered down the jurisdiction of the Court and created an avenue where a State may use the complementary provisions to shield its nationals from the Court's jurisdiction.<sup>23</sup> The Security Council referral of the situation in Darfur, Sudan exposes this concern as it promises to test the effect of such referral. Already, the Sudanese government has left no one in doubt that it has no intention of cooperating with the Court and will not surrender

---

<sup>19</sup> ICC Statute, *supra* note 1, art 18(2).

<sup>20</sup> *Id.*, art 18(4).

<sup>21</sup> *Id.*, art. 19(2) (b), provides that Challenges to the admissibility of a case under Article 17 or challenges to the jurisdiction of the Court may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case.

<sup>22</sup> *Id.*

<sup>23</sup> Jimmy Gurule, United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?, 35 CORNELL INT'L L.J. 1 (2002).

any of their nationals to the Court regarding this referral.<sup>24</sup> Thus, after the referral, the government of Sudan created a special court to prosecute individuals suspected of perpetrating crimes in Darfur.

The Sudanese government has not made any pretensions as to its intention in creating the special court as an official of the Sudanese Ministry of Justice avers that “ICC article 17 stipulates that it can refuse to look into any case if investigations and trials can be carried out in the countries concerned except if they are unwilling to carry out the prosecutions”.<sup>25</sup> Consequently, the Sudanese government has gone ahead to allegedly prosecute some security officials over the Darfur conflict.<sup>26</sup> Contrast with the position of the U.N. Special Rapporteur on Sudan who has argued that the special court is not able to try Sudanese officials responsible for violating international crimes in Darfur, Sudan.<sup>27</sup> Therefore, the alleged prosecution is nothing but a charade to shield Sudanese nationals from the reach of the Court by taking advantage of article 17.

---

<sup>24</sup> See, Sudan Tribune, ICC Delegation to Visit Sudan’s Darfur”, February 27, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14271](http://www.sudantribune.com/article.php3?id_article=14271) (reporting that the Sudan’s Justice Minister Mohamed al-Mardi told Reuters in an interview on 13 December 2005 that Moreno Ocampo’s investigators would not have any access to Darfur, where ethnic cleansing has resulted in killings, rape and the uprooting of 2 million refugees. The paper quoted the Justice Minister as saying that “the ICC officials have no jurisdiction inside the Sudan or with regards to Sudanese citizens,” and that “they cannot investigate anything on Darfur”).

<sup>25</sup> See Wim van Cappellen, Sudan: Judiciary Challenge ICC Over Darfur Cases, Integrated Regional Info. Networks, June 24, 2005 (reporting that the Sudanese Council of Ministers avowed a total rejection of Security Council Resolution 1593 and that Sudan’s Justice Minister, Ali Mohamed Osamn Yassin, has been quoted by local media as stating that the new domestic institution would be a substitute to the International Criminal Court).

<sup>26</sup> See, Agence France Presse, Sudan Hands UN Darfur Suspects List, February 26, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14276](http://www.sudantribune.com/article.php3?id_article=14276) (reporting that the head of the governmental Human Rights Advisory Council (HRAC) Abdel Monim Osman Taha Gave a UN official in charge of human rights in the Sudan, Sima Samar, a list individuals of the regular services who have been tried for perpetrating crimes connected with the Darfur conflict).

<sup>27</sup> Reuters, Sudan Unable to Try Darfur Suspects - UN Official, March 6, 2006, available at: <http://www.alertnet.org/thenews/newsdesk/MCD652175.htm> (quoting Sima Samar, the U.N. Special Rapporteur on Sudan to the effect that “Sudan’s special court for Darfur is not able to try Sudanese officials responsible for war crimes and authorities continue to abuse freedom of expression.” Ms. Samar said the courts had not yet tried anyone with command responsibility for crimes in Darfur and that she had only been given a list of 15 officers from the police and army who had been tried for crimes between 1991 and

It has been suggested that a State may be unable to prosecute if it lacks the required manpower and institutions to carry out a meaningful criminal prosecution.<sup>28</sup> Such a situation could have arisen after the genocide in Rwanda, where very few lawyers and judges survived the 1994 massacre.<sup>29</sup> On the other hand, a State may be unwilling to prosecute a perpetrator if it demonstrates that it lacks the political will to do so. This may occur where the accused is a member of the State government, or exerts influence over or accepts favors from those in government.

Certainly, the situation in Darfur, Sudan fits into this latter category as the government has been fingered as an active party to the crisis in Darfur and has done nothing to disarm militias or end the “culture of impunity” there.<sup>30</sup> Human Rights Watch notes that “the Sudanese government’s systematic attacks on civilians in Darfur have been accompanied by a policy of impunity for all those responsible for the crimes,” and requests that “[s]enior Sudanese officials including President Omar El Bashir must be held accountable for the campaign of ethnic cleansing in Darfur.”<sup>31</sup> Whether the government and military officials Sudan will be held accountable or would hide under article 17 protection is anyone’s guess.

---

2003, before the Darfur conflict even began. “We did ask for information and they didn’t provide much information so that means that maybe they are not able to bring anybody to justice,” she said).

<sup>28</sup> David Rider, Canadian Judge Pans New International Court: Arbour Says Rules Shield World’s Worst Criminals, *The Ottawa Citizen*, Jan. 21, 2002, at A7 (quoting Justice Louise Arbour of the Supreme Court of Canada and former ICTY/ICTR prosecutor).

<sup>29</sup> *Id.*

<sup>30</sup> See Human Rights Watch Report, *Entrenching Impunity Government Responsibility for International Crimes in Darfur* December 12, 2005, Volume 17, No. 17A available at:

<http://hrw.org/reports/2005/darfur1205/>; (visited March 14, 2006) (documenting the role of more than a dozen named civilian and military officials in the use and coordination of “Janjaweed” militias and the Sudanese armed forces to commit war crimes and crimes against humanity in Darfur since mid-2003) available at: <http://hrw.org/reports/2005/darfur1205/>; (visited March 14, 2006).

<sup>31</sup> Human Rights Watch, U.N.: Put Sudan’s Top Leaders on Sanctions List: *ICC Should Investigate Darfur Officials*, available at: <http://hrw.org/english/docs/2005/12/09/sudan12186.htm> (visited March 14, 2006) (quoting Peter Takirambudde, Africa director at Human Rights Watch).

A related matter concerning article 17 is that under the guidelines for determining “unwillingness” or “inability” to prosecute or investigate, it is difficult to imagine a situation where an investigation or prosecution carried out by western countries with an advanced judicial system and history of criminal prosecution would be considered fraudulent. On the contrary, developing countries are less likely to benefit from the complementarity provision as their legal systems and political climate would easily be judged unable or unwilling to undertake satisfactory and successful prosecutions. As has been observed by Justice Arbour, “states with relatively developed legal systems will have a ‘major trump card’ to evade justice and will clash with developing countries that don’t.”<sup>32</sup> She rightly posits that such a clash will be intensely political so that the ICC risks becoming the true default jurisdiction for developing countries, subjecting the Court to major political legal battles with everyone else.<sup>33</sup> This may result in the Court being viewed suspiciously by developing countries as a vestige of western countries thereby tainting the Court as an independent judicial institution.<sup>34</sup>

While this study disputes the primacy jurisdiction of national courts over the ICC, it however suggests that an assessment that a government is unwilling to prosecute should not be based on lack of action in a single case, but on a systematic pattern of

---

<sup>32</sup> David Rider, *supra* note 28.

<sup>33</sup> *Id.*, (quoting Justice Louise Arbour).

<sup>34</sup> See, Institute for War and Peace Reporting (IWPR), Fred Bridgland, Darfur Sanctions Deadlock as ICC Considers Prosecutions, February 28, 2006, available at: [http://www.iwpr.net/?p=acr&s=f&o=259927&apc\\_state=henh](http://www.iwpr.net/?p=acr&s=f&o=259927&apc_state=henh) (visited February 28, 2006) (reporting that the ICC’s main work is so far concentrated on Darfur, northern Uganda and the Ituri region of the Congo, and that this heavy concentration on one continent has perplexed many Africans. They argue that it would have made public relations sense for such a new and important international court to have cast its net over several continents, including Europe from where it operates).

judicial inaction in pertinent cases.<sup>35</sup> Where a judicial system is considered unable to conduct trials, the ICC should not concern itself with assuming jurisdiction; rather the international community should offer assistance and training to overcome any shortcomings.<sup>36</sup> In this way, the ICC would retain the integrity of governments' judicial systems. This is necessary, considering the fact that governments constitute the Court's national partners, and their cooperation and compliance are integral to its functioning.<sup>37</sup>

Also, since States are likely to perceive the process by which the Court determines that a State is unable or unwilling to investigate or prosecute as a challenge to their sovereign powers, the Court is likely to refrain from making such determination.<sup>38</sup> Conferring the Court with primacy jurisdiction *ratione personae* over all cases within the Court's jurisdiction *ratione materiae* would avoid the need for the Court to sit on judicial review of a State's national legal system or the likelihood of abdicating in its responsibility by avoiding confrontation with a State anxious to defend its sovereignty.

---

<sup>35</sup> See Wilton Park Conference, Towards Global Justice: Accountability and the International Criminal Court (ICC), Feb. 4-8, 2002, at <http://www.wiltonpark.org.uk/web/welcome.html> (last visited Feb. 18, 2003).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> In a related development, the general approach followed by the Office of the Prosecutor with respect to its *proprio motu* powers indicates a clear preference for initiating investigations of alleged core crimes, wherever possible, on the basis of a referral by a State party pursuant to Article 14 or by the Security Council pursuant to Article 13(b). While this predilection does not mean, of course, that the Prosecutor will never exercise the authority to initiate investigations *proprio motu*, the Prosecutor seems inclined not to use these powers unless absolutely necessary, for example where states have failed to refer an objectively serious situation. See Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor": Referrals and Communications 1,5 (Apr. 23, 2004) [hereinafter Paper on Some Policy Issues]; Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 8, 2003).



As poignantly argued by the Appeals Chamber of the ICTY, jurisdictional primacy is a functional necessity for an international criminal tribunal.<sup>39</sup> According to the Appeals tribunal:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as “ordinary crimes” or proceedings being “designed to shield the accused,” or cases not being diligently prosecuted. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.<sup>40</sup>

The Appeal’s Chamber rightly noted that States and/or their national courts may not be able to handle the trial of some high profile persons. For instance, in spite of the U.S. support, the Iraqi Special Tribunal has not been able to conduct a hitch free trial of Saddam Hussein and some members of his Baath party.<sup>41</sup> The chaotic scenes that have marred the trial so far have prompted one commentator to suggest that the whole trial is being undermined and to observe as follows:

I think it was a big mistake that this trial was held in Iraq because the judge, you cannot find a person, one individual today in Iraq - judge, lawyer, prosecutor who is impartial vis-à-vis Saddam Hussein. Either they are with him or against him.<sup>42</sup>

Therefore, the Court is in a better position to withstand the political pressure associated with prosecuting high level individuals and avoid allegations of unfairness that may be leveled against a State. The Court will also hold individuals to a worldwide

---

<sup>39</sup> Prosecutor v. Tadic, No. IT-94-1, P 58-59 (I.C.T.Y. Oct. 2, 1995) (Appeal on Jurisdiction) [hereinafter Prosecutor v. Tadic, Appeals Decision on Jurisdiction].

<sup>40</sup> Id.

<sup>41</sup> Saddam Walks Out in Trial Uproar, BBC News, January 29, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4659274.stm](http://news.bbc.co.uk/2/hi/middle_east/4659274.stm)

<sup>42</sup> Id. (referring to Saad Djebbar, an international lawyer and commentator on Middle East politics)

standard of international justice.<sup>43</sup> This approach would promote universal and uniform individual criminal responsibility for the crimes concerned because any person accused of a core crime would normally be tried by the ICC, not by national courts.<sup>44</sup>

Further, it should be borne in mind that the Court's jurisdiction is designed to target a limited number of "persons for the most serious crimes of international concern".<sup>45</sup> In addition, the high threshold requirements for the crimes under the ICC Statute, provides additional device limiting the Court's jurisdiction only over crimes against humanity committed as part of a "widespread or systematic attack"<sup>46</sup> or war

---

<sup>43</sup> See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 60 (1997) (noting that "A permanent system of international criminal justice based on a preexisting international criminal statute would allow any person from any nation to be held accountable for violations. Equal treatment for violators would be guaranteed"). *Id.* at 60.

<sup>44</sup> See Amnesty International, *INTERNATIONAL CRIMINAL COURT: THE FAILURE OF STATES TO ENACT EFFECTIVE IMPLEMENTING LEGISLATION*, AI Index: IOR 40/019/2004, 1 September 2004, [hereinafter AI: Failure of States to Enact Effective Implementing Legislation] available at: <http://web.amnesty.org/library/Index/ENGIOR400192004?open&of=ENG-385> (observing that not many States have enacted national legislation implementing the ICC Statute, and that the few States that have done so, enacted flawed and inconsistent legislation.)

The report notes that the most common problems that are emerging in draft legislation now being prepared or considered are:

- weak definitions of crimes;
- unsatisfactory principles of criminal responsibility and defenses;
- failure to provide for universal jurisdiction to the full extent permitted by international law;
- political control over the initiation of prosecutions;
- failure to provide for the speediest and most efficient procedures for reparations to victims;
- inclusion of provisions that prevent or could potentially prevent cooperation with the Court;
- failure to provide for persons sentenced by the Court to serve sentences in national prisons; and
- failure to establish training programs for national authorities on effective implementation of the Rome Statute.

*Id.*, at 2.

Also of concern is the failure of some of the implementing legislation to provide adequate procedural guarantees, including the right to fair trial. Further, some national implementing legislation allow the imposition of death penalty. This is contrary to Article 77 of the ICC Statute which provides that the maximum penalty the Court may impose is life imprisonment. It is therefore inappropriate that national courts should impose a more severe penalty for a crime under international law than the one chosen by the international community itself.

*Id.*, at 25, 27.

<sup>45</sup> ICC Statute, *supra* note 1, pmb. 9, arts. 1, 5.

<sup>46</sup> *Id.*, art. 7.

crimes when such crimes have been committed as part of a plan or policy or have taken place on a particularly large scale.<sup>47</sup> The Prosecutor is also required under the ICC Statute to satisfy the Court that the case is of “sufficient gravity to justify further action by the Court”.<sup>48</sup>

In view of the above, the Court will not occupy the field as it will target only a small portion of perpetrators who are highly responsible for the atrocities and decline to exercise its inherent jurisdiction in cases in which deferral to national jurisdiction will be more appropriate. Thus, the States would still exercise concurrent jurisdiction by prosecuting others responsible at a lower degree.

### **8.3. Suspension of the Court’s Jurisdiction by the UN Security Council**

One concern throughout the negotiations for the ICC Statute, expressed mostly by the permanent members of the Security Council, was the possibility of conflict between the jurisdiction of the Court and the functions of the Council. It was argued that there may be situations in which the investigation or prosecution of a particular case by the Court could interfere with the resolution of an ongoing conflict by the Security Council. Also, the permanent members of the Security Council wanted to preserve a central role for the Council in the new Court.<sup>49</sup> To this extent, some lobbied for a provision that would automatically exclude the Court’s jurisdiction over any situation under consideration by the Council. Most States regarded this proposal too sweeping and feared it would undermine the Court, for situations could remain pending before the Council indefinitely without its taking any final or serious action. In the end, a

---

<sup>47</sup> ICC Statute, *supra* note 1, art. 8.

<sup>48</sup> *Id.*, art. 17(1)(d).

<sup>49</sup> John Seguin, *supra* note 18, at 95-96.

compromise provision was reached, which provided that the Security Council, acting under Chapter VII of the UN Charter, could adopt a resolution requesting deferral of an investigation or prosecution for a period of twelve months and that such a request could be renewed at twelve-month intervals.<sup>50</sup>

Article 16 is an unnecessary limitation on the jurisdiction of the Court because it allows the Security Council by resolution to stop a prosecution initiated by a State or the ICC Prosecutor from going forward, for an initial period of twelve months if in the opinion of the Security Council the prosecution will interfere with the Council's efforts to maintain international peace and security under Article VII of the UN Charter. The Security Council can renew its request indefinitely, in twelve month segments, under the same conditions.<sup>51</sup> In other words, the UN Security Council may perpetually intervene to suspend a case before the ICC at every twelve month interval on same grounds because article 16 does not limit the number of times the UN Security Council may request the suspension of a case for security reasons.<sup>52</sup> This provision was a result of a compromise suggestion by Singapore to placate the U.S.<sup>53</sup>

One of the main reasons for the creation of the ICC was to end the culture of impunity by holding individuals criminally responsible for egregious violations of crimes prohibited by international law.<sup>54</sup> Therefore, the rationale behind the establishment of the ICC is that it would help end or at least reduce the commission of genocide, war crimes, crimes against humanity and other related atrocities that shock the conscience of

---

<sup>50</sup> ICC Statute, *supra* note 1, art. 16.

<sup>51</sup> *Id.*, art. 16.

<sup>52</sup> *Id.*

<sup>53</sup> John Washburn, *The International Criminal Court Arrivers - The U.S. Position: Status and Prospects*, 25 *FORDHAM INT'L L.J.* 873, 878 (2002) (citing Lionel Yee, *The International Criminal Court and the Security Council*, in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE* 143 (Roy S. Lee ed., 1999)).

<sup>54</sup> ICC Statute, *supra* note 1, preamble.

humankind.<sup>55</sup> Thus, it is an irony of sort to suggest that the Court's exercise of jurisdiction to investigate or prosecute individuals accused of genocide, crimes against humanity and war crimes may impede the Security Council's efforts to maintain international peace and security under Article VII of the UN Charter.

It is plausible to suggest that only States that are permanent members of the Security Council stands in a better position to use this provision to perpetually forestall the prosecution of a case concerning their nationals. Members of the Security Council may choose to use this provision to stop investigations into situations concerning nationals of member States and would be likely to do so at the urging of one of its powerful permanent members. In deed, in 2002, the U.S. threatened to withdraw its nationals from U.N. peacekeeping missions unless the Security Council pass a resolution grating immunity to U.S. nationals from the ICC. The Security Council yielded to U.S. pressure and passed Resolution 1422 in July 2002 which deferred the Court's jurisdiction for one year over personnel of non-State parties participating in peacekeeping missions or operations authorized by the UN.<sup>56</sup> Resolution 1422 was renewed for another year by Resolution 1487 in June 2003.<sup>57</sup>

While Resolution 1422 was adopted unanimously in 2002, France, Germany and Syria abstained from voting in 2003 for Resolution 1487. In 2004, the U.S. withdrew the request to renew Resolution 1487 because it failed to receive the necessary votes to support a draft resolution to defer the Court's jurisdiction.<sup>58</sup> However, the Security

---

<sup>55</sup> See discussions on chapter five, pages 163-164 and accompanying notes.

<sup>56</sup> See Security Council Resolution 1422, S.C. Res. 1422, U.N. SCOR, 4572<sup>nd</sup> mtg., U.N. Doc. S/RES/1422 (2002), July 12, 2002, available at <http://www.un.org/Docs/Scres/2002/sc2002.htm>.

<sup>57</sup> Security Council Resolution 1487, S.C. Res. 1487, U.N. SCOR, 4772<sup>nd</sup> mtg., U.N. Doc. S/RES/1487 (2003), June 12, 2003, available at: [http://www.un.org/Docs/sc/unsc\\_resolutions03.html](http://www.un.org/Docs/sc/unsc_resolutions03.html).

<sup>58</sup> See Coalition for the ICC, Chronology of the Adoption and Withdrawal of Security Council Resolutions 1422/1487, [http://www.iccnw.org/documents/declarationsresolutions/UN1422\\_2004.html](http://www.iccnw.org/documents/declarationsresolutions/UN1422_2004.html). The failure to

Council has created a precedent that may be latched onto by other States to demand similar exemptions in the future. To forestall the unnecessary hindrance to the Court's jurisdiction, it is suggested that article 16 should be deleted from the Statute as it serves no useful purpose.<sup>59</sup>

Further, even where the Security Council refers a case to the Court, the Council may seek to micro manage the investigation or prosecution of the case. For instance, Security Council Resolution 1593 which referred the situation in Darfur to the Court requires the Chief Prosecutor of ICC to periodically apprise the Security Council with actions taken by the ICC pursuant to Resolution 1593.<sup>60</sup> Accordingly, the Prosecutor has addressed the Security Council on the Darfur situation twice.<sup>61</sup> It is not impossible that the Security Council may decide at a latter stage to invoke article 16 to stop the Court from going forward with the case.

---

secure the vote to renew Resolution 1487 has to do with concerns about allegations of abuse by U.S. soldiers at Abu Ghraib prison in Iraq. Id. See Amnesty International, *US Threats to the International Criminal Court*, [hereinafter *US Threats to the ICC*] available at: [http://web.amnesty.org/pages/icc-US\\_threats-eng](http://web.amnesty.org/pages/icc-US_threats-eng) (visited February 10, 2006).

<sup>59</sup> See Amnesty International, *International Criminal Court: The Unlawful Attempt by the Security Council to Give US Citizens Permanent Impunity From International Justice*, AI Index, IOR 40/006/2003 (Legal analysis of S.C. Resolutions 1422 & 1487 by Amnesty International concluding that the resolution is contrary to the Rome Statute, and also to the United Nations Charter). A summary of the Legal analysis is available at: <http://web.amnesty.org/library/index/engIOR400082003?Open&of=eng-393> (visited February 10, 2006).

<sup>60</sup> SC Resolution 1593, U.N. SCOR, 60<sup>th</sup> Sess., 5158<sup>th</sup> mtg., U.N. Doc. S/RES/1593, 8 (March 31, 2005) [hereinafter *S.C. Res. 1593*] *supra* note 46, para. 8 (The Prosecutor is required to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution).

<sup>61</sup> Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSR 1593 (2005), June 29, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=108&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=108&l=en.html) and Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSR 1593 (2005), December 13, 2005, available at [http://www.icc-cpi.int/cases/current\\_situations/Darfur\\_Sudan.html](http://www.icc-cpi.int/cases/current_situations/Darfur_Sudan.html).

The idea that the Security Council should play an oversight role on the operations of the Court should be resisted.<sup>62</sup> The Court is envisioned as an independent entity and should remain as such and the Security Council should not be allowed to politicize the judicial functions of the Court. While the Security Council cooperation with the Court will enhance its effectiveness, any attempt to subject it to the whims and caprice of the Security Council will greatly undermine the Court's independence and credibility. States, particularly developing and "third" world countries may view the Court as another vestige of western domination.

#### **8.4. Failure to Provide for Universal Jurisdiction**

The jurisdictional reach of the ICC is more limited than the general international jurisdiction currently enjoyed by States or groups of States over *jus cogens* violations.<sup>63</sup> As noted above, States delegates at the Rome Conference agreed on a compromised article 12 which sets out the preconditions for the Court's jurisdiction when a situation is not referred to the Court by the Security Council. Throughout the Conference, the U.S. sought to limit the Court's jurisdiction by arguing that the Court should exercise jurisdiction only against nationals of States Parties or territorial States on claims of

---

<sup>62</sup> Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, 2002-Sep *Army Law*. 1, 11 (2002) (noting that one of the main concerns of the United States is the limited role played by the United Nations Security Council in the operation of the ICC).

<sup>63</sup> Damrosch et al., *supra* note 39, at 534; (noting that "*Jus cogens* norms also give rise to obligations *erga omnes*, thus, all states have standing to bring to justice violators of *jus cogens* norms and have, even before the introduction of the ICC"). See also Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMP. PROBS.* 67, 116 (2001) (observing that "the core crimes within the ICC's jurisdiction-genocide, crimes against humanity, and war crimes-are crimes of universal jurisdiction.").

official acts. The United States wanted a situation in which no U.S. national would ever be brought before the ICC without U.S. consent.<sup>64</sup>

Also, the U.S. demanded a guarantee that no U.S. servicemen or women would be investigated or prosecuted by the ICC without U.S. consent.<sup>65</sup> It has been suggested that the justification for the U.S. position was that “more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world.”<sup>66</sup> It was therefore argued that this position renders U.S. personnel “uniquely vulnerable to the potential jurisdiction of an international criminal court.”<sup>67</sup> According to Ambassador David Scheffer:

The illogical consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions...<sup>68</sup>

Apart from the apparent inequality of this request, its obvious implication is that a guarantee for America would mean a *de jure* and *de facto* exemption of all other States which would effectively render the purpose of the Court moribund.<sup>69</sup>

Although the U.S. position was not acceptable to most States at the Rome Conference, they rejected a proposal by Korea that the Court should also exercise

---

<sup>64</sup> Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124, 126 (2001).

