

Criminal Prosecution of Human Rights Violations

I General Considerations

The duty of protection incumbent on states has many facets. Primarily, states are required to see to it that the core rights of all persons under their jurisdiction are fully respected in practice. Individuals must be protected against attacks on their life and limb, on their properties and other essential goods. If, notwithstanding the precautionary measures taken by them, violations occur, they may be obligated to prosecute the offenders under the applicable penal statutes. The threat of criminal proceedings is suited to act as an appropriate deterrent.¹ Thus, criminal law constitutes a necessary ingredient of any coherent human rights policy seeking to fight impunity as a general phenomenon in the political arena. But penal sanctions have inherent limitations. In particular, dealing with a national cataclysm, a period when law and

order break down and the government becomes a murderous machine, is extremely challenging. Under such circumstances, when an entire people is involved in wrongdoing, it will never be possible to prosecute all the infringements of human rights that occurred before the rule of law was restored.² Very few people can then act as objective and impartial arbiters. 'Transitional justice', as the process is called today, is compelled to accept many compromise solutions that will never satisfy everyone.³

On the other hand, it should not be overlooked that criminal prosecution has time and again been abused as a weapon against political opponents of governments. Seen from a historical viewpoint, it can even be said that the doctrine of human rights emerged from the struggle first of the nobility during the feudal epoch, and later of peoples revolting against the feudal system of discrimination, against the arbitrary use of state power. In a central passage of its rich contents, the Magna Carta of 1215 enunciates guarantees against unlawful arrest and detention,⁴ and later codifications are also mainly concerned with procedural safeguards against such interference with personal freedom. In democratic states placed under the rule of law, criminal prosecution is viewed mainly as an instru-

ment designed to shield the public at large from any attacks on their rights and goods. But measures taken under that heading can easily be diverted from their legitimate purpose. Thus, criminal prosecution is Janus-faced. Although in principle used as a weapon to uphold and safeguard human rights, it can at any moment become again, deliberately or inadvertently, an instrument of oppression. It must therefore be held under strict scrutiny. If trials are designed to restore legitimacy and bring about reconciliation, transparency is therefore a paramount requirement. Victim participation may be an appropriate device to reach that goal although, if not held within well-pondered confines, it may threaten the impartiality of proceedings.⁵

Under the currently applicable rules of international criminal law only individuals may be held to account. No provision has been made for the prosecution of corporate bodies, unlike the strategy pursued at the Nuremberg trial of the major German war criminals.⁶ Moreover, the concept of a 'criminal state' has not been accepted by the international community.⁷ Such collective responsibility would clearly be incompatible with the presumption of innocence to which every human being is entitled

even though their government may have engaged in grave abuses.

II National Prosecution

Since the obligations deriving from human rights propositions are mainly addressed to states, it is also states that bear the main burden of instituting criminal proceedings for the defence of human rights. The power of criminal prosecution constitutes one of the essential attributes of national sovereignty. No such comprehensive responsibility rests on international organizations. Apart from the fact that until a few years ago international organizations had been denied any jurisdiction for criminal proceedings, their obligation to respect and ensure human rights is only a sectoral one. Within their fields of competence they have to comply with the human rights standards binding upon them, but this duty only concerns their own conduct. They have not been vested with personal jurisdiction over the citizens in their member countries, and generally they have received only partial delegations of power to that effect. Consequently, they would be unable to secure human rights by initiating criminal proceedings against persons who, in other respects, may be under their jurisdic-

tion. As far as criminal jurisdiction is concerned, states are generally fairly reluctant to divest themselves of the powers which they hold as sovereign states. More recently, under the Treaty of Lisbon, the EU institutions have been vested with powers not only to engage in legislation, but also to take strictly limited measures of enforcement (TFEU, Articles 82–6). Additionally, it should be noted that according to the case law of the CJEU the Union may prescribe criminal sanctions which the member states are then required to introduce if such sanctions are necessary in order to make the legal acts adopted under its jurisdiction *ratione materiae* fully effective.⁸ The CJEU thus considers criminal law to be ancillary to the substantive regulation of a field of activity placed under EU competence. This whole field cannot yet be considered as consolidated since the integration process conflicts inevitably with strong national susceptibilities.

A. Territorial jurisdiction

States are responsible for occurrences within their territories. From the opposite viewpoint of the addressee, the French Civil Code provides (Article 3(1)): '*Les lois de police et de sûreté obligent tous ceux qui habitent le territoire.*' According to traditional

thinking, states had to ensure that nothing happened within their borders which might have injurious consequences for other states. Thus, foreign nationals had to be treated in accordance with the rules of aliens' law, harmful transboundary effects of human activities had to be prevented or curbed,⁹ and foreign diplomats in particular were entitled to claim special immunities and privileges. In case of grave violation of these commitments, criminal sanctions had to be taken against the responsible perpetrators.¹⁰ Since, however, human rights did not exist before 1945 as a distinct legal discipline, it was left entirely to states how they responded to criminal attacks which had no transnational aspects. Inasmuch as only citizens of the same state were involved, international law had no say. To be sure, no state is viable without an effective system of criminal prosecution. Thus, in their own interest, and remaining within the logic which underlies the creation of governmental structures for the benefit of all citizens, governments took care to respond to criminal activities by tracking down their authors and imposing repressive sanctions. But it was their sovereign decision how to handle such matters.

With the emergence of human rights, the picture has changed. The duty of protection implies that, even in circumstances where all the actors involved have the same nationality, states must take all the measures necessary for the purpose of effective protection, including the imposition of adequate penalties. The IACtHR has gone very far by stating that in case of human rights violations a state must:

prevent, investigate and punish any violation of the rights recognized by the Convention [and] use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.¹¹

This statement cannot apply to any infringement of human rights. Fortunately, most violations are of much lesser gravity than what happened in the *Velásquez Rodríguez* case (disappearance and killing at the hands of the Honduran security forces).

Therefore, normally it will not be necessary to initiate criminal proceedings against the responsible governmental agents. Disciplinary measures may be fully sufficient, and on many occasions even that may not be the appropriate response if, for in-

stance, until a decision was made by the competent judicial body, legitimate doubts could be entertained as to the scope and meaning of the relevant human rights guarantee.¹²

According to a constant line of jurisprudence, the ECtHR holds that in appropriate cases states are under an obligation to carry out an investigation which should be capable of leading to the identification and punishment of those responsible for the violation in issue.¹³ As far as can be seen, this legal inference has never been set out as a general proposition applicable to any case of a violation, but was merely added as a sentence reflecting the conclusions to be drawn in cases where Article 2 ECHR—the right to life—or Article 3—the ban on torture or other inhuman or degrading treatment—was in issue. Furthermore, to date, this inference has never appeared as an injunction in the operative part of a judgment, given that the finding of a violation of Article 2 or Article 3 automatically entails the obligation to remedy the consequences of the violation by carrying out what the competent authorities failed to do.

How difficult it may be to draw a reasonable borderline between instances where criminal sanctions are required and less serious cases where

the injury inflicted on an individual can be made good by other means, is illustrated in an exemplary fashion by two decisions of the German Constitutional Court on the issue of abortion. In the first judgment, the Court, proceeding from the premise that even growing human life constitutes human life as protected by Article 2(2) of the Basic Law (the German Constitution), held that the life of the unborn must be protected by all reasonably available means, including criminal law.¹⁴ In its second judgment, it gave up that strict position. Having realized that the existing criminal provisions against abortion had proved largely ineffective, it stated that in these circumstances other means, in particular advisory services, could be deemed to provide a valid alternative to penal sanctions.¹⁵ In sum, the outcome of the appraisal hinged on the degree of effectiveness a provisional forecast could attribute to the different means which, in the circumstances, could be considered serious alternatives.

Reference may also be made to the case law of the HRCee under the Optional Protocol to the CCPR. Originally, when it delivered its first views in accordance with the OP-CCPR, it abstained from pronouncing on the issue of possible criminal prosecution of perpetrators of grave human rights

violations. The first case where it addressed this issue was that of the two brothers *Dermi Barbat*. In the views it handed down on 21 October 1982 it stated, regarding one of the brothers who had died while being imprisoned, that Uruguay was ‘under an obligation to take effective steps . . . to establish the facts of Hugo Dermi’s death, to bring to justice any persons found to be responsible for his death and to pay appropriate compensation to his family’.¹⁶ Similar pronouncements were made in later cases. Thus, for instance, in the case of *Muteba v Zaire*, where torture had been committed, the HRCee stated that Zaire was obligated ‘to conduct an inquiry into the circumstances of his torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future’.¹⁷ Likewise, in a case concerning Surinam, where the entire leadership of the political opposition had been assassinated in a sweeping raid against dissident voices, the Committee urged the respondent state ‘to bring to justice any persons found to be responsible for the death of the victims’.¹⁸

This jurisprudence now seems to be firmly settled. In the more recent cases of *Nydia Bautista de Arellana* and *Arhuacos v Colombia*, the HRCee

clarified its position as to the duties of states where grave violations have been perpetrated:

the Committee has repeatedly held that the Covenant does not provide that private individuals have a right to demand that the State criminally prosecute another person. The Committee nevertheless considers that the State party has a duty to thoroughly investigate alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations.¹⁹

This line of reasoning has become a constant feature of the case law under the OP-CCPR.²⁰

Similar statements can be found in the concluding observations by which the HRCee terminates the examination of a state report. Thus, for instance, in August 2013 it addressed to Ukraine the recommendation: ‘to ensure that cases of death in custody are promptly investigated by an independent and impartial body, that sentencing practices and disciplinary sanctions against those found responsible are not overly lenient and that appropriate compensation is provided to families of victims’.²¹ Accordingly, General Comment No 31 on ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ enunciates

a duty of states to take the requisite measures of criminal prosecution in case Covenant rights have been infringed by state agents or third parties.²²

In sum, according to the HRCee, whether criminal prosecution is a remedy suited to redress legitimate grievances depends on the gravity of the violation in issue. In its practice, it suggests initiating penal proceedings against the responsible persons only if serious crimes against the lives (including forced disappearance), the physical integrity, or the dignity of human beings have been committed.²³ It would appear that with these guiding criteria the HRCee has found a well-balanced solution which should be acknowledged as a general principle determining the consequences of breaches of human rights violations in the field of criminal law. Whether criminal liability lifts the defence of immunity before courts of foreign countries at the same time is currently an open question.²⁴

B. Universal jurisdiction

The duties of states are much more limited where actions alleged to amount to criminal offences have occurred outside their boundaries. Even in such instances, national authorities are not powerless. According to the active personality principle, a

state holds jurisdiction over its nationals wherever they may be. But it stands to reason that, having to respect the territorial sovereignty of their peers, states are prevented from arresting and putting on trial a person residing or sojourning in a foreign country. Nonetheless, they should be able to institute proceedings where one of their nationals has committed a grave crime abroad and is subsequently extradited to them or is otherwise found in their territory. The CAT can be deemed to reflect the complex legal position in an exemplary fashion. Tailored to increase the obligations of states in instances where persons are charged with committing torture, the Convention had to take into account the limits of general international law. Thus, while it establishes a duty of every state party 'to take such measures as may be necessary to establish its jurisdiction' over torture when the alleged offence is committed in its territory or by one of its nationals (Article 5(1)), a duty to arrest arises only with regard to persons in its own territory (Article 6(1)).

A new dimension is added to the legal edifice providing for effective repression of serious crimes against human rights by universal jurisdiction. Universal jurisdiction means the authority of a

state to prosecute and punish offenders, irrespective of the place of commission of the crime and regardless of the link of nationality or any other factual relationship linking the suspect to the prosecuting state.²⁵ No lengthy arguments are needed to explain the *raison d'être* of universal jurisdiction. In the first place, it flows from the empirical knowledge that not all states live up to their duty to combat serious crime as they are required to do. In many instances, when large-scale crimes are committed, this happens with the connivance of a government or is directly attributable to a government. In this sense, the thousands of crimes committed during the wars in the former Yugoslavia were mostly part of an official strategy to expel and/or exterminate persons of a different ethnic identity. Secondly, universal jurisdiction is intended to enable third states eager to assist in the repression of grave crimes to conduct such trials before their tribunals, even if the crimes were perpetrated abroad in foreign countries. In essence, therefore, universal jurisdiction is a legal concept suited to strengthen the protection of human rights once it has become a matter of general knowledge that not even authors of state-sponsored crimes can escape to third countries in order to gain impunity. Obviously, this

presupposes a tight network of mutual obligations which leaves no major loopholes open.