<sup>65</sup> *Id.*, *supra* note 64, at 126. *See also*, Thomas W. Lippman, *America Avoids the Stand: Why the U.S. Objects to a World Criminal Court*, Wash. Post, July 26, 1998, at C01 (noting that the American government insisted that the Rome Statute must contain an ironclad guarantee that no American would ever come before the Court).

<sup>66</sup> Michael P. Scharf, *Rome Diplomatic Conference for an International Criminal Court*, ASIL Insights (June 1998), available at <http://asil.org/insights/insigh20.htm> (accessed Mar. 15, 2002).

<sup>67</sup> *Id.*

<sup>68</sup> David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999).

<sup>69</sup> Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of “Operation Enduring Freedom”*, 9 ANN. SURV. INT'L & COMP. L. 19, 44-45 (2003).



jurisdiction if the victim's State or the custodial State has ratified the ICC Statute in order to accommodate U.S. concerns regarding supposed over-reach of the Court's jurisdiction.<sup>70</sup> Thus, absent submission of a case to the ICC by the UN Security Council, the Court can only exercise jurisdiction if the case occurs in the territory of a State party, or if the crime is committed by a national of a State party.<sup>71</sup> It should be noted that in most cases, the State of nationality and the territorial State are likely to be the same, as was the case with Pol Pot of Cambodia, Idi Amin of Uganda, Pinochet of Chile, and as exemplified by the first three State referrals to the Court.

The inclusion of the custodial State would have made it possible to apprehend an accused while traveling outside his or her State, or in the alternative, make it difficult for the accused to travel outside his or her State, thereby denying a safe haven anywhere. But, given the way article 12 was drafted, a country in whose territory an accused is residing will have no legal basis under the ICC Statute to surrender the accused to the Court. This is because article 12 only requires a State party to submit to the Court's jurisdiction if the crime was committed on its territory, or the person accused of the crime is a national.<sup>72</sup> In other words, a situation in which a national of State A commits a crime in State A and then enters State B ostensibly to evade justice, State B is not obliged to surrender him or her to the Court because the crime was not committed in State B's territory and the accused is not a national of State B. The situation becomes compounded if State B is not a State party to the ICC Statute.

---

<sup>70</sup> Human Rights Watch, Text Analysis International Criminal Court Treaty, July 17, 1998 available at <http://www.hrw.org/press98/july/icc-anly.htm> (last modified Apr. 4, 2002) [hereinafter ICC Treaty Text Analysis]. Id.

<sup>71</sup> ICC Statute, *supra* note 1, art. 12.

<sup>72</sup> Id., art. 12(2)(a-b).

Article 12 also makes it impossible for the victim's State to initiate a case to the ICC if its nationals were victims of international crimes in the territory of another State or by nationals of a non-State party. It has been suggested that if a victim's State is allowed to submit a case to the Court, the Spanish government would have been in a position to petition the ICC (if it were then in existence) for the "disappearance" of some Spaniards in Argentina in the 1970s and 80s.<sup>73</sup> This possibility is not available even under the new ICC Statute.

The idea that extending the ICC jurisdiction to include custodial and/or victim's States or that the current jurisdiction of the Court is overreaching and therefore violates fundamental principles of international law because it binds non-State parties<sup>74</sup> is untenable. The U.S. takes the position that under customary international law, a treaty-based international court cannot exercise jurisdiction over the nationals of a non-party State when acting under the direction of such a non-party State.<sup>75</sup>

Also, another commentator has suggested that, by conferring upon the ICC jurisdiction over non-party nationals, the ICC Statute would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties.<sup>76</sup> This commentator suggested that a State has a right to be free from the exercise of exorbitant jurisdiction over its nationals which cannot be abrogated by a treaty to which it is not a party.<sup>77</sup> Cited in support were the ILC official Commentaries on the Vienna Convention to the effect that "international tribunals have been firm in laying down that in principle

---

<sup>73</sup> ICC Treaty Text Analysis, *supra* note 70.

<sup>74</sup> David Scheffer, *supra* note 195, at 18.

<sup>75</sup> *Id.*

<sup>76</sup> Madeline Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 L. & CONTEMP. PROBS. 13, 26 (2001).

<sup>77</sup> *Id.*, at 27.

treaties, whether bilateral or multilateral, neither imposes obligations on States which are not parties nor modify in any way their legal rights without their consent.”<sup>78</sup> Furthermore, it was argued that because of the gravity of the outcome, member States cannot delegate to the ICC their territorial or universal jurisdiction.<sup>79</sup>

Those who make the argument that the Court cannot exercise jurisdiction over individuals if his or her State has not ratified the ICC Statute confuse and/or equate the position of a nonparty State with that of its nationals. As would be expected, this argument has been rejected by international law commentators on the simple basis that while a non-party State is not itself obligated under a treaty to which it has not consented, the same cannot be said of its nationals if they commit an offense in the territory of a State that is a party.<sup>80</sup> Responding to criticism of the Court’s jurisdiction over nationals of non-party States for crimes committed within the territory of State parties to the ICC Statute, Judge Philippe Kirsch, current President of the Court, noted as follows:

This does not bind non-parties to the [s]tatute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.<sup>81</sup>

The above expression accords with article 34 of the Vienna Convention on the Law of Treaties which provides that “a treaty does not create either obligations or rights for a third state without its consent.”<sup>82</sup> Also, article 35 states that a treaty cannot establish

---

<sup>78</sup> Madeline Morris, *supra* note 76, at 27.

<sup>79</sup> *Id.*, at 26.

<sup>80</sup> Ruth Wedgwood et al., *supra* note 64, at 127

<sup>81</sup> Philippe Kirsch, The Rome Conference on the International Criminal Court: A Comment, American Society of International Law Newsletter 1 (AM. SOC’Y OF INT’L L., WASHINGTON, D.C.) Nov./Dec. 1998. Judge Kirsch was the Chairman of the Rome Diplomatic Conference.

<sup>82</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, U.N. Doc. A/CONF.39/27 (1969), entered into force on Jan. 27, 1980 *reprinted* in 1155 U.N.T.S. 331 (1969); 25 I.L.M. 543 (1969) [hereinafter Vienna Convention on the Law of Treaties].

an obligation on a non-party State unless it “expressly accepts that obligation in writing.”<sup>83</sup> The ICC Statute does not violate the above provisions of the Vienna Convention as no provision of the ICC Statute expressly created obligations for non-party States. Also, allowing the ICC to exercise jurisdiction based on the consent of a custodial or victim’s State will not violate the Vienna Convention.<sup>84</sup>

Suffice it to note that there are plethora of international conventions acceded by the U.S. and many States that are globally binding on nationals of party and non-party States because they reflect the common interest of humanity.<sup>85</sup> No doubt, the crimes prohibited by the ICC Statute reflect the common interest of humanity. Presently, any individual State may try perpetrators of these crimes under the universal or territorial jurisdiction principle without consent from the State of his or her nationality.<sup>86</sup> Thus, if individual States can exercise universal jurisdiction over the same crimes contained in the

---

<sup>83</sup> Vienna Convention on the Law of Treaties, *supra* note 82, art. 35.

<sup>84</sup> *Id.*, art. 38 (“Nothing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such”).

<sup>85</sup> See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done Sept. 14, 1963, 220 U.N.T.S. 1969, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft done Dec. 16, 1970, 106 U.N.T.S. 1973, 22 U.S.T. 1641 (“Hague Convention”); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done Sept. 23, 1971, 178 U.N.T.S. 1975; 24 U.S.T. 565 (“Montreal Convention”); The International Convention Against the Taking of Hostages, done Dec. 17, 1979, 206 U.N.T.S. 1983; 1979 U.S.T. 186; The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 168 U.N.T.S. 1977, 28 U.S.T. 1975 (“Protected Persons Convention”); The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted Dec. 10, 1984, 1465 U.N.T.S. 85, 1988 U.S.T. LEXIS 202 (“Torture Convention”); The International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature Nov. 30, 1973, 1015 U.N.T.S. 243 (“Apartheid Convention”); The Convention on the Physical Protection of Nuclear Material done Oct. 26, 1979, 1979 U.S.T. LEXIS 187. These treaties provide for and obligate states, both states of nationality and territorial states, to exercise jurisdiction or extradite. Furthermore, the Montreal Convention, the International Convention Against the Taking of Hostages, the Protected Persons Convention, the Torture Convention and the Apartheid Convention allow for the victim's state to either exercise jurisdiction or extradite. The U.S. is a member of all except the Apartheid Convention.

<sup>86</sup> Paul Arnell, International Criminal Law and Universal Jurisdiction, 11 INT’L LEGAL PERSP. 53, 60-63 (1999). See also, Attorney-General of Israel v. Adolf Eichmann, 36 I.L.R. 5, 26 (Israel S.Ct. 1962); Demjanjuk v. Petrovsky, 776 F. 2d 571, 582-583 (6th Cir. 1985).

ICC Statute,<sup>87</sup> there has not been any convincing legal argument to deny a group of States joining together to set up a court that does the same thing. Indeed, the Nuremberg tribunal set the precedent for this situation when it stated: “[the Allied Powers] have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.”<sup>88</sup>

In view of the above, it cannot be argued that the Court’s exercise of treaty-based jurisdiction over the nationals of non-party State for international crimes contravenes this rule of international law.<sup>89</sup> Therefore, the argument that the ICC Statute is “overreaching” because it purportedly obligates non-party States through the exercise of jurisdiction over their nationals is a gross distortion of customary international law.<sup>90</sup> Conferring the ICC with universal jurisdiction helps to realize one of the objectives behind the establishment of the Court, which is, to ensure there is no safe sanctuary for individuals wanted for committing egregious crimes.

Until the Court is invested with universal jurisdiction, we will continue to see a similarity of what is going on in the case of Charles Taylor, former president of Liberia finding safe haven in Nigeria even though there is an international arrest warrant for his surrender to the tribunal in Sierra Leone. The only reason Nigeria is under guided pressure to surrender Mr. Taylor to the Sierra Leonean tribunal is because Nigeria has

---

<sup>87</sup> Under the principle of universal jurisdiction, a State is permitted to prosecute non-nationals for certain crimes committed outside that State’s territory. See, M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 520 (1992); Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300-04 (4th ed. 1990); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785 (1988).

<sup>88</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal, Aug. 8, 1945, annex, 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted* in 39 *AM. J. INT’L L.* 257 (Supp. 1945).

<sup>89</sup> Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 *NEW ENG. L.R.* 363, 376 (2001).

<sup>90</sup> See Human Rights Watch, *The ICC Jurisdictional Regime; Addressing U.S. Arguments*, available at <http://www.hrw.org/hrw/campaigns/icc/docs/icc-regime.htm> (last modified Apr. 4, 2002).

expressed its willingness to surrender Mr. Taylor but for its stated reasons.<sup>91</sup> It would be a different situation if Mr. Taylor was wanted by the ICC after he had successfully fled to or granted amnesty by a non-party State. The non-party State would have no obligation whatsoever to surrender Mr. Taylor to the Court and in that circumstance Mr. Taylor would find a safe haven in that State. Also, even if Mr. Taylor finds himself in the territory of a State party to the ICC Statute, that State cannot confer jurisdiction on the Court if Mr. Taylor did not commit the crime in the territory of the said State and he is not a national of the State party. In the above scenario, the traveling tyrant is allowed to exploit the limitation in the ICC jurisdiction to evade justice.<sup>92</sup>

#### **8.5. War Crimes Opt-Out Provision**

With pressure from the United States the Rome Conference agreed on article 124 which allows a State party to opt out of the Court's jurisdiction for war crimes committed on its territory or by its nationals in internal armed conflict for seven years after

---

<sup>91</sup> Mr. Obasanjo, Nigerian's President takes the position that it granted asylum to Mr. Taylor pursuant to the so called Accra Comprehensive Peace Accord to prevent a bloodbath in Liberia on the understanding that he would not be required to try or surrender Mr. Taylor to an International Tribunal except at the request of the government of Liberia or if Mr. Taylor violates his undertaking not to interfere in Liberian politics. See, James Seitua, Why Obasanjo Has Not Turned Taylor Over?, *The Perspective*, Atlanta, Georgia, May 31, 2005, available at: <http://www.theperspective.org/articles/0531200502.html> (visited February 28, 2006); BBC News, Taylor meets Obasanjo in Nigeria, February 27, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4754982.stm> (visited February 28, 2006); BBC NEWS, Taylor off Agenda at Abuja Talks, March 4, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4775012.stm> (reporting that Mr. Taylor departure into exile was part of a deal backed by African and Western powers and quoting BBC's Elizabeth Blunt in Abuja as saying that the terms of the deal are believed to have included a comfortable home in Nigeria and a pledge that he would not be handed over for prosecution. BBC News also quoted Remi Oyo, Mr. Obasanjo's spokeswoman that "the prerogative of the return of former President Taylor remains that of the Liberian people and government."); BBC News, Taylor Meets Obasanjo in Nigeria, February 27, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4754982.stm> (visited February 28, 2006).

<sup>92</sup> Leila Nadya Sadat & S. Richard Cadern, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 414, n. 194 (2000) (attributing the phrase "traveling tyrant" to Jelena Pejic, representative of the Lawyer's Committee at the Rome Conference).

becoming a party to the ICC Statute.<sup>93</sup> The United States' representatives to the Rome Conference had sought a ten year "opt out" from the Court's jurisdiction over war crimes, but the Conference agreed only to a seven year opt-out period for war crimes.<sup>94</sup> Article 124 provides a compromise capable of "undermining the status of war crimes as truly universal crimes [that might] result in a court with a fragmented jurisdiction."<sup>95</sup> Such declaration effectively grants impunity from prosecution by the Court for those who commit war crimes in the future that have caused immense suffering to humankind for many years. Therefore, it has been criticized as creating a loophole to evade justice which is legally and morally unjustifiable.<sup>96</sup>

Presently, Columbia and France have availed themselves of the provisions of article 124.<sup>97</sup> Fortunately, the Burundian government's desire to make article 124

---

<sup>93</sup> ICC Statute, *supra* note 1, art. 124. Article 124 provides that a state party to the ICC may elect to exempt its nationals from the jurisdiction of the Court for a non-renewable period of seven years from the date of ratification of the statute for war crimes.

<sup>94</sup> See David Scheffer, U.N. International Criminal Court, Statement Before the Committee on Foreign Relations of the U.S. Senate (July 23, 1998) available at 1998 WL 12762512 [hereinafter David Scheffer Testimony].

<sup>95</sup> Jonathan Stanley, Focus: International Criminal Court: A Court that Knows No Boundaries?: The International Criminal Court Treaty is a Big Achievement but Can it Deliver what it Promises?, *The Lawyer*, Aug. 11, 1998, available at 1998 WL 9167987.

<sup>96</sup> Phillippe Kirsch, Q.C., *The International Criminal court: Current Issues and Perspectives*, 64 *L. & CONTEMP. PROBS.* 3, 10 (2001).

<sup>97</sup> See Rome Statute of the International Criminal Court: Declarations and Reservations, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp#N7> [hereinafter "ICC Statute: Declarations and Reservations"].

The Columbian article 124 Declaration states as follows:

5. Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory. *Id.*

The French government article 124 Declaration states:

### III. Declaration under article 124

Pursuant to article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. *Id.*

declaration was rejected by the Senate.<sup>98</sup> The “opt out” clause is an unwarranted restriction on the Court’s jurisdiction which will severely hamper its effectiveness for years, if not decades.<sup>99</sup> While it is reassuring that only two States have made article 12 declaration, it is however necessary that States demonstrate their willingness to hold war criminals accountable by ensuring that article 124 is deleted from the ICC Statute when it comes up for review in 2009.<sup>100</sup>

#### **8.6. Reliance on States’ Cooperation**

Generally, in order for the Court to effectively exercise its jurisdiction, the Court must rely on the ability and willingness of State parties to discharge their obligations under the ICC Statute.<sup>101</sup> In the preamble to the ICC Statute, States Parties affirm that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by international cooperation”.<sup>102</sup> With the efforts of likeminded States,<sup>103</sup> delegates at the Rome Conference agreed on the need for effective and speedy

---

<sup>98</sup> See Amnesty International, Burundi - Urge the President to Ratify the Rome Statute of the ICC, available at <http://web.amnesty.org/pages/icc-290104-action-eng> (Appeal Letter from Amnesty International urging the Burundian government to ratify the Rome Statute without such a ‘license to kill’ declaration. The ICC Statute was ratified by Burundi on September 21, 2004, without such declaration. See ICC Statute: Declarations and Reservations, *supra* note 97).

<sup>99</sup> James Rodgers, War Crimes Court Under Fire, 1998 ABA JOURNAL 68 (Sept. 1998) (quoting Jelena Pejic, Senior Program Coordinator, Lawyers Committee for Human Rights, New York).

<sup>100</sup> Article 124 is subject to review at the Review Conference which is scheduled to take place seven years after the entry into force of the ICC Statute. Since the ICC Statute came into force in 2002, the Review Conference will be held in 2009. See ICC Statute, *supra* note 1, arts. 123, 124.

<sup>101</sup> Hans-Peter Kau, Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years, 99 AM. J. INT’L L. 370, 383 (2005) (noting that “the hopes and expectations at the International Criminal Court are that the states parties will support it as responsible joint owners by engaging in unreserved and systematic cooperation in matters of criminal law”).

<sup>102</sup> ICC Statute, *supra* note 1, pmbl. para. 4.

<sup>103</sup> See Philippe Kirsch & John T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, 93 AM. J. INT’L L. 2, 4 (1999).



cooperation with the Court. As a result, Part 9 of the ICC Statute contains the obligations of international cooperation and judicial assistance of States Parties to the Court.<sup>104</sup>

When a State ratifies the ICC Statute, it assumes the obligations to “cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court”.<sup>105</sup> Further, the ICC Statute requires that States Parties ensure that there are procedures under their national law for all forms of cooperation specified in the Statute.<sup>106</sup>

A significant aspect of this obligation is arresting and surrendering persons accused of crimes to the Court.<sup>107</sup> This is necessary as the Court cannot try an accused person *in absentia*.<sup>108</sup> Thus, “a decision by the Prosecutor to bring charges against an accused will prompt the critical, indeed crucial question of arrests and transfer to The Hague”.<sup>109</sup> In other words, the Court would be unable to exercise its jurisdiction if States refused, delayed or otherwise failed to carry out their obligation to arrest and/or surrender

---

<sup>104</sup> For a discussion of the cooperation regime in the Rome Statute, see Bruce Broomhall, *The International Criminal Court: Overview, and Cooperation with States*, in *ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION* 45 (Nouvelles Etudes Penales, 1999); Annalisa Ciampi, *Other Forms of Cooperation*, in *2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1705 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002); Frederik Harhoff & Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 637 (Roy S. Lee ed., 2001); Hans-Peter Kaul & Claus Kre beta, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 1999 *Y.B. INT’L HUMANITARIAN L.* 143; Claus Kre beta et al., *International Cooperation and Judicial Assistance: Preliminary Remarks*, in *COMMENTARY ON THE ROME STATUTE*, *supra* note 12, at 1045; Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE -- ISSUES, NEGOTIATIONS, RESULTS* 305 (Roy S. Lee ed., 1999); Valerie Oosterveld, Mike Perry, & John McManus, *The Cooperation of States with the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 767 (2002); Bert Swart & Goran Sluiter, *The International Criminal Court and International Criminal Co-operation*, in *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT* 91 (Herman von Hebel et al. eds., 1999).

<sup>105</sup> ICC Statute, *supra* note 1, art. 86.

<sup>106</sup> *Id.*, art. 88.

<sup>107</sup> *Id.*, art. 89.

<sup>108</sup> *Id.*, art. 63. Article 63 makes it very clear that “the accused shall be present during the trial” and that there can thus be no trials *in absentia*.

<sup>109</sup> Hans-Peter Kau, *supra* note 101, at 375 (citing the Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 8, 2003)).

the accused to the Court. There is no doubt that “the credibility of the Court would suffer if an arrest warrant issued by the judges of the Pre-Trial Chamber at the request of the prosecutor pursuant to article 58 remained ineffective over a long period because the States Parties were slow, or failed, to execute it”.<sup>110</sup>

Apart from other express and implicit obligations contained in the ICC Statute, Article 93 of the Statute details certain specific cooperation obligations on States parties to assist the Court with respect to investigations and prosecutions.<sup>111</sup> These obligations are by no means exhaustive and should at best represent a minimal requirement on State parties to the ICC Statute. However, a study by Amnesty International in 2004 reveals that States Parties’ response to their obligations under the Statute has been disappointing.<sup>112</sup> The study notes that among the few States that have adopted national legislation implementing their obligations under the ICC Statute, almost all the States

---

<sup>110</sup> Hans-Peter Kau, *supra* note 101, at 383.

<sup>111</sup> Article 93 provides:

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
  - (a) The identification and whereabouts of persons or the location of items;
  - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
  - (c) The questioning of any person being investigated or prosecuted;
  - (d) The service of documents, including judicial documents;
  - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
  - (f) The temporary transfer of persons as provided in paragraph 7;
  - (g) The examination of places or sites, including the exhumation and examination of grave sites;
  - (h) The execution of searches and seizures;
  - (i) The provision of records and documents, including official records and documents;
  - (j) The protection of victims and witnesses and the preservation of evidence;
  - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
  - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

ICC Statute, *supra* note 1, art. 93(1)(a-l).

<sup>112</sup> See Amnesty International, Failure of States to Enact Effective Implementing Legislation, *supra* note 44.

have taken a minimalist approach to cooperation with the Court and few have included provisions that go beyond the express requirements of the ICC Statute.<sup>113</sup> This author shares the concern of Amnesty International that “if every state party were to take a minimalist approach to implementing its cooperation obligations, the effectiveness of the Court would be greatly reduced, leading in some cases to impunity.”<sup>114</sup>

### **8.7. Article 98 Immunity Agreements**

While the ICC Statute requires States Parties to ensure that there are procedures under their national law for all forms of cooperation specified in the Statute,<sup>115</sup> some States Parties have taken steps that make their compliance with article 88 impossible such as entering into an “impunity” agreement with the U.S. The bilateral immunity agreement is an undertaking by the States concerned that U.S. persons will not be surrendered to the Court without U.S. consent.<sup>116</sup> The Bush administration has threatened ICC States Parties with withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry, if they fail to protect Americans serving in their countries from ICC reach.<sup>117</sup> By May of 2005, about 100

---

<sup>113</sup> Amnesty International, Failure of States to Enact Effective Implementing Legislation, *supra* note 44, at 32.

<sup>114</sup> Id. Regarding the situation in Darfur, Sudan, see, Sudan Tribune, ICC Delegation to Visit Sudan’s Darfur, February 27, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14271](http://www.sudantribune.com/article.php3?id_article=14271) (visited February 28, 2006) (reporting that the ICC Prosecutor, Mr. Moreno Ocampo has told the Security Council that the International Criminal Court and the African Union, which has troops in Darfur, had drawn up a Cooperation Agreement in May 2005, which still was not signed).

<sup>115</sup> ICC Statute, *supra* note 1, art. 88.

<sup>116</sup> Christopher Marquis, U.S. Seeking Pacts in a Bid to Shield its Peacekeepers, *New York Times*, August 6, 2002 .

<sup>117</sup> Elizabeth Becker, U.S. Ties Military Aid to Peacekeepers’ Immunity, *N.Y. Times*, Aug. 10, 2002, at A1.

States have signed this immunity agreement which is referred to colloquially as “Article 98 Agreement”.<sup>118</sup>

It has been suggested that “these bilateral agreements ... are provided for under Article 98 of the Rome Statute”.<sup>119</sup> This argument is inapposite.<sup>120</sup> Article 98, which emerged at the Rome Diplomatic Conference, was drafted to address the question of the relationship between the obligations of States Parties under the *future* ICC Statute and *existing* obligations of States Parties under international law.<sup>121</sup>

---

<sup>118</sup> See U.S. Department of State Press Statement, U.S. Signs 100th Article 98 Agreement, May 3, 2005, 2005/463, available at: <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> (the press statement notes that on May 2, 2005, Angola became the 100th country to conclude such an agreement with the United States). As at May 18, 2005, Amnesty International reports that the States that have ratified an impunity agreement with the USA include Afghanistan, Albania, Azerbaijan, Bhutan, Bosnia-Herzegovina, Djibouti, the Dominican Republic, El Salvador, Gambia, Georgia, Ghana, Guyana, Honduras, India, Israel, Kazakhstan, Macedonia, the Marshall Islands, Mauritania, Micronesia, Mozambique, Nepal, Nicaragua, Palau, Panama, Romania, Sierra Leone, Sri Lanka, Tajikistan, Timor-Leste, and Uzbekistan have ratified such agreements. See Amnesty International, available at: [http://web.amnesty.org/pages/int\\_jus\\_icc\\_imp\\_agrees](http://web.amnesty.org/pages/int_jus_icc_imp_agrees) (last updated May 18, 2005).

<sup>119</sup> *Id.* See also, Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999). As at May 18, 2005, Amnesty International reports that the States that have ratified an impunity agreement with the USA include Afghanistan, Albania, Azerbaijan, Bhutan, Bosnia-Herzegovina, Djibouti, the Dominican Republic, El Salvador, Gambia, Georgia, Ghana, Guyana, Honduras, India, Israel, Kazakhstan, Macedonia, the Marshall Islands, Mauritania, Micronesia, Mozambique, Nepal, Nicaragua, Palau, Panama, Romania, Sierra Leone, Sri Lanka, Tajikistan, Timor-Leste, and Uzbekistan have ratified such agreements. See Amnesty International, available at: [http://web.amnesty.org/pages/int\\_jus\\_icc\\_imp\\_agrees](http://web.amnesty.org/pages/int_jus_icc_imp_agrees) (last updated May 18, 2005).

<sup>120</sup> For a detailed analyses on this, see generally, Amnesty International, *INTERNATIONAL CRIMINAL COURT: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, AI Index: IOR 40/025/2002, September 2, 2002, [hereinafter *US Efforts to Obtain Impunity Agreement*] available at <http://web.amnesty.org/library/index/engIOR400252002?Open&of=eng-385> (visited February 10, 2006); Amnesty International, *INTERNATIONAL CRIMINAL COURT: The Need for the European Union to Take More Effective Steps to Prevent Members From Signing US Impunity Agreements*, AI Index: IOR 40/030/2002, October 1, 2002, [hereinafter *The Need for EU to Take More Effective Steps*], available at: <http://web.amnesty.org/library/index/engior400302002?open&of=eng-385> (visited February 10, 2006); Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 (2) Agreements*, July 9, 2002, available at [www.hrw.org/campaigns/icc/icc\\_article98.pdf](http://www.hrw.org/campaigns/icc/icc_article98.pdf) (visited February 10, 2006) (expressing the view “that existing U.S. SOFAs are not the type of agreement that would qualify under Article 98 (2), and cannot trump any obligations under the Rome Statute”). *Ibid.* (footnote omitted); Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429 (2001).

<sup>121</sup> Amnesty International, *US Efforts to Obtain Impunity Agreement*, *supra* note 120, at p. 7. Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) reads:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic

Article 98 paragraph 1 deal exclusively with the limited question of the relationship between the obligations of States Parties to the ICC Statute and their prior obligations under customary or conventional international law concerning diplomatic immunities and State immunities, particularly those incorporated in the Vienna Convention on Diplomatic Relations.<sup>122</sup> On the other hand, article 98 paragraph 2 was intended to address the question of the effect of the ICC Statute on *existing* Status of Forces Agreements (SOFAs).<sup>123</sup> As explained by Hans-Peter Kaul and Claus Kress, both members of the German delegation, article 98 (2) was designed to address possible - not certain - conflicts between existing obligations under SOFAs and under the ICC Statute:

The idea behind the provision [Article 98 (2)] was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98 (2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court.<sup>124</sup>

---

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.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

ICC Statute, *supra* note 1, art. 98(1)(2).

<sup>122</sup> Amnesty International, *US Efforts to Obtain Impunity Agreement*, *supra* note 120, at p. 7. William A. Schabas, *supra* note 4, at 92; See Bruce Broomhall, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 145 (2003); John T. Holmes, *Complementarity: National Courts Versus the ICC*, in *1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 667 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002); Paola Gaeta, *Official Capacities and Immunities*, in *THE ROME STATUTE*,

<sup>123</sup> Amnesty International, *US Efforts to Obtain Impunity Agreement*, *supra* note 120, at p. 7 (emphasis in the original).

<sup>124</sup> Hans-Peter Kaul and Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 *Y.B. INT'L. HUM. L.* 143, 165 (1999). See also, Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 *AM. J. INT'L L.* 773, 786 n. 36 (2000) (noting that Article 98 (2) was added to address existing agreements on status of forces);

Similarly, Kimberly Prost, a member of the Canadian delegation, and Angelika Schlunck, a member of the German delegation, have noted that States were concerned about *existing* international obligations when drafting article 98.<sup>125</sup> Thus, “it would be very hard indeed to concede by way of an interpretive statement that a State Party acted in conformity with its obligation to ‘fully cooperate’ with the Court in concluding [a] new Statu[s] of Forces Agreement to this effect.”<sup>126</sup>

However, even if article 98 (2) were to be construed by the Court to apply to renewed SOFAs and new SOFAs entered into by States Parties to the ICC Statute, these agreements would have to be consistent with the object and purpose of the Statute, as well as with other international law.<sup>127</sup> The object and purpose of the ICC Statute is to end impunity by ensuring that no one is above the law and immune for genocide, crimes against humanity or war crimes.<sup>128</sup> Article 98 “immunity” agreement is what it is called – an immunity of U.S. nationals from the Court’s jurisdiction. Therefore, to the extent that the immunity agreement is intended to insulate certain persons from the Court’s jurisdiction, the immunity agreement is inconsistent with the object and purpose of the

---

<sup>125</sup> Kimberly Prost & Angelika Schlunck, Article 98, in Otto Triffterer, ed., *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE* 1131 (Baden-Baden: Nomos Verlagsgesellschaft 1999) (“All States participating in the negotiations in Rome had concerns about conflicts with existing international obligations. Thus, there are several provisions within Part 9, including those in articles 90, 93 para. 9 and 98 which address that concern. . . . Even States which advocated for a strong Court were concerned about actions taken pursuant to this Statute, which would violate these existing fundamental obligations at international law.”).

<sup>126</sup> Hans-Peter Kaul and Claus Kress, *supra* note 124, at 174.

<sup>127</sup> Amnesty International, *US Efforts to Obtain Impunity Agreement*, *supra* note 120, at p. 9 (citing the Vienna Convention on the Law of Treaties, *supra* note 210, art. 31(1)). Article 31(1) of the Vienna Convention on the Law of Treaties provides that:

[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

<sup>128</sup> ICC Statute, *supra* note 1, pmbl. para. 5, art. 27(1). Article 27(1) provides that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.

ICC Statute. States Parties to the ICC Statute should therefore not enter into such immunity agreement as they are obligated to refrain from acts which would defeat the object and purpose of the treaty.<sup>129</sup>

Further, the conclusion of immunity agreements between States Parties to the ICC Statute and the United States or any other State is questionable, as it contradicts the customary international law principle of *pacta sunt servanda*, which obligates a State party to a treaty not to do anything that will undermine its treaty obligations.<sup>130</sup> Besides, the validity of these bilateral immunity agreements are doubtful considering that they were procured under coercion<sup>131</sup> and/or by threat<sup>132</sup> of withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry if the States failed to sign the immunity agreements.<sup>133</sup>

Also, the immunity agreements are void because they contradict a *jus cogens* norm of *pacta sunt servanda*<sup>134</sup> which is undoubtedly universally recognized as a

---

<sup>129</sup> Vienna Convention on the Law of Treaties, *supra* note 82, art. 18 (“A state is obliged to refrain from acts which would defeat the object and purpose of a treaty ...”). See, Judy Dempsey, Accords with US ‘will violate’ ICC treaty, Financial Times, 27 August 2002, (referring to the text of the legal opinion of European Union’s legal experts which concluded that a contracting party to the statute concluding such an agreement with the US acts against the object and purpose of the statute and thereby violates its general obligation to perform the obligations of the statutes in good faith. ...[a contracting party’s] legal obligation vis-à-vis its co-contracting parties and the Court to surrender a person to the Court upon request cannot be modified by concluding an agreement of the kind proposed by the US.

<sup>130</sup> Vienna Convention on the Law of Treaties, *supra* note 82, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”).

<sup>131</sup> The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. 51, 52

<sup>132</sup> Vienna Convention on the Law of Treaties, *supra* note 82, art. 52 (“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”). 52

<sup>133</sup> See Elizabeth Becker, U.S. Ties Military Aid to Peacekeepers’ Immunity, N.Y. TIMES, Aug. 10, 2002, at A1.

<sup>134</sup> Vienna Convention on the Law of Treaties, *supra* note 82, art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

peremptory norm of customary international law.<sup>135</sup> States Parties to the ICC agreed in article 88 to “ensure that there are procedures available under their national law for all forms of cooperation” listed in Part 9 of the Rome Statute. Therefore, any national legislation, procedures or practices which would delay or obstruct full cooperation with the Court would be inconsistent with States Parties’ obligations under the ICC Statute.<sup>136</sup>

Thus, since States Parties to the ICC have an affirmative duty to comply immediately with requests by the ICC to arrest and surrender accused persons in their territories,<sup>137</sup> they should be concluding agreements that will expedite this obligation. However, the essence of a bilateral treaty with the United States is to insulate U.S. nationals from the jurisdiction of the ICC, which will directly affect the ability of the Court to prosecute those accused of committing international crimes. The ICC was created to ensure that anyone, no matter his or her position, who commits international crime, is held accountable for his or her actions. Therefore, there is no doubt that States Parties to the ICC are violating their international obligations under the Statute by signing such impunity agreement and that such violation could lead to a finding of non-cooperation pursuant to article 87, paragraph 7.<sup>138</sup>

## **8.8. Observations and Commentary**

The highlighted bottlenecks to the Court’s effective exercise of jurisdiction are by no means exhaustive. Due to sovereignty concerns, some of the noted impediments were

---

<sup>135</sup> See Vienna Convention on the Law of Treaties, *supra* note 82, pmb1. Para 3, (“Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized”).

<sup>136</sup> Amnesty International, THE INTERNATIONAL CRIMINAL COURT: CHECKLIST FOR EFFECTIVE IMPLEMENTATION 9, AI Index: IOR 40/011/2000, 1 August 2000, available at: <http://web.amnesty.org/library/index/engior400112000?open&of=eng-385> [hereinafter Checklist for Effective Implementation].

<sup>137</sup> ICC Statute, *supra* note 1, art. 59(1).

<sup>138</sup> Amnesty International, Checklist for Effective Implementation, *supra* note 136, at p. 9.



not mere oversights, but compromises that had to be made in order to gather enough support to establish the Court. While there is nothing to suggest that these sovereignty concerns are waning, it is nevertheless imperative that more is required from the international community to ensure the effective operation of the Court and to enable the Court achieve its stated objective. Fortunately, there is an expectation from States Parties that the ICC Statute require further elaboration which informed the requirement to review the Statute within seven years of entry into force.<sup>139</sup>

A meaningful review of the ICC Statute should consider amending the operation of the complementarity principle to at least, grant the Court primacy jurisdiction over the crime of genocide<sup>140</sup> and certain categories of offenders who by virtue of their official position are unlikely to be genuinely prosecuted domestically.<sup>141</sup> The complementarity principle remains a viable threat to the future of the international criminal system and the effectiveness of the Court. It is worrisome that States may under the guise of complementarity shield their nationals from the Court and only selectively refer situations or willingly surrender accused persons to the Court that it does not want to deal with.<sup>142</sup> This kind of selective referral by States may unwittingly expose the Court to accusations of aiding the State to pursue its vendetta against perceived opponents. A

---

<sup>139</sup> ICC Statute, *supra* note 1, art. 123.

<sup>140</sup> See Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of Its Forty-Sixth Session, U.N. Doc. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) art. 21 (prescribing inherent jurisdiction to the ICC only for the crime of genocide); Johan D. van der Vyver, Personal and Territorial Jurisdiction of the International Criminal Court, 14 EMORY INT'L L. REV. 1, 20 (2000) (noting that the United States was willing to concede "inherent jurisdiction" of the ICC in regard to the crime of genocide).

<sup>141</sup> Such amendment would draw from the Statute of the Sierra Leone which restricted the primacy jurisdiction of the tribunals to "those who bear the greatest responsibility" for the atrocities. See The Statute for the Special Court for Sierra Leone, art. 1, as amended [hereinafter Sierra Leone Special Court Statute], annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>, also available at: <http://www.sc-sl.org/scsl-statute.html>.

<sup>142</sup> Claus Kress, 'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy, 2 J. INT'L. CRIM. JUS. 944, 946 (2004) (noting that States may embark on 'selective or asymmetrical self-referral' where the *de jure* government is itself party to an internal armed conflict).

perception of the Court as an avenue to pursue victor's justice will not augur well for the image of the Court.

Further, States Parties should at the next review conference delete article 124 from the Statute because its retention sends a dangerous signal that it is okay to commit war crimes for seven years before accountability can be attributed. Equally, there is the need to discourage States Parties from concluding the so called "article 98" immunity agreement. Such immunity agreement flies in opposition to the States Parties obligation under the ICC Statute. Without States Parties' assistance and cooperation to surrender accused persons to the Court, the Prosecutor and the Court will face a formidable challenge to discharge the objective of the ICC Statute. Such support is urgently needed because, except when a situation is referred by the Security Council pursuant to article 13(b) of the Statute, the Office of the Prosecutor and the Court will constantly be confronted with a special problem and would need to make special efforts to ensure the ready and voluntary support and cooperation of States Parties to the extent possible.

## CHAPTER NINE

---

### 9.0. CONCLUSION

---

The conflicts witnessed during the recent decade gave rise to an increasing attention to the issue of accountability for international crimes such as genocide, war crimes, crimes against humanity, and serious human rights violations. It seemed that the natural legal response to address these atrocious violations is to devise a means to hold the individuals responsible for those acts accountable. While individual criminal responsibility at the international level for violations of international crimes began to creep into international criminal law from the Nuremberg trials through the ad hoc tribunals for the former Yugoslavia and Rwanda respectively, it has now become firmly established with the adoption of the Statute of the ICC. The principle of individual criminal responsibility is also reflected in the mixed tribunals for Sierra Leone, Timor-Leste, and Cambodia that were established after the ICC Statute was adopted.

With the entry into force of the ICC Statute, 129 years after the idea was first suggested by Gustave Moynier in 1872,<sup>1</sup> the ICC Statute became the first multilateral legal document in recent years to detail the investigation and prosecution of international crimes such as genocide, war crimes, and crimes against humanity. After the establishment of the ICC, it is very unlikely that the international community may establish another ad hoc international or hybrid criminal tribunal to prosecute persons

---

<sup>1</sup> Gustave Moynier, *Note sur la creation d'une institution judiciaire internationale propre a prevenir et a reprimer les infractions a la Convention de Geneve*, BULLETIN INTERNATIONAL DES SOCIETES DE SECOURS AUX MILITAIRES BLESSES, NO. 11, Apr. 1872, at 122, *translated in* Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, INT'L REV. RED CROSS, NO. 322, Mar. 1998, at 57, 72.

accused of international crimes post 2002 when the ICC Statute entered into force.<sup>2</sup> Thus, the continued application of international individual criminal responsibility rests on the Court. It is therefore imperative that the Court be endowed with sufficient personal jurisdiction in order to ensure that perpetrators of egregious international crimes do not go unpunished.

This study suggests that the ICC should be endowed with universal jurisdiction to enable the Court reach perpetrators of international crimes prohibited in the ICC Statute. The exercise of universal jurisdiction by the Court will ensure that international criminal justice is on a progressive path and not retrogressing from the Nuremberg standard which recognizes that States may do together what any one of them could have done separately.<sup>3</sup> The crimes under the Court's jurisdiction are crimes which there exists universal jurisdiction enabling each State to exercise jurisdiction over those crimes.<sup>4</sup> Thus, since States have come together to establish the ICC, the Court should exercise that jurisdiction which national courts of the States can individually exercise. Limiting the Court's jurisdiction to crimes committed in the territory of a State party or by a national of a State party unfairly limits the Court's jurisdiction and inadvertently creates a safe haven for perpetrators of international crimes.

---

<sup>2</sup> For instance, instead of establishing another ad hoc tribunal in Sudan, the Security Council chose to refer the situation in Darfur, Sudan to the Court.

<sup>3</sup> International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 216-17 (1947) [hereinafter Nuremberg Judgment].

<sup>4</sup> See Philippe Kirsch & John T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, 93 AM. J. INT'L L. 2, 12 n.19 (1999). Also see, the preamble to the ICC Statute, *supra* note 1, which "affirms that the most serious crimes of concern to the international community as a whole must not go unpunished," states that the Rome Conference is "determined to put an end to impunity for the perpetrators of these crimes," and "recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." Rome Statute for the International Criminal Court, 37 I.L.M. 999 (1998), U.N. Doc. A/CONF. 183/9 (1998) [hereinafter ICC Statute]. See also Michael P. Scharf, The United States and the International Criminal Court: The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 LAW & CONTEMP. PROB. 67 (2001).

Similarly, the application of complementarity principle serves as a labyrinth capable of rendering the Court otiose. The complementarity principle is a foundational principle that will not only shape the international criminal law system but will also determine the functioning of the Court.<sup>5</sup> As presently stated in the ICC Statute, the complementarity principle will so dramatically limit the Court's jurisdiction, role, and authority such that the Court could easily become only a meaningless, residual institution.<sup>6</sup> Should States satisfactorily discharge their overriding duty to prosecute individuals for the crimes under the ICC Statute, the Court will be redundant.<sup>7</sup> This is however a utopian expectation. As already mentioned, the ICC was created in part, because of unwillingness or inability of national authorities to conduct domestic prosecutions and trials of perpetrators of serious crimes under international law.<sup>8</sup>

For the Court to exercise jurisdiction under the complementarity principle absent Security Council referral, all States that have colorable jurisdiction must consent. Where State(s) failed to consent, the Court can only exercise jurisdiction after determining that the State(s) with jurisdiction is/are unwilling or unable to investigate or prosecute.<sup>9</sup> Using ICC as a residuary Court is certainly not what was envisioned by the pioneer and advocates of a permanent international criminal court. Besides, the international supervision necessary for the full implementation of complementary jurisdiction under

---

<sup>5</sup> Hans-Peter Kaul, *Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370, 384 (2005).

<sup>6</sup> Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals* 23 YALE J. INT'L L. 383, 425 (1998) (citing the Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, P 157, U.N. Doc. A/51/22 (1996) [hereinafter 51<sup>st</sup> Sess. Preparatory Committee Report].

<sup>7</sup> Hans-Peter Kaul, *supra* note 5, at 384.

<sup>8</sup> Peter Finell, *ACCOUNTABILITY UNDER HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW FOR ATROCITIES AGAINST MINORITY GROUPS COMMITTED BY NON-STATE ACTORS* 23 (Åbo Akademi Institute for Human Rights, 2002).

<sup>9</sup> ICC Statute, *supra* note 4, art. 17.

this circumstance could be extremely embarrassing to States<sup>10</sup> and may pitch the Court and States Parties in an unhealthy rivalry. Thus, the likely scenario is that the Court and the State may be locked in a contest for jurisdiction.

By design, the Court's jurisdiction extends only to a small number of persons who commit the most serious crimes of concern to the international community as a whole.<sup>11</sup> Also, the high subject matter jurisdictional threshold of the Court<sup>12</sup> as well as the limited instructional and financial resources of the Court further makes it inevitable that the Court can only target those few individuals who bear the greatest responsibility for the violations of crimes under the Court's jurisdiction. Therefore, this study suggests that conferring the Court with primacy jurisdiction over this category of individuals would not impinge States' sovereignty. The Court would still rely on the ability and willingness of States to prosecute other perpetrators at the national level in order to minimize the burden on the ICC. Should States insist upon preserving the totality of their sovereign prerogatives, no effective international criminal jurisdiction will thrive.<sup>13</sup>

The challenge is to establish appropriate balance between the need for international prosecutions in some cases and national prosecutions in others. It may well be that in some cases, the Court may be preferable than national courts for reasons unrelated to national courts' credibility.<sup>14</sup> For instance, the Court may be better

---

<sup>10</sup> Bartram S. Brown, *supra* note 6, at 431 (noting that some of the States may eventually conclude that the complementarity principle compromises their sovereignty more than would a general primacy).

<sup>11</sup> See ICC Statute, *supra* note 4, arts. 1, 5.

<sup>12</sup> See the Chapeau of Articles 6, 7, & 8 which further limits the Court's subject matter jurisdiction to genocide "committed with intent to destroy, in whole or in part"; crimes against humanity committed "as part of a widespread or systematic attack", and war crimes "committed as part of a plan or policy or as part of a large-scale commission of such crimes." ICC Statute, *supra* note 4, arts. 6, 7, & 8. These jurisdictional thresholds ensures that the application of the Statute is limited to serious violations.

<sup>13</sup> Bartram S. Brown, *supra* note 6, at 431.

<sup>14</sup> See Paper on Some Policy Issues Before the Office of the Prosecutor, ICC-OTP, September 2003, 5 (noting that "There may be cases where inaction by States is the appropriate course of action. For example,

positioned to prosecute individuals responsible for genocide and crimes against humanity because these crimes are principally crimes of States. The major actors are more often agents of the State or other state like or quasi-state entities.<sup>15</sup> What distinguishes these crimes from other international crimes is that they are the product of a “state action or policy”, and require some form of organizational structure.<sup>16</sup> In such situations, it might well serve the interest of justice to have the Court prosecute the responsible individuals. The Court will also be in a better position to absorb the political pressure that may be associated with domestic prosecution of the “high” profile individuals.

The idea that the Security Council may block the Court’s jurisdiction is troubling as it is an invitation of political meddlesomeness in judiciary function. It puts the independence and credibility of the Court at issue. At the same time, it exposes the Court to allegations of institution of western dominance by developing countries. There is no doubt that an effective and independent judiciary can only be achieved when courts are institutionally shielded from direct political influence. Independence of the judiciary is a *sine qua non* to effective and credible national court. There is no reason why the ICC Statute which exerts its independence status should not confer unfettered independence on the Court’s exercise of jurisdiction.<sup>17</sup> Should the Security Council prevent ICC

---

the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach.”).

<sup>15</sup> John Dugard, Criminal Responsibility of States in M. Cherif Bassiouni ed., INTERNATIONAL CRIMINAL LAW, vol. 1, CRIMES, 2<sup>nd</sup> ed. (Ardsley, NY: Transnational Publishers, 1999) p. 239.

<sup>16</sup> Peter Finell, *supra* note 8, at 29-30 (observing that up to the Second World War victimization of civilians and mass scale human rights violations of human rights was perpetrated by the State’s public apparatus, such as the armed forces, the police, paramilitary units and the civilian bureaucracy, as products of a State action or policy).

<sup>17</sup> See ICC Statute, *supra* note 4, art. 2; Relationship Agreement Between the United Nations and the International Criminal Court, Oct. 4, 2004, UN Doc. A/58/874, U.N. Doc. PCNICC/2001/1/Add.1, pmb1.4., UN Doc. A/58/874, annex (2004) (entered into force Oct. 4, 2004). (Preamble 4 to the Relationships Agreement states expressly that “the International Criminal Court is established as an independent permanent institution in relationship with the United Nations.”). Thus, ICC is not a specialized agency or as otherwise belonging to the “UN Family.” For a discussion on the earlier draft of the Relationship

investigations or prosecutions willy nilly, this will violate the principle of prosecutorial independence.<sup>18</sup>

While the inclusion of article 16 in the ICC Statute was not a popular decision, and that the prudent thing to do is to delete it from the Statute of the Court, it is not politically feasible as long as the lonely super power maintains its grip on the Security Council.<sup>19</sup> However, the value of a permanent ICC will lie in its international credibility as an impartial institution capable of promoting equal justice for all. Much of that credibility would be lost if its prosecutions can be halted or otherwise subject to the approval of the Security Council. This would represent a step backwards from the practice of the ad hoc tribunals, which, apart from matters of enforcement, operate independently of the Security Council. No doubt, the ICC may have to rely on the support of the Security Council for the enforcement of its arrest warrants and other orders. This unavoidable dependence will do doubt influence relations between the two bodies. Hopefully, the Security Council will rise above political considerations and apply high moral leadership in the exercise of its powers under article 16.