One of the best-known examples of universal jurisdiction is provided by the CAT. The *Pinochet* case has highlighted the vast potential of this principle. Former Chilean President Augusto Pinochet, who had come to the United Kingdom for a medical visit, was arrested and faced extradition to Spain until he was sent back to Chile on humanitarian grounds after a forced stay of many months in his host country. As the commander-in-chief of the Chilean armed forces during the time of his dictatorship, he was charged with mercilessly hunting down all political opponents of his rule and subjecting many of them to brutal forms of physical mistreatment (ie torture). Indeed, the CAT sets forth a duty for states to establish their jurisdiction over the crime of torture without any regard for the place of the commission of the crime if the alleged offender is found in their territory and they do not extradite him (Article 5(2)).²⁶ This acknowledgement of the universal principle is typical of the numerous treaties based on the legal proposition 'to try or to extradite' (*'aut dedere, aut prosequi'*)²⁷ which have been concluded above all for the purpose of combating terrorism.²⁸ All

of these treaties may be classified as treaties for the protection of human rights since terrorist acts are essentially directed against the life and limb of innocent human beings outside a situation of armed conflict. We need refer, in this connection, only to a few of these treaties, in particular the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,²⁹ the International Convention against the Taking of Hostages,³⁰ and the International Convention for the Suppression of Terrorist Bombings.³¹ All of these conventions seek to establish such a tight network of obligations that not a single one of the acts summarily indicated in their titles and more precisely circumscribed in their operative provisions goes unpunished. One may call their status of ratification fairly impressive.³² It is difficult to say, though, whether in practice they have yielded all the results expected of them. In many cases, the agreement which states have reached to ban by all means certain forms of violent attack is overshadowed by political sympathy for the motives of the perpetrator(s). In such circumstances, it cannot be expected that the legal mechanisms will operate smoothly.

It is one of the big questions which to date remain unresolved whether universal jurisdiction exists for all of the offences which the international community has taken to calling 'international crimes'. It is well known that the first list of such crimes, which was contained in the Charter of the International Military Tribunal at Nuremberg, comprised three classes, namely, crimes against peace, war crimes, and crimes against humanity, the latter group being linked to war crimes and not being recognized as a class on a level of parity with the other two. Currently, the most authoritative list can be found in the Rome Statute of the ICC, which enunciates four groups of crimes, namely genocide, crimes against humanity, war crimes, and the crime of aggression. There is broad international agreement to the effect that this is indeed a complete inventory of the most atrocious acts that adversely affect human rights. It has already emerged that crimes against humanity will in the future take centre-stage in international criminal prosecution.³³

Curiously enough, the international community has refrained from clearly setting forth the universal principle for all of these crimes. Even the ICC has not been vested with automatic jurisdiction

for their prosecution.³⁴ According to Articles 12 and 13 Rome Statute, certain conditions must be met for the jurisdictional clauses to take full effect. The fact alone that the state of custody of a suspect is a party to the Statute does not entitle the Court to commence proceedings. Rather, its jurisdiction depends on either the state in the territory of which the crime was committed or the state of nationality of the suspect having accepted the Statute. This extreme caution of the drafters puts the statement in the preamble to the Statute according to which 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', seriously in doubt.³⁵ Such doubts are strengthened by a close look at the different offences.³⁶

The Genocide Convention does not establish universal jurisdiction for the prosecution of the crime of genocide, despite the fact that genocide is the most horrendous form of attack on human values.³⁷ In a carefully drafted clause (Article VI), it provides that genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by an international penal tribunal 'as may have jurisdiction with respect to those Contracting Parties which shall have

accepted its jurisdiction'. This formula was originally meant to exclude universal jurisdiction.³⁸ But in legal doctrine it was soon pointed out that Article VI did not do away with the other grounds of jurisdiction recognized by general international law, in particular the personality principle, the effects principle, and the protective principle. Later, the *Eichmann* judgment of the Supreme Court of Israel even went one step further by arguing that, because of its abhorrent character, genocide must be prosecutable in accordance with the universal principle.³⁹ In recent years, the applicability of the universal principle to genocide has been affirmed by the ICJ.⁴⁰ In fact, a restrictive reading of Article VI does not divest it of any substance. Article VI may be construed—in perfect harmony with the plain meaning of its terms—in the sense that it deals with no more than the duty to prosecute genocide, without specifying the conditions under which genocide may be prosecuted.⁴¹ This reading of the jurisdictional clause now enjoys universal support inasmuch as it corresponds to the inherent logic of the system which has taken shape for the repression of 'international' crimes, ie, of crimes which affect the interests of the entire international community. The application of universal

jurisdiction is one of the main tools in that battle. If, however, universal jurisdiction did not apply to genocide, the whole system would lose its most significant signpost.⁴²

Concerning crimes against humanity,⁴³ the second class of crimes listed by the Rome Statute, no general international treaty exists apart from that Statute itself. The international community has produced only a number of specific international instruments that deal with certain crimes enunciated by the Statute. Thus slavery, a practice which has been combated by treaty law since 1814,⁴⁴ has found its regulation in the Slavery Convention of 1926⁴⁵ and two additional treaty instruments;⁴⁶ torture became the subject matter of a separate instrument in 1984; the General Assembly adopted at its 61st session the International Convention for the Protection of All Persons from Enforced Disappearance;⁴⁷ and lastly apartheid was proscribed by the International Convention on the Suppression and Punishment of the Crime of Apartheid.⁴⁸ Other offences mentioned in the Rome Statute, however, remain rather controversial. Thus, it would be somewhat bold to suggest that 'deportation or forcible transfer of population' (Article 7(1)(d) Rome Statute) is solidly founded on international

consensus. However, this innovation through a deliberate act of law-making by treaty is to be unreservedly welcomed.

Of all the four examples referred to in the preceding paragraph, torture and enforced disappearance are clearly subject to universal jurisdiction, as pointed out earlier. The other two crimes, however, have a status which may be adequately described as unsettled. The clause of the Slavery Convention dealing with criminal jurisdiction (Article 6) was framed at a time when the international community had not yet reaped sufficiently broad experiences in respect of the universal principle. The relevant sentence, according to which states parties ‘undertake to adopt the necessary measures in order that severe penalties may be imposed’, does not specifically address the issue of jurisdiction to prosecute, and Article 3(1) of the Supplementary Convention is marred by the same lack of clarity. Lastly, it is a well-known fact that the Apartheid Convention, which contains the most rigorous jurisdictional clause providing for universal jurisdiction (Article IV(b)), has never been ratified by any state of the Western group.⁴⁹ To date, its acceptance among the international community remains significantly low.⁵⁰ Additionally, the Apartheid

Convention has had little, if any, impact in practice. It would appear, above all, that it was never applied by the so-called 'frontline' states, which on the political level continually attacked South Africa, but which on the level of economic exchanges consistently cooperated with their southern neighbour, who during the time of the apartheid regime was and today still is the only important industrial power in the whole of southern Africa. It might be argued today that by ratifying the Rome Statute all states parties have accepted apartheid as a crime entailing universal jurisdiction. Indeed, apartheid has been included as a crime against humanity in Article 7(1)(j) of the Statute. Pursuant to the principle of complementarity, the jurisdiction of the International Criminal Court (ICC) goes hand in hand with the jurisdiction of domestic courts. Before the ICC can initiate prosecution, it must first give the competent domestic courts the opportunity to exercise their right to deal with an alleged case of criminal wrongdoing within the scope of the Rome Statute. However, the inclusion of apartheid in the list of crimes against humanity does not mean that the traditional rules on jurisdiction have been done away with. In principle, jurisdiction of domestic courts under the Rome Statute depends

primarily on either a territorial or a personal connection. Article 25(4) is a clear indication in that direction.⁵¹ Consequently, the few examples given do not support the conclusion that every state is entitled to commence criminal proceedings against anyone charged with a crime against humanity, irrespective of the specific nature of the crime and irrespective of the place where it allegedly was committed.⁵² In its resolution on the issue adopted at its Krakow session in 2005 (section 3(a)), the Institut de droit international stressed that universal jurisdiction may be exercised 'over international crimes identified by international law as falling within that jurisdiction', thus specifically requiring the recognition by the international community of the particular procedural aspect of universality as a second element.⁵³ Significantly enough, in 2003 Belgium was compelled to abandon its extremely expansive legislation on universal jurisdiction.⁵⁴ Likewise, in 2009 Spain restricted the scope of its Ley Orgánica del Poder Judicial (Article 23(4)) by introducing the requirement of a domestic linkage.⁵⁵ After arrest warrants had been issued against leading Chinese politicians, Spain, in February 2014, narrowed down even further the clause on universal jurisdiction by requiring that the crime in

issue must have been directed against a Spanish citizen or a foreigner living permanently in Spain.⁵⁶ In Germany, the Federal Prosecutor has to date shied away from putting into operation the similarly ambitious Code of crimes against international law,⁵⁷ relying on the principle of subsidiarity as it is enshrined in the German Code of criminal procedure.⁵⁸

Concerning war crimes, the legal position is different, due to the wise political leadership exercised by the International Committee of the Red Cross (ICRC).⁵⁹ The four Geneva Conventions of 1949 each contain a clause which is literally the same in all of them, according to which allegations of grave breaches of the applicable norms must be looked into by the competent territorial state (I: Article 49; II: Article 50; III: Article 129; IV: Article 146). States are even under the obligation to search for persons responsible for such breaches and to bring them, if found, before their own courts. Additional Protocol I of 1977 extended that obligation to the new grave breaches set forth therein (Article 85). As pointed out by authors who sought to verify the real significance of these clauses, little heed was paid by states to their duties during the first four decades of the existence of the Geneva Conven-

tions⁶⁰ so that the customary law character of the inherent proposition '*aut dedere aut judicare*' may seem doubtful.⁶¹ It was only after the outbreak of the wars in the former Yugoslavia that third states started bringing to trial persons involved in atrocities who afterwards had moved to other European countries.⁶² Currently, it is being debated whether the jurisdictional clauses of the four Geneva conventions are subject to the principle of complementarity or subsidiarity in the same way as the jurisdiction of the ICC according to Article 17 of the Rome Statute.⁶³ Lastly, it should also be noted that the grave-breaches regime continues not to be applicable to violations committed in non-international armed conflict.⁶⁴

It is not only lack of goodwill which explains this shortcoming. The difficulties of conducting a trial based on facts which occurred far away in another country or even continent are of a tremendous magnitude and cannot easily be overcome. No tribunal in Europe would be able to clarify in an individual case what happened during the hostilities in the Great Lakes district in Central Africa. A small country could not even bear the costs of a proceeding which would imply hearing witnesses from far-away countries with the help of interpreters. Thus,

until recently, the obligation to institute criminal proceedings in all instances of grave breaches regardless of the place of the commission of the crime has largely remained a dead letter.