Further, an important aspect to the success of the Court depend to a large extent, on the willingness of States Parties to the ICC Statute to rise above sovereignty protection, embrace the Court wholeheartedly as they did at the Rome Conference, by demonstrating the political will to cooperate with the Court by providing the Court the

---

Agreement, see Daryl A. Mundis, *The Assembly of States Parties and the Institutional Framework of the International Criminal Court*, 97 AM. J. INT'L. L. 132 (2003).

<sup>18</sup> Bartram S. Brown, *supra* note 6, 389.

<sup>19</sup> See Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. Times, Aug. 13, 1997, at A10 (noting that “Washington wants the Security Council to be the arbiter of what cases would go to the international court, a view at odds with nearly all other countries. Europeans and some Latin American nations would give international prosecutors wide latitude in bringing cases.”).



necessary resources and cooperation it needs to carry out its responsibility.<sup>20</sup> The ICC, as currently structured, has no police force to assist it with finding, arresting, and securing potential suspects.<sup>21</sup> The ICC relies on the cooperation of States to arrest and surrender suspects to the Court.<sup>22</sup> Also, the ICC does not have a facility where ICC convicts will be incarcerated but depends on “willing States” to provide prison facilities.<sup>23</sup> In addition, the ICC depends on the assessed contributions of States Parties and the United Nations to fund the operations of the Court.<sup>24</sup> Thus, the Court can only be as strong and effective as the States Parties would want it to be.<sup>25</sup>

While this study advocates the review of the ICC Statute to grant the Court primacy or inherent jurisdiction, it notes this may not be politically feasible yet because States believe that conferring the Court with such jurisdiction over its nationals somehow

---

<sup>20</sup> M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55, 66 (1999).

<sup>21</sup> Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 415 (2000).

<sup>22</sup> The ICC is based in The Hague but its investigations may need to be conducted in the territory of a State where the crime allegedly happened. Without the support of the local authorities, the work of the ICC investigators will be difficult and probably impossible. The credibility of the Court would suffer if an arrest warrant issued by the judges of the Pre-Trial Chamber at the request of the Prosecutor pursuant to Article 58 remained ineffective over a long period because the State parties were slow, or failed, to execute it. In this respect, it is encouraging to note that the government of Uganda has held talks with the ICC about the possible arrest of rebel leader Joseph Kony and his co-indictees. *See Govt Meets ICC Over Kony Arrest*, *The Monitor* (Kampala), February 3, 2006, at: <http://allafrica.com/stories/200602020781.html> (last visited February 9, 2006) (reporting that the Minister of Foreign Affairs, Mr. Sam Kuteesa told journalists on February 8, 2006 that he met the ICC Chief Prosecutor, Mr. Luis Moreno Ocampo, at The Hague in Netherlands to explore issues of possible partners and financing of the process of arresting and surrendering the indictees to the Court. Last year the ICC issued arrest warrants for Kony, Vincent Otti, the second in command, and three other top rebel commanders the Lord's Resistance Army for war crimes and crimes against humanity).

<sup>23</sup> See ICC Statute, *supra* note 4, art. 103. Article 103 provides in pertinent part that:

1(a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

1(b) At the time of declaring its willingness ..., a State may attach conditions to its acceptance as agreed by the Court ... *Id.*

<sup>24</sup> ICC Statute, *supra* note 4, art. 115. The ICC may also receive additional voluntary contributions from governments, nongovernmental organizations, individuals, corporations and other entities. *Id.*, art. 116.

<sup>25</sup> Bartram S. Brown, *supra* note 6, 383.

deprives or belittles its sovereignty. Thus, the principle of complementarity set out in the ICC Statute can only be effective if States Parties fulfill their obligations to cooperate fully with the Court. Satisfactory national legislation that criminalizes the crimes in the ICC Statute and fully implements the obligation of each State party to cooperate with the Court is essential to ensure that the Court is able to fulfill its historic function with full cooperation by the States. Therefore, it is of serious concern that draft and enacted implementing legislation deals unsatisfactorily, and in some cases not at all, with the question of cooperation. This trend may undermine the ability of the Court to function effectively given that the foundation of the Court is based on the proper application of the principle of complementarity.<sup>26</sup>

Therefore, to ensure that national courts of States Parties to the Statute serve as effective complement to the Court, States Parties should enact implementing legislation and/or reform their national criminal justice systems to fully integrate the ICC Statute and international system of justice in their national legal systems. Also, such legislation should strengthen the existing system of interstate cooperation through extradition and mutual legal assistance by eliminating inappropriate grounds of refusal and having courts, not political officials make decisions on whether to cooperate.<sup>27</sup> The implementing

---

<sup>26</sup> Amnesty International, INTERNATIONAL CRIMINAL COURT: THE FAILURE OF STATES TO ENACT EFFECTIVE IMPLEMENTING LEGISLATION 29, AI Index: IOR 40/019/2004 1 September 2004, available at: <http://web.amnesty.org/library/Index/ENGIOR400192004?open&of=ENG-385> (visited February 20, 2006) [hereinafter The Failure of States to Enact Effective Implementing Legislation]

<sup>27</sup> See Amnesty International, THE INTERNATIONAL CRIMINAL COURT: CHECKLIST FOR EFFECTIVE IMPLEMENTATION 3, AI Index: IOR 40/011/2000, August 1, 2000, available at: <http://web.amnesty.org/library/index/engior400112000?open&of=eng-385> (visited February 20, 2006); Amnesty International, The Failure of States to Enact Effective Implementing Legislation, supra note 25, at 26 (noting that several States are including the requirement of consent to prosecute by the Attorney General, a political official, in their national implementing legislation. These States include Australia (Article 268.121 of the International Criminal Court (Consequential Amendments) Act 2002), Canada (Section 9 (3) and (4)), Malta (Article 54 (I) (2) of the Criminal Code, as amended by the ICC Act), New Zealand (Section 13), UK (England, Wales and Northern Ireland Act, Sections 53 (3), 54 (5), 60 (3) and 61 (5)) and Uganda (Section 17). Although these States have argued that such consent is given in the Attorney

legislation should also define the crimes within the Court's jurisdiction as crimes under national law consistent with the ICC Statute and international law to expressly confer adequate jurisdiction to their national courts to prosecute the crimes.

Further, the implementing legislation should clearly permit the surrender of accused persons to the Court and require relevant authorities to cooperate with the Court. To this end, States Parties and the ICC should develop, on the basis of Part 9 of the Rome Statute, a system of "best practices" for effective cooperation in conducting criminal investigations, in particular with regard to arrests and transfers to The Hague.<sup>28</sup>

This study argues unequivocally that the conclusion of bilateral immunity agreements between States Parties and the U.S. which serves to insulate U.S. nationals from the Court's jurisdiction is indubitably a violation of the obligations of States Parties under the ICC Statute. Such conduct sends a wrong signal that States may avoid the Court's jurisdiction by offering military and economic assistance to States Parties to the ICC Statute. Therefore, this study urges the Assembly of States and the Court to reject any argument that the immunity agreement serves as a legal basis prohibiting States Parties from complying with their obligation to arrest and surrender accused persons to the Court.

Although the Court is an independent institution and not a specialized agency of the United Nations, the Relationship Agreement between the Court and the United Nations calls for close cooperation and consultation between them on matters of mutual

---

General's role as a professional prosecutor, rather than as a political official, and is in keeping with common law doctrine, Amnesty International is concerned that such a requirement risks creating the perception that prosecution decisions in cases involving crimes under international law have been made for political reasons. Such a requirement should be excluded in all implementing legislation. On the other hand, the better approach is one adopted by some States, including South Africa (Section 5) which provides that the decision whether to prosecute a person for genocide, crimes against humanity or war crimes is to be made by a professional prosecutor). *Id.*

<sup>28</sup> Hans-Peter Kau, *supra* note 5, at 379.

interest.<sup>29</sup> In particular, under the Relationships Agreement, the United Nations undertakes to cooperate with the ICC on judicial matters.<sup>30</sup> This obligation requires the United Nations to provide *inter alia*, information and other forms of cooperation and assistance compatible with the UN Charter and the Rome Statute. Also, the United Nations has agreed, in principle, to waive the confidentiality obligations of its officials when they testify in ICC proceedings.<sup>31</sup> How this cooperation will work out in practice remains to be seen. It is hoped that the Court will not be hamstrung by the cumbersome United Nations' bureaucratic and financial procedures.

This study however notes that the extent of United Nations' cooperation with the Court will depend to a large extent, on the disposition of the UN Secretary-General to the Court. Thus, as the term of office of the current Secretary-General nears to an end, Assembly of States parties to the ICC Statute should play an active role in the selection of the next Secretary-General to ensure the continuation of the cordial relationship between the Court and the United Nations under Kofi Annan.<sup>32</sup> Considering U.S. current objection to the ICC, it is necessary that Assembly of States Parties, especially those in the Security Council should work together to ensure that the next Secretary-General is not adverse to the operation of the ICC.

The ICC Statute has been praised for detailing the crime of genocide, crimes against humanity, and war crimes more than previous legal instruments. On the other

---

<sup>29</sup> Relationship Agreement, *supra* note 17, art 3.

<sup>30</sup> *Id.*, art. 15.

<sup>31</sup> *Id.*, art. 16.

<sup>32</sup> Already the United States is looking to influence the choice of the next U.N. Secretary-General. See Edith M. Lederer, Bolton Launches Talks on Replacing Annan, AP News, February 17, 2006, available at <http://www.townhall.com/news/ap/online/headlines/D8FQOOF02.html> (visited February 18, 2006); Patrick Goodenough, Security Council Discord Expected Over Annan's Successor, Cybercast News Services, February 13, 2006, available at: <http://www.cnsnews.com/news/viewstory.asp?Page=\ForeignBureaus\archive\200602\FOR20060213b.htm> (visited February 18, 2006).

hand, the Statute has also been criticized for its failure to elaborate on these crimes due to sovereignty concerns and reluctance to tinker with the definition of genocide as stated in the Genocide Convention. While further elaboration may and are indeed desirable in some situations, it should however be noted that no criminal Statute addresses all possible crimes at once. The Review Conference should serve as opportunities to embark on this objective. The emphasis now should be on breathing life to the crimes prohibited in the ICC Statute to achieve the objectives of the Statute. The objectives of the ICC Statute to instill a culture of individual criminal accountability and end the culture of impunity would be achieved if States and the Court successfully prosecute individuals who commit genocide, crimes against humanity, and war crimes.

Suffice it however to note that one of the major disappointments of the Rome Conference was the inability of States to agree on a definition of the crime of aggression based on the Nuremberg conclusions regarding the crime of aggression.<sup>33</sup> Hopefully at the Review Conference in 2009, States Parties may find the political will to agree on a definition of the crime of aggression and the conditions for the exercise of the Court's jurisdiction.<sup>34</sup>

Notwithstanding the highlighted jurisdictional limitations of the Court, the establishment of the ICC remains one of the remarkable achievements of the twentieth century. In this respect, it is commendable that the governments of Uganda, DR Congo,

---

<sup>33</sup> Theodor Meron, *Defining Aggression For the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 2 (2001) (observing that the "the crime of aggression was extremely controversial during the Rome Statute's negotiations. Although many countries wished to see the crime included in the Statute, there was no agreement on the definition or on how to respect the Security Council's mandate under the United Nations (U.N.) Charter with respect to determining whether an act of aggression has occurred).

<sup>34</sup> The Rome Conference resolved that the Court's jurisdiction over the crime of aggression is deferred until a definition of the crime and conditions under which the Court will exercise jurisdiction over the crime is concluded. ICC Statute, *supra* note 4, art. 5(1).

and Central African Republic (CAR) have referred situations in their respective States to the Court. Equally commendable is the decision of the Security Council to refer the situation in Darfur, Sudan to the Court. Fortunately, the Court obtained jurisdiction over these situations based on self referrals and “waivers of complementarity”,<sup>35</sup> thereby avoiding the concerns of procedural hurdles expressed in this study that may follow the application of the complementarity principle.<sup>36</sup>

These referrals give the Court its first set of opportunities to show to the international community that the ICC is a useful institution capable of successfully handling international criminal investigation and prosecution. At the same time, there is the concern that the implementation of State referrals may lead to a “temptation of the territorial state to proceed to what may be called a ‘selective or asymmetrical self-referral’ where the *de jure* government is itself party to an internal armed conflict.”<sup>37</sup>

Cognizant of this possibility, the Prosecutor interpreted the referral by the Ugandan government to the ‘situation concerning the Lord’s Resistance Army’ as covering ‘crimes within the situation of northern Uganda by whomever committed’.<sup>38</sup>

---

<sup>35</sup> See generally, Claus Kress, ‘Self Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy, 2 J. INT’L CRIM. JUST. 944 (2004).

<sup>36</sup> Note however that Sudanese President Omar el-Bashir has vowed not to extradite any of its citizens to the ICC, insisting that it can prosecute any war criminal in its own courts.” See, Xinhua News Agency, “Sudan Vows Not to Extradite Suspects of Darfur War Crimes, February 19, 2006, available at: [http://news.xinhuanet.com/english/2006-02/19/content\\_4200443.htm](http://news.xinhuanet.com/english/2006-02/19/content_4200443.htm) (visited February 28, 2006); Sudan Tribune, Only Sudanese Judiciary Can Try Darfur War Crimes -al-Bashir, February 19, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14151](http://www.sudantribune.com/article.php3?id_article=14151) (visited February 28, 2006). See also, IWPR, Fred Bridgland, Darfur Sanctions Deadlock as ICC Considers Prosecutions, February 28, 2006, available at: [http://www.iwpr.net/?p=acr&s=f&o=259927&apc\\_state=henh](http://www.iwpr.net/?p=acr&s=f&o=259927&apc_state=henh) (visited February 28, 2006) (reporting that President al-Bashir has warned that Sudan will not cooperate and has also sworn “before Allah three times” that he will never extradite a Sudanese citizen to any foreign court).

<sup>37</sup> Claus Kress, ‘Self-Referrals’ and ‘Waivers of Complementarity’ Some Considerations in Law and Policy, 2 J. INT’L. CRIM. JUS. 944, 946 (2004).

<sup>38</sup> Letter by the Chief Prosecutor of 17 June 2004 addressed to the President of the ICC as attached to the decisions of the Presidency of ICC, *supra* note 5. See the Decision of the Presidency assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04, and the Decision of the Presidency assigning the situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04.

Similarly, with respect to the referral by Cote d'Ivoire, although the State accepted ICC jurisdiction to investigate in the country and requested the ICC's help in bringing to justice rebels who started the civil war in that country, the Prosecutor noted that since only "situations" can be referred to the ICC, the Prosecutor will consider the actions of all individuals in groups involved in the conflict. Such approach is consistent with the principle of individual criminal responsibility espoused in the Statute to the effect that the "Statute shall apply equally to *all* persons without any distinction ..."<sup>39</sup>

The establishment of the Court is only the beginning as the important work of the Court lies ahead. The sustainability of international criminal justice will depend on how well the Court is able to deliver on its objective to bring justice to victims of international crimes and to end the culture of impunity. It is hoped that in the interest of justice, States Parties to the ICC Statute will support the Court to establish confidence in the international criminal system. Thus, efforts are necessary across the board, not only by the new institution and its staff, but also by the States Parties that established the Court, the United Nations as an institution, the Security Council as well as nongovernmental organizations to support the works of the Court. A successful cooperation between the above named entities and the ICC can cement an international consensus in favor of strong and effective ICC jurisdiction.

The cooperation of the United States as a permanent member of the Security Council and the lone super power is vital to the success of the Court. States Parties should therefore make every effort to persuade the United States' government to abandon

---

<sup>39</sup> ICC Statute, *supra* note 4, art. 27(1) (emphasis added).

its hostility toward the ICC.<sup>40</sup> The U.S. and other States that fear the scrutiny of an independent international Prosecutor should heed the counsel of Justice Louise Arbour, former Prosecutor of the ICTY and the ICTR, who observed that there is more reason to fear that the international prosecutor will be impotent than there is to fear that the Prosecutor will overreach.<sup>41</sup> According to Justice Arbour, the ICC Prosecutor must necessarily depend upon States and the Security Council for essential political support and enforcement, thus, the Prosecutor will have no reason to pursue frivolous prosecutions against the citizens of any State.<sup>42</sup>

There is therefore no reason for the United States, as a permanent member of the Council, to fear frivolous international prosecutions of U.S. military personnel and other U.S. nationals. It would be both futile and irrational for the ICC to pursue such a course

---

<sup>40</sup> See Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of Operation Enduring Freedom*, 9 ANN. SURV. INT'L & COMP. L. 19, 48-52 (2003) (noting that U.S. has taken various measures to undermine the ICC such as "un-signing of the ICC Statute; the adoption of the American Servicemembers' Protection Act of 2002; and systematic campaign to coerce States parties to sign the so-called Article 98 agreements).

<sup>41</sup> See NATO: Statement by Justice Louise Arbour on Establishment of an International Criminal Court, M2 Presswire, Dec. 10, 1997, available in LEXIS, World Library, Currnws File. In her statement before the ICC PrepCom, Justice Arbour observed:

Turning then to the powers of the Prosecutor of the permanent Court, I would like to expand on my earlier remarks that it may be unwarranted for States to fear the possible overreach, or simply the untrammelled power of the Prosecutor of the permanent Court. Despite the fact that the ad hoc Tribunals' powers originate in Chapter VII of the United Nations Charter, the taxing experience of my Office suggests that it is more likely that the Prosecutor of the permanent Court could be chronically enfeebled by inadequate enforcement powers combined with a persistent and widespread unwillingness of States Parties to cooperate. The existence of jurisdiction will not necessarily correspond to the reality facing the Prosecutor of the permanent Court on a day-to-day basis.

Id.

<sup>42</sup> Justice Arbour drawing on her experience as Prosecutor for the ICTY and ICTR noted as follows:

In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention. . . . [A]n appropriate process of vigorous internal indictment review, such as we presently have in place at the two Tribunals [as is the case in the ICC Statute], confirmation by a competent judge, and the inevitable acquittal that would result from an unfounded prosecution, should alleviate any fear that an overzealous or politically-driven Prosecutor could abuse his or her powers.

Id.



of action. There are implicit safeguard in the ICC Statute to ensure that the United States will be able to protect its legitimate interests without compromising the independence of the ICC.

We must always remember that it is now the expectation of many that the ICC is necessary to ensure that acts of mass murder, rape and torture whether committed in the form of genocide, war crimes or crimes against humanity are not committed with impunity.<sup>43</sup> To realize this noble goal, it is imperative that the Court be endowed with jurisdiction and provided the necessary resources and cooperation to enable the Court hold individuals responsible for these heinous acts and egregious violations of international crimes that are of grave concerns to the international community as a whole, accountable for their actions.

In the final analysis, whether the Court will achieve the aspirations behind its establishment will depend largely on the application of the complementarity principle, a concession to States' sovereignty, whose retention in the Statute remains a potential source of conflict between the Court and States. The complementarity principle is capable of undermining the efficacy of the Court because it is antithetical to the objective of the Court.<sup>44</sup>

Lastly, it should be reiterated that the full cooperation of States Parties and the United Nations, particularly the Security Council, is necessary for the realization of the objectives of the ICC. In deserving situations, such support should include timely military actions especially where it will lead to immediate end to the killing of innocent

---

<sup>43</sup> Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 2 (2001)

<sup>44</sup> See Leila N. Sadat & S. Richard Carden, *supra* note 21, at 413 (noting that "the ends sought by the Statute are imperfectly addressed by the means chosen"). *Id.*

civilians.<sup>45</sup> As one of the Judges of the International Criminal Court, and President of the Pre-Trial Division noted, “[w]hether they will do so remains, as it were, the question to end all questions”.<sup>46</sup>

---

<sup>45</sup> See, CNN World Edition, Senate Urges Bush to Take Action on Darfur, Friday, March 3, 2006, available at: <http://www.cnn.com/2006/WORLD/africa/03/03/sudan.congress.reut/index.html> (reporting that the U.S. Senate on March 2, 2006, unanimously passed a resolution urging President Bush to take swift action to stop the genocide that the United States says is occurring in Sudan, and pressed for NATO to send troops and enforce a no-fly zone in the Darfur region. The resolution also calls on the U.N. Security Council to approve a peace enforcement mission for the region where tens of thousands of people have been killed and 2 million driven from their homes in three years of fighting between rebels and government-allied Arab militias).

<sup>46</sup> Hans-Peter Kau, *supra* note 5, at 383.

## **BOOKS**

Appleman, J.A., MILITARY TRIBUNALS AND INTERNATIONAL CRIMES, 239-58 (1954).

Ball, H., PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 100 (1999).

Bassiouni, M.C. & Manikas, P., THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 538-54 (1996).

Bassiouni, M.C. & Nanda, V.P. eds., INTERNATIONAL CRIMINAL LAW 590 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

Bassiouni, M.C. & Wise, E.M., AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3-5, 56-57 (Dordrecht/Boston/London: Martinus Nijhoff, 1995).

Bassiouni, M.C., A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (Dordrecht: Martinus Nijhoff Publishers 1987).

Bassiouni, M.C., CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 503-26 (1992).

Bassiouni, M.C., CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 62 (2d rev. ed., 1999).

Bassiouni, M.C., INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (1997).

Bassiouni, M.C., INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE Ch. VIII (3d ed. 1996).

Bassiouni, M.C., INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 431-32 (Transnational Publishers, 2003).

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

Bassiouni, M.C., THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 3 (1998).

Becker, E., WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION (Public Affairs 2d ed. 1998) (1986)

Best, G, WAR AND LAW SINCE 1945, 166 (1994)

Boot, M., GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLEM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 428 (Intersentia: New York, 2002).

Bossier, P., FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 283-284 (Geneva: Henry Dunant Institute 1985).

Brockman, A.C., THE OTHER NUREMBERG, THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987)

Broomhall, B., INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 145 (2003).

Brownlie, I., PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300-04 (4th ed. 1990);

Brownlie, I., PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (3d ed. 1979).

Brownlie, I., PRINCIPLES OF PUBLIC INTERNATIONAL LAW 562 (Oxford, 1991)

Brownlie, I., PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 5<sup>th</sup> ED., 678-981 (Oxford University Press 1998).

Buergenthal, T. & Maier, H.G., PUBLIC INTERNATIONAL LAW IN A NUTSHELL 1 (1990).

Buscher, F.M., THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955 (1989);

Carter, B., & Trimble, P.R., INTERNATIONAL LAW 411 (1991).

Carter, B.E. & Trimble, P.R. eds., INTERNATIONAL LAW 262, (Barry E. Carter & Phillip R. Trimble eds., 3rd ed. 1999).

Chanda, N., BROTHER ENEMY: THE WAR AFTER THE WAR (1986).

Chandler, D., A HISTORY OF CAMBODIA 218 (2d ed. 1996).

Cigar, N. & Williams, P., INDICTMENT AT THE HAGUE: THE MILOSEVIC REGIME AND CRIMES OF THE BALKAN WAR 25 (New York University Press 2002);

De Nike, H.J., ed., GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 549 (Howard J. De Nike et al. eds., 2000)

Dinstein, Y., THE DEFENCE OF OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW (1965).

Drost, P.N., THE CRIME OF STATE: GENOCIDE 62 (1959).

Fein, H., GENOCIDE: A SOCIOLOGICAL PERSPECTIVE 20 (1993)

Ferencz, B.B., AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD PEACE: A DOCUMENTARY HISTORY (London: Oceana Publications 1980).

Ferencz, B.B., AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE, Vol. 1, 30 (London: Oceana, 1980)

Ferencz, B.B., DEFINING INTERNATIONAL AGRESSION 522, 523 (1975)

Finell, P., ACCOUNTABILITY UNDER HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW FOR ATROCITIES AGAINST MINORITY GROUPS COMMITTED BY NON-STATE ACTORS 23 (Åbo Akademi Institute for Human Rights, 2002).

Fiore, P., INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION OR THE LEGAL ORGANIZATION OF THE SOCIETY OF STATES 36, 51, 109 (5<sup>th</sup> ed. 1918).

Green, L.C., SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976)

Green, L.C., THE CONTEMPORARY LAW OF ARMED CONFLICT, 2<sup>nd</sup> Ed., 43 (2000).

Greenlees, D. & Garran, R., DELIVERANCE: THE INSIDE STORY OF EAST TIMOR'S FIGHT FOR FREEDOM 4 (2002).

Henkin, L. et al., HUMAN RIGHTS (1999)

Henkin, L. et al., INTERNATIONAL LAW 448 (3d ed. 1993).

Holmes, O.W., THE COMMON LAW 1 (Little, Brown & Co. 1881).

Horwitz, S., *The Tokyo Trial*, 465 INT'L RECONCILIATION 473 (1950).

Hosoya, C. et al. eds., *THE TOKYO WAR CRIMES TRIAL* (C. Hosoya et al. eds., 1986).

Jackson, K.D., *CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH* (Karl D. Jackson ed., 1989)

Jackson, R.H., *THE CASE AGAINST THE NAZI WAR CRIMINALS* (New York, 1945);

Jackson, R.H., *THE NUREMBERG CASE*, (New York, 1948).

Joint Evaluation of Emergency Assistance to Rwanda, *THE INTERNATIONAL RESPONSE TO CONFLICT AND GENOCIDE: LESSONS FROM THE RWANDA EXPERIENCE*, Vols. I-V (March 1996).

Kalshoven, F., *CONSTRAINTS ON THE WAGING OF WAR 40-41* (ICRC, 2nd ed, 1991)

Kazazi, M., *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 54-66 (1996).

Keijzer, N., *MILITARY OBEDIENCE* (1978)

Kelsen, H., *GENERAL THEORY OF LAW AND STATE* 342 (Anders Wedberg Trans., 1949)

Kiernan, B., *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* (2d ed. 2002).

Kiernan, B., ed., *CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS AND THE INTERNATIONAL COMMUNITY* 141, 142 (Ben Kiernan ed., 1993).

Kindred, H.M. et al. eds., *INTERNATIONAL LAW AS CHIEFLY INTERPRETED AND APPLIED IN CANADA* 4<sup>th</sup> ed. 271(1987).

Klip, A. & Sluiter, G., eds., *1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998*, at 679 (Andre Klip & Goran Sluiter eds., 1999).

Knierem, A. von, *THE NUREMBERG TRIALS* (1959)

Lawyers Committee for Human Rights, PROSECUTING WAR CRIMES IN THE FORMER YUGOSLAVIA - THE INTERNATIONAL TRIBUNAL, NATIONAL COURTS AND CONCURRENT JURISDICTION: A GUIDE TO APPLICABLE INTERNATIONAL LAW, NATIONAL LEGISLATION AND ITS RELATION TO INTERNATIONAL HUMAN RIGHTS STANDARDS iii (May 1995).

Lawyers Committee for Human Rights, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 33 (April 1995).

Leblanc, L., THE UNITED STATES AND THE GENOCIDE CONVENTION 80 (Durham, N.C.: Duke University Press 1991)

Lemkin, R., AXIS RULE IN OCCUPIED EUROPE, LAWS OF OCCUPATION: ANALYSIS OF GOVERNMENT: PROPOSALS FOR REDRESS 79 (Washington: Carnegie Endowment for International Peace, 1944).

Levie, H.S., TERRORISM IN WAR: THE LAW OF WAR CRIMES 559 (1993).  
Malanczuk, P., AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 15-16 (Routledge, 7<sup>th</sup> rev. ed. 1997).

Malekian, F., INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES (1985).

Manchester, W., AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964, 484-91 (1978).

McDonald, G.K. & Swaak-Goldman, O. eds., SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF THE INTERNATIONAL AND NATIONAL COURTS (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

Mcdougal, M.S. et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 96 (1980).

Metzl, J.F., WESTERN RESPONSES TO HUMAN RIGHTS ABUSES IN CAMBODIA, 1975-80, at 2-3 (1996).

Minear, R.H., VICTOR'S VENGEANCE: THE TOKYO WAR CRIMES TRIAL (1971).

Moir, L., THE LAW OF INTERNAL ARMED CONFLICT 1 (2002).

Moore, J.N., CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 302-03, 310 (1992)

Morris, V. & Scharf, M.P., AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS xxi (Virginia Morris & Michael P. Scharf eds., 1995).

Muller, A.S., INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES 75 (1995).

Mullins, C., THE LEIPZIG TRIALS (1921).

Murphy, J.F., NORMS OF CRIMINAL PROCEDURE AT THE INTERNATIONAL MILITARY TRIBUNAL, THE NUREMBERG TRIAL AND INTERNATIONAL LAW 62 (Ginsburgs & Kudriavstev eds., 1990).

O'Connell, D.P., INTERNATIONAL LAW 80 (2nd ed. 1970)

Okeke, C.N., CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY 18 (1974).

Oppenheim, L., INTERNATIONAL LAW 264-65 (1st ed. 1906)).

Oppenheim, L., INTERNATIONAL LAW: A TREATISE 5 (7<sup>th</sup> ed. 1948)

Paust, J.J., Bassiouni, M.C. et al., INTERNATIONAL CRIMINAL LAW 622 (2d ed. 2000).

Physicians for Human Rights, MEDICINE UNDER SIEGE IN THE FORMER YUGOSLAVIA: 1991-1995 24 (1996).

Piccigallo, P.R., THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST 1945-1951 (1979).

Picket, J.S., ed., COMMENTARY ON THE GENEVA CONVENTION of 12 August, 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (Jean S. Pictet ed., 1958).

Picket, J.S., ed., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 26 (J. Pictet ed. 1952).

Ponchaud, F., CAMBODIA: YEAR ZERO (Nancy Amphoux trans., 1978)

Power, S., "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 42-60 (2003).



Pritchard, R.J. & Zaide, S.M. eds., THE TOKYO WAR CRIMES TRIAL: THE COMPREHENSIVE INDEX AND GUIDE TO THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN FIVE VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

Prunier, G., THE RWANDA CRISIS 1959-1994: HISTORY OF GENOCIDE (1995).

Ramos-Horta, J., FUNU: THE UNFINISHED SAGA OF EAST TIMOR 64-71 (1987).

Ratner, S.R. & Abrams, J.S., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, BEYOND THE NUREMBERG LEGACY, 2<sup>nd</sup> Ed., 39 (Oxford: Clarendon 2000).

Roberts, A. & Guelff, R., eds., DOCUMENTS ON THE LAWS OF WAR 169 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

Robinson, N., THE GENOCIDE CONVENTION: A COMMENTARY (New York, 1960).

Roling, B.V.A. & Cassese, A., THE TOKYO TRIAL AND BEYOND 3 (Oxford, 1993)

Roling, B.V.A., The Nuremberg and Tokyo Trials in Retrospect, in A TREATISE ON

Sands, P. & Klein, P., BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 471 (2001)

Schabas, W.A., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 46 (2003).

Schabas, W.A., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 68 (2<sup>nd</sup> ed. 2004).

Schabas, W.A., GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 222-25 (2000).

Scharf, M.P. & Schabas, W.A., MILOSEVIC ON TRIAL 14 (The Continuum International Publishing Group, Inc., 2002).

Schermers, H.G. & Blokker, N.M., INTERNATIONAL INSTITUTIONAL LAW 979 (1995)

Schwarzenberger G. & Brown, E., A MANUAL OF INTERNATIONAL LAW 26-27 (6th ed. 1976)

Schwarzenberger, G., INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Volume II: THE LAW OF ARMED CONFLICT 462 (Stevens, London, 1968).

Shaw, M., INTERNATIONAL LAW 471 (Cambridge, 1998).

Shawcross, H. Lord, LIFE SENTENCE (London: Constable 1995).

Shiroyama, S., WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI (1977)

Steiner, H. & Alston, P., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 705  
(Oxford U. Press, 2d ed. 2000)

Sunga, L.S., THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW:  
DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 8-9 (1997).

Tanaka, Y., HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II  
(1996).

Taylor, T., FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE  
NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10  
(1949).

Taylor, T., THE ANATOMY OF THE NUREMBERG TRIALS 17 (1992).

Terret, S., THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER  
ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING  
EFFORTS IN THE POST COLD WAR WORLD 33 (Ashgate Publishing Co. 2000).

The BRITISH MANUAL OF MILITARY LAW, No. 443 (1914).

Pritchard, R.J. & Zaide, S.M. eds., THE INTERNATIONAL MILITARY TRIBUNAL  
FOR THE FAR EAST IN TWENTY-TWO VOLUMES (R. John Pritchard & Sonia  
Magbanua Zaide eds., 1981).

Toman, J., THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF  
ARMED CONFLICT (Paris, 1996).

Tusa, A. & Tusa, J., THE NUREMBERG TRIAL 22 (1984).

U.S. DEPT of the Army, FIELD MANUAL 27-10 (1940).

U.S. DEPT of the Army, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE  
(1956).

Uhler, O. & Coursier, H., eds., COMMENTARY ON THE GENEVA CONVENTIONS  
OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION  
OF CIVILIAN PERSONS IN TIME OF WAR 16 (O. Uhler & H. Coursier eds. 1958).

United Nations War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 89-92 (1948).

Vickery, M., CAMBODIA: 1975-1982 (1984).

Willis, J.F., PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 37, (1982).

Wingaert, C. van den, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER (1980).

Yves, S., Swinarski, C & Zimmerman, B., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, 1320 (Yves, Swinarski, & Zimmerman eds., 1987).

Zimmermann, A., War Crimes Committed in an Armed Conflict Not of an International Character, in Otto TRIFFTERER, COMMENTARY ON STATUTE OF THE INTERNATIONAL CRIMINAL COURT 285 (1999).

#### ARTICLES IN A BOOK

Afflitto, F.M. & Margaret, M., The Political Determinants of Ethnic Genocide, in ANATOMY OF GENOCIDE: STATE SPONSORED MASS KILLINGS IN THE TWENTIETH CENTURY 7 (Alexandre Kimenyi & Otis L. Scott eds., 2001).

Ashworth, A.J., Defining Criminal Offences Without Harm, in CRIMINAL LAW: ESSAYS IN HONOUR OF J.C. SMITH 7, 8 (Peter Smith ed., 1987).

Bierzanek, R., The Prosecution of War Crimes, in A TREATISE ON INTERNATIONAL CRIMINAL LAW 562 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

Bierzanek, R., War Crimes: History and Definition, in 3 INTERNATIONAL CRIMINAL LAW 29, 36 (M. Cherif Bassiouni ed., 3 vols., 1987).

Broomhall, B., The International Criminal Court: Overview, and Cooperation with States, in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 45 (Nouvelles Etudes Penales, 1999).

Brownlie, I., A Rebirth of Statehood, in Malcolm D. Evans, ed., ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE 5 (1996).

Chalk, F., Redefining Genocide, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 47, 50 (George J. Andreopoulos ed., 1994).

Ciampi, A., Other Forms of Cooperation, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1705 (Antonio Cassese,

Paola Gaeta, & John R. W. D. Jones eds., 2002).

Deschenes, J., Toward International Criminal Justice, in PROSECUTION OF INTERNATIONAL CRIMES, 29, 32 (Rogers Clark & Madeleine Sann, eds., Transnational Publishers, 1<sup>st</sup> ed. 1996).

Dugard, J., Criminal Responsibility of States, in M. Cherif Bassiouni ed., INTERNATIONAL CRIMINAL LAW, vol. 1, CRIMES, 2<sup>nd</sup> ed., 239 (Ardsley, NY: Transnational Publishers, 1999).

Fenrick, W.J., Article 8, margin No. 6 in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 1999).

Gaeta, P., Official Capacities and Immunities, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1131 (Baden-Baden: Nomos Verlagsgesellschaft 1999).

Gallagher, A., Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING 201 (Philip Alston & James Crawford, eds., 2000).

Hall, C.K., Article 19, Challenges to the Jurisdiction of the Court or the Admissibility of a Case, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 405, 408 (Otto Triffterer, ed. 1999).

Harhoff, F., & Mochochoko, P., International Cooperation and Judicial Assistance, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 637 (Roy S. Lee ed., 2001).

Hebel, H. von and Robinson, D., Crimes Within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 79-126, 89 (R.S. Lee Ed. The Hague/Boston/London: Kluwer Law International, 1999).

Holmes, J.T., Complementarity: National Courts versus the ICC in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 683 (Cassese, Gaeta & Jones, eds., 2002).

Holmes, J.T., The Principle of Complementarity, in Roy S. Lee (ed) THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE,

ISSUES, NEGOTIATIONS, RESULTS 78 (The Hague/London/Boston: Kluwer Law International, 1999).

Kingsbury, D., East Timor to 1999, in GUNS AND BALLOT BOXES: EAST TIMOR'S VOTE FOR INDEPENDENCE, 17, 20 (Damien Kingsbury ed., 2000).

Kolodkin, R.A., An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia, in THE PROSECUTION OF INTERNATIONAL CRIMES, 165, 165-66 (Roger S. Clark & Madeleine Sann eds., 1996).

Kre., C. beta et al., International Cooperation and Judicial Assistance: Preliminary Remarks, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1045 (Otto Triffterer, ed. 1999).

M. Cherif Bassiouni, The Need for International Accountability, in INTERNATIONAL CRIMINAL LAW 3 (M. Cherif Bassiouni ed., 1986).

Mendelsohn, J., War Crimes Trials and Clemency in Germany and Japan, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952, 226 (Robert Wolfe ed., 1984).

Mochochoko, P., International Cooperation and Judicial Assistance, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE - ISSUES, NEGOTIATIONS, RESULTS 305 (Roy S. Lee ed., 1999);

Moynier, G., *Note sur la creation d'une institution judiciaire internationale propre a prevenir et a reprimer les infractions a la Convention de Geneve*, BULLETIN INTERNATIONAL DES SOCIETES DE SECOURS AUX MILITAIRES BLESSES, NO. 11, Apr. 1872, at 122, *translated in* Christopher Keith Hall, The First Proposal for a Permanent International Criminal Court, INT'L REV. RED CROSS, NO. 322, Mar. 1998, at 57, 72.

Munch, F., Criminal Responsibility of States, in INTERNATIONAL CRIMINAL LAW 122-29 (M. Cherif Bassiouni ed., 1986).

Ntanda Nsereko, D.D., Article 18 Preliminary Rulings Regarding Admissibility, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 395, 401 (Otto Triffterer, ed. 1999).

Paust, J.J., Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft: Article 5[20], Crimes Within the Jurisdiction of the Court, and Articles 19[C] and 26[M], Leader and Responsibility and Superior Orders, in OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE (Leila Sadat Wexler ed., 1998).

Prost, K. & Schlunck, A., Article 98, in Otto Triffterer, ed., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1131 (Baden-Baden: Nomos Verlagsgesellschaft 1999)

Rao, S.R., Article 112: Assembly of State Parties, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1201-13 (Otto Triffterer ed., 1999).

Ratner, S.R. & Abrams, J.S., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 4 (Oxford, 2<sup>nd</sup> Ed. 2001).

Robert H. Jackson, R.H., Prosecutor's Address of Nov. 21, 1945 to the International Military Tribunal, in 2 TRIAL OF THE MAJOR WAR CRIMINALS 99 (1947).

Robinson, G., With UNAMET in East Timor - An Historian's Personal View, in BITTER FLOWERS, SWEET FLOWERS: EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY (Richard Tanter et al. eds., 2001).

Robison, D., Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 144-49 (Flavia Lattanzi & William A. Schabas eds., 1999).

Shaw, M., Genocide and International Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 797, 806 (Yoram Dinstein ed., 1989)

Sinha, P., The Position of the Individual in an International Criminal Law in, A TREATISE ON INTERNATIONAL CRIMINAL LAW 122-34 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

Swart, B. & Sluiter, G., The International Criminal Court and International Criminal Co-operation, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 91 (Herman von Hebel et al. eds., 1999).

Tanter, R. et al., East Timor Faces the Future, in BITTER FLOWERS, SWEET FLOWERS: EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY 243, 260 (Richard Tanter et al. eds., 2001).

Tomuschat, C., Crimes Against the Peace and the Security of Mankind and the Recalcitrant Third State, in WAR CRIMES IN INTERNATIONAL LAW 41, 49-50 (Yoram Dinstein & Mala Tabory eds., 1996).



Yee, L., *The International Criminal Court and the Security Council*, in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE* 143 (Roy S. Lee ed., 1999).

### LAW REVIEW ARTICLES

Abrams, J., *Universal Jurisdiction: Myths, Realities and Prospects: The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide*, 35 *NEW ENG. L. REV.* 303 (2001).

Akhavan, P., *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 *HARV. HUM. RTS. J.* 229 (1995).

Akhavan, P., *The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment*, 90 *AM. J. INT'L L.* 501 (1996).

Alston, P. & Simma, B., *First Session of the U.N. Committee on Economic, Social and Cultural Rights*, 81 *AM. J. INT'L L.* 747 (1987).

Amann, D.M., *International Decisions: Prosecutor v. Akayesu - Case ICTR-96-4-T - International Criminal Tribunal for Rwanda, September 2, 1998*, 93 *AM. J. INT'L L.* 195 (1999).

Arnell, P., *International Criminal Law and Universal Jurisdiction*, 11 *INT'L LEGAL PERSP.* 53 (1999).

Arsanjani, M.H., *Developments In International Criminal Law: The Rome Statute of the International Criminal Court*, 93 *AM. J. INT'L L.* 22 (1999).

Bakuramutsa, M., *Why the Government of Rwanda Called for an International Tribunal and Yet Opposed the United Nations Security Council Resolution*, 12 *N.Y.L. SCH. J. HUM. RTS.* 631 (1995).

Bassiouni, M.C., *Combating Impunity For International Crimes*, 71 *U. COLO. L. REV.* 409, 420 (2000).

Bassiouni, M.C., *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 *HARV. HUM. RTS. J.* 11 (1997).

Bassiouni, M.C., *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *DUKE J. COMP. & INT'L L.* 235 (1993).

Bassiouni, M.C., *International Law and the Holocaust*, 9 *CAL.W. INT'L L.J.* 201 (1979).

Bassiouni, M.C., The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian law in the Former Yugoslavia, 5 CRIM. L. F. 279 (1994).

Bassiouni, M.C., The International Criminal Court in Historical Context, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55 (1999).

Bassiouni, M.C., The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998).

Bassiouni, M.C., The Time Has Come for an International Criminal Court, 1 IND. INT'L & COMP. L. REV. 1 (1991).

Beresford, S., The Privileges and Immunities of the International Criminal Court: Are They Sufficient for the Proper Functioning of the Court or Is There Still Room for Improvement? 3 SAN DIEGO INT'L L.J. 83 (2002).

Bloom, E.T., Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel, 89 AM. J. INT'L L. 621(1995).

Bos, A., The Universal Declaration of Human Rights and the Statute of the International Criminal Court, 22 FORDHAM INT'L L.J. 229 (1998).

Bourloyannis-Vrailas, M.-C., The Convention on the Safety of United Nations and Associated Personnel, 44 INT'L & COMP. L.Q. 560 (1995).

Bowman, H. D., Letting The Big Fish Get Away: The United Nations Justice Effort In East Timor 18 EMORY INT'L L. REV. 371 (2004).

Brown, B.S., Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals 23 YALE J. INT'L L. 383 (1998).

Bryant, B., Substantive Scope of the Convention, 16 HARV. INT'L L.J. 681 (1975).

Bunyanunda, M., Note, The Khmer Rouge on Trial: Whither the Defense?, 74 S. CAL. L. REV. 1581 (2001).

Burns, P., An International Criminal Tribunal: The Difficult Union of Principles and Politics, 5 CRIM. L. F. 341 (1994).

Caggiano, M.J.T. , The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form, 20 B.C. ENVTL. AFF. L. REV. 479 (1993).



Caron, D.D. & Sloss, D.L., Availability of U.S. Courts to Detainees at Guantanamo Bay Naval Base - Reach of Habeas Corpus - Executive Power in War on Terror 98 AM. J. INT'L L. 788 (2004).

Cassese, A., The Statute of the International Criminal Court: Some Preliminary Reflections, 10 EUR. J. INT'L L. 144 (1999).

Cerna, C.M., Recent Development: A Small Step Forward For Human Rights: The Creation Of The Post Of United Nations High Commissioner For Human Rights, 10 AM. U.J. INT'L L. & POL'Y 1265 (1995).

Cerna, C.M., A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner of Human Rights, 10 AM. U.J. INT'L L. & POL'Y 1265 (1995).

Charney, J.I., Transnational Corporations and Developing International Law, 1983 Duke L.J. 748 (1983).

Chibueze, R., United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom", 9 ANN. SURV. INT'L & COMP. L. 19 (2003).

Clark, R.S., Methods of Warfare That Cause Unnecessary Suffering or Are Inherently Indiscriminate: A Memorial Tribute to Howard Berman, 28 CAL. W. INT'L L.J. 379 (1998).

Corn, M., United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters Into Force, ARMY LAW, Feb. 1999, 21.

Dadrian, V.N., Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications, 14 YALE J. INT'L L. 221 (1989).

Dickinson, L.A., The Promise of Hybrid Courts, 97 AM. J. INT'L L. 295 (2003).

Diederich, Jr., M.D., "Law of War" and Ecology - A Proposal for a Workable Approach to Protecting the Environment Through the Law or [sic] War, 136 MIL. L. REV. 137 (1992).

Dormann, K. & Maresca, L., The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments, 5 CHI. J. INT'L L. 217 (2004).

Ehard, H., The Nuremberg Trial against the Major War Criminals and International Law, 43 AM. J. INT'L L. 223 (1949).

- Elias, T.O., *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L. L. 285 (1980).
- Enache-Brown, C. & Fried, A., *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L. J. 613, 626 (1998).
- Etcheson, C., *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT'L & COMP. L. 507 (2000).
- Ettinger, D.J., *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97 (1992).
- Forbes, G.W., *Some Legal Aspects of the Nuremberg Trial*, 24 CAN. B. REV. 584 (1946).
- Forsythe, D.P., *Politics and the International Tribunal For The Former Yugoslavia*, 5 CRIM. L.F. 401 (1994).
- Fritz, N. & Smith, A., *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391 (2001).
- Gallagher, K., *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000).
- Garner, J.W., *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L. L. 70 (1920).
- Glendon, M.A., *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998).
- Goebel, C.M., *Population Transfer, Humanitarian Law, and the Use of Ground Force in U.N. Peacemaking: Bosnia and Herzegovina in the Wake of Iraq*, 25 N.Y.U. J. INT'L L. & POL. 627 (1993).
- Gordon, M., *Justice on Trial: the Efficacy of the International Tribunal for Rwanda*, 1 ILSA J. INT'L & COMP. L. 217 (1995).
- Graditzky, T., *War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court*, 5 U.C. DAVIS J. INT'L L & POL'Y, 199, 210 (1999).
- Green, L.C., *Superior Orders and Command Responsibility*, 27 CAN. Y.B. INT'L L. 167 (1989).
- Greenawalt, A.K.A., *Rethinking Genocide Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999).

- Gurule, J., United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?, 35 CORNELL INT'L L.J. 1 (2001-2002).
- Hall, C.K., The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AM. J. INT'L L 331 (1998).
- Hall, C.K., The First Five Sessions of the UN Preparatory Commission for the International Criminal Court, 94 AM. J. INT'L L. 773 (2000).
- Hall, C.K., The first proposal for a Permanent International Criminal Court, 322 INT'L REV. RED CROSS 57 (1998).
- Hall, C.K., The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 91 AM. J. INT'L L. 117 (1997).
- Hall, C.K., The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AM. J. INT'L L 124 (1998).
- Hannum, H., International Law and Cambodian Genocide: The Sounds of Silence, 11 HUM. RTS. Q. 82 (1989).
- Hannum, H., The Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT'L & COMP. L. 287 (1996).
- Koh, K.H., How is International Human Rights Law Enforced?, 74 IND. L.J. 1397 (1999).
- Hathaway, O.A., Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935 (2002).
- Helfer, L.R. & Slaughter, A-M, Toward a Theory of Effective Supranational Adjudications, 107 YALE L.J. 273 (1997).
- Hickey, Jr., James E., The Source of International Legal Personality in the 21<sup>st</sup> Century, 2 HOFSTRA L POL'Y SYM 1 (1997).
- Hobb, S., Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations, 5 IND. J. GLOBAL LEG. STUD. 191 (1997).
- Hwang, P., Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court, 22 FORDHAM INT'L L.J. 457 (1998).
- Ireland, G., Ex Post Facto from Rome to Tokyo, 21 TEMPLE L.Q. 27 (1947).
- Jinks, D., September 11 and the Laws of War, 28 YALE J. INT'L L. 1 (2003).