The crime of aggression, originally included in the Rome Statute (Article 5(1)(d)), was no more than a reminder designed to keep the continuity with the Nuremberg trials, where crimes against peace were one of the four heads of accusation. It was specified in Article 5(2) immediately afterwards that the ICC shall 'exercise' its jurisdiction only after a definition has been hammered out and agreement has been reached on the conditions determining the procedural modalities of that exercise. Amazingly enough, that agreement was reached at a conference held in Kampala (Uganda) in June 2010.⁶⁵ The definition of aggression set forth in Article 5bis was essentially taken from the definition as shaped by the UN General Assembly in Res 3314 (XXIX), 14 December 1974. A carefully drafted provision on jurisdiction will come into force after having been ratified by 30 states, and only with regard to states having accepted the corresponding jurisdiction of the ICC. One may doubt whether a magistrates' court would ever have the necessary moral steadfastness to try for-

merly powerful political leaders. But the Kampala amendment constitutes nonetheless an important symbolic act. The Nazi clique of Germany's criminal Nazi dictatorship was rightly put on trial at Nuremberg. Should any time in the future a similar configuration arise, the defendants should not go free for lack of a suitable legal basis carrying their indictment and possibly conviction. One does not need to be a prophet in order to predict that for decades the new crime of aggression will lie dormant. None of the great powers has any interest in seeing its military actions reviewed within the framework of an international criminal proceeding where individuals, even heads of state, could be made accountable and not just the state as an abstract entity. Curiously enough, the House of Lords a few years ago manifested an act of faith in the customary foundations of the crime of aggression,⁶⁶ ignoring all the clues pointing in the opposite direction.⁶⁷

In conclusion, it can be said that universal jurisdiction is a highly complex concept, resort to which should not be blindly advocated. The international community has shown great reluctance in accepting it. Almost without exception, universal jurisdiction has its roots in conventional instruments. As

the example of aggression makes particularly clear, states are afraid of granting access to complex factual situations to judges who either know little of the contextual background or who may be biased from the very outset against the alleged perpetrators. Indeed, such fears have solid foundations. Although it is a general requirement of a fair proceeding that judges must be independent and impartial (see, for instance, Article 14(1) CCPR), the factual situation in many countries differs greatly from that normative model. Whenever a dictatorship comes into power, one of its first concerns is to streamline the judiciary so that no major political decision can be challenged. But even in countries where in principle the rule of law is upheld, judges can never escape the zeitgeist which links them to the societies in which they are operating. On the one hand, universal jurisdiction seems ideally suited to prevent authors of despicable crimes from finding safe havens. On the other hand, it subjects persons who at an initial stage are only alleged criminals, to the whims and fancies of judiciaries some of which act as the long arm of the political power in their countries. In this regard, Judges Higgins, Kooijmans, and Buergenthal, who wrote a concurring opinion in the *Arrest Warrant* case of the

ICJ,⁶⁸ showed a certain degree of naivety when they said that 'charges may only be laid by a prosecutor or juge d'instruction who acts in full independence without links to or control by the government' of his state.⁶⁹ In postulating a rule of general international law, a jurist must take into account all conceivable configurations. If and when universal jurisdiction is affirmed and exists, it may be relied upon by all states. It is precisely the threat of judicial arbitrariness which to date has prevented states from being generous in accepting such jurisdiction which denies to an accused the benefit of the legal system with which he/she is familiar.⁷⁰ Writers who approach this delicate issue exclusively from the viewpoint of human rights activism, without reflecting on the possible negative consequences, act injudiciously and close their eyes to political realities.⁷¹ In any event, the rights of the defence have an important stronghold: trials may only be held when the suspect is in the territory of the forum state.⁷² And subsidiarity should be acknowledged as another pre-condition for the exercise of universal jurisdiction: third states should only be legitimated to take acts of prosecution if the directly affected states remain passive.⁷³

III International Prosecution

For the reasons just explained, an international tribunal brought into being by the international community is much to be preferred to national tribunals which are inevitably caught within the framework of their national culture and political thinking. Absolute independence of the judges⁷⁴ and full guarantees of fair trial⁷⁵ are the *raison d'être* of the establishment of international judicial bodies.

A. International Military Tribunal at Nuremberg

The first international criminal tribunal was the International Military Tribunal established at Nuremberg for the prosecution of the major war criminals of the German Third Reich, the evil Nazi empire. Its foundation was an international agreement between the victorious powers—the United States, France, the United Kingdom, and the USSR.⁷⁶ No participation from neutral states was provided for, which would have helped the Tribunal shed the suspicion that it constituted nothing more than an embodiment of ‘victors’ justice’. Thus, essentially it was a multinational

rather than an international judicial body.⁷⁷ Additionally, the trial suffered from another deficiency in that its jurisdiction was strictly limited to crimes committed by German nationals, whereas war crimes committed by members of the Allied Forces could not even be touched upon. At the same time when the Nuremberg Tribunal held its hearings, massive murderous repression of political opponents of the regime took place in the USSR. Hence, the Soviet judge was hardly legitimated to act in defence of the rule of law. Despite these structural weaknesses, the trial was conducted fairly, and all the penalties meted out by the Tribunal, including the death sentences, were fully deserved by the accused. The general degree of objectivity of the Tribunal was demonstrated in particular by the fact that no fewer than three of the accused were acquitted.

Having been established after the defeat of Germany, the Nuremberg Tribunal could not do anything to prevent the commission of the atrocious crimes perpetrated by the Nazi dictatorship. Thus, the main goal of international criminal prosecution, namely prevention, could not be reached. The same can be said of the Tokyo trial, where the main representatives of imperialist Japan

were made accountable for their criminal conduct during World War II. In the following years and decades, it seemed that the concept of international criminal jurisdiction had outlived itself, given the prevailing circumstances of the Cold War between East and West. Attempts to generalize the Nuremberg experience failed at the United Nations. The reference in the 1948 Genocide Convention (Article VI) to an 'international penal tribunal' remained a dead letter. In 1973 the Apartheid Convention (Article V) repeated the same formula, but again no actual steps were taken to establish such a judicial body. On the whole, it could be assumed that the grandiose idea of making perpetrators of grave human rights violations directly responsible under international law had fallen into obsolescence.

B. Ad hoc tribunals established by the Security Council

It was the progress of history which made the international community aware of the truth that for some historical situations, in any event, international criminal tribunals were a suitable instrument of effective suppression and hopefully also prevention. The ILC worked again on a Code of Crimes against the Peace and Security of Mankind

as from 1982, after the topic had been provisionally abandoned in 1954. But during the early 1980s no one really believed in a positive outcome of these endeavours. The big change came about in 1990, together with the demise of socialism as a political doctrine. For the first time, precisely in that year, concrete suggestions were made to elaborate, together with the Code, the statute of an international criminal court.⁷⁸ A number of exceptional international occurrences helped pave the way to a more fruitful outcome of the work that progressively moved away from its traditional slowness. On 21 December 1988 an American jetliner was blown up over the Scottish town of Lockerbie, raising the question of who should try the perpetrators if it should ever be possible to issue an indictment against an individual. The defeat of Iraq after its invasion of Kuwait could have ended with the arrest of Iraqi dictator Saddam Hussein, but there was no international body that could have charged him with the crime of aggression. Only after the US-led invasion of Iraq in 2003 was Saddam Hussein arrested, put on trial, and eventually executed.⁷⁹ The wars in the former Yugoslavia, which started in 1991, soon became known to the whole world on account of their brutality and disregard of all ap-

plicable rules of humanitarian law. For a long time, the international community remained essentially passive, contenting itself with sending peacekeeping forces to the embattled zones, forces which had no mandate to put an end to the massive violations of human rights by both sides, in particular by the Serbian forces. Lastly, the Caribbean countries, which felt overwhelmed by drug-related crime, strongly supported all initiatives for the establishment of an international criminal court.⁸⁰

Against this background, and fully aware of its disastrous handling of the Yugoslav crisis, the Security Council decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY). SC Res 808, 22 February 1993, made the determination of principle, requesting the Secretary-General to work out the details. SC Res 827, 25 May 1993, thereafter took the definitive step by adopting the report of the Secretary-General which contained the Statute of the ICTY.⁸¹ In the following year, by SC Res 955, 8 November 1994, the Security Council brought into being the International Criminal Tribunal for Rwanda (ICTR), a move which was again prompted by the recognition that the international community had failed to respond adequately to the threat of genocide which had visibly loomed over

Rwanda many months before it actually materialized.⁸²

C. International Criminal Court

The establishment of these ad hoc tribunals prepared the ground for the creation of the ICC.⁸³ Since the two judicial bodies had successfully stood their first tests of reality, it seemed not only possible but entirely feasible to broaden the experience thus acquired by setting up a criminal tribunal with comprehensive jurisdiction for all classes of international crimes. Obviously, this could not be effected again by a resolution of the Security Council. The Security Council is empowered to maintain and restore international peace and security but it can make use of these powers only in a situation where there is, at a minimum, an actual threat to peace and security. It would by far exceed its area of competence if it decided to set up permanent new institutions with a mandate to combat abstract dangers that could arise even outside a context of international peace and security. In the former Yugoslavia, and in Rwanda, massive disturbances of public order had prevailed. In the former Yugoslavia, these disturbances undoubtedly had an international character since the former compo-

nent units of the Socialist Federal Republic of Yugoslavia had been recognized by the international community as sovereign states. In Rwanda, it was the fact of the genocide which imprinted an international hallmark on the situation prevailing in the country. In both instances, it was felt necessary to set up an international mechanism of criminal prosecution in order to bring the hostilities to a formal closure and to consolidate peace. Article 41 UNCh grants the Security Council a broad margin of discretion as to the appropriateness of the measures required for the restoration of a peaceful situation. The Security Council is under no obligation to stop its intervention as soon as actual hostilities have ended. But an ICC with comprehensive jurisdiction over all kinds of international crime does not primarily serve the cause of international peace and security. It is designed generally to protect human rights through the preventive effect which is expected to attach to its judgments. There is certainly a partial overlap but the mandate of the ICC as outlined in the Rome Statute is much wider, both *ratione territorii* and *ratione temporis*, than the mandate of the two ad hoc tribunals established by the Security Council. It was therefore necessary to resort to the traditional technique of treaty-making

—with the great disadvantage that any state could evade membership just by refusing to ratify the Rome Statute. On the other hand, the great advantage of the new legal technique is that the crimes concerned have now been provided with a firm and unchallengeable legal basis. Contrary to the ad hoc tribunals established by the Security Council, the ICC is not limited to prosecuting offences recognized as such in customary international law. The Rome Statute is a substantive and not only a jurisdictional instrument fully satisfying the requirements of the proposition *nullum crimen sine lege*.⁸⁴

It is well known that among all the opponents of the Rome Statute the United States had embarked on a path not only of distancing itself from the ICC by ‘unsigned’ the Rome Statute which President Clinton had signed on the last day of his term of office (31 December 2000),⁸⁵ but of actively combating it,⁸⁶ even attempting to bring pressure to bear on third states by concluding agreements with them that provide for non-surrender of their mutual nationals to the ICC.⁸⁷ Although the Rome Statute entered into force on 1 July 2002, the battle for the ICC is not yet over. The fact that the United States stays aloof from it, and that consequently

China and Russia will for the time being do the same, cannot but negatively affect its authority.⁸⁸ The United States obtained an important victory in prompting the Security Council to adopt SC Resolution 1422 (2002), according to which for a period of one year (starting 1 July 2002) the ICC was requested not to take measures of prosecution against nationals of states parties not having ratified the Rome Statute if the acts in issue relate to an operation established or authorized by the United Nations.⁸⁹ In the following year, the Security Council again addressed a similar request to the ICC.⁹⁰ However, after the inhumane treatment of the prisoners in the Abu Ghraib prison in Iraq had come to light, it became impossible to find sufficient support for such a guarantee of immunity which could have been interpreted as open encouragement for criminal brutality.

The original rejection of the ICC by the United States has considerably softened over the years.⁹¹ In 2005 it did not oppose a draft resolution tabled in the Security Council that provided for the referral of the situation in the Sudanese province of Darfur to the Prosecutor of the ICC.⁹² In 2011, going one step further, the United States positively agreed to referring the situation in Libya to the

ICC, a decision which was taken unanimously by all the members of the Security Council.⁹³ Thus, a situation of tolerance has come about where the United States views the ICC at least as a useful instrument as long as its own interests are not directly affected.⁹⁴

Whereas the Statute of the ICTY as well as that of the ICTR provide for jurisdiction to prosecute individual breaches of the applicable standards of humanitarian law, the ICC has not been conceived of as an institution designed to engage in such exercises where isolated acts would become the subject matter. Rather, the ICC is called upon under Article 8 of its Statute to pronounce on war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. Thus, only in cases of particular significance might the ICC try a person whose criminal conduct was not enmeshed in a general pattern. The ICC will be placed under the principle of subsidiarity or complementarity (Article 17). It is expected to step in after the normal mechanisms are shown to have failed, in spite of the wide reach of the principle of universal jurisdiction. Indeed, the ICC would simply be over-burdened if it had to

look into each and every charge of violation of humanitarian law.

Very rarely will the Nuremberg or Tokyo situation recur in the sense that a country has been completely defeated and that its entire leadership can be put on trial for war crimes systematically committed during a preceding armed conflict. Consequently, international prosecution of war crimes remains largely dependent on cooperation by states for purposes of surrender of indicted persons or retrieval of documentary evidence. Events in the former Yugoslavia have amply demonstrated that the requisite assistance is not automatically forthcoming, notwithstanding existing legal commitments. Antonio Cassese, the former President of the ICTY, has compared his institution to 'a giant without arms and legs'.⁹⁵ Although this observation may seem somewhat exaggerated, the dilemma can hardly be denied. All the crimes falling within the scope of jurisdiction of an international criminal tribunal constitute essentially state crimes, involving not only the individual under indictment, but the entire state machinery. Therefore, reluctance to cooperate with an international criminal tribunal must be viewed as an almost natural attitude of a state involved in such

criminal practices. The refusal of Sudan to support the ICC in giving effect to the prosecution against the members of its administration identified in the report of the International Commission of Inquiry sent to the province of Darfur in early 2004⁹⁶ is a telling example. Nonetheless, there is no other avenue available. Despite all the foreseeable difficulties, the establishment of the ICC has not only strengthened humanitarian law, but also means a considerable gain in objectivity by better ensuring equality before the law.⁹⁷

In any event, however, the ICC finds itself still at the preliminary stage of its work. The Rome Statute entered into force on 1 July 2002.⁹⁸ Ten years later, it had handed down only one judgment in the case of the Congolese military leader *Thomas Lubanga Dyilo*, against which an appeal is pending.⁹⁹ Since the ICC does not conduct trials *in absentia* (Article 63 Rome Statute), it becomes fully operative in a case only after a suspect has been surrendered to it. Six persons seem to be currently (February 2014) held in the detention centre of the ICC in The Hague. Four country situations (Democratic Republic of the Congo, Uganda, Central African Republic, and Mali) have been brought under its jurisdiction by the responsible governments themselves,¹⁰⁰

two investigations were opened *proprio motu* by the ICC upon a request by its Prosecutor (Kenya and Côte d'Ivoire), and two investigations result from the referrals by the Security Council which were already mentioned (Sudan and Libya). Additionally, eight preliminary examinations are being carried out. But notwithstanding the valuable efforts by the new Prosecutor to instill more dynamism into the ICC, concerns are growing. No less than 12 arrest warrants remain outstanding. On 5 September 2013, the Kenyan Parliament approved a motion to withdraw from the Rome Statute, which is possible under the withdrawal clause of Article 127 (but cannot affect pending proceedings). The move by Kenya reflects a deep-seated resentment by many political circles in Africa which feel that the ICC has focused its activity on Africa in an unbalanced way.¹⁰¹ At an African Union meeting in Addis Ababa, Ethiopia, on 12 October 2013 the Kenyan President Mr Kenyatta urged African states to withdraw en masse from the ICC.¹⁰² The ICC will have to show even more convincingly than during its first decade that it belongs to the entire international community and cannot be rejected as a tool of neo-colonial ambitions. It is almost self-evident that its proceedings must be conducted in con-

sonance with internationally recognized human rights standards (Article 21(3) Rome Statute).¹⁰³ Nonetheless, as long as the three most powerful permanent members of the Security Council refrain from ratifying the Rome Statute its standing will inevitably remain precarious.¹⁰⁴

D. Hybrid criminal tribunals¹⁰⁵

Criminal tribunals of a hybrid character, composed of both national and international judges, may constitute a better mechanism than reliance either on national courts pursuant to the principle of universal jurisdiction or on truly international courts. Such hybrid courts may sit in the country where the offences underlying the prosecution were committed. Thus, the defendants will be made accountable within the social environment where the crimes occurred. It will therefore be difficult to castigate the exercise of jurisdiction by such courts as a manifestation of neo-colonial arrogance. Additionally, such courts cost only a fraction of the expenditure incurred for the ICC. Witnesses do not have to travel over long distances, and the language problems will generally also be less dramatic. In particular, a people having suffered from the injustices of a criminal regime can see themselves as

the 'owners' of the court and its proceedings. Great care is generally taken to ensure that the victims have access to the trials. Thus the meting out of just retribution may also produce a healing effect which is likely to reunite a divided nation. Indeed, self-determination also involves the right to make the rulers of the past accountable for their criminal conduct. It may well be that hybrid tribunals, established with the assistance of the United Nations, will become a model that constitutes a viable alternative to the ICC.

Four hybrid tribunals deserve to be described in greater detail. The first of these was the Serious Crimes Unit, tasked with prosecuting grave crimes committed in East Timor (Timor Leste) during the transitional stage from 1 January to 25 October 1999. When the United Nations brought into being the UN Transitional Administration in East Timor (UNTAET), it demanded at the same time that the persons responsible for those crimes be put on trial.¹⁰⁶ Basing itself on that decision taken under Chapter VII UNCh, in 2000 UNTAET established the Serious Crimes Unit, a judicial body. The Special Panels of Serious Crimes operating within that framework each consisted of two international judges and one East Timorese judge. After the

independence of the country on 20 May 2002, the Serious Crimes Unit became a joint undertaking of the United Nations and the new state. In May 2005 it concluded its work. 392 people had been indicted, 85 were convicted and 2 acquitted.¹⁰⁷ It has been reported that Indonesia did not cooperate. In no case of a conviction did it execute the judgment. In fact, the tribunal was empowered to conduct trials in absentia, which eventually proved to be of no avail.¹⁰⁸

The Special Court for Sierra Leone,¹⁰⁹ mandated to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, goes back to Security Council Resolution 1315 (2000) of 14 August 2000, which made the basic determination on its creation, but it was founded on an Agreement between the United Nations and the Government of Sierra Leone of 16 January 2002 to which the Statute of the Tribunal was annexed.¹¹⁰ Its statutory seat was the capital of the country, Freetown. In the two Trial Chambers, each composed of three judges, and the Appeals Chamber, composed of five judges, foreign nationals held a majority. The Special

Court comprised not only a Prosecutor's Office, the Chief Prosecutor being appointed by the UN Secretary-General, but also a Defence Office which was entrusted with ensuring that all the suspects and accused received adequate legal assistance. The number of indictees was fairly low (22). At the end of the day, 17 convictions were pronounced. The last proceeding was directed against Charles Taylor, former head of government of Liberia. He was convicted on 26 April 2012 for assisting the atrocious conduct of the rebellious forces in Sierra Leone. The appeals judgment of 26 September 2013 upheld the conviction and confirmed the 50-year sentence. The trial had been held in The Hague due to concerns that security might not be guaranteed in Freetown. The Court closed its doors at the end of 2013 but was immediately succeeded by a Residual Special Court entrusted with taking care of the functions to be discharged even after the formal closing down of the original Court.¹¹¹

The Special Court for Sierra Leone was not placed under the direct authority of the Security Council, but it did not form part of the judiciary of Sierra Leone either. Therefore, it did not come automatically under the budgetary responsibility of the United Nations, unlike the ICTY and the ICTR. Fi-

nancing had to be sought from the international community, ie individual states, and from private foundations. Fortunately, generous contributions were made, in particular from Western states, the United States and the United Kingdom figuring far ahead in the list of sponsors.¹¹²

The hybrid court that currently operates in Cambodia, the 'Extraordinary Chambers in the Courts of Cambodia' (ECCC), took a long time to come into existence.¹¹³ In 1997 the Government of Cambodia, on its own initiative, asked the United Nations to assist it in the establishment of a judicial body to prosecute the main leaders of the Khmer Rouge. But only six years later, in May 2003, could an agreement between the United Nations and Cambodia be finalized.¹¹⁴ The actual establishment of the ECCC was again delayed. The judges were sworn in on 3 July 2006, and they held their first session in May/June 2007. Four cases—some of them with several defendants—appeared on the agenda of the ECCC.¹¹⁵ The first case came to an end when on 3 February 2012 the Supreme Court sentenced Guek Eav Kaing alias Duch, director of the Khmer Rouge detention centre in Phnom Penh, to life imprisonment. Life imprisonment has also been requested in proceeding 002 against two former high-ranking

office holders of the Khmer Rouge regime, Khieu Samphan and Nuon Chea. In cases 003 (two suspects) and 004 (three suspects) investigations are continuing. To date, the names of those persons have not been revealed.

The ECCC have many features that distinguish them from the other hybrid tribunals. They are domestic courts with international participation. In contrast to the composition of the Special Court in Sierra Leone, the Chambers are characterized by a majority of Cambodian judges (three against two in the Trial Chambers, four against three in the Supreme Court Chamber). Two Co-Prosecutors of equal rank have been assigned to the ECCC. Cambodia is obligated to finance the bulk of the operations of the ECCC, but has made an appeal for financial assistance from the international community. The United Nations shall cover the expenditure for the international elements of the ECCC and for defence counsel. Some concerns have been voiced that because of the strong national element in the structure and composition of the ECCC a fair trial might not be secured as prescribed by international standards. However, a Defence Support Section has been institutionalized to provide for equality of the accused with the prosecution. Thus, the preoccupa-

tion rather was that the ECCC would be too lenient vis-à-vis those who bear the main responsibility for the genocidal events that took place in Cambodia from April 1975 to January 1979, a preoccupation which eventually was not borne out by the facts. The extensive waiting period before the actual commencement of the work of the ECCC provides indeed ample proof for the reluctance of Cambodian society to try their former leaders. Amnesties that have been declared by former governments may also become a stumbling block for the work of the ECCC. Currently, no final assessment is possible.¹¹⁶

The Special Court for Lebanon (STL) goes back to a request by the Lebanese Government to the UN for assistance in the establishment of a tribunal of an international character mandated to inquire into the bomb attack of 14 February 2005 against Prime Minister Rafiq Hariri, in which 23 other persons also died. The Lebanese Government felt that without outside support it would not be able to clarify the background of that attack, given the high-running political tensions in the country. An indictment against the four main suspects, identified by their names, was released on 2 August 2013. They

are all at large. However, the STL is empowered to conduct trials in absentia.^{[117](#)}

An Agreement for the establishment of the STL was negotiated between Lebanon and the UN and signed by the two partners. It was then annexed to SC Res 1757 (2007) 30 May 2007. But it could not be ratified since the Lebanese Parliament refused its approval. Circumventing this stumbling block, the UN Secretary-General decided to bring the STL into operation on the basis of SC Res 1757 (2007) and the annexed statute. The STL was inaugurated on 1 March 2009. In two decisions of its Trial and its Appellate Chamber, the STL has confirmed that it relies on an unchallengeable legal basis.^{[118](#)} Given the dangers threatening the STL in Beirut, it was further decided to carry out the main operations in the Netherlands (on the outskirts of The Hague), opening only a small office in Beirut.^{[119](#)} Besides the main case, the STL has a small number of connected cases on its agenda. Since Lebanon finds itself at the brink of civil war, it can hardly be expected that the proceedings will move on in a climate of sober objectivity, notwithstanding the strenuous efforts of prosecutors and judges to abide strictly by the rule of law.

IV A Summary Balance Sheet

of the Ad Hoc Tribunals

The ICTY and the ICTR, since they have now been in operation for more than a decade, may already be assessed on the contribution they have made to the cause of human rights. In this regard, two aspects need to be considered. The effectiveness of the two tribunals must be examined, but it is no less interesting to inquire whether their functions have been discharged in full conformity with the requirements of the rule of law.