Johnson, D.H.N., The Draft Code of Offences Against the Peace and Security of Mankind, 4 INT'L & COMP. L.Q. 445 (1955).

Joyner, C.C., Enforcing Human Rights Standards in the Former Yugoslavia, 22 DENVER J. INT'L L. & POL'Y 235 (1994).

Joyner, C.C., Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia, 6 DUKE J. COMP. & INT'L L. 79 (1995).

Katzenstein, S., NOTE: Hybrid Tribunals: Searching for Justice in East Timor, 16 HARV. HUM. RTS. J. 245 (2003).

Kau, H-P. & Kress, C., Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, 2 Y.B. INT'L HUM. L. 143 (1999).

Kau, H-P., Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years, 99 AM. J. INT'L L. 370 (2005).

Kelsen, H., Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law, 1 INT'L L.Q. 153 (1947).

Kerwin, G.J., The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts, 1983 Duke L.J. 876 (1983).

Kirsch, P. & Holmes, J.T., The Rome Conference on an International Criminal Court: The Negotiating Process, 93 AM. J. INT'L L. 2 (1999).

Kirsch, P., Q.C., The International Criminal court: Current Issues and Perspectives, 64 L. & CONTEMP. PROBS. 3 (2001).

Kirsch, P., The Rome Conference on the International Criminal Court: A Comment, American Society of International Law Newsletter 1 (AM. SOC'Y OF INT'L L., WASHINGTON, D.C.) Nov./Dec. 1998.

Kress, C., 'Self Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy, 2 J. INT'L CRIM. JUST. 944 (2004).

Kress, C., War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice, 30 ISR. Y.B. Human Rights 103 (2001).

Kunz, J.L., The United Nations Convention on Genocide, 43 AM. J.INT'L.L., 738 (1949).

Laber, J. & Nizich, I., The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects, 18 FLETCHER F. OF WORLD AFF. 7 (1994).

Landrum, B.D. The Globalization of Justice: The Rome Statute of the International Criminal Court, 2002-Sep Army Law. 1 (2002).

Lawrence, F.M., The Case for a Federal Bias Crime Law, 16 NAT'L BLACK L.J. 144 (1999).

LeBlanc, L.J., The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?, 13 YALE J. INT'L L. 268 (1988).

Lehr-Lehnardt, R., One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court, 16 BYU J. PUB. L. 317 (2002).

Lemkin, R., Genocide as a Crime Under International Law, 41 AM. J. INT'L L., 145 (1947).

Linton, S., Prosecuting Atrocities at the District Court of Dili, 2 Melb. J. INT'L L. 414 (2001).

Lippman, M., The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 B.U. INT'L L.J. 1 (1985).

Lippman, M., Genocide: The Crime of the Century - The Jurisprudence of Death at the Dawn of the new Millennium, 23 HOUS. J. INT'L L. 467 (2001).

Lippman, M., The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 ARIZ. J. INT'L & COMP. LAW 415 (1998).

Mallory, J.L., Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings, 86 COLUM. L. REV. 169 (1986).

Matas, D., Prosecuting Crimes Against Humanity: The Lessons of World War I, 13 FORDHAM INT'L L. J. 86 (1989).

McCormack, T.L.H., Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law, 60 ALB. L. REV. 681 (1997).

McCormick, T.L.H. & Robertson, S., Jurisdictional Aspects of the Rome Statute for the New International Criminal Court, 23 MELBOURNE U. L. REV. 635 (1999).

McIntire, A., Be Careful What You Wish for Because You Just Might Get It: The United States and the International Criminal Court, 25 SUFFOLK TRANSNAT'L L. REV. 249 (2001).

Menon, P.K., The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, 1 J. TRANSNAT'L L. & POL'Y 151 (1992).

Meron, T., Classification of the Conflict in the Former Yugoslavia: Nicaragua's Fallout, 92 AM. J. INT'L L. 236 (1998).

Meron, T., Defining Aggression For the International Criminal Court, 25 SUFFOLK TRANSNAT'L L. REV. 1 (2001).

Meron, T., International Criminalization of Internal Atrocities, 89 AM. J. INT'L L. 554 (1995).

Meron, T., The Geneva Conventions as Customary International Law, 81 AM. J. INT'L L. 348 (1987).

Meron, T., The Humanization of Humanitarian Law, 94 AM. J. INT'L L. 239 (2000).

Mignone, F.A., After Nuremberg, Tokyo, 25 TEX. L. REV. 475 (1947).

Miller, 18 A.B.A. NAT'L SECURITY L. REP. 1 (1996).

Mochochoko, P., Completing the Work of the Preparatory Commission: The Agreement on Privileges and Immunities of the International Criminal Court, 25 FORDHAM INT'L L.J. 638 (2002).

Moor, A., The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities, 18 FORDHAM INT'L L.J. 870 (1995).

Morris, M.H., The Trials of Concurrent Jurisdiction: The Case of Rwanda, 7 DUKE J. COMP. & INT'L L. 349 (1997).

Morris, M., High Crimes and Misconceptions: The ICC and Non-Party States, 64 L. & CONTEMP. PROBS. 13 (2001).

Mundis, D.A., The Assembly of States Parties and the Institutional Framework of the International Criminal Court, 97 AM. J. INT'L L. 132 (2003).

Mundis, D.A., Current Development: New Mechanisms for the Enforcement of International Humanitarian Law, 95 AM. J. INT'L L. 934 (2001).

Mundis, D.A., Note and Comment: The Judicial Effects of the "Completion Strategies" on the ad hoc International Criminal Tribunals, 99 AM. J. INT'L L. 142 (2005).

Mutua, M., Open Forum: Never Again: Questioning the Yugoslav and Rwanda Tribunals, 11 TEMP. INT'L & COMP. L.J. 167 (1997).

Nersessian, D.L., The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention, 36 CORNELL INT'L L.J. 293 (2003).

Newton, M.A., Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court, 167 MIL. L. REV. 20 (2001).

Nissel, A., Continuing Crimes in the Rome Statute, 25 MICH. J. INT'L L. 653 (2004).

Nowrot, K., Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law, 6 IND. J. GLOBAL LEG. STUD. 579 (1999).

Okeke, C.N., International Law in the Nigerian Legal System, 27 CAL. W. INT'L L.J. 311 (1997).

Oosterveld, V., Perry, M. & McManus, J., The Cooperation of States with the International Criminal Court, 25 FORDHAM INT'L L.J. 767 (2002).

Parks, W.H., Command Responsibility for War Crimes, 62 MIL. L. REV. 1 (1973).

Paust, J.J., Book Review, 96 AM J. INT'L L. 1006 (2002).

Paust, J.J., Selective History of International Tribunals and Efforts Prior to Nuremberg, 10 ILSA J INT'L & COMP. L. 207 (2003).

Payam, A., The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment, 90 AM. J. INT'L L. 501 (1996).

Payam, A., Enforcement of the Genocide Convention: A Challenge to Civilization, 8 HARV. HUM. RTS. J. 229 (1995).

Pejic, J., Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness, 29 COLUM. HUM. RTS. L. REV. 291 (1998).

Plattner, D., The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts, 278 INT'L REV. of the RED CROSS 409 (1990).

Podgers, J., War Crimes Court Under Fire, 1998 ABA Journal 68 (Sept.1998).

Pritchard, R.J., The Gift of Clemency Following British War Crimes Trials in the Far East, 1946-1947, 7 CRIM. L.F. 15 (1996).



- Quigley, J., "Perestroika and International Law", 82 AM. J. INT'L L. 788 (1988).
- Ramji, J., Reclaiming Cambodian History: The Case for a Truth Commission, 24 FLETCHER F. WORLD AFF. 137 (2000).
- Randall, K., Universal Jurisdiction Under International Law, 66 TEX. L. REV. 785 (1988).
- Ratner, S.R., The Cambodia Settlement Agreements, 87 AM. J. INT'L L. 1, 2 (1993).
- Ratner, S.R., The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity, 92 AM. SOC. INT'L L. PROC. 1 (1998).
- Ratner, S.R., The United Nations Group of Experts for Cambodia, 93 AM. J. INT'L L. 948 (1999).
- Ray, A.E., The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries, 46 AM. U. L. REV. 793 (1997).
- Reif, L.C., Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, 13 HARV. HUM. RTS. J. 1 (2000).
- Roberge, M-C, The New International Criminal Court: A Preliminary Assessment, 325 INT'L REV. RED CROSS 671 (Dec. 1998).
- Robinson, D. & von Hebel, H., War Crimes in Internal Conflicts: Article 8 of the ICC Statute, 2 Y.B. INT'L HUM. L., 193 (1999).
- Robinson, D., Developments in International Criminal Law: Defining "Crimes Against Humanity" at the Rome Conference, 93 AM. J. INT'L L. 43 (1999).
- Rodgers, J., War Crimes Court Under Fire, 1998 ABA JOURNAL 68 (Sept. 1998).
- Sadat, L.N. & Carden, S. R., The New International Criminal Court: An Uneasy Revolution, 88 GEO. L.J. 381 (2000).
- Salzman, T. A., Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victim in the Former Yugoslavia, 20 HUM. RTS. Q. 348 (1998).
- Sapru, T., Into the Heart of Darkness: The Case Against the Foray of the Security Council Into the Rwandan Crisis, 32 TEX. INT'L L.J. 329 (1997).



Schabas, W.A., Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, 6 *ILSA J. INT'L. & COMP. L.* 375 (2000).

Schabas, W.A., Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide?, 35 NEW ENG. L. REV. 287 (2001).

Scharf, M.P., Rome Diplomatic Conference for an International Criminal Court, *ASIL Insights* (June 1998).

Scharf, M.P., The United States and the International Criminal Court: The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 *LAW & CONTEMP. PROB.* 67 (2001).

Scharf, M.P., Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, 35 *NEW ENG. L.R.* 363 (2001).

Scharf, M.P., Comment: The Politics of Establishing an International Criminal Court, 6 *DUKE J. COMP. & INT'L L.* 167 (1995).

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

Scharf, M.P., The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 *LAW & CONTEMP. PROBS.* 67 (2001).

Scheffer, D.J., Staying the Course with the International Criminal Court, 35 *CORNELL INT'L L.J.* 47 (Nov. 2001-Feb. 2002).

Scheffer, D., The United States and the International Criminal Court, 93 AM. J. INT'L L. 12 (1999).

Scheffer, D., U.N. International Criminal Court, Statement Before the Committee on Foreign Relations of the U.S. Senate (July 23, 1998) 1998 WL 12762512.

Schwarzenberger, G., The Judgment of Nuremberg, 21 *TUL. L. REV.* 329 (1947).

Schwelb, E., Crimes Against Humanity, 23 *BRIT. Y.B. INT'L L.* 178 (1946).

Seguin, J., Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute, 18 *B.U. INT'L L.J.* 85 (2000).

Shabas, W.A., Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems, 7 CRIM. L.F. 523 (1996).

Simon, T.W., Defining Genocide, 15 *WIS. INT'L L.J.* 243 (1996).

Simonds, S.N., Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform, 29 STAN. J. INT'L L. 165 (1992).

Stanley, J., Focus: International Criminal Court: A Court that Knows No Boundaries?: The International Criminal Court Treaty is a Big Achievement but Can it Deliver what it Promises?, The Lawyer, Aug. 11, 1998, 1998 WL 9167987.

Starkman, P., Genocide and International Law; Is there a Cause of Action?, 8 ASILS INT'L L.J. 1 (1984).

Taulbee, James L., A Call to Arms Declined: The United States and the International Criminal Court, 14 EMORY INT'L L. REV. 105, 129 (2000).

Tejan-Cole, A, Note from the Field: The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, 6 YALE H.R. & DEV. L.J. 139 (2003).

Tittlemore, B.D., Khmer Rouge Crimes: The Elusive Search for Justice, 7 HUM. RTS. BRIEF 3 (Fall 1999).

Titunov, O.I., The International Legal Personality of States: Problems and Solutions, 37 ST. LOUIS U.L.J. 323 (1993).

Topper, C., And Justice for All? An Ad Hoc Tribunal for the Former Yugoslavia, 8 N. Y. INT'L L. REV. 48 (1995).

Vyver, J.D. van der, Personal and Territorial Jurisdiction of the International Criminal Court, 14 EMORY INT'L L. REV. 1, 20 (2000).

Vyver, J.D. van der, Prosecution and Punishment of the Crime of Genocide, 23 FORDHAM INT'L L.J. 286 (1999).

Schaack, V.A., The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 COLUM. J. TRANSNAT'L L. 787 (1999).

Schaack, V.A., The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, 106 YALE L.J. 2259 (1997).

Verdirame, G., The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals, 49 INT'L & COMP. L.Q. 578 (2000).

von Sternberg, Mark R., A Comparison of the Yugoslav and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity," 22 BROOKLYN J. INT'L L. 111 (1996).

Wald, P.M., The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court, 5 WASH. U. J.L. & POL'Y 87 (2001).

Wang, M.M., The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact, 27 COLUM. HUM. RTS. L. REV. 177 (1995).

Washburn, J., The International Criminal Court Arrives - The U.S. Position: Status and Prospects, 25 FORDHAM INT'L L.J. 873 (2002).

Webb, J., Genocide Treaty: Ethnic Cleansing, Substantive and Procedural Hurdles in the Application of the genocide Convention to Alleged Crimes in the Former Yugoslavia, 23 GA. J. INT'L. & COMP. L. 377 (1993).

Wedgwood, R., War Crimes: Bosnia and Beyond, 34 VA. J. INT'L L. 267 (1994).

Wedgwood, Ruth, The International Criminal Court: An American View, 10 EUR. J. INT'L L. 93 (1999).

Wedgwood, R., Jacobson, H.K., & Leigh, M., The United States and the Statute of Rome, 95 AM. J. INT'L L. 124 (2001).

Wexler, L.S., The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

Wexler, L.S., The Proposed Permanent International Criminal Court: An Appraisal, 29 CORNELL INT'L L.J. 665 (1995).

Wirth, S., Immunities, Related Problems, and Article 98 of the Rome Statute, 12 CRIM. L.F. 429 (2001).

Wright, L., War Crimes Under International Law, 62 LAW Q. REV. 40 (1946).

Wright, Q., The Jural Personality of the United Nations, 43 AM. J. INT'L L. 509 (1949).

Wright, Q., The Legality of the Kaiser, 13 AM. POL. SCI. REV. 121 (1919).

### CASES

Barcelona Traction (Belgium v. Spain), 1970 I.C.J. Rep. 3, 32 (Feb 5, 1970) (Second Phase)

International Military Tribunal Judgment and Sentence, October 1, 1946, 41 Am. J. Int'l L. 172, 252 (1947)

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. REP. 4, 23 (6 April 1955) (Second Phase)

Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 T.M.W.C. 411.

Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment (June 1997),  
Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T 710 (Int'l Crim. Trib. Rwanda, Trial Chamber I, September 2, 1998),

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (ICTR Appeal Chamber Jul. 3, 2002), available at [www.ictr.org](http://www.ictr.org)

Prosecutor v. Delalic, et al., Trial Chamber Judgment, Case No. IT-96-21, paras. 183-84 (16 November 1998)

Prosecutor v. Delalic, Mucic, Delic and Landzo, Trial Chamber Judgment, Case No. IT-96-21-T, pp 230-34 (16 November 1998).

Prosecutor v. Erdemovic, Judgment, Case No. IT-96-22-T (Trial Chamber, November 29, 1996).

Prosecutor v. Erdemovic, Sentencing Judgment, Trial Chamber, Case No. IT-96-22-Tbis (Int'l Crim. Trib. Yugoslavia, Trial Chamber, March 5, 1998)

Prosecutor v. Furundzija, Trial Chamber Judgment, Case No. IT-95-17/1 (December 10, 1998)

Prosecutor v. Jelusic, Appeal, Case No. IT-95-10-A (Int'l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001)

Prosecutor v. Jelusic, Case No. IT-95-10, (ICTY Appeal Chamber Jul. 5, 2001), available at [www.un.org/icty](http://www.un.org/icty)

Prosecutor v. Jelusic, Judgment, Case No. IT-95-10-T P 102 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999),

Prosecutor v. Karazic and Mladic, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61 94 (Int'l Crim. Trib. Yugoslavia, Trial Chamber 1, July 11, 1996)

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, (May 21, 1999)

Prosecutor v. Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999) available at:  
<http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>

Prosecutor v. Krstic, Case No. IT-98-33 (ICTY Trial Chamber Aug. 2, 2001) available at [www.un.org/icty](http://www.un.org/icty)

Prosecutor v. Krstic, Judgment, Case No. IT-98-33-T, (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>

Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, at para. 93 (June 12, 2002)

Prosecutor v. Kunarac, Kovac and Vukovic, Appeals Chamber Judgment, Case No. IT-96-23, para. 56 (June 12, 2002)

Prosecutor v. Mile Msksic, Miroslav Radic, and Veselin Sljivancanin, (Case No. IT-95-13-R 61) Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, April 3, 1996.

Prosecutor v. Milorad Krnojelac, Trial Chamber II Judgment, Case No. IT-97-25, (March 15, 2002).

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac, Trial Chamber Judgment, Case No. IT-98-30/1 (November 2, 2001).

Prosecutor v. Musema, Judgment, Case No. ICTR-96-13-T (Int'l Crim. Trib. Rwanda, Trial Chamber, Jan. 27, 2000) at  
<http://www.ictr.org/wwwroot/ENGLISH/cases/Musema/judgement/index.htm>;

Prosecutor v. Rutaganda, Case No. ICTR-96-3, (ICTR Trial Chamber Dec. 6, 1999), available at [www.ictr.org](http://www.ictr.org);

Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>

Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, April 21 and July 28, 2004;

Prosecutor v. Slobodan Milosevic, Case No. IT-99-37-PT, May 24, 1999, available at:  
<http://www.un.org/icty/cases-e/index-e.htm>.

Prosecutor v. Slobodan Milosevic, et al., Case No. IT-99-37, May 24, 1999, available at:  
<http://www.un.org/icty/cases-e/index-e.htm>.

Prosecutor v. Tadic (Sentencing Judgment) Case No. IT-94-1-T, July 14, 1997.

Prosecutor v. Tadic, Appeal on Jurisdiction, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996), available at: <[www.un.org/icty](http://www.un.org/icty)>

Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para 305 (Appeals Chamber, July 15, 1999).

Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, (Trial Chamber II, May 7, 1997), *reprinted in* 36 I.L.M. 908 (1997)

Prosecutor v. Tadic, Form of the Indictment, No. IT-94-1-T (Nov. 14, 1995).

Prosecutor v. Tadic, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, Case IT-94-1-T (May 7, 1997), 36 I.L.M. at 970, 979, para. 34.]

Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 174 (1949)

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep., 15, 23 (May 28, 1951).

S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 18.

U.S. Military Tribunal in Nuremberg in the *Altstotter* case, 6 LAW REPORTS OF TRIALS OF MAJOR WAR CRIMINALS 1, 79-80 (UN War Crimes Commission, 1948).

#### STATES CASES

Attorney-General of Israel v. Adolf Eichmann, 36 I.L.R. 5, 26 (Israel S.Ct. 1962); Barbie, French Court of Cassation (Criminal Chamber), June 3, 1988, *reprinted in* 100 I.L.R 331, 336 (1995)

Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351). Barbie, Cass. Crim., Dec. 20, 1985, 1985 Bull. Crim., No. 407, at 1053

Demjanjuk v. Petrovsky, 776 F. 2d 571, 582-583 (6th Cir. 1985).

Public Prosecutor v. Menten, The Netherlands, District Court of Amsterdam, Extraordinary Penal Chamber, 75 I.L.R. 361-63 (1981).

Regina v. Finta, 1 S.C.R. at 820 (Can. 1994).

*The Paquete Habana*, 175 U.S. 677 (1900)

Touvier French Court of Appeal of Paris (First Chamber of Accusation), April 13, 1992, *reprinted* in 100 I.L.R. 338, 350-51 (1995)

Touvier, Cass. Crim., Nov. 27, 1992, 1992 Bull. Crim., No. 394, at 1085.

U.S. v. Altstoetter, Case No. 3, *reprinted* in 3 NMT 974 (1949) [hereinafter The Justice Case].

U.S. v. Flick, Case No. 5, *reprinted* in 6 NMT 3, 1212-13 (1949) [hereinafter The Flick Case].

U.S. v. Ohlendorf, Case No. 9, *reprinted* in 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Council Law No. 10 (1946-48) 3, 499 (1949) [hereinafter Einsatzgruppen Case].

U.S. v. von Weizsaecker, Case No. 11, *reprinted* in 14 NMT 1, 316 (1949) [hereinafter The Ministries Case].

Wittmann v. Deutscher Schulverein, Pretoria and Others, 1998 (4) SA 423 (T), at 449 (South Africa 1998).

## **TREATIES AND INTERNATIONAL DOCUMENTS**

### **TREATIES/AGREEMENTS/REGULATIONS**

Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, U.N. Doc. A/64/Add Sess. 1, pt. 2, 55th Plen. Mtg. at 188 (1946).

African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1981) (entered into force on October 21, 1986).

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted* in 39 AM. J. INT'L L. 257 (1945).



Agreement on the Privileges and Immunities of the Court (APIC), Article 2, U.N. Doc. PCNICC/2001/1/Add.3 (January 2002).

Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, *reprinted* in Benjamin B. Ferencz, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980) [hereinafter CCL No. 10].

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 Bevens 27

Charter of the United Nations, June 26, 1945, arts. 51, 59, Stat. 1031, 1044, 3 Bevens 1153, 1165.

Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted Dec. 10, 1984, 1465 U.N.T.S. 85, 1988 U.S.T. LEXIS 202

Convention Concerning the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, 1 Bevens 247.

Convention Concerning the Laws and Customs of War on Land (Hague IV), October 18, 1907, 36 Stat. 2277; 1 Bevens 631.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done Sept. 23, 1971, 178 U.N.T.S. 1975.

Convention for the Suppression of Unlawful Seizure of Aircraft done Dec. 16, 1970, 106 U.N.T.S. 1973.

Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done Sept. 14, 1963, 220 U.N.T.S. 1969.

Convention on the Physical Protection of Nuclear Material done Oct. 26, 1979, 1979 U.S.T. LEXIS 187.

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 168 U.N.T.S. 1977..

Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, 78 U.N.T.S. 277 (entered into force on January 12, 1951) [hereinafter Genocide Convention].



Convention on the Rights of the Child, GA Res. 44/25, (1989).

Convention on the Safety of United Nations and Associated Personnel, Annex to U.N. Doc. A/RES/49/59 (1994), *reprinted* in 34 I.L.M. 482, (1995) (entered into force January 15, 1999).

Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N. GAOR 3d Comm., 57th Sess., Annex, Agenda Item 109(b) U.N. Doc. A/57/806 (2003).

Draft Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, Principle 1(j), U.N. Doc. PCNICC/2002/1/Add.1

Elements of Crimes, adopted by the Assembly of States Parties at its first session in New York 3-10 September 2002, ICC-ASP/1/3 at [www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_b\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf) (visited October 7, 2005).

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

Final Act of the Paris Peace Conference on Cambodia, art. 15, U.N. SCOR, 46th Sess., Annex, U.N. Doc. A/46/608 & S/23177 (1991), *reprinted* in 31 I.L.M. 180, 186 (1992).

Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/10, Annex II, III (1998).

Fourth Hague Convention Respecting the Laws and Customs of War on Land, Preamble, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907.