A. Authority of the Security Council

In the first place, the question arose whether the Security Council was empowered to establish judicial bodies for the prosecution of genocide, war crimes, and crimes against humanity. The defence in one of the first cases, the *Tadić* case, argued that Chapter VII of the UN Charter did not confer such far-reaching authority on the Security Council. In a carefully drafted and entirely persuasive decision of its Appeals Chamber of 2 October 1995,¹²⁰ the ICTY, however, rejected all of these objections. It held that Article 41 UNCh provided a sufficient legal

basis for its establishment, that among other measures the creation of a judicial body, too, was permissible, and that in the circumstances a resolution of the Security Council could be equated with a 'law' as generally required by human rights instruments for the establishment of a criminal tribunal.¹²¹ Yet one difficulty remains. It is certainly true that criminal prosecutions may be necessary in order to restore peace in a country ravaged by war. On the other hand, a post-conflict regime cannot continue forever. At some point normality must return. This is an issue which the Appeals Chamber did not have to address back in 1995 but which became ever more urgent as time went by. Generally, the ICTY has become aware of the actual time constraints. According to the completion strategy approved by the Security Council for both ad hoc tribunals in August 2003,¹²² investigations were to be completed by the end of 2004, all trial activities at first instance by the end of 2008, and all of the work in 2010. However, this time schedule could not be maintained inasmuch as two of the most wanted fugitives, Ratko Mladić and Goran Hadžić, could be arrested at a late stage only and are kept detained in The Hague. According to current estimates, the trial phase will last until July

2016. Afterwards, the defendants may challenge their convictions by the remedy of appeal. In order to bring pressure to bear on the ICTY, the Security Council decided to create a new ad hoc institution, the International Residual Mechanism for Criminal Tribunals.¹²³ Its task will be to continue the jurisdiction, rights and obligations and essential functions of the ICTY as well as of the ICTR, in particular by handling any appeals proceedings. Additionally, many cases of low-level or mid-level suspects have been transferred to the competent national institutions pursuant to Article 11bis of the Rules of Procedure and Evidence. Specifically for that purpose, in January 2005 a War Crimes Chamber was established in Bosnia-Herzegovina as a component element of the State Court. This War Crimes Chamber, which started its work in March 2005, also has the nature of a hybrid tribunal. At the initial stage, its sections are composed of two international judges and one national judge. Like the ECCC in Cambodia, the War Crimes Chamber is fully integrated into the Bosnian judicial system. To date, little is known outside Bosnia about its actual practice.¹²⁴

B. Customary nature of international criminal law

Another focal issue is the legal foundations of the crimes within the jurisdiction of the ICTY and the ICTR. The Security Council proceeded on the premise that it was empowered to bring into being a judicial body, but it never thought of creating new substantive rules establishing offences for which individuals may directly incur criminal responsibility under international law. Such legislative authority would not have been covered by Article 41 UNCh. Conceiving of the Security Council as a body competent to enact substantive criminal law would have been all the less acceptable since the rule *nullum crimen, nulla poena sine lege* belongs to the core elements of criminal justice in consonance with the rule of law. The ICTY was mandated to prosecute persons who had committed crimes since 1991, well before the date of its establishment. Since the *nullum crimen* rule forbids retroactive legislation, the Security Council had to assume that all of the offences listed in Articles 2 to 5 of the ICTY Statute and Articles 2 to 4 of the ICTR Statute were recognized as crimes under customary international or treaty law.¹²⁵ No doubts could be enter-

tained as to the punishable character of genocide and the grave breaches listed in the four Geneva Conventions of 1949 and in Additional Protocol I of 1977 (Article 85). It was far less obvious that other violations of the laws or customs of war and crimes against humanity had reliable bases in general international law. Only rarely have the judges rejected charges brought by the prosecution as lacking a basis in customary law.¹²⁶ An extensive discussion was devoted to the question of whether command responsibility as recognized with regard to international armed conflict was a legal concept that could be resorted to in internal conflict too. Eventually, this question was answered affirmatively.¹²⁷ In three cases, however, the ICTY came to a negative conclusion. It denied that the vague concept of 'violence to life and person' had a valid legal basis in customary international law,¹²⁸ it rejected the concept of 'indirect co-perpetration' as opposed to 'joint criminal enterprise',¹²⁹ and it held that the concept of 'deportation' could not be extended to include the transfer of people beyond 'constantly changing frontlines'.¹³⁰ However, in the case of *Galić* German judge Wolfgang Schomburg remained isolated with his opposition against the holding by his colleagues that the crime of spread-

ing terror among the civilian population lacked a foundation in international customary law.¹³¹ It should be added that a lively debate has set in regarding the customary basis of joint criminal enterprise as a form of offence which has enormous advantages for the prosecution and may therefore bring it onto a slippery slope.¹³²

C. Non-international armed conflict

The most serious doubts arose in connection with violations of the rules applicable to non-international armed conflict. The ICTY Statute does not mention such violations as punishable offences, but the ICTR Statute does so quite openly: Article 4 bears the heading 'Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II'. Yet neither common Article 3 (of 1949) nor Additional Protocol II (of 1977) declare in any way whatsoever that acts contrary to the legal regime governing internal armed conflict shall entail criminal responsibility of the responsible actors. At the Geneva Conference of 1949, which drafted common Article 3, no suggestion was made to that effect. The official commentary of the International Committee of the Red Cross does not contain any reference to criminal sanctions. Probably, since

the introduction of the new regime was utterly controversial, common Article 3 would not have received the necessary approval if it had been complemented from the very outset by a provision establishing penal consequences.¹³³ Likewise, a provision on grave breaches is conspicuously absent from Additional Protocol II. While Additional Protocol I ties in with the regime provided for in the four 1949 Conventions which it is designed to complement, this was a clear message to the effect that the participating states did not wish to see their sovereign freedom in handling internal conflicts restricted by a tight system of international responsibility.

This might have seemed to block any prosecution of violations of the rules governing non-international armed conflicts, but the ICTY and the ICTR did not hesitate to conclude that the dividing line between international and non-international conflicts had been blurred over the course of time and that sufficient practice had accumulated to support the punishment of authors of grave breaches of the applicable legal regime, irrespective of the nature of the conflict at hand. In the *Tadić* case (Jurisdiction), the ICTY held that:

customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.¹³⁴

It goes without saying that the ICTR had to follow this precedent in order to maintain consistency within the system of prosecution established by the Security Council. Indeed, in *Akayesu*¹³⁵ it adhered to the *Tadić* doctrine, stating that it found the reasoning of the ICTY Appeals Chamber ‘convincing and dispositive of the issue’.¹³⁶ Since that time, the issue has indeed been considered as closed by the two ad hoc tribunals.¹³⁷ This has not prevented voices in legal doctrine from expressing dissent, arguing that the materials relied upon by the Appeals Chamber in the *Tadić* case did not really seem to corroborate what they were made to say.¹³⁸

D. Amnesties

One of the big problems the ICC will have to deal with is the granting of amnesties by the national state of an accused person. Neither for the ICTY nor for the ICTR has there been any need to pronounce on this issue, since the successor states of the for-

mer Yugoslavia as well as Rwanda have refrained from enacting any amnesties. Logically, it would seem to follow from the concept of international prosecution that the state of nationality has no right to block or impede proceedings conducted on behalf of the international community. This is indeed the argument relied upon by the Special Court for Sierra Leone in the case of *Kallon and Kamara* where, by a preliminary ruling of 13 March 2004,¹³⁹ it rejected the motion challenging the jurisdiction of the Court because of an amnesty that had been granted by virtue of a peace agreement between the rebel movement RUF and the Government of Sierra Leone. The Court argued that, where jurisdiction is universal, a state cannot deprive other states of their right to prosecute the offenders. Likewise, the IACtHR has developed a doctrine according to which no obstacles may be raised against the duty to punish the perpetrators of (serious?) human rights violations.¹⁴⁰ Yet the example of South Africa has shown that there may be other means of reckoning with the past than to impose punishments on persons found guilty of committing atrocities.¹⁴¹ To deny any effect to an amnesty amounts also to gross interference in the domestic sovereignty of a state or its power

to shape its foreign policy. It stands to reason, for instance, that a future peace treaty between Israel and Palestine will require far-reaching amnesties for both sides to lay stable foundations of peace and mutual cooperation. If any third state was able to brush aside such clauses, initiating criminal proceedings against persons allegedly guilty of international crimes, the entire artfully constructed edifice of such a peace treaty could easily be destroyed.

On the other hand, there seems to be broad agreement in the legal literature that blanket amnesties, by which a dictatorship exonerates itself from any criminal responsibility before handing over power to democratic institutions, cannot have any binding effect on other actors authorized under international law to initiate criminal proceedings.¹⁴²

However, it is highly questionable whether Article 17 Rome Statute provides a sensible answer. According to this provision, an individual investigation or trial seems to be necessary to create a bar to the jurisdiction of the ICC. But in a peace treaty between two states or even in a peace agreement between a government and a rebel group, it may be necessary, in order precisely to attain the objective of peace and security, to declare

a general amnesty.¹⁴³ Such instances should not be dismissed outright as clearly devoid of any legal effect. Future case law will have to look for differentiated answers. It is hardly imaginable, in particular, that an amnesty granted for acts of genocide will withstand attempts to make the perpetrators accountable.¹⁴⁴

E. Pre-trial detention

Another one of the difficulties facing the ICTY, as well as the ICTR, is the length of time suspects may have to spend in pre-trial detention before the proceedings against them actually start. Thus, in the proceeding against Dragan Nikolić,¹⁴⁵ the oral hearings began only in September 2003 although Nikolić had been apprehended in April 2000; the Trial Chamber handed down its judgment in December 2003. The case of Momcilo Krajišnik¹⁴⁶ gave even more rise for concern: Krajišnik was arrested in April 2000, but the presentation of the evidence in public hearing began almost four years later, in February 2004, and the judgment could be delivered only on 27 September 2006. Of course, these considerable time spans are largely explained by the huge quantities of evidence placed before the ICTY in cases where a great number of occurrences

in different places had to be clarified. Compliance with Article 14(4)(c) of the Statute, according to which the accused has a right to be tried without undue delay, encounters therefore tremendous difficulties.¹⁴⁷

Regarding the ICTR, it was reported that at the beginning of July 2012 17 persons were held in custody in its detention facility, waiting for their appeals proceedings to be completed. Since many arrests were carried out between 1995 and 2000, the time spent under detention is considerable. The last appeals proceedings are expected to be completed by August 2015.¹⁴⁸ In one case, emphasizing that the rule providing for speedy trial had not been respected, the Appeals Chamber reduced the life sentence to 40 years' imprisonment.¹⁴⁹ Such delays affect the reputation of the system of international criminal jurisdiction which is expected to set an example of good administration of justice. The problem of excessive length of proceedings will inevitably remain with the ICC notwithstanding best efforts engaged in shortening the proceedings. This is a structural problem of international criminal jurisdiction and has even affected the practice of the hybrid tribunals as pointed out above.

F. Reparation for persons erroneously prosecuted

An unresolved problem is reparation for persons erroneously prosecuted. The statutes of the two ad hoc tribunals do not address this issue. According to Article 14(6) CCPR, any person who is a victim of a 'miscarriage of justice' shall be compensated 'according to law', which means that the CCPR enjoins states parties to enact domestic legislation for that purpose. A famous case in this regard is the case of the *Kupreškić Brothers*, two of whom were in custody in The Hague for four years before being acquitted by the ICTY. Thereafter, they demanded financial compensation, a claim which generated confusion and does not seem to have been satisfied.¹⁵⁰ In the case of *Rwamakuba*, the defendant had to spend almost eight years before being acquitted. His request for compensation was dismissed in view of the lack of any legal basis for that purpose.¹⁵¹ It stands to reason that a judicial body established by the United Nations should comply with the judicial guarantees as they are laid down in the human rights treaties established under the auspices of the world organization. Otherwise, its authority would be gravely affected.¹⁵²

G. Statistics

Both the ICTY and the ICTR are relatively small institutions. Originally, the ICTY, composed of 11 judges, was made up of just two Trial Chambers and one Appeals Chamber, and the same configuration was chosen for the ICTR. In view of the increasing workload, the ICTY Statute was amended by the Security Council 19 times,¹⁵³ and the ICTR Statute was also adapted more than a dozen times to the exigencies of the situation. Both institutions were made up of three Trial Chambers—trial work at the ICTR was terminated in 2012—while there is still just one Appeals Chamber, which is shared by the two tribunals. Corresponding to this extension, the number of permanent judges was pushed up to 18 (11 for the ICTR), and furthermore allowance was made for the addition of *ad litem* judges, in the case of the ICTY much earlier than in the case of the ICTR.¹⁵⁴ This strengthening of the judicial staff made it possible, at the same time, to provide for the splitting of the Trial Chambers into sections of three judges, each of which may discharge the functions of a Trial Chamber. In this fashion, it may be possible to significantly reduce the number of pending cases.

In spite of all the efforts undertaken with a view to making the two tribunals more effective, their balance sheet is far from attracting unrestricted applause. The latest report of the ICTR, its 18th Annual Report,¹⁵⁵ reveals that at the end of June 2013 46 persons had been convicted and sentenced, while on the other hand there had been 12 acquittals. The latest acquittals in the case of two former ministers, Mugenzi and Mugiraneza, where the ICTR found that genocidal intent could not be proven,¹⁵⁶ were rather controversial. It is remarkable, however, that among the convicted there was the former Prime Minister together with six other ministers. In the case of the ICTY, the latest report¹⁵⁷ indicates that at the end of June 2013 the proceedings against 136 accused had been concluded. Out of the 161 that had initially been charged 69 persons were convicted, and 18 were found not guilty. Additionally, 13 cases were referred to national jurisdictions.¹⁵⁸

On the whole, this statistical breakdown cannot be comforting to an observer. It amply demonstrates the difficulties surrounding trials before international tribunals. 760 people (not including consultants, interns and individual contractors) were currently at the service of the ICTY in Sep-

tember 2013, and its annual budget amounts to roughly US\$125 million. In 2012 the ICC employed comprehensively 1,044 persons,¹⁵⁹ and its budget for 2014 amounts to roughly €126 million.¹⁶⁰ Administering justice within an international context obviously constitutes a tremendously expensive undertaking. This is one of the reasons why the ICC operates in accordance with the principle of complementarity.¹⁶¹ It has become clear during the last two decades that international criminal justice will under any circumstances necessarily remain confined to the prosecution of the persons bearing the main responsibility for massive violations of human rights. The prosecution of the major war criminals of the Nazi regime before the Allied Military Tribunal at Nuremberg has anticipated this experience.

V Conclusion

The critical comments put forward in the preceding sections should not be regarded as totally eclipsing the positive side of the balance sheet. The work of the ICTY has made clear that individual criminal responsibility does exist and cannot be brushed aside as a hollow word.¹⁶² One may take it that the ongoing process of criminal prosecution has

largely contributed to stabilizing the situation in Bosnia-Herzegovina. Even ethnic fanatics know that they are well-advised to refrain from engaging in criminal activities since otherwise they might end up before the judges in The Hague. Never has it been contended that the ICTY might be able to deal with all of the crimes that were committed during the years of cataclysm, when ethnic hatred superseded all considerations of human solidarity and tolerance. Also, some issues of principle need to be addressed, in particular the question of which values the judges in The Hague defend in convicting and sentencing the accused. A critic of the sentencing practice of the ad hoc tribunals cautions against 'sentencing in the ICC . . . becoming part of the unaccountable apparatus of inter-state oppression'¹⁶³—a formulation which is certainly somewhat exaggerated but which nonetheless may serve as a useful reminder of dangers to be avoided.

For an outsider, it is hard to say whether the activity of the ICTR may be assessed in similarly positive terms. In Rwanda, tens of thousands of people were involved in the mass killings during the fatal months in 1994. Compared to these figures, the number of cases tried by the ICTR seems almost irrelevant. It is true that the ICTR has succeeded in

convicting and sentencing a number of politicians who held prominent positions in the structure of the state. Among them are Jean Kambanda, the Prime Minister, and Jean-Paul Akayesu, the Mayor of Taba, both sentenced to life imprisonment, as well as three other ministers (four ministers were acquitted).¹⁶⁴ Generally, however, one must conclude that for the future of human rights in Rwanda it is much more important to achieve fairness of proceedings for the thousands of suspects who are still being held by the current government of the country. Local justice by laymen, to which recourse is increasingly had (the system of '*gacaca*'), may not constitute an ideal solution in light of the fundamental guarantees set out in Article 14 CCPR but it is a simple fact that the ICTR would be simply overwhelmed and submerged if it had to deal with all the cases requiring an assessment from the viewpoint of criminal law.

The ICC, according to the Rome Statute, will encounter even greater difficulties than the two ad hoc tribunals. Since for the time being it lacks the support of three of the permanent Security Council members—China, Russia, and the United States—its effectiveness will be seriously curtailed. International criminal justice can be successful

only if it is supported by the entire international community. Currently, a human rights lawyer can only express the wish that the United States may be able definitively to revise its opposition to an institution which, in an environment of bona fide international understanding and cooperation, is certainly capable of making a significant contribution to the real enjoyment of human rights for the benefit of every human being.

In sum, to date international criminal law has made only a modest contribution to upholding the standards of human rights and humanitarian law. Since loss of human life can never be repaired, emphasis must be placed on prevention. To create a culture of humanity may be the best safeguard. Yet now that the ICC has come into actual operation, the sole fact of its existence may act as another deterrent factor capable of inducing all of the persons involved in armed conflict to abide by the standards evolved by the international community.

¹ For an optimistic view see P Akhavan, 'Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 AJIL 7.

² A Seibert-Fohr, 'Reconstruction through Accountability' (2005) 9 *Max Planck UNYB* 555, at 569 et seq.

³ General considerations on punishment as a just sanction by M Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck UNYB* 1. Without regard for other methods of settlement in situations of transitional justice is R Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *HRQ* 605. To date, Spain has not touched the criminal legacy of the Civil War and the Franco dictatorship. Now it may be too late: see M Davis, 'Is Spain Recovering its Memory? Breaking the *Pacto del Olvido*?' (2005) 27 *HRQ* 858; JM Tamarit Sumalla, 'Transition, Historical Memory and Criminal Justice in Spain' (2011) 9 *JICJ* 729; P Burbidge, 'Waking the Dead of the Spanish Civil War' (2011) 9 *JICJ* 753.

⁴ Section 39: 'No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.'

⁵ See symposium 'Victims' Participation in International Criminal Law' (2010) 8 *JICJ* 75–179. In the *Lubanga* case before the ICC, the massive participation of victims entailed considerable difficulties, see L Catani, 'Victims at the International Criminal Court' (2012) 10 *JICJ* 905.

⁶ See *de lege ferenda* advocacy by C Chiamenti, 'Corporations and the International Criminal Court'

in O de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford and Portland, US: Hart, 2006) 287; M Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 JICJ 909.

⁷ A different view is held by A Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425.

⁸ CJEU, *Commission v Council*, case C-176/03, 13 September 2005, para 48; *Commission v Council*, case 440/05, 23 October 2007, para 66 (but no competence to make determinations on the type and level of the criminal penalties to be applied).

⁹ See the famous *Trail Smelter* award: *United States v Canada*, 11 March 1941, 3 RIAA 1938, at 1965.

¹⁰ See examples from the earlier practice given by C Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928) 185–7; an account of the contemporary practice is given by G Arangio-Ruiz, 'Second Report on State Responsibility' (UN doc A/CN.4/425 and Add 1), II.1 (1989) *Yearbook of the ILC* 39–40. See also the *Rainbow Warrior* case, where the transfer of the two responsible French officers to a French military facility on an isolated island outside Europe, as determined by the UN Secretary-General in his award of 6 July 1986, 20 RIAA 224, boiled down to a quasi-punishment.

¹¹ IACtHR, case C 4, *Velásquez Rodríguez*, 29 July 1988, (1989) 28 ILM 294, at 324, para 166, and 325, para 174;

confirmed in many later judgments, see, eg, case C 100, *Bulacio v Argentina*, 18 September 2003, paras 110–21.

¹² See critique by FF Basch, ‘The Doctrine of the IACtHR Regarding States’ Duty to Punish Human Rights Violations and its Dangers’ (2007) 23 *American University International Law Review* 195.

¹³ First articulated in the *McCann* case, 27 September 1995 (A No 324) 47–9, §§ 157–61; thereafter *Kaya v Turkey*, 19 February 1998, Reports 1998-I, 329, § 105; *LCB v UK*, app 23413/94, 9 June 1998, § 36; *Osman v UK*, app 87/1997/871/1083, 28 October 1998 [GC], §§ 115–16; *Nachova v Bulgaria*, app 43577/98, 6 July 2005 [GC], § 160; *Estamirov and Others v Russia*, app 60272/00, 12 October 2006, §§ 85–7; from the more recent jurisprudence, see, eg, *Meryem Çelik and Others v Turkey*, app 3598/03, 16 April 2013, §§ 73–5; *Grimailovs v Latvia*, app 6087/03, 25 June 2013, §§ 102–6; *Keller v Russia*, app 26824/04, 17 October 2013, §§ 92–5, 107–8; for an overall assessment, see A Mowbray, ‘Duties of Investigation under the ECHR’ (2002) 51 ICLQ 437; F Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’ (2011) 9 JICJ 577, at 582.

¹⁴ Judgment of 25 February 1975, 39 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 1, at 51–66.

¹⁵ Judgment of 28 May 1993, 88 BVerfGE 203, at 257–63.

¹⁶ Case 84/1981, 21 October 1982, 2 Selected Decisions 112, at 116, para 11.

¹⁷ Case 124/1982, 24 July 1984, 2 Selected Decisions 158, at 160, para 13.

¹⁸ Cases 146/1983 and 148 to 154/1983, 4 April 1985, 2 Selected Decisions 172, at 176, para 16.

¹⁹ Case 612/1995, 29 July 1997, para 8.8.

²⁰ *Guezout v Algeria*, case 1753/2008, 19 July 2012, paras 8.10, 10; *Muharjan v Nepal*, case 1863/2009, 19 July 2012, para 8.8; *Khaled Il Khwildy v Libya*, case 1804/2008, 1 November 2012, para 7.11; *Kholodova v Russia*, case 1548/2007, 1 November 2012, para 10.4; *Boudjemai v Algeria*, case 1791/2008, 22 March 2013, para 10; *Saadoun v Algeria*, case 1806/2008, 22 March 2013, para 10; *Prutina and Others v Bosnia-Herzegovina*, case 1917/2009, 28 March 2013, para 11; *Al-Khazmi v Libya*, case 1832/2008, 18 July 2013, para 10.

²¹ UN doc CCPR/C/UKR/CO/7, 22 August 2013. Similar statements can regularly be found in the concluding observations in respect of state reports, see for the recent past [2013] I Report of the HRCee (UN doc A/68/40): Armenia, 26, paras 12, 13; Kenya, 35, paras 11, 13; Lithuania, 40, para 9; Maldives, 45, para 14; Germany, 56, para 10.

²² Of 29 March 2004 (UN doc CCPR/C/21/Rev 1/Add 13, 26 May 2004) paras 8, 18; see also General Comment No 34, Article 19: Freedoms of opinion and expression (UN doc CCPR/C/GC/34, July 2011) para 23.

²³ See General Comment No 31 (above [n 22](#)) para 18, where the categories of offences warranting investi-

gation and punishment of the responsible agents are specified.

²⁴ At its Naples session in 2009, the Institut de droit international suggested that immunity of state agents in case of international crimes should be confined to 'personal immunity' (2009) 73 *Annuaire de l'IDI* 226, Article II(1). See also D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *EJIL* 815. The immunity of foreign officials is currently a topic under examination by the ILC, see [2013] ILC Report (UN doc A/68/10) 49. For a confused judicial pronouncement see French Cour de cassation, 19 March 2013, (2013) 117 *RGDIP* 929.

²⁵ For an extensive study, see M Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 *AJIL* 1–49; C Tomuschat, Report submitted to the Institut de droit international on 'Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes' (2005) 71-I *Annuaire de l'Institut de droit international* 215, 349; AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, Report, 16 April 2009, <http://ec.europa.eu/development/icebter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf>; see also O Swaak-Goldman, 'Recent Developments in International Criminal Law' (2005) 54 *ICLQ* 691, at 697 et seq.

²⁶ For the dispute between Belgium and Senegal about Senegal's duty of prosecution see ICJ, (2012) ICJ Reports 422.

²⁷ This proposition has been under consideration by the ILC since 2005. No definitive results are available as yet. The customary law nature of the proposition is contended by R van Steenberghe, 'The Obligation to Extradite or Prosecute' (2011) JICJ 1089; the contrary view is held by C Tomuschat, 'Positive Duties under General International Law' in M Breuer et al (eds), *Der Staat im Recht. Festschrift für Eckart Klein* (Berlin: Duncker & Humblot, 2013) 923; judge Abraham, individual opinion in ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012) ICJ Reports 471, at 479–80, paras 32–40.

²⁸ The International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN GA on 13 April 2005, 44 ILM 815, the latest of the anti-terrorism conventions at universal level, contains the standard formula in Article 9 (4).

²⁹ Adopted by GA Res 3166 (XXVIII), 14 December 1973.

³⁰ Adopted by GA Res 34/146, 17 December 1979.

³¹ Adopted by GA Res 52/164, 15 December 1997.

³² In May 2014 there were 176, 173, and 168 states parties respectively.

³³ See LN Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 AJIL 334.

³⁴ See O Bekou and R Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 ICLQ 49.

³⁵ But this statement was accepted *tel quel* by L Condorelli, 'La Cour pénale internationale: Un pas de géant (pourvu qu'il soit accompli . . .)' (1999) 103 RGDIP 7, at 19. JI Charney, 'Progress in International Criminal Law?' (1999) 93 AJIL 452, at 455, also believes that universal jurisdiction exists for all international crimes. This opinion is now widely shared: see, for instance, K Ambos, *Internationales Strafrecht* (2nd edn, Munich: Beck, 2009) 54, margin note 96; Bekou and Cryer (above [n 34](#)) 50; DF Donovan and A Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 AJIL 142; J Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction' (2009) 7 JICJ 945, at 951; A Mbata B Mangu, 'States' Revenge against People in International Law' (2004) 44 IJIL 324, at 329; G Werle, *Principles of International Criminal Law* (2nd edn, The Hague: Asser Press, 2009) 64, margin note 184. The AU-EU expert report (above [n 25](#)) rather lightly joins this trend (para 9).