Geneva Convention for the Amelioration of Conditions of the Wounded and Sick in Armies in the Field, July 27, 1929, 118 L.N.T.S. 303

Geneva Convention Relative to the Treatment of Prisoners of War, July 29, 1929, 118 L.N.T.S. 343.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Hague Convention Respecting the Laws and Customs of War on Land of 1899,

ICC, Rules of Procedure and Evidence (adopted by the Assembly of States Parties, First Session, New York, 3-10 Sept. 2002), U.N. Doc. PCNICC/2000/1/Add. 1, ICC-ASP/1/3, Rules 53 & 54, available at: [http://www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf)

ICTY Rule of Procedure and Evidence 47, U.N. Doc. IT/32 (1994)).

Inter-American Commission on Human Rights ("IACHR"), at <http://www.oas.org/>.

Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, OEA Doc. AG/RES. 1256 (XXIV-0/94), *reprinted in* 33 I.L.M. 1529 (1994).

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534

Inter-American Court of Human Rights ("IACtHR"), at <http://www.oas.org/>.

International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973).

International Convention Against the Taking of Hostages, done Dec. 17, 1979, 206 U.N.T.S. 1983; 1979 U.S.T. 186.

International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature Nov. 30, 1973, 1015 U.N.T.S. 243.

International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14(2), 999 U.N.T.S. 171, 176

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1966).

Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *reprinted* in 999 U.N.T.S. 302 (1966)

Paper on Some Policy Issues Before the Office of the Prosecutor, ICC-OTP, September 2003.

Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), November 30, 1996 (Abidjan Accord), available at: <http://www.sierra-leone.org/abidjanaccord.html>.

Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999 [Accord]

Press Release, Agreement Between the International Criminal Court and the United Nations, October 4, 2004, at <http://www.icc-cpi.int/press/pressreleases/47.html>

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 ILM 1391 (1977)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 16 ILM 1442 (1977)

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 3 *Martens Nouveau Recueil* (3d) 461.

Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). available at: [http://www.africa-union.org/organs/orgCourt\\_of\\_Justice.htm](http://www.africa-union.org/organs/orgCourt_of_Justice.htm)

Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET, 1.1, 1.3, 2.3, U.N. Doc. UNTAET/REG/2000/15 (2000).

Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor, UNTAET, U.N. Doc. UNTAET/REG/2000/16 (June 6, 2000).

Regulation No. 2001/24 on the Establishment of a Legal Aid Service in East Timor, UNTAET, 1-3, 6, U.N.Doc. UNTAET/REG/2001/24 (2001)

Regulations of the Court, Reg. 48, Doc. ICC-BD/01-01-04 (May 26, 2004)

Relationship Agreement Between the United Nations and the International Criminal Court, Oct. 4, 2004, UN Doc. A/58/874, U.N. Doc. PCNICC/2001/1/Add.1, UN Doc. A/58/874, annex (2004)

Report of the International Law Commission to the General Assembly, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 374-78, U.N. Doc. A/CN.4/SER.A/1950/Add.1

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, paras. 212-93, U.N. Doc. A/51/22 (1996)) [hereinafter Preparatory Committee Report].

Rome Statute for the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998), *reprinted* in 37 I.L.M. 999 (1998), U.N. Doc. A/CONF. 183/9 (1998).

ICC Rules of Procedure and Evidence, adopted by the Assembly of States Parties at its first session in New York 3-10 September 2002, ICC-ASP/1/3 at [www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf).

Rules of Procedure of the Assembly of States Parties, chapter iv, ICC-Asp/1/3 (2002), adopted by the S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827(1993), *reprinted* in 32 I.L.M. 1203 (1993).

Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevens 20

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993, 3 Bevens 1179,

Statute of the International Criminal Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 ILM 1602 (1994).

Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993), *reprinted in* 32 ILM 1192 (1993)

The Peace Treaty of Westphalia is a peace settlement enacted in 1648 in Leo Gross, *The Peace of Westphalia, 1648-1948, in INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 25 (Leo Gross ed., 1969).

The Truth and Reconciliation Commission Act, section 2(1) (2000), (Sierra Leone) [hereinafter TRC Act], at: <http://www.sierra-leone.org/trcact2000.html> (last visited March 24, 2005).

The Special Court Agreement 2002 (RATIFICATION) ACT, (2002) (Sierra Leone)  
available at: [www.specialcourt.org/documents/SpecialCourtAct.html](http://www.specialcourt.org/documents/SpecialCourtAct.html)

The Statute for the Special Court for Sierra Leone, art. 1, as amended [hereinafter Sierra Leone Special Court Statute], annexed to the Secretary-General's Sierra Leone Report, available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>, also available at: <http://www.sc-sl.org/scsl-statute.html>.

Treaty of Peace Between the Allied and Associated Powers and Germany, (Versailles Treaty), June 23, 1919, 2 BEVANS 43, 13 AM. J.I.L. (Supp) 151 (1919).

U.N. GAOR 3d Comm., 57th Sess., Annex, Agenda Item 109(b) U.N. Doc. A/57/806 (2003) [Khmer Rouge Tribunal Agreement].

Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S 340 (1969).

#### STATE LAWS

Restatement (Third) of Foreign Relations of the United States, § 402 cmt. (American Law Institute, 1987).

ALI, Restatement of the Foreign Relations Law of the United States (Third), s. 101 (1987).

Restatement (Third) of Foreign Relations Law 111 cmt. h (2002).

Proxmire Act, 18 U.S.C. 1093(8) (2001).

RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Introductory Note at 16 (Tent. Draft No. 1, 1980)

Proxmire Act, 18 U.S.C. 1093(7) (1988) (emphasis added).

#### RESOLUTIONS/DECLARATIONS

ACP-EU Joint Assembly, Resolution ACP-EU 1866/96/fin. on the establishment of the Permanent International Criminal Court, adopted on 26 September 1996, para. 1. by the Charter of the Nuremberg Tribunal.

Declaration of German Atrocities, Nov. 1, 1943, 3 BEVANS 816, 834; 9 DEP'T ST. BULL. 308 (1943),

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR, 73d plen. mtg., Supp. No. 51, at 171, art. 1(1), U.N. Doc. A/36/684 (1981)

Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, UN GAOR, 47th Sess., Supp. No. 49, at 207, UN Doc. A/47/49 (1992)

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, Adam Roberts & Richard Guelff eds, 30-31 (Oxford: Clarendon Press 2d ed., 1989)

E.S.C. Res. 1985/17, U.N. ESCOR, para. B, U.N. Doc. E/1985/85 (1985).

European Parl., Resolution on the establishment of the Permanent International Criminal Court, B4- 0992/96, 9 September 1996.

G.A. Res. 52/135, U.N. GAOR, 52d Sess., 70th plen. mtg., Agenda Item 112(b), P 16, U.N. Doc. A/RES/52/135 (1998).

G.A. Res. 3314, 29 U.N. GAOR., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975)

G.A. Res. 260 (III), U.N. Doc. A/810, at 174 (1948).

G.A. Res. 48/31 of December 9, 1993.

G.A. Res. 51/207, December 17, 1996.

G.A. Res. 51/207, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (1997)

G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948)

G.A. Res. 177 (II), U.N. GAOR, 2d Sess., 123rd plen. mtg., at 111, U.N. Doc A/519 (1947).

G.A. Res. 52/135, U.N. GAOR, 52<sup>nd</sup> Sess., at 2, U.N. Doc. A/52/644/Add.2 (1997).

G.A. Res. 96 (I), U.N. GAOR 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1947)

GA Res. 44/39 of 4 December 1989

GA Res. 45/41 of 28 November 1990.

GA Res. 49/53 of 9 December 1994.

GA Res. 50/46 of 11 December 1995.

General Assembly Resolution 57/289 (2003) para. 15 (a),

S.C Res. 1503, U.N. SCOR, 4817<sup>th</sup> mtg., U.N. Doc. S/RES/1503, para. 8 (Aug. 28, 2003).

S.C. Res. 1132, U.N. SCOR, 51<sup>st</sup> Sess., U.N. Doc. S/RES/1132 (1997).

S.C. Res. 1165, U.N. SCOR, 53rd Sess., 3877th mtg., U.N. Doc. S/RES/1165 (1998).

S.C. Res. 1270, U.N. SCOR, 4054<sup>th</sup> mtg., U.N. Doc. S/RES/1270 (1999).

S.C. Res. 1315, U.N. SCOR, 55<sup>th</sup> Sess., at 2, U.N. Doc. S/RES/1315 (2000).

S.C. Res. 771, U.N. SCOR, 3106th mtg. U.N. Doc. S/RES/771 (1992).

S.C. Res. 780, U.N. SCOR, 47<sup>th</sup> Sess., U.N. Doc. S/RES/780 (1992),

S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/RES/808 (1993).

S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg., U.N. Doc. S/RES/872 (1993).

S.C. Res. 912, U.N. SCOR, 49th Sess., 336th mtg., U.N. Doc. S/RES/912 (1994)

S.C. Res. 935, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc. S/RES/935 (1994).

S.C. Res.1593, U.N. SCOR, 60<sup>th</sup> Sess., 5158<sup>th</sup> mtg., U.N. Doc. S/RES/1593.

S.C.Res.1422, S.C. Res. 1422, U.N. SCOR, 4572<sup>nd</sup> mtg., U.N. Doc. S/RES/1422 (2002).

S.C. Res.1487, S.C. Res. 1487, U.N. SCOR, 4772<sup>nd</sup> mtg., U.N. Doc. S/RES/1487 (2003).

S.C. Res. 713, U.N. SCOR, 3009<sup>th</sup> mtg., U.N. Doc. S/Res/713 (1991).

S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/RES/827 (1993).

S.C. Res. 743, U.N. SCOR, 3055<sup>th</sup> mtg., U.N. Doc. S/Res/743 (1992).

S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999)

S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999)

#### REPORTS/ADDRESS



Address by José Ayala-Lasso, United Nations High Commissioner for Human Rights to the Commencement Class of 1996 of the Columbia School of International and Public Affairs, 14 May 1996;

Address to the United Nations Security Council by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Ms. Carla Del Ponte, 27 November 2001, [http://www.icttr.org/ ENGLISH/speeches/delponte271101sc.htm](http://www.icttr.org/ENGLISH/speeches/delponte271101sc.htm).

Doudou Thiam, Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, Agenda Item 5, U.N. Doc. A/CN.4/398 (1986), *reprinted* in 2 Year Book of Int'l L. Comm'n 53, 38th Sess., U.N. Doc. A/CN.4/SER.A/1986/Add.1 (1986).

Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the Int'l Law Commission on the Work of Its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 265, U.N. Doc. A/46/10 (July 19, 1991)

Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of Its Forty-Eighth Session May 6 –July 26, 1996, p 88, U.N. GAOR. 51st Sess., Supp. No. 10, U.N. Doc. GA/51/10 (1996),

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. A/1994/674 at P 94 (1994).

Final Report of the Commission of Experts for Rwanda established pursuant to Security Council Resolution 955 (1994), Dec. 9, 1994, U.N. Doc. S/1994/1405 (1994).

Final Report of the Commission of Experts for Rwanda, U.N. Doc. S/1994/1405.

Final Report of the Commission of Experts for the former Yugoslavia, U.N. Doc. S/1994/674 (1994).

Final Report of the Commission of Experts, U.N. Doc. S/1994/674 (May 5, 1994).

Final Report on ten-year Sierra Leone conflict published; seeks to set out historical record, offer guidance for future, Press Release ECOSOC/6140 GA/10287 SC/8227,

Finalized draft text of the Elements of Crimes adopted by Preparatory Commission for the International Criminal Court, at its 23rd meeting on 30 June 2000 UN Doc. PCNICC/2000/1/Add.2, p. 9-17.

Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 48<sup>th</sup> Sess., Annex, at 20, U.N. Doc. S/25274 (1993). International Commission of Jurists, The International Criminal Court: Third ICJ Position Paper (August 1995);



International Law Commission Report on the Principles of the Nuremberg Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12 at 11, U.N. Doc. A/1316 (1950),

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, P 157, U.N. Doc. A/51/22 (1996).

Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953, 9 UN GAOR Supp. (No. 12), UN Doc. A/2645 (1954).

Report of the 1953 Committee on International Criminal Jurisdiction, 27 July 27- August 20, 1953, UN Doc. A/2645 (1954).

Report of the Ad Hoc Committee on Genocide, UN ESCOR, 7<sup>th</sup> Sess., Supp. No. 6, U.N. Doc. E/794/Corr.1 (1948).

Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 49 UN GAOR Supp. (No. 22), UN Doc. A/50/22 (1995).

Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, 7 UN GAOR Supp. (No. 11) at 21, UN Doc. A/2136 (1952).

Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. GAOR, 53d Sess, U.N. Doc. A/53/850, S/1999/231 (1999).

Report of the High Commissioner for Human Rights, UN Doc. A/51/36, 18 October 1996.

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Jan. 25, 2005).

Report of the International Commission on Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of September 18, 2004, 608 (Jan. 25, 2005).

Report of the International Law Commission Covering its Second Session 5 June-29 July 1950, 5 UN GAOR Supp. (No. 12) at para. 140, UN Doc. A/1316.

Report of the International Law Commission on the Work of Its Forty-Sixth Session, Draft Article 9(7), U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994)

Report of the International Law Commission on the work of its forty-eighth session U.N. GAOR, 51st Sess., Supp. No. 10, ch. 2, art. 18, at paras. 3 & 4, U.N. Doc. A/51/10 (1996).

Report of the International Law Commission to the General Assembly, Draft Code of Offences Against the Peace and Security of Mankind, U.N. GAOR, 6th Sess., Supp. No. 9, U.N. Doc. A/1858 (1951).

Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, art. 11, p. 42 n. 53 (1998).

Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, at 16, U.N. Doc. A/51/22 (1996).

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, A/Conf.183/2/Add.1 (1998).

Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 8, 2003).

Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSR 1593 (2005), June 29, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=108&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=108&l=en.html)

Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000) [hereinafter Report of the Secretary-General on Sierra Leone Special Court], available at: <http://www.un.org/Docs/sc/reports/2000/915e.pdf>.

Report of the Secretary-General on the United Nations Transitional Administration In East Timor, U.N. S.C., 55th Sess., U.N. Doc. S/2000/53 (2000).

Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, at para. 10., Gen. Ass. 54 Sess. November 15, 1999, U.N. Doc. A/54/549, at [www.un.org/peace/srebrenica/pdf](http://www.un.org/peace/srebrenica/pdf).

Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/25704 (1993).

Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), P 9, U.N. Doc. S/1995/134 (1995).

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457 (1996).

Report of the Special Rapporteur on the independence of judges and lawyers, Dato'Param Kumaraswamy, UN Doc. E/CN.4/1996/37 (1996).

Report of the UN Secretary General on the Establishment of a Special Court for Sierra Leone, at 13, U.N. Doc. S/2000/915 (2000).

Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Doc. S/2002/678 (2002).

Report on the Situation of Human Rights in Rwanda submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, U.N. ESCOR, Comm'n on Hum. Rts., 51st Sess., Prov. Agenda Item 12, P 25, U.N. Doc. E/CN.4/1995/71 (1995).

Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSR 1593 (2005), December 13, 2005, available at [http://www.icc-cpi.int/cases/current\\_situations/Darfur\\_Sudan.html](http://www.icc-cpi.int/cases/current_situations/Darfur_Sudan.html)

Whitaker Report, Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide 16, 29-30, Jul. 2, 1985, 38 UN ESCOR, Human Rights Sub-Comm'n on the Prevent. of Discrim. and Protect. of Minorities, 38th Sess. U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [hereinafter Whitaker Report]

#### PRESS RELEASE

Decision of the Presidency Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04, and the Decision of the Presidency assigning the situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04.

ICC Press Release, Decision Constituting Pre-Trial Chambers, June 23, 2004, ICC-Pres-01/04, available at <http://www.icc-cpi.int/organs/presidency/decisions.html>

ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, The Hague, January 29, 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) (visited February 26, 2006);

ICC Press Release, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda, July 29, 2004, at [http://www.icc-cpi.int/pressrelease\\_details&id=33&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html) (visited February 26, 2006).

ICC Press Release, Prosecutor Receives Referral Concerning Central African Republic, January 7, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html) (visited February 26, 2006).

ICC Press Release, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, April 19, 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=19&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html)

ICC Press Release, Registrar Confirms that the Republic of Cote d'Ivoire Has Accepted the Jurisdiction of the Court, February 15, 2005, available at <http://www.icc-cpi.int/press/pressreleases/93.html>

ICC Press Release, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation, June 23, 2004, at [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) (visited February 26, 2006).

Nigeria: Surrender Charles Taylor to Special Court for Sierra Leone, Amnesty International Press Release 8/11/2005 available at: <http://news.amnesty.org/index/ENGAFR440182005> (visited September 8, 2005). Press Release, 1st Preparatory Committee on Establishment of International Criminal Court, Preparatory Committee For Establishment of International Criminal Court Discusses Definitions of "Genocide," "Crimes Against Humanity" (Mar. 25, 1996), at <http://www.iccnw.org/romearchive/documentsreportsprepcmt1.html>

Press Release, Luis Moreno-Ocampo, ICC Chief Prosecutor, Security Council refers Situation in Darfur to ICC Prosecutor (April 1, 2005), available at: [http://www.icc-cpi-int/pressrelease\\_details&id=98.html](http://www.icc-cpi-int/pressrelease_details&id=98.html) (visited February 28, 2006).

Press Release, United Nations, General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials, U.N. GAOR 57th. Sess., 85th plen. mtg., U.N. Doc. GA/10135 (May 13, 2003)

Situation in the Central African Republic, Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, No. ICC-01/05-1 (Jan. 19, 2005).

Situation in the Democratic Republic of Congo, Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, No. ICC-01/04-1 (July 5, 2004).

Situation in Uganda, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, No. ICC-02/04-1 (July 5, 2004).

Situation in Uganda, Pre-Trial Chamber II, Warrant of Arrests, No. ICC-02/04-01/05-53-57, available at [http://www.icc-cpi.int/cases/current\\_situations/Uganda.html](http://www.icc-cpi.int/cases/current_situations/Uganda.html)

U.N. Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, March 31, 2005, SC/8351, S.C. Res. 1593, U.N. SCOR, 60<sup>th</sup> Sess., 5158<sup>th</sup> mtg., U.N. SC Res. 1593, 1 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (hereinafter "SC Resolution 1593").

ICC Press Release, Security Council Refers Situation in Darfur to ICC Prosecutor (Apr. 1, 2005).

Situation in the Darfur, Decision Assigning the Situation in Darfur to Pre-Trial Chamber I, No. ICC-02/05-1 (April 21, 2005).

ICC Press Release, The Prosecutor of the ICC opens investigation in Darfur, June 6, 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=107&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=107&l=en.html).

UN Press Release SC/8351, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, at 6-7 (Mar. 31, 2005), *available at* <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

Press Release, 1st Preparatory Committee on Establishment of International Criminal Court, Preparatory Committee on Establishment of International Criminal Court Begins First Session (Mar. 25, 1996) U.N. Press Release L/27614 (1996), at <http://www.iccnw.org/romearchive/documentsreportsprepcmt1.html> [hereinafter Preparatory Committee First Session].

Preparatory Committee on Establishment of International Criminal Court Begins First Session, Mar. 25, 1996, U.N. Press Release L/27614 (1996).

ICTY Press Release JJJ/PIS/709-e, 3-4 (Oct. 30, 2002)

ICTY Press Release JDH/PIS/708-e 1, 2 (Oct. 30, 2002) [hereinafter Jorda, Oct. 2002 Speech].

ICTY Press Release CC/PIS/735-e (Feb. 27, 2003).

UN Doc. S/PV.4838, at 3-7, 9-13 (2003) [hereinafter Meron Speech and Del Ponte],

ICTY Press Release JL/P.I.S./788-e (Oct. 9, 2003)

ICTY Press Release FH/PIS/791-e (Oct. 10, 2003). ICTY press releases are available at the ICTY Website, <http://www.un.org/icty>.

ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002).

Press Release, African Union, The Protocol on the African Court on Human Rights and Peoples' Rights to Come Into Force Soon (Dec. 30, 2003), at <http://www.pict-pcti.org/pdf/APHRC%20coming%20into%20force.pdf> (last visited March 10, 2006).

Press Release, Milan Babic Found Dead in Detention Unit, The Hague, AM/MOW/1046e, March 6, 2006, available at <http://www.un.org/icty/pressreal/2006/p1046-e.htm> (visited March 12, 2006).

Press Release, Slobodan Milosevic Found Dead in His Cell at the Detention Unit The Hague, CC/MOW/1050ef, March 11, 2006, available at:  
<http://www.un.org/icty/pressreal/2006/p1050-e.htm>

Press Release, Amnesty International, Rwanda: Amnesty International Welcomes Historic Rulings of the International Criminal Tribunal for Rwanda. Sept. 4, 1998, available at:  
[www.amnestyusa.org/news/1998/14703098.htm](http://www.amnestyusa.org/news/1998/14703098.htm) (last visited Mar. 26, 2004)

Fourth ICTR Courtroom Inaugurated, available at  
<http://www.icttr.org/ENGLISH/PRESSREL/2005/421.htm>, (visited March 11, 2005).

ICTR Completion Strategy dated 19 November, 2004, available at  
<http://www.icttr.org/ENGLISH/completionstrat/191104.pdf>, (visited March 11, 2005).

ICTR Completion Strategy dated 19 November, 2004, available at  
<http://www.icttr.org/ENGLISH/completionstrat/191104.pdf>, (visited March 11, 2005).

Press Release, Judicial System Monitoring Programme, Court of Appeal Decision Raises National and International Concern (July 17, 2003), at  
[http://www.jsmp.minihub.org/News/17nb-7\\_03nb.htm](http://www.jsmp.minihub.org/News/17nb-7_03nb.htm) (last visited Sept. 24, 2004)

Press Release, Election of the Prosecutor - Statement by the President of the Assembly of States Parties Prince Zeid Raad Al Hussein (Mar. 25, 2003), available at <http://www.icc-cpi.int/news/details.php?id=2>.

International Criminal Court: Ceremony for the Solemn Undertaking of the Chief Prosecutor (June 16, 2003), available at [http://www.icc-cpi.int/otp/otp\\_ceremony.html](http://www.icc-cpi.int/otp/otp_ceremony.html) (visited October 7, 2005).

ICC Press Release, Election of the Deputy Prosecutor of the International Criminal Court (Sept. 10, 2003), at <http://www.un.org/law/icc/asp/aspfra.htm>

ICC Press Release, States Parties to International Criminal Court elect Ms. Fatou Bensouda of the Gambia Deputy Prosecutor (Prosecutions) [Sept. 10, 2003], at  
[http://www.icc-cpi.int/statesparties/third\\_session.html](http://www.icc-cpi.int/statesparties/third_session.html) (visited October 7, 2005).

ICC Press Release, Solemn Undertaking of Deputy Prosecutor (Prosecutions) (Nov. 1, 2004), at [http://www.icc-cpi.int/pressrelease\\_details&id=83.html](http://www.icc-cpi.int/pressrelease_details&id=83.html) .

Press Release, interim Headquarters Agreement Exchange of Notes between the Netherlands and the ICC, The Hague, November 19, 2002, at <http://www.icc-cpi.int/press/pressreleases/4.html> (visited October 4, 2005).

Amnesty International, Security Council Inaction on Justice for Timor-Leste Leaves Fight Against Impunity in Limbo, August 19, 2005, available at:



<http://www.globalpolicy.org/intljustice/tribunals/timor/2005/0819AItimor.htm>  
[hereinafter Fight Against Impunity in Limbo].

East Timor National Alliance for International Tribunal Dili, Timor Leste, Press Release, August 7, 2005, and Victims and Militia Demand Justice but Not Commission of Truth and Friendship at <http://www.etan.org/news/2005/08all.htm>;

International Federation for East Timor urges UN Security Council to create International Tribunal for East Timor, Media Release, 05/20/2003, at [http://home.snafu.de/watchin/IFET\\_Release4.htm](http://home.snafu.de/watchin/IFET_Release4.htm);

Amnesty International, Indonesia/Timor-Leste: International Responsibility For Justice, Press Release, 14 April 2003, AI Index: ASA 21/013/2003, at <http://web.amnesty.org/library/Index/ENGASA210132003?open&of=ENG-IDN>

## **OTHER SOURCES**

### **NEWSPAPERS ARTICLES**

“Khmer Rouge Trial Stalled Over Language”, Reuters, Phnom Penh, 26 November 2001(on file with the author).