³⁶ For the reluctant French practice, see B Stern, note on the *Javor* and the *Munyeshyaka* case, (1999) 93 AJIL 525.

³⁷ See G Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 ICLQ 578; F Jessberger, 'The Definition and the Elements of the

Crime of Genocide' in P Gaeta (ed), *The UN Genocide Convention—A Commentary* (Oxford: OUP, 2009) 87.

³⁸ See WA Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: CUP, 2000) 355–8.

³⁹ *Attorney General of Israel v Eichmann*, 29 May 1962, 36 ILR 277, at 304.

⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (1996) ICJ Reports 595, at 616, para 31.

⁴¹ However, the ICJ has stated—as an *obiter dictum*—that 'the obligation each State . . . has to prevent and to punish the crime of genocide is not territorially limited by the Convention', (1996) ICJ Reports 616, para 31.

⁴² See S Zappalà, 'International Criminal Jurisdiction over Genocide' in P Gaeta (ed), *The UN Genocide Convention. A Commentary* (Oxford: OUP, 2009) 259.

⁴³ See M McAuliffe de Guzman, 'The Road from Rome: The Developing Law of Crimes against Humanity' (2000) 22 HRQ 335; D Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 AJIL 43; N Zakr, 'Approche analytique du crime contre l'humanité en droit international' (2001) 105 RGDIP 281.

⁴⁴ See D Weissbrodt, 'Slavery' (2012) 9 MPEPIL 216.

⁴⁵ 60 LNTS 253.

⁴⁶ Protocol amending the Slavery Convention, adopted by GA Res 794 (VIII), 23 October 1953, 182 UNTS 51; Supplementary Convention on the Abolition of Slavery,

the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 266 UNTS 3.

⁴⁷ GA Res 61/177, 20 December 2006.

⁴⁸ Adopted by GA Res 3068 (XXVIII), 30 November 1973, 1015 UNTS 243.

⁴⁹ By contrast, it was the policy of the socialist states to support any form of combat against apartheid.

⁵⁰ 108 states parties in February 2014. The last two ratifications occurred in 2005.

⁵¹ See A Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 *Max Planck UNYB* 553, at 558–60.

⁵² A Cassese, 'Crimes Against Humanity' in A Cassese, P Gaeta, and JRWD Jones (eds), 1 *The Rome Statute of the ICC: A Commentary* (Oxford: OUP, 2002) 353, at 376, openly acknowledges that by including apartheid in Article 7 the Rome Statute went beyond the existing rules of general international law.

⁵³ (2006) 71-II *Annuaire de l'Institut de droit international* 297.

⁵⁴ Law of 5 August 2003, (2003) 42 ILM 1258, and summary of events (2003) 97 AJIL 984; comment by P d'Argent, 'L'expérience belge de la compétence universelle: beaucoup de bruit pour rien?' (2004) 108 RGDIP 597, at 610 et seq.

⁵⁵ See E Carnero Rojo, 'National Legislation Providing for the Prosecution and Punishment of International

Crimes in Spain' (2011) 9 JICJ 699, at 713; J Ríos Rodríguez, 'La restriction de la compétence universelle des juridictions nationales: Les exemples belge et espagnol' (2010) 114 RGDIP 563, at 586–7.

⁵⁶ Ley Orgánica 1/2014, 13 March 2014, *Boletín Oficial del Estado* A-2014-2709.

⁵⁷ Of 26 June 2002, (2003) 42 ILM 998; for a commentary see Werle (above [n 35](#)) 134, margin note 360.

⁵⁸ See decision of the German Federal Prosecutor in *Center for Constitutional Rights et al v Donald Rumsfeld et al*, 10 February 2005, (2006) 45 ILM 119, with note by A Fischer-Lescano, (2006) 45 ILM 115, and comment by M Bothe, 'La juridiction universelle en matière de crimes de guerre' in *Droit du pouvoir—Pouvoir du droit—Mélanges offerts à Jean Salmon* (Brussels: Bruylant, 2007) 833.

⁵⁹ The contention that, contrary to the explicit text of the relevant clauses, universal jurisdiction does not exist for domestic courts—judge Guillaume in the *Arrest Warrant* case (2002) ICJ Reports 35, at 38, para 6, and judge Ranjeva, (2002) ICJ Reports 54, at 56, para 7—is not supported by any reasons.

⁶⁰ A Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 EJIL 2, at 7; JI Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 AJIL 120, at 120; W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 JICJ 723, at 738; R Maison, 'Les premiers

cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes' (1995) 6 EJIL 260, at 263. AR Ziegler, 'Domestic Prosecution and International Cooperation with Regard to Violations of International Humanitarian Law: The Case of Switzerland' (1997) 7 *Revue suisse de droit international et de droit européen* 561, at 586, underlines the almost insurmountable difficulties which efforts at prosecution of crimes committed in foreign countries have to face.

⁶¹ But see JM Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 JICJ 683.

⁶² See statistical breakdown by Langer (above [n 25](#)) 7–9, 42, 44.

⁶³ See, for instance, Bothe (above [n 58](#)) 844–6.

⁶⁴ See D Fleck, 'Shortcomings of the Grave Breaches Regime' (2009) 7 JICJ 833, at 836–40; L Moir, 'Grave Breaches and Internal Armed Conflicts' (2009) 7 JICJ 763.

⁶⁵ For the text of the amendment see <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>.

⁶⁶ *R v Jones et al*, 29 March 2006, [2006] UKHL 16.

⁶⁷ See criticism by C Tomuschat, 'Foreign Policy Issues before Domestic Courts. The Rule of Law under Challenge' in A Reinisch and U Kriebaum (eds), *The Law of International Relations—Liber Amicorum Hanspeter Neuhold* (Utrecht: Eleven, 2007) 415, at 424 et seq.

⁶⁸ ICJ, (2002) ICJ Reports 3.

⁶⁹ (2002) ICJ Reports 80, para 59.

⁷⁰ On the decline of universal jurisdiction see balanced view of D Luban, 'After the Honeymoon' (2013) 11 JICJ 505, at 512–13; H van der Wilt, 'Universal Jurisdiction under Attack' (2011) 9 JICJ 1043.

⁷¹ Well-intentioned advocacy by A Adeno, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 HRQ 129.

⁷² See the Krakow Resolution of the Institut de droit international, Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes, (2006) 71-II *Annuaire de l'Institut de droit international, Session de Cracovie* 299, s 3(b), recently confirmed by the US Genocide Accountability Act of 2007, 18 USC § 1091(e)(2). From the literature see F Lafontaine, 'Universal Jurisdiction—the Realistic Utopia' (2012) 10 JICJ 1277, at 1280–6.

⁷³ Lafontaine (above [n 72](#)) 1290.

⁷⁴ See T Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 AJIL 359.

⁷⁵ Whether accused persons have a full right to self-representation became a major problem before the ICTY in the Milošević case: see NHB Jörgensen, 'The Right of the Accused to Self-Representation Before International Criminal Tribunals: Further Developments' (2005) 99 AJIL 663.

⁷⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August

1945, reprinted in I von Münch (ed), *Dokumente des geteilten Deutschland* (Stuttgart: Alfred Kröner, 1968) 43.

⁷⁷ See C Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia' (1998) 2 *Max Planck UNYB* 97, at 100.

⁷⁸ For the discussion in the ILC see (1990) II.2 Yearbook of the ILC 19–25, paras 93–157.

⁷⁹ The Statute of the Iraqi Special Tribunal, 10 December 2003, (2004) 43 ILM 231, was enacted by the Coalition Provisional Authority, with some participation of the (truly Iraqi) Iraq Governing Council: see I Bantekas, 'The Iraqi Special Tribunal for Crimes against Humanity' (2005) 54 ICLQ 237, at 239. In contrast, the Tribunal was exclusively composed of Iraqi judges, although the President of the Tribunal was required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the chambers.

⁸⁰ See A Cassese, 'From Nuremberg to Rome: International Military Tribunals to the ICC' in Cassese, Gaeta, and Jones (above [n 52](#)) 3, at 16.

⁸¹ UN doc S/25704, 3 May 1993.

⁸² On the two ad hoc Tribunals see WA Schabas, *The UN International Criminal Tribunals* (Cambridge: CUP, 2006).

⁸³ On the ICC see, for instance, M Arsanjani, 'The Rome Statute of the ICC' (1999) 93 AJIL 22; Cassese, Gaeta, and Jones (above [n 52](#)); O Triffterer (ed), *Commentary on the*

Rome Statute of the International Criminal Court (Baden-Baden: Nomos, 1999).

⁸⁴ But there may be borderline problems, see M Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 JICJ 25.

⁸⁵ See letter by US Under-Secretary of State for Arms Control and International Security, John R Bolton, of 27 April 2002, (2002) 41 ILM 1014. The American viewpoint is presented by R Wedgwood, 'The International Criminal Court: An American View' (1999) 10 EJIL 93; contra: G Hafner, K Boon, A Rübesame, and J Huston, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) 10 EJIL 108.

⁸⁶ The American Service Members' Protection Act, HR 4775, reprinted in (2002) 23 HRLJ 275, threatens resort to military force in case a criminal trial should be conducted before the ICC against a member of the US armed forces. For a critical response to that Act see letter of 24 June 2002 by Benjamin B Ferencz, former prosecutor at the Nuremberg trial, <<http://www.globalpolicy.org/intljustice/icc/2002/0624ben.htm>>.

⁸⁷ Such bilateral arrangements would be unlawful for a state party to the Rome Statute: see opinion of EU Commission, (2002) 23 HRLJ 158. The first country where such a treaty on a mutual obligation of non-surrender to the ICC was definitively approved by the competent legislative body was Sierra Leone (6 May 2003): see Human

Rights Watch information, 20 June 2003, <<http://www.hrw.org>>.

⁸⁸ See Charney (above [n 60](#)); RC Johansen, 'The Impact of US Policy toward the ICC on the Prevention of Genocide, War Crimes, and Crimes Against Humanity' (2006) 28 HRQ 301.

⁸⁹ For background information see (2002) 96 AJIL 725.

⁹⁰ SC Res 1487 (2003), 12 June 2003.

⁹¹ For a comprehensive account see JP Cerone, 'Dynamic Equilibrium: The Evolution of US Attitudes towards International Criminal Courts and Tribunals' (2007) 18 EJIL 277.

⁹² SC, Res 1593 (2005), 31 March 2005; Algeria, Brazil, China, and the United States abstained. Comment by M Happold, 'Darfur, the Security Council, and the ICC' (2006) 55 ICLQ 226.

⁹³ SC, Res 1970 (2011), 26 February 2011.

⁹⁴ See statement to Assembly of states parties to the Rome Statute (2012) 106 AJIL 384 (December 2011).

⁹⁵ Above [n 60](#), 13.

⁹⁶ Report of the Commission: UN doc S/2005/60.

⁹⁷ Inevitably, however, it will face the same problems of enforcement: see A Cassese, 'The Statute of the ICC: Some Preliminary Reflections' (1999) 10 EJIL 144, at 164–7; Wedgwood (above [n 85](#)) 106.

⁹⁸ On 1 February 2014 it had 122 states parties.

⁹⁹ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012 (conviction), <<http://>

www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>, and 10 July 2012 (sentencing), <<http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>>.

¹⁰⁰ On the first referral to the ICC see P Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 AJIL 403.

¹⁰¹ See H van der Wilt, 'Universal Jurisdiction under Attack' (2011) 9 JICJ 1043.

¹⁵³ For amended version see <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

¹⁰² International New York Times, 6 November 2013. For the full text see <<http://www.citizennews.co.ke/news/2012/local/item/14250-president-kenyattas-speech-at-the-au-summit>>.

¹⁰³ See R Young, "'Internationally Recognized Human Rights" before the International Criminal Court' (2011) 60 ICLQ 189.

¹⁰⁴ For a general assessment of the first decade of the ICC's activity see P Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11 JICJ 527; M Delmas-Marty, 'Ambiguities and Lacunae' (2013) 11 JICJ 553; WA Schabas, 'The Banality of International Justice' (2013) 11 JICJ 545, at 546–50; C Tomuschat, 'The International Criminal Court at Age Ten' (2012) 32 HRLJ 15.

¹⁰⁵ For a comprehensive overview see E Cimiotta, *I Tribunali Penali Misti* (Padova: CEDAM, 2009); CPR Romano,

A Nollkaemper, and JK Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: OUP, 2004); see also LA Dickinson, 'The Promise of Hybrid Courts' (2003) 97 AJIL 295; Swaak-Goldman (above [n 25](#)) 694 et seq.

[106](#) SC Res 1272 (1999), 25 October 1999, para 16.

[107](#) See assessment by A Del Vecchio, *International Courts and Tribunals between Globalisation and Localism* (The Hague: Eleven, 2013) 167–70.

[108](#) For an overall assessment see L Kent, 'Interrogating the "Gap" between Law and Justice' (2012) 34 HRQ 1021.

[109](#) See Del Vecchio (above [n 107](#)) 158–64; WA Schabas, 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) 25 HRQ 1035.

[110](#) All the relevant documentation is to be found at <<http://www.rscsl.org/documents.html>>.

[111](#) Explanations by F Donlon, 'The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone' (2013) 11 JICJ 857.

[112](#) The Ninth (last) Annual Report, June 2011 to May 2012, <<http://www.sc-sl.org/LinkClick.aspx?fileticket=ZEDnSBp6ahc%3d&tabid=176>> informs that the Court faced difficulties in finding the requisite resources for the completion budget and the budget for the Residual Special Court.

¹¹³ For extensive documentation see <<http://www.eccc.gov.kh/en>>. General assessment by Del Vecchio (above ^{n 107}) 164–7.

¹¹⁴ Annex to GA Res 57/228 B, 13 May 2003.

¹¹⁵ For the Order of Provisional Detention against Guek Eav Kaing, 31 July 2007, see (2007) 46 ILM 913.

¹¹⁶ But see J Herman, ‘A Necessary Compromise or Compromised Justice?’ in HF Carey and SM Mitchell (eds), *Trials and Tribulations of International Prosecution* (Lanham et al: Lexington Books, 2012) 209.

¹¹⁷ See P Gaeta, ‘To Be (Present) or Not To Be (Present)’ (2007) 5 JICJ 1165; N Pons, ‘Some Remarks on *in Absentia* Proceedings before the Special Tribunal for Lebanon in Case of a State’s Failure or Refusal to Hand over the Accused’ (2010) 8 JICJ 1307; R Riachy, ‘Trials *in Absentia* in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenge or Evolution?’ (2010) 8 JICJ 1295.

¹¹⁸ *Ayyash and others*, case STL-11-01/PT/TC, 27 July 2012; STL-11-01/PT/AC/AR126.1, 1 November 2012. See critical comment on the legal tools used for the establishment of the STL by B Fassbender, ‘Reflections on the International Legality of the Special Tribunal for Lebanon’ (2007) 5 JICJ 1091, and on the relevant case law by JR Alvarez, ‘Tadić Revisited’ (2013) 11 JICJ 291.

¹¹⁹ See K Barrett, in *Trials and Tribulations* (above ^{n 116}) 223; further information can be gleaned from the

website of the STL: <<http://www.stl-tsl.org/en/about-the-stl>>.

¹²⁰ (1996) 35 ILM 35, at 42–8.

¹²¹ But see critical comments by Greenwood (above ⁿ 77) 104.

¹²² SC Res 1503 (2003), 28 August 2003, confirmed by SC Res 1534 (2004), 26 March 2004; see D Raab, ‘Evaluating the ICTY and its Completion Strategy’ (2005) 3 JICJ 82.

¹²³ SC Res 1966 (2010), 22 December 2010. See the comments by DA Mundis, G Aquaviva, T Wayde Pittman, and C Denis, (2011) 9 JICJ 787–837.

¹²⁴ But see C Garbett, ‘Transitional Justice and “National Ownership”: an Assessment of the Institutional Development of the War Crimes Chamber of Bosnia and Herzegovina’ (2012) 13 *Human Rights Review* 65; O Martin-Ortega, ‘Hybrid Tribunals and the Rule of Law: War Crimes Chamber of the State Court of Bosnia and Herzegovina’ in *Trials and Tribulations* (above ⁿ 116) 195.

¹²⁵ This was confirmed by the ICTY in *Delalić*, case IT-96-21, judgment of the Trial Chamber, 16 November 1998, and judgment of the Appeals Chamber, 20 February 2001.

¹²⁶ For a comprehensive analysis of the dividing line between interpretation and development of the relevant offences see B Schlütter, *Developments in Customary International Law* (Leiden and Boston: Martinus Nijhoff, 2010); M Fan, ‘General Principles and the Great Architect

Cassese' (2012) 10 JICJ 1063. Critical comments by M Ubeda-Saillard, 'Les techniques interprétatives des tribunaux pénaux internationaux' 2011 (115) RGDIP 421, at 425–6.

¹²⁷ *Hadžihasanović*, case IT-01-47, decision of the Trial Chamber, 12 November 2002, confirmed by Appeals Chamber, 16 July 2003.

¹²⁸ *Vasiljević*, case IT-98-32, judgment of the Trial Chamber, 29 November 2002, para 203.

¹²⁹ *Milutinović and Others*, case IT-05-87, decision of the Trial Chamber, 22 March 2006, paras 39–40; comment by Schlütter (above [n 126](#)) 253; *Stakić*, case IT-97-24-A, judgment of the Appeals Chamber, 22 March 2006, para 62.

¹³⁰ *Stakić* (above [n 129](#)), paras 302–3.

¹³¹ Separate and partly dissenting opinion in the *Galić* case, IT-98-29-A, judgment of the Appeals Chamber, 30 November 2006, regarding acts and threats of violence the primary purpose of which is to spread terror among the civilian population.

¹³² See commentaries by G Sluiter, JD Ohlin, H van der Wilt, A Cassese, K Gustafson, K Ambos, E van Sliedregt, and K Hamdorf (2007) 5 JICJ 67–226; Schlütter (above [n 126](#)) 247–8.

¹³³ See Condorelli (above [n 35](#)) 11.

¹³⁴ (1996) 35 ILM 32, at 71, para 134.

¹³⁵ Case ICTR-96-4-T, judgment of 2 September 1998.

¹³⁶ Case ICTR-96-4-T (above [n 135](#)) para 615.

¹³⁷ The Appeals Chamber confirmed its ruling in the *Tadić* jurisdiction decision in the case of *Delalić et al*, case IT-96-21, 20 February 2001, paras 153–74. In leading textbooks, the same view is propagated: Werle (above ⁿ 35) 362 margin note 972. This view is also firmly supported by the ICRC: see JM Henckaerts and L Doswald-Beck (eds), *I Customary International Humanitarian Law* (Cambridge: CUP, 2005) 568, Rule 156.

¹³⁸ See H Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal' (1997) 46 ICLQ 434, at 442. By contrast, Greenwood (above ⁿ 77) 130–3, defends the reasoning in *Tadić*. For a somewhat cautious statement see M Bothe, 'War Crimes' in Cassese, Gaeta, and Jones (above ⁿ 52) 379, at 417.

¹³⁹ <<http://www.sc-sl.org/LinkClick.aspx?fileticket=u0qVGu09CTE%3d&tabid=195>> accessed December 2013. See also the individual opinion of Judge Robertson in the case of *Kondewa*, preliminary decision of 25 May 2004 <<http://www.sc-sl.org/LinkClick.aspx?fileticket=K%2ffmdARhGe0%3d&tabid=193>>.

¹⁴⁰ IACtHR, case C 124, *Moiwana Community v Suriname*, 15 June 2005, para 206; case C 132, *Gutiérrez-Soler v Colombia*, 12 September 2005, paras 54, 95–6; case C 252, *Masacres de El Mozote v El Salvador*, 25 October 2012, para 296.

¹⁴¹ On this issue see, for instance, J Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the ICC' (2002) 51 ICLQ 91, at 106–

8 (without a definitive stance); Hafner, Boon, Rübesame, and Huston (above [n 85](#)) 109–13 (denying the relevance of national amnesties); D Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 EJIL 481 (with differentiated proposals); N Roht-Arriaza and L Gibson, ‘The Developing Jurisprudence on Amnesty’ (1998) 20 HRQ 843 (rejecting amnesties); LN Sadat, ‘Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable’ in S Macedo (ed), *Universal Jurisdiction* (Philadelphia: University of Pennsylvania Press, 2004) 193, at 210 et seq (well-balanced); Seibert-Fohr (above [n 51](#)) 586 (affirming the preclusive effect of serious truth commission investigations); C Stahn, ‘United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?’ (2002) 84 (845) IRRC 191; C Tomuschat, ‘Current Issues of Responsibility under International Law’ (2000) IV *Bancaja Euromediterranean Courses of International Law* 515, at 595–6.

¹⁴² See, in particular, IACtHR, case C 75, *Barrios Altos*, 14 March 2001, paras 41–4; Case C 221, *Gelman v Uruguay*, 24 February 2011, paras 225–9; ECtHR, *Ould Dah v France*, app 13113/03, 17 March 2003.

¹⁴³ This was one of the reasons motivating the United States’ refusal to ratify the Rome Statute, see Seibert-Fohr (above [n 51](#)) 556.

¹⁴⁴ The IACtHR considers any amnesty, pardon, or extinction of legal action in cases of crimes under international law as incompatible with the obligations under the IACHR, see case C 211, *Massacres 'Las Dos Erres'*, 24 November 2009, para 129; case C 221, *Gelman v Uruguay*, 24 February 2011, paras 195–221.

¹⁴⁵ Case IT-94-2.

¹⁴⁶ Case IT-00-39.

¹⁴⁷ According to Articles 65(b) of the Rules, provisional release may be granted. See analysis by M Fairlie, 'The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Travelled' (2010) 33 *Fordham Law Review* 1101.

¹⁴⁸ This is the situation of the six members of the 'Butare group'. They were arrested between 1996 and 1998. The first instance trial judgment was rendered on 24 June 2011, and appeal proceedings may be completed by August 2015, see Overview of detainees and convicted persons as of 5 September 2013, <<http://www.unictr.org/Cases/StatusofDetainees/tabid/202/Default.aspx>>.

¹⁴⁹ ICTR, *Gatete*, case ICTR-00-61-A, 9 October 2012.

¹⁵⁰ Acquittal by judgment of 23 October 2001, case IT-95-16-A. On the issue of compensation, the website of the ICTY does not provide any information.

¹⁵¹ ICTR, *Rwamakuba v The Prosecutor*, case ICTR-98-44C-A, 13 September 2007.

¹⁵² See S Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons

Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals' (2002) 96 AJIL 628; JD Michels, 'Compensating Acquitted Defendants for Detention before International Criminal Courts' (2010) 8 JICJ 407.

¹⁵⁴ SC Res 1431, 14 August 2002.

¹⁵⁵ UN doc A/68/270-S/2013/460, 2 August 2013.

¹⁵⁶ ICTR, case ICTR-99-50-A, 4 February 2013.

¹⁵⁷ UN doc A/68/255-S/2013/463, 2 August 2013.

¹⁵⁸ <[http://www.icty.org/sections/TheCases/](http://www.icty.org/sections/TheCases/KeyFiguresoftheCases)

[KeyFiguresoftheCases](http://www.icty.org/sections/TheCases/KeyFiguresoftheCases)>.

¹⁵⁹ See Assembly of States Parties to the Rome Statute of the ICC, Session The Hague, 14–22 November 2012, Official Records, Vol II (doc ICC-ASP/11/20) 220.

¹⁶⁰ More precise data has been presented by D Wippman: 'The Costs of International Justice' (2006) 100 AJIL 861.

¹⁶¹ Article 17 Rome Statute: in principle, prosecution is committed to national courts.

¹⁶² See also optimistic appraisal by P Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the UN War Crimes Tribunal' (1998) 20 HRQ 737.

¹⁶³ R Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 ICLQ 81, at 82; D Van Zyl Smit, 'International Imprisonment' (2005) 54 ICLQ 357, at 373, notes that the ad hoc tribunals 'have not clarified their penal objectives'.

¹⁶⁴ See oversight of cases, 1 November 2013, <<http://www.unictr.org/Cases/tabid/204/Default.aspx>>.