“Sierra Leone: UN Government Sign Historic Accord to Set up Special War Crimes Court”, UN NewsCenter, 16 January 2002, available at: <http://www.un.org/apps/news/story.asp?NewsID2639&CrSierra&Crlcourt> (last visited March 16, 2005).

Agence France Presse, Sudan Hands UN Darfur Suspects List, February 26, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14276](http://www.sudantribune.com/article.php3?id_article=14276) (visited February 28, 2006).

Agence France Presse, Sudan Hands UN Darfur Suspects List, February 26, 2006, available at:

Agence France Presse, Sudan Hands UN Darfur Suspects List, February 26, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14276](http://www.sudantribune.com/article.php3?id_article=14276) (visited February 28, 2006).

Alan Sipress, For Torture Camp Survivor, Time is Scarce: Chance to Bear Witness Against Khmer Rouge Hinges on Stalled Tribunal, Wash. Post, Feb. 18, 2003, at A20  
Amnesty Int’l, Kingdom of Cambodia: Amnesty International’s Position and Concerns Regarding the Proposed “Khmer Rouge” Tribunal, AI Index: ASA 23/005/2003, <http://web.amnesty.org/library/Index/ENGASA230052003>;

Barbara Crossette, World Criminal Court Having a Painful Birth, N.Y. Times, Aug. 13, 1997, at A10

BBC News, Taylor meets Obasanjo in Nigeria, February 27, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4754982.stm> (visited February 28, 2006);

BBC NEWS, Taylor off Agenda at Abuja Talks, March 4, 2006, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4775012.stm>

Chris Seper, Cambodia Captures Last Khmer Rouge Leader: Government Vows to Put Ta Mok on Trial, Wash. Post, Mar. 7, 1999, at A22.

Christopher S. Wren, U.N. Says Leone Rebels Now Hold 92 Peacekeepers, N.Y. Times, May 5, 2000, at Croatia Defies Tribunal, Independent (London), Feb. 20, 1997, available in LEXIS, News Library, CURNWS File

Christopher Marquis, U.S. Seeking Pacts in a Bid to Shield its Peacekeepers, New York Times, August 6, 2002 .

CNN World Edition, Senate Urges Bush to Take Action on Darfur, Friday, March 3, 2006, available at: <http://www.cnn.com/2006/WORLD/africa/03/03/sudan.congress.reut/index.html>

Colum Lynch, "UN Warns Cambodia on War Crimes Tribunal", The Washington Post, 3 February 2001, p. A22;

Corinne Dufka, Irish Leader Expresses Concern at Rwanda Justice, Reuters, Mar. 3, 1997, available in LEXIS, News Library, CURNWS File.

David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?, 63 ASIA PACIFIC ISSUES, Aug. 2002, at 3-4, available at <http://www.eastwestcenter.org/stored/pdfs/api061.pdf>

David Rider, Canadian Judge Pans New International Court: Arbour Says Rules Shield World's Worst Criminals, The Ottawa Citizen, Jan. 21, 2002, at A7

Despite UN Tribunal, Rwanda Plans to Try Suspects for War Crimes, Chicago Tribune, Nov. 10, 1994, at A6.

Diane F. Orentlicher, Putting Limits on Lawlessness: From Nuremberg to Pinochet, Wash. Post, Oct. 25, 1998, at C1.



East Timor, Asia-Pacific Daily Rep. (Ctr. of Excellence in Disaster Mgmt. and Humanitarian Assistance, Tripler AMC, Hawaii), Sept. 30, 2003, at 2, at <http://www.who.int/disasters/repo/10959.pdf> [hereinafter Asia-Pacific Rep.].

Edith M. Lederer, Bolton Launches Talks on Replacing Annan, AP News, February 17, 2006, available at <http://www.townhall.com/news/ap/online/headlines/D8FQOOF02.html> (visited February 18, 2006);

Edward Rwema, Rwanda Launches New Phase of Genocide Trials at Traditional Courts, available at: <http://www.rwanda.net/english/News/2005/032005/news03102005c.htm>, (visited March 11, 2005).

From President to Prison, BBC News World Edition, Monday, 7 June, 2004, at: <http://news.bbc.co.uk/2/hi/africa/3728807.stm>, (visited March 14, 2005).

Elizabeth Becker, U.S. Ties Military Aid to Peacekeepers' Immunity, N.Y. Times, Aug. 10, 2002, at A1.

Govt Meets ICC Over Kony Arrest, The Monitor (Kampala), February 3, 2006, at: <http://allafrica.com/stories/200602020781.html> (last visited February 9, 2006) [http://news.xinhuanet.com/english/2006-02/19/content\\_4200443.htm](http://news.xinhuanet.com/english/2006-02/19/content_4200443.htm) (visited February 28, 2006)

IWPR, Fred Bridgland, Darfur Sanctions Deadlock as ICC Considers Prosecutions, February 28, 2006, available at: [http://www.iwpr.net/?p=acr&s=f&o=259927&apc\\_state=henh](http://www.iwpr.net/?p=acr&s=f&o=259927&apc_state=henh) (visited February 28, 2006)

James Rupert and Douglas Farah, Liberian Leader Urges Sierra Leone Rebels to Free Hostages, Wash. Post, May 20, 2000, at A20.

James Seitua, Why Obasanjo Has Not Turned Taylor Over?, The Perspective, Atlanta, Georgia, May 31, 2005, available at: <http://www.theperspective.org/articles/0531200502.html> (visited February 28, 2006);

Jeff Sallot, Canadian First to Lead War-Crimes Court, Globe and Mail, March 12, 2003, at <http://www.globalpolicy.org/intljustice/icc/2003/0312canuck.htm>

Jess Bravin, International Criminal Court Picks US Lawyer to Lead First Case, WALL ST. J., Jan. 30, 2004.

Jim Leach, Don't Help Pol Pot. Try Him., N.Y. Times, Sept. 27, 1989, at A29.

Judicial Tribunal Made up of Three Cambodians and Two Foreign Members, Portland Oregonian, Oct. 20, 1999, at A12

Judy Dempsey, Accords with US 'will violate' ICC treaty, Financial Times, 27 August 2002.

Julian Bedford, Judges to Set Rules for Rwanda Genocide Tribunal, Reuters, Jun. 26, 1995, available in LEXIS, News Library, ARCNWS File.

Kenyan Appointed to Top Job on War Crimes Tribunal, Reuters, available in LEXIS, News Library, CURNWS File.

Khmer Rouge Tribunal Approved, BBC News World Edition, Monday 4 October, 2004, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/3712482.stm> (last visited August 11, 2005).

Lippman, T.W., America Avoids the Stand: Why the U.S. Objects to a World Criminal Court, Wash. Post, July 26, 1998, at C01

Nathaniel Myers, Khmer Rouge Tribunal Needs More Than Money, Bangkok Post, July 19, 2005.

NATO: Statement by Justice Louise Arbour on Establishment of an International Criminal Court, M2 Presswire, Dec. 10, 1997, available in LEXIS, World Library, Curnws File.

Norimitsu Onishi, Gunmen Fire on Protesters in Sierra Leone, N.Y. Times, May 9, 2000, at A6. The Sierra Leone Web cited Medecins Sans Frontieres (Doctors Without Borders)

Patrick Goodenough, Security Council Discord Expected Over Annan's Successor, Cybercast News Services, February 13, 2006, available at: <http://www.cnsnews.com/news/viewstory.asp?Page=\ForeignBureaus\archive\200602\FOR20060213b.html> (visited February 18, 2006).

Paul Lewis, UN Votes 13-0 for Embargo on Trade with Yugoslavia; Air Travel and Oil Curbed, N.Y. Times, May 31, 1992, at 1.

Philippe Naughton, Rwandan Minister Defends "No" Vote on Tribunal, Reuters World Service, Nov. 9, 1994, available in LEXIS, News Library, ARCNWS File.

Raymond Bonner, Rwandan Leader, Calling U.S. Envoy "A Disaster," Hopes for a Replacement, Int'l Herald Trib., Nov. 9, 1994, available in LEXIS, News Library, PAPERS File

Raymond Bonner, Rwandans Divided on War-Crimes Plan, N.Y. Times, Nov. 2, 1994, at A10

Raymond Bonner, Shattered Nation: A Special Report; Rwanda Now Faces Painful Ordeal of Rebirth, N.Y. Times, Dec. 29 1994, at A1.

Richard D. Lyons, U.N. Approves Tribunal on Rwandan Atrocities, N.Y. Times, Nov. 9, 1994, at A12

Roger Cohen, For Cambodia's Dead, Farce Heaped on Insult, International Herald Tribune, April 2, 2005,  
<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0402farce.htm>;

Roger Thurow, Tito's Legacy: Political Drifting, An Economy in Chaos Prevail in Yugoslavia; Question is

Rory Carroll, Genocide Tribunal 'Ignoring Tutsi Crimes', The Guardian, January 13, 2005, available at: <http://www.guardian.co.uk/rwanda/story/0,14451,1389194,00.html>, (last visited March 15, 2005).

Roy Gutman, Prisoners of Serbia's War: Tales of Hunger, Torture at Camp in North Bosnia, Newsday (N.Y.), July 19, 1992, at 7.

Rwandan President Claims Landslide, BBC News World Edition, 26 August, 2003, available at: <http://news.bbc.co.uk/2/hi/africa/3178611.stm>, (visited March 14, 2005).

Saddam Walks Out in Trial Uproar, BBC News, January 29, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4659274.stm](http://news.bbc.co.uk/2/hi/middle_east/4659274.stm)

See Elizabeth Becker, U.S. Ties Military Aid to Peacekeepers' Immunity, N.Y. TIMES, Aug. 10, 2002, at A1.

See Human Rights Watch, The ICC Jurisdictional Regime; Addressing U.S. Arguments, available at <http://www.hrw.org/hrw/campaigns/icc/docs/icc-regime.htm> (last modified Apr. 4, 2002).

See Jon Silverman, Worst Outcome for Milosevic Tribunal, 11 March 2006, BBC News, available at: <http://news.bbc.co.uk/2/hi/europe/4797696.stm> (visited March 12, 2006)

Seth Mydans, Cambodia Purge Said to Claim 40 Victims, N.Y. Times, July 16, 1997, at A8.

Seth Mydans, East Timor Atrocities will go Unpunished, International Herald Tribune WEDNESDAY, MAY 11, 2005, at  
<http://www.iht.com/articles/2005/05/10/news/timor.php>;

Steve Coll, The Other War: The Gratuitous Cruelties Against Civilians in Sierra Leone Last Year Rivalled Those Committed in Kosovo at the Same Time, Washington Post

Magazine, January 9, 2000, at W8, available at <http://www.washingtonpost.com/wpsrv/photo/galleries/sierraleone;>

Steven Edwards, Del Ponte Says UN Caved to Rwandan Pressure National Post, September 17, 2003, at <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0918ponte.htm>

Sudan Tribune, ICC Delegation to Visit Sudan's Darfur, February 27, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14271](http://www.sudantribune.com/article.php3?id_article=14271) (visited February 28, 2006)

Sudan Tribune, Only Sudanese Judiciary Can Try Darfur War Crimes -al-Bashir, February 19, 2006, available at: [http://www.sudantribune.com/article.php3?id\\_article=14151](http://www.sudantribune.com/article.php3?id_article=14151) (visited February 28, 2006).

Truth and Friendship Commission: More Friendship, Less Truth, Impunity from the Law, JSMP Press Release, January 14, 2005, at [http://www.asia-pacific-action.org/statements/jsmp\\_truthandfriendshipcommission\\_140105.htm](http://www.asia-pacific-action.org/statements/jsmp_truthandfriendshipcommission_140105.htm)

UN Panel Opens Inquiry on Rwanda, N.Y. Times, Jun. 28, 1995, at A5.

UN War Crimes Court Hands over 15 Cases to Rwanda, available at <http://www.rwanda.net/english/News/2005/022005/news02232005d.htm>, (visited March 11, 2005).

War Crimes Court Loses Steam, The Analyst (Monrovia) March 2, 2005, available at: <http://allafrica.com/stories/200503020699.html>

War Criminals to Become International Pariahs, Agence France Presse, May 26, 1993, available in LEXIS, News Library, ARCNWS File.

Whether Nation Will Turn More to Soviets Out of Economic Need; Sharpening Ethnic Rivalries, Wall St. J., May 8, 1986, available in 1986 WL-WSJ 258991.

Wim van Cappellen, Sudan: Judiciary Challenge ICC Over Darfur Cases, Integrated Regional Info. Networks, June 24, 2005

Xanana and SBY Sign Truth Commission Agreement, Timor Post, Thursday March 10, 2005, at <http://www.unmiset.org/> .

Xinhua News Agency, "Sudan Vows Not to Extradite Suspects of Darfur War Crimes, February 19, 2006, available at:

#### INTERNET SOURCES

Amnesty International, Burundi - Urge the President to Ratify the Rome Statute of the ICC, available at <http://web.amnesty.org/pages/icc-290104-action-eng>

Amnesty International, INTERNATIONAL CRIMINAL COURT: The Need for the European Union to Take More Effective Steps to Prevent Members From Signing US Impunity Agreements, AI Index: IOR 40/030/2002, October 1, 2002, <http://web.amnesty.org/library/index/engior400302002?open&of=eng-385> (visited February 10, 2006);

Amnesty International, International Criminal Court: The Unlawful Attempt by the Security Council to Give US Citizens Permanent Impunity From International Justice, AI Index, IOR 40/006/2003 (Legal analysis of S.C. Resolutions 1422 & 1487 by Amnesty International concluding that the resolution is contrary to the Rome Statute, and also to the United Nations Charter) available at: <http://web.amnesty.org/library/index/engIOR400082003?Open&of=eng-393> (visited February 10, 2006).

Amnesty International, INTERNATIONAL CRIMINAL COURT: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes, AI Index: IOR 40/025/2002, September 2, 2002, available at <http://web.amnesty.org/library/index/engIOR400252002?Open&of=eng-385> (visited February 10, 2006);

Amnesty International, THE INTERNATIONAL CRIMINAL COURT: CHECKLIST FOR EFFECTIVE IMPLEMENTATION 3, AI Index: IOR 40/011/2000, August 1, 2000, available at: <http://web.amnesty.org/library/index/engior400112000?open&of=eng-385> (visited February 20, 2006);

Amnesty International, THE INTERNATIONAL CRIMINAL COURT: Fundamental Principles Concerning the Elements of Genocide, AI Index: IOR 40/001/1999, February 17, 1999 available at: <http://web.amnesty.org/library/Index/ENGior400011999?open&of=ENG-385>

Amnesty International, THE INTERNATIONAL CRIMINAL COURT: Making the Right Choices – Part I, 5 (Amnesty International Index: IOR 40/001/1997) at <http://www.amnesty.org/library/Index/engior400011997>, (visited September 28, 2005)

Amnesty International, US Threats to the International Criminal Court, [hereinafter US Threats to the ICC] available at: [http://web.amnesty.org/pages/icc-US\\_threats-eng](http://web.amnesty.org/pages/icc-US_threats-eng) (visited February 10, 2006).

Benjamin A. Ferencz, The Evolution of International Criminal Law, at <http://www.benferencz.org/hamburg.htm>

Beth K. Lamont, The International Criminal Court, available at: [www.corliss-lamont.org/hsmny/icc.htm](http://www.corliss-lamont.org/hsmny/icc.htm)

CIA: THE WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/rw.html>

Coalition for the ICC, Chronology of the Adoption and Withdrawal of Security Council Resolutions 1422/1487, [http://www.iccnw.org/documents/declarationsresolutions/UN1422\\_2004.html](http://www.iccnw.org/documents/declarationsresolutions/UN1422_2004.html).

Curriculum vitae Luis Moreno Ocampo, available at [http://www.icc-cpi.int/otp/morenoocampo\\_cve\\_revised.pdf](http://www.icc-cpi.int/otp/morenoocampo_cve_revised.pdf) (last visited Oct. 10, 2005).

David J. Scheffer, Developments at Rome Treaty Conference, p. 3 (July 23, 1998) [http://www.state.gov/www/policy\\_remarks/1998/981021/scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/981021/scheffer_icc.html)

Edoardo Greppi, The Evolution of Individual Criminal Responsibility Under International Law, in INTERNATIONAL REVIEW OF THE RED CROSS, No. 835, pp. 531-553 (1999) available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList106/911763EAA63170C0C1256B66005D85D0>

Election of the Prosecutor of the International Criminal Court (last modified Apr. 21, 2003), at <http://www.un.org/law/icc/elections/results/prosecutor<uscore>results.htm>.

Establishment of an International Criminal Court – Overview, available at: <http://www.un.org/law/icc/general/overview.htm> (visited on March 6, 2006)

Human Rights Watch Press Release, “Core Issues in the Khmer Rouge Tribunal Unresolved”, 21 January 2001, available at: <http://www.hrw.org/press/2000/01/cambo0121.htm>,

Human Rights Watch Report, Entrenching Impunity Government Responsibility for International Crimes in Darfur December 12, 2005, Volume 17, No. 17A available at: <http://hrw.org/reports/2005/darfur1205/>; (visited March 14, 2006)

Human Rights Watch, *Rwanda - Human Rights Developments*  
Human Rights Watch, Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement, Human Rights Watch Briefing Paper April 2003, [http://hrw.org/backgrounders/asia/cambodia040303-bck.htm#P91\\_17633](http://hrw.org/backgrounders/asia/cambodia040303-bck.htm#P91_17633)

Human Rights Watch, Sierra Leone: Getting Away With Murder, Mutilation, Rape-New testimony from Sierra Leone, in WORLD REPORT 1999 (July 1999), at <http://www.hrw.org/hrw/reports/1999/sierra;>

Human Rights Watch, Text Analysis International Criminal Court Treaty, July 17, 1998 available at <http://www.hrw.org/press98/july/icc-anly.htm> (last modified Apr. 4, 2002)



Human Rights Watch, The ICC Jurisdictional Regime; Addressing U.S. Arguments 1, available at: <http://www.hrw.org/campaigns/icc/docs/icc-regime.htm>.

Human Rights Watch, U.N.: Put Sudan's Top Leaders on Sanctions List: *ICC Should Investigate Darfur Officials*, available at: <http://hrw.org/english/docs/2005/12/09/sudan12186.htm> (visited March 14, 2006)

Human Rights Watch, UNFINISHED BUSINESS: JUSTICE FOR EAST TIMOR 5 (August 2000), at <http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm>.

Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Article 98 (2) Agreements, July 9, 2002, available at [www.hrw.org/campaigns/icc/icc\\_article98.pdf](http://www.hrw.org/campaigns/icc/icc_article98.pdf) (visited February 10, 2006)

Human Rights Watch/Africa, GENOCIDE IN RWANDA APRIL-MAY 1994, vol. 6, no 4, at 2 (May 1994), available at <http://hrw.org/reports/world/rwanda-pubs.php>  
Humanitarian Law, Geneva (Jan. 19-23, 1998), available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/02CED570ABFDD384C1256B66005C91C6>.

Human Rights Watch, Human Rights News, Progress on War Crimes Accountability, The Rule of Law, and Minority Rights in Serbia And Montenegro, HRW Statement to the U.S. Commission on Security and Cooperation In Europe (June 4, 2003), at <http://www.hrw.org/backgrounder/eca/serbiatestimony060403.htm>.

Human Rights Watch, Leave None to Tell the Story: Genocide in Rwanda, available at: <http://www.hrw.org/reports/1999/rwanda/index.htm> (visited March 3, 2005)

Human Rights Watch, The Sierra Leone Amnesty Under International Law (August 3 1999), available at: <http://www.hrw.org/campaigns/sierra/int-law2.htm>.

Human Rights Watch, WORLD REPORT 1995, 41 (1994).

Human Rights Watch/Africa, Genocide in Rwanda April-May 1994, vol. 6, no 4, at 2 (May 1994), available at <http://hrw.org/reports/world/rwanda-pubs.php>.

ICRC, Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Amnesty International, INTERNATIONAL CRIMINAL COURT: THE FAILURE OF STATES TO ENACT EFFECTIVE IMPLEMENTING LEGISLATION 29, AI Index: IOR 40/019/2004 1 September 2004, available at: <http://web.amnesty.org/library/Index/ENGIOR400192004?open&of=ENG-385> (visited February 20, 2006)

ICTY at a Glance, Key Figures, available at: <http://www.un.org/icty/glance-e/index.htm>. (visited March 10, 2006)

International Committee of the Red Cross (ICRC) Working Paper, June 29, 1999, available at [http://www.icrc.org/icc/html/icrc8\\_2e19990629.html](http://www.icrc.org/icc/html/icrc8_2e19990629.html)

International Committee of the Red Cross at [www.icrc.org](http://www.icrc.org).

International Criminal Court – Office of the Prosecutor: General Organization, at <http://www.icc-cpi.int/organs/otp.html> (visited October 10, 2005).

International Criminal Court: <http://www.icc-cpi.int>

Judicial System Monitoring Programme, THE GENERAL PROSECUTOR v. JONI MARQUES AND 9 OTHERS (THE LOS PALOS CASE) 4 (Mar. 2002), available at: <http://www.jsmp.minihub.org/Resources.htm> .

Media Alert, International Criminal Court, Election of the Prosecutor (Apr. 24, 2003), available at: <http://www.icc-cpi.int/php/news/details.php?id=3> (last visited Oct. 6, 2005).

Multilateral Treaties Deposited with the Secretary-General, available at <http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (visited March 13, 2006).

Office of the High Commissioner for Human Rights, Committee Against Torture: Overview and Procedure, at <http://www.unhchr.ch/html/menu2/8/overcat.htm> (last visited May 20, 2004).

Prendergast, J. & Smock, D., POSTGENOCIDAL RECONSTRUCTION: BUILDING PEACE IN RWANDA AND BURUNDI (1999), available at <http://www.usip.org/oc/sr/sr990915/sr990915.html>

Rome Statute of the International Criminal Court: Declarations and Reservations, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp#N7> .

Sierra Leone Special Court available at: <http://www.sc-sl.org>

Sierra Leone Web News Archives, May 5, 2000, available at <http://sierra-leone.org/slnews0500.html>.

Status of Detainees, available at <http://www.ictr.org/ENGLISH/factsheets/detainee.htm> (visited March 11, 2005).



Stephen Heder & Brian D. Tittmore, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge 5-6 (2001),  
[http://www.cij.org/pdf/seven\\_candidates\\_for\\_prosecution\\_Cambodia.pdf](http://www.cij.org/pdf/seven_candidates_for_prosecution_Cambodia.pdf)

Thierry Cruvellier and Marieke Wierda, The Special Court for Sierra Leone: The First Eighteen Months, March 2004, 5 available at:  
[www.ictj.org/downloads/SC\\_SL\\_Case\\_Study\\_designed.pdf](http://www.ictj.org/downloads/SC_SL_Case_Study_designed.pdf),

U.N. Dep't of Public Information, The Draft Statute of the International Criminal Court: Background Information (May 1998), at <http://www.un.org/icc/statute.htm>.

U.S. Department of State Press Statement, U.S. Signs 100th Article 98 Agreement, May 3, 2005, 2005/463, available at: <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>

United Nations Mission of Support in East Timor – Mandate, available at:  
<http://www.un.org/Depts/dpko/missions/unmiset/mandate.html> (visited September 10, 2005).

United Nations, Rome Statute of the International Criminal Court: Overview, available at: <http://www.un.org/law/icc/general/overview.html> (last visited March 6, 2006) [hereinafter ICC Overview].

United Nations Mission in Sierra Leone, SIERRA LEONE – UNAMSIL – BACKGROUND, available at:  
<http://www.un.org/Depts/dpko/missions/unamsil/background.html>).

United States Institute for Peace, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE (1995), available at <http://www.usip.org/oc/sr/rwanda1.html>

United States Institute for Peace, Rwanda: Accountability for War Crimes and Genocide (1995), available at <http://www.usip.org/oc/sr/rwanda1.html>

Wilton Park Conference, Towards Global Justice: Accountability and the International Criminal Court (ICC), Feb. 4-8, 2002, at  
<http://www.wiltonpark.org.uk/web/welcome.html> (last visited Feb. 18, 2003).